

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§297.1, 297.15, 297.18, 297.21, 297.41 - 297.43, 297.51, 297.52, 297.61, 297.71, 297.73, 297.74, and 297.104. Sections 297.1, 297.21, 297.51, 297.61, and 297.71 are adopted *with changes* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 3004). Sections 297.15, 297.18, 297.41 - 297.43, 297.52, 297.73, 297.74, and 297.104 are adopted *without changes* 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 to surface water law in Texas 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 category of agricultural use. This new agricultural use category included irrigation use and provided a detailed listing of other activities that are included in the agricultural use category, including floriculture, viticulture, silviculture, horticulture, nursery operations, raising of animals for production of food and fiber, raising equine animals, wildlife management, and planting of cover crops. Some of these types of use, such as raising of animals in concentrated animal feeding operations (CAFOs) or certain types of nursery operations, could have been permitted under the industrial use category prior to September 1, 2001.

Many of the adopted amendments to Chapter 297 relate to implementation of this change from irrigation use to agricultural use and providing for a transition. Other provisions of SB 2 implemented by the adopted rules include amendments to TWC, §§11.146, 11.173, and 11.177, related to forfeiture and

cancellation of water rights. Also adopted are rules to implement SB 2, §2.15, that relate to a requirement that persons who do not timely complete and return groundwater or surface water surveys conducted by the Texas Water Development Board (TWDB) are ineligible to obtain permits, permit amendments, or permit renewals from the commission under TWC, Chapter 11, Water Rights.

Amendments adopted in this rulemaking also include amendments designed to implement the new surface water permit exemption for certain reservoirs used for fish and wildlife management purposes enacted by House Bill (HB) 247 and SB 2, §2.09. These bills also made changes to the domestic and livestock exemption that are also implemented by this rulemaking. This rulemaking also proposes clarification of provisions of some rules.

Section references in this preamble are generally to the section of the codified version of the TWC as amended by SB 2 and are not generally references to the statute-at-large unless the context clearly indicates otherwise.

Also as part of this rulemaking implementing HB 247 and portions of SB 2, the commission adopts revisions to 30 TAC Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements, and 30 TAC Chapter 295, Water Rights, Procedural. The adoption notices for Chapters 288 and 295 are also published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

Subchapter A: Definitions

The amendments to §297.1, Definitions, are adopted with changes to the proposed text. The amended section provides definitions for new words required by SB 2, or in some cases, amends old definitions to comply with the requirements of SB 2. Definitions were added for agriculture or agricultural, agricultural use, nursery grower, and river basin. The definition of agriculture generally tracks the definition found in TWC, §11.002. The word “Agriculture” was added to the definitions to clearly indicate that "agricultural use" in §297.1(2) includes all activities listed in the definition of agriculture in §297.1(1).

The definition of “Baseflow or normal flow” in adopted §297.1(6) was amended to substitute the agricultural use created by SB 2 for the older term “irrigation use.” The term "industrial use" has been amended in adopted §297.1(24), to remove commercial feedlot operations which were an industrial use, but now are included within agricultural uses in accordance with SB 2. In adopted §297.1(26), the term “Irrigation use” is revised to “Irrigation,” and in adopted §297.1(27), the term “Irrigation water use efficiency” is revised to “Irrigation water efficiency.” These changes were made since irrigation is no longer a use category due to the changes made by SB 2. In adopted §297.1(34), the definition of "Nursery grower" generally tracks the definition of SB 2. However, in response to comment, 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. In adopted §297.1(39), the definition of “Reclaimed water” is revised to change the term “irrigation” to “agricultural” in accordance with SB 2. In adopted §297.1(45), the definition of “River basin” tracks

the new definition in TWC, §11.002(11), and was necessary to implement the statute. The other definitions are renumbered to accommodate the additional definitions. Other minor grammatical corrections were made throughout the section, including changes since proposal to spell out Texas Water Code within each definition.

Subchapter B: Classes of Water Rights

The adopted amendments to §297.15, Permit for Additional Uses from a Domestic and Livestock Reservoir, Texas Water Code, §11.143, include revising the section title to Permit for Use of Water from Exempt Dam or Reservoir for Nonexempt Purposes, Texas Water Code, §11.143, to reflect the new title of TWC, §11.143, as amended by HB 247. The adopted amendments also include changes to incorporate dams or reservoirs exempt for wildlife management purposes. This revision was necessary to implement amendments to TWC, §11.143.

The adopted amendments to §297.18, Interbasin Transfers, Texas Water Code, §11.085, delete language from the rule that provided that basins are designated as provided by TWC, §16.051. The amendment was necessary to implement changes to TWC, §11.085(p). The rule that river basins are designated by the TWDB as provided by TWC, §16.051, is retained in the rules under the adopted definition of river basin, in accordance with the definition of river basin in TWC, §11.002.

Subchapter C: Use Exempt From Permitting

The amendments to §297.21, Domestic and Livestock Use, are adopted with changes to the proposed text. The amendments were necessary to implement HB 247 and SB 2, §2.09. The section title

becomes Domestic and Livestock and Wildlife Permit Exemptions. Subsection (b) clarifies that use of land for livestock purposes does not defeat the domestic and livestock exemption, but other commercial operations will require a permit. Language added to adopted subsection (b) in response to comment clarifies that a person may temporarily store more than 200 acre-feet in a larger capacity exempt domestic and livestock reservoir, as long as the person does not average more than 200 acre-feet in a 12-month period. The rule specifies that the choice of the 12-month period is at the owner's discretion, but the owner must be consistent from year-to-year in the choice of the 12 months to be averaged. In response to comment, the adopted rule was revised to add details regarding the type of records required. The adopted rule specifies that the owner must also keep records to demonstrate his or her compliance. The owner must keep reservoir water level records that are taken at least once a month. In addition the owner must be able to produce reservoir capacity data that shows the volume of water in acre-feet for a given water level of the reservoir. This reservoir capacity data which relates the water level to the volume of water in acre-feet may be available from the original plans and specifications for the dam. The United States Department of Agriculture Natural Resources Conservation Service, formerly the Soil Conservation Service, may have records or information to produce this data. The owner may also decide to have a consulting engineer produce this information. The reservoir capacity data need not be updated. Also in response to comment, the adopted rule was revised to clarify that it is the owner's responsibility to maintain the monthly reservoir water level records and obtain the reservoir capacity data for inspection by the executive director, if requested. The records and other data need not be turned over to the executive director on a routine basis or absent a request.

Adopted subsection (e) adds a new exemption for wildlife management and fish management purposes. The dam or reservoir must be located on property that qualifies as open-space land under Texas Tax Code (TTC), §23.51. Commercial operations were given a specific definition in proposed subsection (e) to harmonize the provisions of HB 247 and the related provisions of SB 2 and to indicate that only certain commercial operations were intended to be excluded. The exemption is not available for commercial operations, which was defined at proposal as the use of land for industrial parks and housing developments. However, to further clarify the definition and partially in response to comment, the adopted rule was revised to define commercial operation as the use of land for industrial facilities, industrial parks, aquaculture facilities, fish farming facilities, or housing developments. But if the land remains qualified open-space under the TTC, then the incidental use of the land for commercial purposes does not defeat the exemption.

Subchapter E: Issuance and Conditions of Water Rights

The adopted amendments to §297.41, General Approval Criteria, delete obsolete language and revise §297.41(a)(3)(D) to add references to specific assessments that must be performed under the TWC. The adopted changes to §297.41(a)(3)(E) clarify that an application must be consistent with the relevant approved regional water plan. These adopted amendments were necessary to implement TWC, §11.134, which requires consistency with approved regional water plans. The adopted §297.41(a)(5) adds a new requirement that the applicant must have completed and returned all required TWDB surveys of groundwater and surface water use. Surveys prior to September 1, 2001 need not be completed by the applicant for the commission to consider the application. However, the adopted amendments would require the applicant to have completed all other TWDB water surveys required by

the TWDB of the applicant since that time in order for the water right application, including applicants for amendments to existing water rights, to be considered by the commission. If the application was for a new entity that had never used groundwater or surface water or never had the type of use that would trigger a TWDB water survey, then the requirement does not apply. These amendments were necessary to implement TWC, §16.012, which added these survey requirements for a person to apply for a water right.

The adopted amendments to §297.42, Water Availability, add an additional reference in subsection (b) to clarify that the commission will be considering the results of instream flow studies in its review of any management plan, water right, or interbasin transfer. This amendment was necessary to implement TWC, §16.059, which added this requirement. In addition, subsection (c) is amended to clarify that the criteria to have 75% of the water requested available 75% of the time (75/75 criteria) at the source of supply continues to apply to applications for direct diversion without storage for irrigation. However, the word "use" was deleted since the use category is no longer irrigation, but is now agricultural. For those new types of agricultural activities other than irrigation, the applicant must meet the general criteria that there is a sufficient amount of unappropriated water available for a sufficient amount of the time to make the adopted project viable, and ensure the beneficial use of water without waste. That determination will be made on a case-by-case basis. This amendment was necessary to clarify the application of the 75/75 criteria now that irrigation is an activity included with other agricultural activities under TWC, §11.002 and §11.023.

The adopted amendments to §297.43, Beneficial Uses, add agriculture as a type of use for which state water may be appropriated, stored, or diverted and delete irrigation and stock raising as uses because those activities are now included in the agricultural use category. Other paragraphs are renumbered accordingly. The commission is not implying any order or preference of use by the order of listing uses in this section. These amendments were necessary to implement TWC, §11.023.

The amendment to §297.51, Time Limitations for Commencement or Completion of Construction, is adopted with changes to the proposed text to add the phrase “of this title,” which is required after a section reference. The adopted section clarifies that the time limit for construction of a storage reservoir is subject to not only the notice and hearing requirements of §295.72, Applications for Extensions of Time, but also to the exceptions of §297.74, Forfeiture and Revocation of Water Right. The adopted amendment was necessary to implement TWC, §11.146, which added that exemption.

The adopted amendments to §297.52, Supplier of Water for Irrigation, revise the section title to Suppliers of Water for Agriculture, and replace the term “irrigation” with the term “agriculture.” The adopted amendments were necessary to implement the new agricultural use under TWC, §11.023.

Subchapter F: Amendments to Water Rights; Corrections to Water Rights

The proposed amendment to §297.61, Amendments by Executive Director, is not adopted because this revision is unnecessary since this section only applies to amendments initiated by the executive director.

Subchapter G: Cancellation, Revocation, Abandonment, and Forfeiture of Water Rights

The amendments to §297.71, Cancellation in Whole or in Part, are adopted with changes to the proposed text in order to use the acronym “TWC” for Texas Water Code. The adopted amendments include the addition of qualifiers to the exemption from cancellation for water rights used in accordance with the approved regional water plan. The adopted amendments also add new exemptions from cancellation for long-term public water or electrical generation supplies consistent with the state water plan and for reservoirs funded as part of the holder’s long-term water planning. These exemptions were factors to consider in cancellation procedures in §297.73, but were deleted in that section. The amendments were necessary to implement TWC, §11.173.

The adopted amendments to §297.73, Commission Finding; Action, revise the term “due diligence” to “reasonable diligence” in subsection (b) to follow the wording of TWC, §11.146 and §11.177, and to clarify that the commission does not intend to set a different standard for cancellation of water rights for failure to begin construction than its expressed legislative authorization for cancellation of water rights in §11.177. Paragraphs (3) and (4) are moved to §297.71 in order to implement TWC, §11.173 and §11.177, which made these factors exemptions from cancellation. Other adopted amendments make clerical corrections and renumber the paragraphs.

The adopted amendment to §297.74, Forfeiture and Revocation of Water Right, adds a new exemption from forfeiture for reservoirs of more than 50,000 acre-feet of water. The amendment was necessary to implement TWC, §11.146.

Subchapter J: Water Supply Contracts and Amendments

The adopted amendment to §297.104, Special Requirements for Upstream Sales of Water from Storage, deletes the words "term or temporary" from the requirement that a supplier or purchaser obtain a permit or amendment when the purchaser of water obtains a contract to divert water upstream of a supplier's storage reservoir in a manner that impairs the supplier's water right. This change was necessary to clarify that the type of permit to be obtained is not a temporary or term permit as defined in TWC, Chapter 11.

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 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. These rules relate to changes to the definition of irrigation and agricultural use, minor changes to the cancellation statutes, and changes to the exemption from permitting for impounding water on one's own property for domestic and livestock use. The exemption is expanded to cover wildlife management and property which is exempt from taxation under

the agriculture, or open space, exemption. These changes, if anything, could have a positive effect on the economy.

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 amendments to TWC, Chapter 11. These amendments relate to definitions, cancellation of a water right, and the domestic and livestock reservoir exemption from permitting and do not contain any provisions which would have adverse impacts on any property interests. The cancellation provisions simply change a factor for determining cancellation to an exemption. The domestic and livestock reservoir changes provide that more types of uses of this impounded water may be exempt from permitting. Thus, there is no burden to private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it was 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 HB 247 and portions of SB 2. More specifically, the adopted rules include changes to the definition of irrigation and agricultural use, minor changes to the cancellation statutes, changes to the exemption from permitting for impounding water on one's own property for domestic and livestock use, and the expansion of the permit exemption to cover wildlife management and property which is exempt from taxation under the agriculture, or open space, exemption. 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. No new uses for water rights are authorized by these amendments. In accordance with SB 2, certain types of uses that were formally industrial or irrigation uses are now reclassified as agricultural uses. The creation of a permit exemption for wildlife management purposes is anticipated

to have a positive effect on enhancing the diversity of CNRAs by facilitating the creation of small wetlands. 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. James Kowis Consulting (Kowis) submitted oral comments at the hearing. Kowis, the Lower Colorado River Authority (LCRA), the National Wildlife Federation (NWF), and the Texas Prairie Wetlands Project (TPWP) submitted written comments on the proposed revisions to Chapter 297. TPWP expressed support for the proposed rules, and LCRA, NWF, and Kowis generally supported the rules, but suggested changes.

RESPONSE TO COMMENTS

LCRA commented that the definition of irrigation in §297.1(26) should be limited to only that type of irrigation that is directly related to "agriculture" as that term is defined in SB 2. LCRA specifically mentioned the irrigation of golf courses or parks as the type of irrigation that it felt the rules should expressly exclude as an agricultural use.

The commission made no changes to the rule 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 use to include some types of use under the old irrigation use category, but move other types of irrigation use to some other category. 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.

NWF commented 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 agrees that nursery growers were intended to be limited to growers of plants. Aquaculture activities were not included in the detailed listing of activities included by the legislature in its definition of agriculture. Accordingly, §297.1(34) has been clarified by limiting nursery growers to those operations involved in the cultivation of plant activities listed by the legislature in its definition of agriculture.

LCRA commented that the definition of recreational use in the proposed new §297.1(40) should include use of water to maintain golf courses and parks.

The commission has made no change in response to this comment. The commission reads the agricultural use definition in SB 2 of "any use or activity involving agriculture, including irrigation," as expressing a legislative intent to expand the old irrigation use to include additional uses rather than move some irrigation uses to the new agricultural use category and move other types of irrigation uses to other existing types of use for which state water could be appropriated, stored, or diverted.

TPWP expressed support and the group's strong endorsement of §297.21 as proposed.

The commission appreciates the support.

Kowis commented that §297.21(b) should be clarified in several aspects. First, he suggested that the section be clarified that a person could temporarily store more than 200 acre-feet of water in a reservoir that has a normal storage capacity of greater than 200 acre-feet. Kowis felt that the proposed language could be interpreted that only a reservoir with a normal capacity of 200 acre-feet or less would qualify under the rule. Second, Kowis suggested that the rule be clarified to state that water level information is the information required to be maintained by the owner. Finally, Kowis commented that the rule should be clarified that the records be required to be maintained by the owner and not routinely submitted to the commission.

The commission notes that the proposed rule tracked the language of the statute. However, the commission agrees that the intent of the statute was to allow a person to temporarily store more

than 200 acre-feet in a larger capacity reservoir without obtaining a permit if the person otherwise complies with provisions of the exemption. Therefore, the commission revised the rule accordingly. In response to the comment regarding the required records, the commission clarified what records must be kept to document that the reservoir has not stored more than 200 acre-feet during a 12-month period. The commission notes that reservoir water level data alone is insufficient to determine the volume of water in acre-feet at any one time or for a 12-month average. The reservoir water level information must be coupled with reservoir capacity data that relates the volume of storage in acre-feet in the reservoir given the reservoir water level. This reservoir capacity data may be available from the original plans and specifications for the dam, or the Natural Resources Conservation Service, formerly the Soil Conservation Service, may have records or information to produce this data, or the owner may decide to have a consulting engineer produce the data. Accordingly, the commission revised the rule to specify the data that must be collected by the owner. The adopted rule specifies that the reservoir water level records must be kept on a monthly basis so that a monthly average can be calculated, if necessary, to demonstrate compliance with the 12-month average requirement. There is no requirement to update the reservoir capacity data. The commission agrees that the records should be maintained by the owner, so that they are available for inspection by the executive director, if necessary. Accordingly, the commission revised the rule to clarify that the records must be maintained by the owner.

NWF commented that §297.21(e) should be clarified in several aspects. First, NWF commented that the phrase "does not apply to a commercial operation" could be read as only disqualifying direct use of

the impoundment in a commercial operation. NWF suggested changing the provision to: "This exemption does not apply to property used in connection with a commercial operation."

The commission has made no change in response to this comment. In harmonizing HB 247 and the related provisions of SB 2, the commission understands the legislative intent to allow this wildlife management exempt reservoir on land used for agricultural operations, but that the legislature did not intend for the exemption to be available to a narrow class of commercial operations. Use of the suggested phrase could be interpreted as not allowing the exemption for activities that are incidental to traditional family farms and ranches that are trying to expand their economic base. The commission believes these family farms are intended to be covered by the exemption.

NWF commented that the word "and" should be changed to "or" in the phrase "the use of land for industrial parks and housing developments" in §297.21(e) because either use should be excluded.

The commission agrees that the legislature intended that either use be excluded from the opportunity for this exemption. Therefore, this change has been made to the adopted rule.

NWF commented that the scope of the commercial operation provision in §297.21(e) was vague because the terms "industrial park" and "housing developments" are undefined. NWF suggested that an industrial facility that was housed in a single building and an apartment complex are examples of types of operations that were not intended to have the benefit of the exemption, yet might not be clearly

excluded by the language of the proposed rule. NWF suggested adding the phrase "or similar types of operations" to the reference to commercial operations.

The commission revised the rule in response to this comment. The commission understands the legislative intent to exclude industrial facilities whether they are in a stand-alone facility or an industrial park. Therefore, the adopted rule has been modified to reflect this clarification. The commission believes that use of the land for a housing development was intended to disqualify the land for the wildlife exemption, but that the addition of apartment complexes to the list is unnecessary because the commission notes that in order to qualify for the exemption under the adopted rule, the land must be qualified open-space land as defined in TTC, §23.51. The commission declined to use the suggested phrase "or similar types of operations," because the commission is concerned that the phrase could be interpreted not to allow the exemption for activities that are incidental to traditional family farms and ranches that are trying to expand their economic base which were clearly intended to be covered by the exemption.

NWF commented that the last sentence of §297.21(e) should be clarified by adding a "commercial operations" qualifier so that the sentence could not be read as an exception to the earlier commercial operations language. NWF stated that the qualifier would still allow other incidental commercial activities.

The commission made no changes to the rule in response to the comment. The commission does not read the sentence in the adopted rule as an exception to the earlier commercial operations

language. To qualify for the permit exemption under the adopted rule, the land must be on qualified open-space land as defined in TTC, §23.51, and it cannot be used for industrial facilities, industrial parks, aquaculture facilities, fish farming facilities, or housing developments. However, incidental use of the property in a manner that does not take the land out of the qualified open-space definition is permissible even if the incidental use of the land is for a commercial operation as defined in adopted §297.21(e).

NWF commented that §297.61(c) is overly broad. NWF felt that the proposed rule language could be interpreted to authorize an industrial use permit to include any irrigation activity even if the industrial use permit had never contemplated any type of irrigation use.

The commission determined that proposed language in §297.61(c) is not necessary since the section only applies to amendments initiated by the executive director; therefore, proposed subsection (c) is not adopted. However, the same language was correctly proposed to be added to §295.71, Applications To Amend a Permit, and the commission agrees that the language in the proposed rule might be misinterpreted by some as authorizing any industrial use permit to now use that permit for agricultural uses. That is not the commission's understanding of the legislative intent; therefore, the commission revised §295.71 accordingly. Under adopted §295.71 , holders of water rights issued as irrigation water rights before September 1, 2001 do not have to obtain an amendment to be able to continue to use that water right for the same purposes, which is now classified as an agricultural water right. Also under the adopted rule, holders of water rights issues before September 1, 2001 for industrial uses, where the water was actually used for

activities such as CAFOs that are now classified as agricultural uses, do not have to obtain an amendment to continue to use that water right for the same purpose.

SUBCHAPTER A: DEFINITIONS

§297.1

STATUTORY AUTHORITY

The amendment is 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, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapters 288 and 295 of this title (relating to Water Conservation and Drought Contingency Plans and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Agriculture or agricultural** - 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) **Appropriations** - The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(4) **Appropriative right** - The right to impound, divert, store, take, or use a specific quantity of state water acquired by law.

(5) **Aquifer Storage and Retrieval Project** - A project with two phases that anticipates the use of a Class V aquifer storage well, as defined in §331.2 of this title (relating to Definitions), for injection into a geologic formation, group of formations, or part of a formation that is capable of underground storage of appropriated surface water for subsequent retrieval and beneficial use. Phase I of the project requires commission authorization by a temporary or term permit to determine feasibility for ultimate storage and retrieval for beneficial use. Phase II of the project requires commission authorization by permit or permit amendment after the commission has determined that Phase I of the project has been successful.

(6) **Baseflow or normal flow** - The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.)

(7) **Beneficial inflows** - Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(8) **Beneficial use** - Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(9) **Certificate of adjudication** - An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of Texas Water Code, §11.323, or the final judgment and decree in *State of Texas v. Hidalgo County Water Control and Improvement District No. 18*, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(10) **Certified filing** - A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(11) **Claim** - A sworn statement filed under Texas Water Code, §11.303.

(12) **Commencement of construction** - An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

(13) **Conservation** - Those practices, techniques, and technologies that will 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.

(14) **Conserved water** - That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques, or technologies.

(15) **Dam** - Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(16) **Diffused surface water** - Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

(17) **District** - Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(18) **Domestic use** - Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(19) **Drought of record** - The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(20) **Firm yield** - That amount of water, that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, naturalized streamflows will be modified as appropriate to account for the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions as well as the passage of flows needed to meet all applicable permit conditions relating to instream and freshwater inflow requirements.

(21) **Groundwater** - Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(22) **Habitat Mitigation** - Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(23) **Hydropower use** - The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(24) **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 fish and shellfish production and the development of power by means other than hydroelectric, but does not include agricultural use.

(25) **Instream use** - The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

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

(27) **Irrigation water 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 and salinity management and leaching requirements associated with irrigation.

(28) **Livestock use** - The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in §142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in §63.001 and 71.001, respectively, of the Parks and Wildlife Code.

(29) **Mariculture** - The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

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

(31) **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.

(32) **Municipal use** - The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, or the use of reclaimed water in lieu of potable water for the preceding purposes or the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

(A) the application site is land owned or leased by the Chapter 26 permit holder; or

(B) the application site is within an area for which the commission has adopted a no-discharge rule.

(33) **Navigable stream** - By law, Natural Resources Code, §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(34) **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.

(35) **One-hundred-year flood** - The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year.

(36) **Permit** - The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

(37) **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 or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(38) **Priority** - As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.

(39) **Reclaimed water** - Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or agricultural tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(40) **Recreational use** - The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aquatic and wildlife enjoyment, and aesthetic land enhancement of a subdivision, golf course, or similar development.

(41) **Register** - The *Texas Register*.

(42) **Reservoir system operations** - The coordinated operation of more than one reservoir or a reservoir in combination with a direct diversion facility in order to optimize available water supplies.

(43) **Return water or return flow** - That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(44) **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.

(45) **River basin** - A river or coastal basin designated by the Texas Water Development Board as a river basin under Texas Water Code, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

(46) **Runoff** - That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(47) **Secondary use** - The reuse of state water for a purpose after the original, authorized use.

(48) **Sewage or sewage effluent** - Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(49) **Spreader dam** - A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(50) **State water** - The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state. Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water. State water does not include percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or springwater before it reaches a watercourse.

(51) **Stormwater or floodwater** - Water flowing in a watercourse as the result of recent rainfall.

(52) **Streamflow** - The water flowing within a watercourse.

(53) **Surplus water** - Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(54) **Unappropriated water** - The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(55) **Underflow of a stream** - Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(56) **Waste** - The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that

purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system, or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used.

(57) **Water conservation plan** - A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or 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 planning document or may be contained within another water management document(s).

(58) **Water in the state** - Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(59) **Watercourse** - A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter, with some degree of regularity, depending on the characteristics of the sources.)

(60) **Water right** - A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water.

(61) **Watershed** - A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(62) **Water supply** - Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(63) **Wetland** - An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least

periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including, but not limited to, impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts. This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

SUBCHAPTER B: CLASSES OF WATER RIGHTS

§297.15, §297.18

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, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.15. Permit For Use of Water from Exempt Dam or Reservoir for Nonexempt Purposes, Texas Water Code, §11.143.

A Texas Water Code (TWC), §11.143, permit authorizes anyone owning a dam or reservoir on the person's own property with normal storage of not more than 200 acre-feet of water for domestic and livestock purposes or wildlife management purposes, to take state water therefrom for any lawful purpose authorized in the permit. (A permit is not required to use water from such a reservoir for domestic and livestock or wildlife management purposes.) Reservoirs on navigable streams are not exempt under TWC, §11.142. Application requirements and procedures are less detailed than those required for TWC, §11.121, permits. It may be permanent in nature, seasonal, or granted for a term of years. The owner of an exempt impoundment under TWC, §11.142, who subsequently desires to use

state water therefrom for other than domestic and livestock, or wildlife management purposes may elect to apply for a permit under TWC, §11.143, or proceed under the provisions of TWC, §11.124, et seq.

§297.18. Interbasin Transfers, Texas Water Code, §11.085.

(a) No person may take or divert any state water from a river basin and transfer such water to any other river basin without first applying for and receiving a water right or an amendment to a water right authorizing the transfer.

(b) An increase in the authorized amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin transfer for purposes of this section.

(c) In addition to the other requirements of this chapter relating to the review of and action on an application for a new or amended water right, the commission shall weigh the effects of the proposed transfer by considering:

(1) the need for the water in the basin of origin and in the proposed receiving basin based on the period for which the water supply is requested, but not to exceed fifty years;

(2) factors identified in the applicable approved regional water plans which address the following:

(A) the availability of feasible and practicable alternative supplies in the receiving basin to the water proposed for transfer;

(B) the amount and purposes of use in the receiving basin for which the water is needed;

(C) proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right in the basin of origin, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on the historical uses of the water right for which amendment is sought.

(3) proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(4) the continued need to use the water for the purposes authorized under the existing water right if an amendment to an existing water right is sought;

(5) comments received from county judges required to be provided notice of the application as provided by §295.17 of this title (relating to Emergency Authorization, Texas Water Code, §11.139); and

(6) information required to be submitted by the applicant.

(d) The commission may grant, in whole or in part, an application for an interbasin transfer only to the extent that:

(1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period as defined by the factors provided in subsection (c) of this section; and

(2) the applicant for the interbasin transfer has prepared drought contingency and water conservation plans meeting the requirements of Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, and Guidelines and Requirements) and has implemented a water conservation plan that will result in the highest practicable levels of water

conservation and efficiency achievable within the jurisdiction of the applicant.

(e) The commission may grant new or amended water rights under this section with or without specific terms or periods of use and with specific conditions under which a transfer of water may occur.

(f) If an interbasin transfer of water is based on a contractual sale of water, the new or amended water right authorizing the transfer shall contain a condition for a term or period not greater than the contract term, including any extension or renewal of the term.

(g) The parties to a contract for an interbasin transfer of water may include provisions for compensation and mitigation. If the party from the basin of origin is a governmental entity, each county judge located in whole or in part in the basin of origin may provide comment on the appropriate compensation and mitigation for the interbasin transfer.

(h) A new water right or amendment to an existing water right for a proposed interbasin transfer of water is junior in priority to water rights in the basin of origin granted before the time an administratively complete application for the transfer is filed with the chief clerk in accordance with §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness). If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.

(i) A new water right or amendment to an existing water right for a transfer of water from a river basin in which two or more river authorities or water districts have written agreements or permits that provide for the coordinated operation of their respective reservoirs to maximize the amount of water for beneficial use within their respective water service areas shall be junior in priority to water rights granted in that basin before the time an administratively complete application for the interbasin transfer is filed with the chief clerk in accordance with §281.17 of this title. If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.

(j) An appropriator of water for municipal purposes in the basin of origin may, at the appropriator's option, be a party in any hearings under this section. Nothing in this provision shall be construed as adversely affecting the ability of any other potentially affected person to obtain party status.

(k) The provisions that are contained in subsections (b) - (j) of this section that are in addition to those generally required for an application for a new or amended water right do not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;

(2) a request for an emergency transfer of water as provided by §297.17 of this title (relating to Emergency Authorizations; Texas Water Code, §11.139);

(3) a proposed transfer from a basin to its adjoining coastal basin; or

(4) a proposed interbasin transfer from the basin of origin to a county or municipality or the municipality's retail service area that is partially within the basin of origin for use in the part of the county or municipality and the municipality's retail service area not within the basin of origin. The further transfer and use of this water outside of such county or municipal retail service area as existing at the time of the transfer or as may exist in the future other than back to the basin of origin shall not be exempt under this paragraph. For purposes of this paragraph, a county, municipality, or municipality's retail service area refers to a geographic area.

SUBCHAPTER C: USE EXEMPT FROM PERMITTING

§297.21

STATUTORY AUTHORITY

The amendment is 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, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.21. Domestic and Livestock and Wildlife Permit Exemptions.

(a) In accordance with Texas Water Code (TWC), §11.303(l), a person may directly divert and use water from a stream or watercourse for domestic and livestock purposes on land owned by the person and that is adjacent to the stream without obtaining a permit. Manner of diversion may be by pumping or by gravity flow. Such riparian domestic and livestock use is a vested right that predates the prior appropriation system in Texas and is superior to appropriative rights. A vested riparian right is only to the normal flow in the stream, not to the storm water, floodwater, or authorized releases from storage for downstream use.

(b) In accordance with TWC, §11.142, a person may construct on the person's own property a dam or reservoir with a normal storage of not more than 200 acre-feet of state water for domestic and

livestock purposes without obtaining a permit. The reservoir may be on-channel, adjacent to the stream, or on a contiguous piece of property through which flows the stream from which the water is diverted. For purposes of this subsection, normal storage means the conservation storage of the reservoir, i.e., the amount of water the reservoir may hold before water is released uncontrolled through a spillway or into a standpipe. A person who temporarily stores more than 200 acre-feet of water in a dam or reservoir having a normal storage of greater than 200 acre-feet is not required to obtain a permit for the dam or reservoir if the person can demonstrate through reservoir capacity data and monthly reservoir water level records maintained by the owner that the person has not stored in the dam or reservoir more than 200 acre-feet of state water on average in any 12-month cycle. Selection of the 12-month cycle shall be at the owner's discretion, but must be consistent from year to year. This exemption does not apply to a commercial operation. Use of land for livestock purposes is not a commercial operation. This domestic and livestock exemption is not available to owners or property sold by a municipality having a population of 250,000 or less and owning land within 5,000 feet of where the shoreline of a lake would be if the lake were filled to its storage capacity, if the property was sold without notice or the solicitation of bids to the person leasing the land, in accordance with Local Government Code, §272.001(h).

(c) A dam constructed in accordance with subsection (b) of this section may not be located on a navigable stream.

(d) The use of a reservoir by free-ranging wild game and fur-bearing animals that may be harvested by hunters and trappers who pay a fee or other compensation to hunt or trap on the property does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir. Additionally, the use of water that is used in making products from a family garden or orchard that are traded with a neighbor or used in a local bake sale or potluck dinner does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir.

(e) In accordance with TWC, §11.142(b), a person may construct on the person's property a dam or reservoir with normal storage of not more than 200 acre-feet of water for wildlife management as defined in Texas Tax Code (TTC), §23.51(7), and for fish management purposes, excluding aquaculture or fish farming purposes, if the property on which the dam or reservoir will be constructed is qualified open-space land, as defined by TTC, §23.51. For purposes of this subsection, normal storage means the conservation storage of the reservoir, i.e., the amount of water the reservoir may hold before water is released uncontrolled through a spillway or into a standpipe. This exemption does not apply to a commercial operation. For the purposes of this subsection, commercial operation means the use of land for industrial facilities, industrial parks, aquaculture facilities, fish farming facilities, or housing developments. The incidental use of the reservoir in a manner that does not remove the land from the definition of qualified open-space land as defined by TTC, §23.51, including using a photograph in advertising, does not constitute a use for which a permit must be obtained for an otherwise exempt reservoir.

SUBCHAPTER E: ISSUANCE AND CONDITIONS OF WATER RIGHTS

§§297.41 - 297.43, 297.51, 297.52

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, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.41. General Approval Criteria.

(a) Except as otherwise provided by this chapter, the commission shall grant an application for a water right only if:

(1) the application conforms to the requirements prescribed by Chapter 295 of this title (relating to Water Rights, Procedural) and is accompanied by the prescribed fee;

(2) unappropriated water is available in the source of supply;

(3) the proposed appropriation:

(A) is intended for a beneficial use;

(B) does not impair existing water rights or vested riparian rights;

(C) is not detrimental to the public welfare;

(D) considers the assessments performed under Texas Water Code (TWC), §§11.147(d) and (e), and 11.150 - 11.152; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that new, changed, or unaccounted for conditions warrant waiver of this requirement;

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 of this title (relating to Definitions); and

(5) the applicant has completed and returned all Texas Water Development Board surveys of groundwater and surface water use required since September 1, 2001 under TWC, §16.012.

(b) Beginning January 5, 2002, the commission will not issue a water right for municipal purposes in a region that does not have an approved regional water plan in accordance with TWC,

§16.053(i) unless the commission determines that new, changed, or unaccounted for conditions warrant the waiver of this requirement.

§297.42. Water Availability.

(a) Except as provided by Texas Water Code (TWC), §11.1381, and §297.19 of this title (relating to Term Permit Under Texas Water Code §§11.1381 and 11.153, 11.155), an application for a new or increased appropriation will be denied unless there is a sufficient amount of unappropriated water available for a sufficient amount of the time to make the proposed project viable and ensure the beneficial use of water without waste.

(b) A new water right may be conditioned as appropriate to protect instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries as provided by TWC, §§11.147, 11.150, 11.152, and 16.059.

(c) For the approval of an application for a direct diversion from a stream without sufficient on or off channel water storage facilities for irrigation, approximately 75% of the water requested must be available approximately 75% of the time when distributed on a monthly basis and based upon the available historic stream flow record. Lower availability percentages may be acceptable if the applicant can demonstrate that a long-term, reliable, alternative source or sources of water of sufficient quantity and quality are economically available to the applicant to make the proposed project viable and ensure the beneficial use of state water without waste.

(d) Projects that are not required to be based upon the continuous availability of historic, normal stream flow include, but are not limited to: the artificial recharge of the Edwards Aquifer under TWC, §11.023(c); conjunctive ground and surface water management projects such as aquifer storage and recovery projects; diversions or impoundments at times of above-normal stream flow (e.g., "scalping" operations) for seasonal or supplemental use; a system operation in conjunction with other water rights; non-consumptive instream uses; or other similar type projects. The required availability of unappropriated water for these special type projects shall be determined on a case-by-case basis based upon whether the proposed project can be viable for the intended purposes and the water will be beneficially used without waste.

(e) For an application for an on-channel storage facility to be authorized for domestic or municipal water use, the proposed diversion right of the reservoir must be equal to its firm yield. The purpose of this limitation is to ensure a secure and dependable source of water supply for uses necessary to protect the public health, safety, and welfare (see also 30 TAC §290.41(b) requiring public water systems to have a "safe" yield capable of supplying the maximum daily demands during extended periods of peak usage and "critical hydrologic conditions"). Such reservoir may be authorized in excess of its firm yield when the implementation of a drought management plan or alternative sources of water supply such as groundwater, other reservoir systems, or other means are available to satisfy water needs during drought periods when the reservoir's normal supply capabilities would be exceeded.

(f) Except for an application for an emergency, temporary, seasonal, or term permit, or as provided by this section, the commission may require an applicant to provide storage sufficient to yield the requested annual diversion.

(g) In order to make the optimum beneficial use of available water, a water right may be granted based upon the availability of return flows or discharges. However, a water right granted upon return flows or discharges that may cease in the future because of new or increased direct reuse (i.e., the lawful reuse of water before it is returned or discharged into the stream) or that may cease for other lawful reasons will be granted with the express provision that the water available for the water right is dependent upon potentially interruptible return flows or discharges.

§297.43. Beneficial Uses.

(a) State water may be appropriated, stored, or diverted for the following purposes of use:

- (1) domestic and municipal;
- (2) industrial;
- (3) agriculture;
- (4) mining and the recovery of minerals;

(5) hydroelectric power;

(6) navigation;

(7) recreation and pleasure;

(8) public parks;

(9) game preserves;

(10) instream uses, water quality, aquatic and wildlife habitat, or freshwater inflows to bays and estuaries; and

(11) other beneficial purposes of use recognized by law.

(b) Unappropriated storm water and floodwater may be appropriated to recharge freshwater bearing sands and aquifers in the portion of the Edwards Aquifer located within Kinney, Uvalde, Medina, Bexar, Comal, and Hays Counties if it can be established by expert testimony that an unreasonable loss of state water will not occur and that the water can be withdrawn at a later time for application to a beneficial use. The normal or ordinary flow of a stream or watercourse may never be appropriated, diverted, or used by a water right holder for this recharge purpose.

(c) The amount of water appropriated for each purpose listed under this section shall be specifically appropriated for that purpose. The commission may authorize the appropriation of a single amount or volume of water for more than one purpose of use. In the event that a single amount or volume of water is appropriated for more than one purpose of use, the total amount of water actually diverted for all of the authorized purposes may not exceed the total amount of water appropriated.

(d) State policy regarding preferences for certain type uses provided by Texas Water Code (TWC), §11.024 does not alter the basic principle of priority based upon first in time established under TWC, §11.027. Rather, such preferences will be used, in part, by the commission in determining which competing new uses will be granted water rights as provided by TWC, §11.123.

(e) The water of any arm, inlet, or bay of the Gulf of Mexico may be changed from salt water to sweet or fresh water and held or stored by dams, dikes, or other structures and may be taken or diverted for any purpose authorized by this chapter.

§297.51. Time Limitations for Commencement or Completion of Construction.

When a water right is issued for appropriation by direct diversion or construction, modification or repair of a storage reservoir, or any work in which a time limitation is set by the water right for commencement or completion of construction, a water right holder shall commence and complete actual construction of the proposed facilities within the time fixed by the commission. Failure to commence or complete construction within the time specified in the permit or extension granted by the commission

shall cause the water right holder to forfeit all rights to the permit, subject to the provisions of §295.72 of this title (relating to Applications for Extensions of Time) and the provisions of §297.74 of this title (relating to Forfeiture and Revocation of Water Right).

§297.52. Suppliers of Water for Agriculture.

Persons supplying state water for agriculture purposes shall charge the purchaser on a volumetric basis. The commission may direct suppliers of state water to implement appropriate procedures for determining the volume of water delivered.

**SUBCHAPTER F: AMENDMENTS TO WATER RIGHTS;
CORRECTIONS TO WATER RIGHTS**

§297.61

STATUTORY AUTHORITY

The amendment is 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, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.61. Amendments by Executive Director.

(a) On the petition of the executive director, the commission may amend a permit, certified filing, or certificate of adjudication in order to:

(1) protect superior and senior water rights in the river basin, or in the case of transwatershed diversions of water, in the basin of origin;

(2) provide a reasonable means for the enforcement of the terms, conditions, provisions, and limitations contained in the water right;

(3) provide for the keeping and reporting of information and measurements in connection with the use of water;

(4) provide a reasonable means for the enforcement of applicable law;

(5) correct errors inadvertently made in the preparation of a water right, such as in the name of the water right holder, boundary description, or other detail incorrectly transcribed; or

(6) cure ambiguities or ineffective provisions in a water right.

(b) See §295.71 of this title (relating to Applications to Amend a Permit); see also §295.158 of this title (relating to Notice of Amendments to Water Rights).

**SUBCHAPTER G: CANCELLATION, REVOCATION, ABANDONMENT, AND
FORFEITURE OF WATER RIGHTS**

§§297.71, 297.73, 297.74

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, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.71. Cancellation in Whole or in Part.

(a) Except as provided by subsection (b) of this section, if all or part of a water right has not been put to beneficial use during a consecutive ten year period, such water right is subject to cancellation in whole or in part as provided by this subchapter.

(b) A water right is not subject to cancellation as provided by subsection (a) of this section to the extent that such nonuse is the result of:

(1) the water right holder's participation in the Conservation Reserve Program authorized by the Food Security Act, Pub. L. No. 99-198, Secs. 1231-1236, 99 Stat. 1354, 1509-1514 (1985) or a similar governmental program;

(2) a significant portion of the water right has been used in accordance with a specific recommendation for meeting a water need included in the applicable regional water plan approved under Texas Water Code (TWC), §16.053;

(3) the deposit of the water right in the Water Trust for the maintenance of environmental flow needs in accordance with TWC, §15.7031;

(4) the deposit of the water right in the Texas Water Bank and the water right is protected from cancellation in accordance with TWC, §15.703;

(5) the water right was obtained to meet demonstrated long-term public water supply or electric generation needs as evidenced by a water management plan developed by the water right holder, and the water right is consistent with projections of future water needs contained in the state water plan; or

(6) the water right was obtained as the result of the construction of a reservoir funded, in whole or in part, by the holder of the water right, as part of the water right holder's long-term water planning.

§297.73. Commission Finding; Action.

(a) At the conclusion of the hearing, the commission shall cancel the water right in whole or in part to the extent that it finds that:

(1) the water or any portion of the water under the water right has not been put to an authorized beneficial use during the ten-year period; and

(2) the water right holder has not used reasonable diligence in applying the water or the unused portion of the water to an authorized beneficial use or is otherwise unjustified in the nonuse as provided by subsection (b) of this section.

(b) In determining what constitutes reasonable diligence or a justified nonuse as provided in subsection (a)(2) of this section, the commission shall give consideration to:

(1) whether sufficient water is available in the source of supply to meet all or part of the appropriation during the ten-year period of nonuse;

(2) whether the nonuse is justified by the water right holder's participation in the federal Conservation Reserve Program or a similar governmental program as provided by §297.71 of this title (relating to Cancellation in Whole or In Part);

(3) whether the existing or proposed authorized purpose and place of use are consistent with an approved regional water plan as provided by Texas Water Code (TWC), §16.053;

(4) whether the water right has been deposited into the Texas Water Bank or Water Trust as provided by TWC, §15.7031 and §15.704 or whether it can be shown by the water right holder that the water right or water is currently being made available for purchase through private marketing efforts at fair market value and under reasonable terms and conditions; or

(5) whether the water right has been reserved for instream uses or beneficial inflows for bays and estuaries.

(c) Regardless of the other provisions of this subchapter, no portion of a water right held by a city, town, village, or municipal water district authorizing the use of water for municipal purposes shall be canceled if the water has been put to beneficial use under the water right at any time during the ten-year period immediately preceding the initiation of cancellation proceedings.

(d) Failure to initiate cancellation proceedings under this subchapter does not validate or improve the status of any water right in whole or in part.

(e) Once cancellation proceedings have been initiated against a particular water right and a hearing has been held, further cancellation proceedings shall not be initiated against the same water right within the five-year period immediately following the date of the hearing.

§297.74. Forfeiture and Revocation of Water Right.

(a) A water right may be forfeited for failure to timely commence or complete construction of the diversion facilities as provided by §295.72 of this title (relating to Applications for Extension of Time).

(b) A temporary or term permit may be revoked or suspended upon written or verbal notice by the executive director or watermaster, as applicable, without hearing if necessary to protect senior and vested water rights or instream uses and freshwater inflow needs for bays and estuaries. Notice of such revocation shall also be provided to the affected water right holder by registered mail, return receipt requested.

(c) Authorization to divert water from a reservoir constructed by the federal government for which no local sponsor has been designated nor permit issued or a reservoir permitted for storage solely for the purpose of optimum development of the project may be revoked when compliance with the conditions contained in the letter authorizing the diversion of water is not occurring or, in the case of authorized diversions for domestic use, water becomes reasonably available through a water supply system. Revocation shall be made by a letter setting forth the basis of the revocation signed by a commissioner. Upon receipt of the letter, the user shall cease diverting water and remove diversion facilities.

(d) This section does not apply to a permit for construction of a reservoir designed for storage of more than 50,000 acre-feet of water.

SUBCHAPTER J: WATER SUPPLY CONTRACTS AND AMENDMENTS

§297.104

STATUTORY AUTHORITY

The amendment is 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, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.104. Special Requirements for Upstream Sales of Water from Storage.

If a contract provides that a purchaser may divert water upstream of a supplier's storage reservoir in a manner which impairs the supplier's water right:

(1) the purchaser shall obtain a permit to the extent of the person's maximum annual diversions of water for the term of the contract; or

(2) the supplier shall obtain a permit or an amendment to the extent of the purchaser's maximum annual diversions of water for the term of the contract; provided that the contract specifies that the supplier shall apply for such permit or amendment and that the purchaser shall divert water only under such permit or amendment.