

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §288.1 and §288.4. Section 288.1 is adopted *with change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2965). Section 288.4 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 2, 77th Legislature, 2001, made significant changes to the Texas Water Code (TWC). Among those changes was the elimination of irrigation as a type of use for which one could obtain a permit to use state water. In the place of the old irrigation use, SB 2, §§2.01 - 2.03, created the new use category of agricultural use. This new agricultural use category also includes some types of use, such as concentrated animal feeding operations (CAFOs), that in the past would have been permitted under the industrial use category.

The adopted amendments to Chapter 288 update the requirements for water conservation plans to reflect the new use classifications and the new definitions of agriculture and agricultural use from SB 2. No substantive changes in the requirements for water conservation plans are required by the adopted rules. For example, a previously approved water conservation plan for a CAFO is still an acceptable water conservation plan for that agricultural use.

Also as part of this rulemaking implementing portions of SB 2 and House Bill 247, 77th Legislature, 2001, the commission adopts revisions to Chapter 295, Water Rights, Procedural, and Chapter 297,

Water Rights, Substantive. The adoption notices for Chapters 295 and 297 are also published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

Subchapter A: Water Conservation Plans

Section 288.1, Definitions, is adopted with changes to the proposed text. The adopted amendments add definitions for agriculture or agricultural, agricultural use, and nursery grower. The definitions generally track the definitions established in SB 2 and are necessary for consistency with SB 2.

Existing definitions are renumbered accordingly. Additionally, the definition of irrigation use is revised to indicate that irrigation is an agricultural use in accordance with SB 2.

In response to comment on the Chapter 297 proposal stating that the definition of nursery grower in §297.1(34) should be expressly limited to the growing of plants to avoid a potential ambiguity about the potential application of the activities to aquaculture, the commission amended the definition in §297.1(34). The definition has been expressly limited to the activities associated with the growing of plants that the legislature listed in its definition of agriculture to clarify that aquaculture activities are excluded. For consistency, the definition of nursery grower in §288.1 was amended in the same way.

The adopted amendments to §288.4, Water Conservation Plans for Irrigation Use, include changing the section title to Water Conservation Plans for Agricultural Use. The amendments to this section are necessary because SB 2 created a new agricultural use category that included the existing irrigation use

and some uses that had been industrial. The existing §288.4(a) only contains requirements for the information that must be provided for individual irrigation users and for systems providing irrigation water to more than one user. The adopted amendments add a new §288.4(a)(1) to provide the requirements for the information that must be provided for individual agricultural users other than irrigation. In the new category of agricultural user, the type of activity that can come under that definition is quite broad. Accordingly, the adopted new §288.4(a)(1) provides very general requirements for all types of agricultural use except irrigation that must be tailored on a case-by-case basis to the particular type of agricultural activity for which the water is being used. Water conservation plans for irrigation uses remain the same as under the existing rules. Those requirements are now in adopted §288.4(a)(2), due to the renumbering of existing paragraphs (1) and (2). Additionally, the adopted amendments replace the term “irrigation” with the broader term “agricultural” in existing paragraph (2), renumbered as paragraph (3). The adopted amendments also correct an error in subsection (a) by deleting a repeated phrase, “shall provide information.” Also in subsection (a), the sentence is reworded by deleting the word “applicable” and adding the phrase “where applicable” for clarification.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute.

“Major environmental rule” means a rule the specific intent of which is to protect the environment or

reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a section of the state. These rules relate to changes to the definition of irrigation and agricultural use and require conservation plans for agricultural use as well as irrigation use. These amended rules implement legislation and do not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or public health and safety.

In addition, §2001.0225 only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. These rules implement state legislation, do not go beyond that legislation, and do not involve federal law. The commission invited public comment on the draft regulatory impact analysis determination, and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rule amendments under Texas Government Code, §2007.043. The purpose of these amendments is to implement revisions to TWC, Chapter 11. These amendments relate to definitions, and requirements for the types of activities which will come under the definition of “agricultural use.” These amendments do not contain any provisions

which would have adverse impacts on any property interests. Under TWC, §11.1271, all water users must file a conservation plan when they request a new or amended water right, and all existing water right holders which use over certain amounts of water must file conservation plans. These provisions are already in the statute; therefore, these requirements should not be a further task to these agricultural users. Furthermore, preparing a water conservation plan is not a burden on private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and, therefore, required that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. In accordance with the regulations of the Coastal Coordination Council, the commission reviewed the rulemaking for consistency with the CMP goals and policies. The CMP goal applicable to this rulemaking is the goal in 31 TAC §501.12(l) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). The CMP policies applicable to this rulemaking are the policies in 31 TAC §501.14(r), regarding appropriations of water.

The purpose of the adopted rules is to implement portions of SB 2. In accordance with SB 2, certain types of uses that were formally industrial or irrigation uses are now reclassified as agricultural uses. The rules update the requirements for water conservation plans to reflect the new use classifications and

the new definitions of agriculture and agricultural use from SB 2. No substantive changes in the requirements for water conservation plans are required by these rules. Therefore, promulgation and enforcement of the adopted rules will not have a direct or significant adverse effect on any CNRAs, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. Therefore, the rulemaking is consistent with the applicable goals and policy. The commission invited public comment on the consistency determination, and no comments were received.

PUBLIC COMMENTS

A public hearing on this proposal was held in Austin on May 9, 2002 at 2:00 p.m., Texas Natural Resource Conservation Commission complex, Building F, Room 2210, 12100 Park 35 Circle. The public comment period closed on May 13, 2002. No oral comments were received at the hearing regarding Chapter 288.

The Lower Colorado River Authority (LCRA) submitted written comments on the proposed revisions to Chapter 288. LCRA generally supported the rules, but suggested changes.

RESPONSE TO COMMENTS

LCRA commented that the proposed rule amendment to §288.1(6) appropriately added qualifying language to the definition of "irrigation" to reflect that only the type of irrigation that qualifies as an "agricultural use" is that type of irrigation that is directly related to "agriculture." LCRA specifically commented that the irrigation of golf courses or parks are types of irrigation that the rules should

expressly exclude as an agricultural use. LCRA recommended the addition of an amended definition of "recreational use" that includes all watering of golf courses. LCRA also commented that there should be specific conservation requirements for golf course watering.

The commission has made no change in response to this comment. SB 2 deleted irrigation as a type of use for which state water may be appropriated, stored, or diverted. SB 2 also added agricultural uses as a type of use for which state water may be appropriated, stored, or diverted. Agricultural use was specifically defined in SB 2 as meaning "any use or activity involving agriculture, including irrigation." The commission does not find any language in the statute or any suggestion in the legislative history that the legislature intended agriculture to include some types of use found in the old irrigation use, but exclude from the definition of agriculture some types of activities that under the prior law were considered irrigation. Further, the commission is unable to find in SB 2 a grant of authority to the commission to allow it to decide that certain types of irrigation use should now be reclassified to other non-agricultural uses. The commission believes that irrigation, now part of the agricultural use category, is meant to be defined as it was defined prior to SB 2.

SUBCHAPTER A: WATER CONSERVATION PLANS

§288.1, §288.4

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.024, as amended by SB 2, §§2.01 - 2.03.

§288.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Agricultural or Agriculture** - means any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management; and

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

(2) **Agricultural use** - Any use or activity involving agriculture, including irrigation.

(3) **Conservation** - Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(4) **Drought contingency plan** - A strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply

shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

(5) **Industrial use** - The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, commercial fish production, and the development of power by means other than hydroelectric, but does not include agricultural use.

(6) **Irrigation** - The agricultural use of water for the irrigation of crops, trees, and pastureland, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(7) **Irrigation water use efficiency** - The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth, salinity management, and leaching requirements associated with irrigation.

(8) **Mining use** - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(9) **Municipal per capita water use** - The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(10) **Municipal use** - The use of potable water within or outside a municipality and its environs whether supplied by a person, privately owned utility, political subdivision, or other entity as well as the use of sewage effluent for certain purposes, including the use of treated water for domestic purposes, fighting fires, sprinkling streets, flushing sewers and drains, watering parks and parkways, and recreational purposes, including public and private swimming pools, the use of potable water in industrial and commercial enterprises supplied by a municipal distribution system without special construction to meet its demands, and for the watering of lawns and family gardens.

(11) **Nursery grower** - A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease, and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(12) **Pollution** - The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(13) **Public Water Supplier** - An individual or entity that supplies water to the public for human consumption.

(14) **Regional Water Planning Group** - A group established by the Texas Water Development Board to prepare a regional water plan under Texas Water Code, §16.053.

(15) **Retail Public Water Supplier** - An individual or entity that for compensation supplies water to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants when that water is not resold to or used by others.

(16) **Reuse** - The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(17) **Water conservation plan** - A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

(18) **Wholesale Public Water Supplier** - An individual or entity that for compensation supplies water to another for resale to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants as an incident of that employee service or tenancy when that water is not resold to or used by others, or an individual or entity that conveys water to another individual or entity, but does not own the right to the water which is conveyed, whether or not for a delivery fee.

§288.4. Water Conservation Plans for Agricultural Use.

(a) A water conservation plan for agricultural use of water shall provide information, where applicable, in response to the following subsections.

(1) For an individual agricultural user other than irrigation:

(A) a description of the use of the water in the production process, including how the water is diverted and transported from the source(s) of supply, how the water is utilized in the production process, and the estimated quantity of water consumed in the production process and therefore unavailable for reuse, discharge, or other means of disposal;

(B) specification of conservation goals, the basis for the development of such goals, and a time frame for achieving the specified goals;

(C) a description of the device(s) and/or method(s) within an accuracy of plus or minus 5.0% to be used in order to measure and account for the amount of water diverted from the source of supply;

(D) leak-detection, repair, and accounting for water loss in the water distribution system;

(E) application of state-of-the-art equipment and/or process modifications to improve water use efficiency; and

(F) any other water conservation practice, method, or technique which the user shows to be appropriate for achieving the stated goal or goals of the water conservation plan.

(2) For an individual irrigation user:

(A) a description of the irrigation production process which shall include, but is not limited to, the type of crops and acreage of each crop to be irrigated, monthly irrigation diversions, any seasonal or annual crop rotation, and soil types of the land to be irrigated;

(B) a description of the irrigation method or system and equipment including pumps, flow rates, plans, and/or sketches of the system layout;

(C) a description of the device(s) and/or methods within an accuracy of plus or minus 5.0%, to be used in order to measure and account for the amount of water diverted from the source of supply;

(D) specification of conservation goals including, where appropriate, quantitative goals for irrigation water use efficiency and a pollution abatement and prevention plan;

(E) water-conserving irrigation equipment and application system or method including, but not limited to, surge irrigation, low pressure sprinkler, drip irrigation, and nonleaking pipe;

(F) leak-detection, repair, and water-loss control;

(G) scheduling the timing and/or measuring the amount of water applied (for example, soil moisture monitoring);

(H) land improvements for retaining or reducing runoff, and increasing the infiltration of rain and irrigation water including, but not limited to, land leveling, furrow diking, terracing, and weed control;

(I) tailwater recovery and reuse; and

(J) any other water conservation practice, method, or technique which the user shows to be appropriate for preventing waste and achieving conservation.

(3) For a system providing agricultural water to more than one user:

(A) a system inventory for the supplier's:

(i) structural facilities including the supplier's water storage, conveyance, and delivery structures;

(ii) management practices, including the supplier's operating rules and regulations, water pricing policy, and a description of practices and/or devices used to account for water deliveries; and

(iii) a user profile including square miles of the service area, the number of customers taking delivery of water by the system, the types of crops, the types of irrigation systems, the types of drainage systems, and total acreage under irrigation, both historical and projected;

(B) specification of water conservation goals, including maximum allowable losses for the storage and distribution system;

(C) a description of the practice(s) and/or device(s) which will be utilized to measure and account for the amount of water diverted from the source(s) of supply;

(D) a monitoring and record management program of water deliveries, sales, and losses;

(E) a leak-detection, repair, and water loss control program;

(F) a program to assist customers in the development of on-farm water conservation and pollution prevention plans and/or measures;

(G) a requirement in every wholesale water supply contract entered into or renewed after official adoption of the plan (by either ordinance, resolution, or tariff), and including any contract extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements in this chapter; if the customer intends to resell the water, then the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with applicable provisions of this chapter;

(H) official adoption of the water conservation plan and goals, by ordinance, rule, resolution, or tariff, indicating that the plan reflects official policy of the supplier;

(I) any other water conservation practice, method, or technique which the supplier shows to be appropriate for achieving conservation; and

(J) documentation of coordination with the Regional Water Planning Groups in order to insure consistency with the appropriate approved regional water plans.

(b) A water conservation plan prepared in accordance with the rules of the United States Department of Agriculture Natural Resource Conservation Service, the State Soil and Water Conservation Board, or other federal or state agency and substantially meeting the requirements of this

section and other applicable commission rules may be submitted to meet application requirements pursuant to a memorandum of understanding between the commission and that agency.