

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §288.1 and §288.4.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Senate Bill (SB) 2, 77th Legislature, 2001, made numerous, 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 confined animal feeding operations (CAFOs), that in the past would have been permitted under the industrial use category.

The proposed 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 proposed 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 proposes revisions to Chapter 295, Water Rights, Procedural, and Chapter 297, Water Rights, Substantive. These proposed revisions are also published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

Subchapter A: Water Conservation Plans

The proposed amendments to §288.1, Definitions, add definitions for agriculture or agricultural, agricultural use, and nursery grower. The proposed definitions 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 changed to irrigation and revised to indicate that irrigation is an agricultural use in accordance with SB 2.

The proposed 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 proposed 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 proposed 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 proposed §288.4(a)(2), due to the renumbering of existing paragraphs (1) and (2). Additionally, the proposed amendments replace the term “irrigation” with the broader term

“agricultural” in existing paragraph (2), renumbered as paragraph (3). The proposed amendments also correct an error in subsection (a) by deleting a repeated phrase, “shall provide information.” Also in subsection (a), the sentence is proposed to be reworded by deleting the word “applicable” and adding the phrase “where applicable” for clarification.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for each year of the first five-year period the proposed amendments are in effect, no significant fiscal implications are anticipated for the agency or other units of state and local government due to implementation of the proposed amendments.

The proposed amendments implement certain provisions of SB 2. The bill eliminated irrigation, and in its place created agricultural, as a type of use for which an entity could obtain a permit to use state water. Additionally, SB 2 included a new definition of agricultural and agriculture. The proposed amendments would update existing commission water conservation and drought contingency plan rules to reflect the water use classification change and new definitions.

The proposed amendments apply to any applicant for a surface water use permit or amendment. These amendments do not introduce new permit requirements; therefore, the commission does not anticipate significant fiscal implications for units of state and local government due to implementation of the proposed amendments.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of implementing the proposed amendments will be the clarification of water use categories, which is intended to provide affected individuals and businesses with a clearer understanding of which requirements apply to them.

The proposed amendments implement certain provisions of SB 2 which eliminated irrigation, and in its place created agricultural, as a type of use for which an entity could obtain a permit to use state water. Additionally, SB 2 included a new definition of agricultural and agriculture. The proposed amendments would update existing commission water conservation and drought contingency plan rules to reflect the water use classification change and new definitions.

The proposed amendments apply to any applicant for a surface water use permit or amendment. These amendments do not introduce new permit requirements; therefore, the commission does not anticipate significant fiscal implications for individuals or businesses due to implementation of the proposed amendments.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There are no adverse fiscal implications anticipated for small or micro-businesses due to implementation of the proposed amendments, which are intended to implement certain provisions of SB 2. The bill eliminated irrigation, and in its place created agricultural, as a type of use for which an entity could obtain a permit to use state water. Additionally, SB 2 included a new definition of agricultural and

agriculture. The proposed amendments would update existing commission water conservation and drought contingency plan rules to reflect the water use classification change and new definitions.

The proposed amendments apply to any applicant for a surface water use permit or amendment. These amendments do not introduce new permit requirements; therefore, the commission does not anticipate significant fiscal implications for small or micro-businesses due to implementation of the proposed amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed the proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT 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 invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission prepared a preliminary takings impact assessment for the proposed rule amendments under Texas Government Code, §2007.43. The purpose of these amendments is to implement amendments 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 amended provisions 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 proposed rulemaking and found that the proposal 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 will, therefore, require 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 proposed 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. The CMP policies applicable to this rulemaking are the policies in 31 TAC §501.14(r), regarding appropriations of water.

The purpose of the proposed 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 proposed 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 proposed rules will not have a direct or significant adverse effect on any coastal natural resource areas, 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 seeks public comment on this preliminary consistency determination.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be 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 hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment, at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-031-297-WT. Comments must be received by 5:00 p.m., May 13, 2002. For further information, please contact Jill Burditt, Regulation Development Section, (512) 239-0560.

SUBCHAPTER A: WATER CONSERVATION PLANS

§288.1, §288.4

STATUTORY AUTHORITY

The amendments are proposed 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 Texas Water Code, §§11.002, 11.023, 11.024, as amended by SB 2, §§2.01 - 2.03.

The proposed amendments implement 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) [(1)] **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) [(2)] **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) [(3)] **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, [including commercial feedlot operations,] commercial fish production, and the development of power by means other than hydroelectric, but does not include agricultural use.

(6) [(4)] **Irrigation [use]** - 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) [(5)] **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) [(6)] **Mining use** - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(9) [(7)] **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) [(8)] **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 [sue] 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 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) [(9)] **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) [(10)] **Public Water Supplier** - An individual or entity that supplies water to the public for human consumption.

(14) [(11)] **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) [(12)] **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) [(13)] **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) [(14)] **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) [(15)] **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 [Irrigation] Use.

(a) A water conservation plan for agricultural use [irrigation uses] of water shall provide information, where applicable, [shall provide information] in response to the following [applicable] 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) [(1)] For an individual irrigation user:

(A) a description of the irrigation [agricultural] 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) [(2)] For a system providing agricultural [irrigation] 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) (No change.)