

The Texas Natural Resource Conservation Commission (commission) proposes 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.

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 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. 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 confined 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 proposed amendments to Chapter 297, Water Rights, Substantive, relate to implementing this change from irrigation use to agricultural use and providing for a transition. Other provisions of SB 2 implemented by the proposed rules include amendments to TWC, §§11.146, 11.173, and 11.177, related to forfeiture and cancellation of water rights. Also proposed 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 proposed 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 proposed to be 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 proposes revisions to Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements, and Chapter 295, Water Rights, Procedural. These proposed revisions are also published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

Subchapter A: Definitions

The proposed amendments to §297.1, Definitions, provide definitions for new words required by SB 2, or in some cases, amend 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 proposed §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 proposed §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 proposed §297.1(26), the term “irrigation use” is revised to “irrigation,” and in proposed §297.1(27), the term “irrigation water use efficiency” is revised to “irrigation water efficiency.” These changes are necessary since irrigation is no longer a use category due to the changes made by SB 2. In proposed §297.1(39), the definition of reclaimed water is revised to change the term “irrigation” to “agricultural” in accordance with SB 2. In proposed §297.1(45), the definition of river basin tracks the new definition in TWC, §11.002(11), and is necessary to implement the statute. The other definitions are renumbered to accommodate the additional definitions. Other minor grammatical corrections were made throughout the section.

Subchapter B: Classes of Water Rights

The proposed 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 proposed amendments also include changes to incorporate dams or reservoirs exempt for wildlife management purposes. This revision is necessary to implement amendments to TWC, §11.143.

The proposed 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 is 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 proposed definition of river basin, in accordance with the definition of river basin in TWC, §11.002.

Subchapter C: Use Exempt From Permitting

The proposed amendments to §297.21, Domestic and Livestock Use, are necessary to implement HB 247 and SB 2, §2.09. The section title is proposed to become Domestic and Livestock and Wildlife Permit Exemptions. Language added to proposed subsection (b) allows a person to temporarily store more than 200 acre-feet in an 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. The owner must also keep monthly records to demonstrate his or her compliance. Subsection (b) is further amended to clarify that use of land for livestock purposes does not defeat the domestic and livestock exemption, but other commercial operations will require a permit. Proposed 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, §23.51. The exemption is not available for commercial operations as defined in proposed subsection (e), but if the land remains qualified open-space under the Texas Tax Code, then incidental use of the land for commercial purposes does not defeat the exemption.

Subchapter E: Issuance and Conditions of Water Rights

The proposed 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 proposed changes to §297.41(a)(3)(E) clarify that an application must be consistent with the relevant approved regional water plan. These proposed amendments are necessary to implement TWC, §11.134. The proposed §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 proposed 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 are necessary to implement TWC, §16.012.

The proposed 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 is necessary to implement

TWC, §16.059. 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 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. That determination will be made on a case-by-case basis. This amendment is 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 proposed 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 subsections are renumbered accordingly. The commission is not implying any order or preference of use under TWC, §11.024, by the order of listing uses in this section. These amendments are necessary to implement TWC, §11.023.

The proposed amendment to §297.51, Time Limitations for Commencement or Completion of Construction, 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 proposed amendment is necessary to implement TWC, §11.146.

The proposed 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 broader new category of “agricultural use.” The proposed amendments are necessary to implement the new agricultural use type of TWC, §11.023.

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

The proposed amendment to §297.61, Amendments by Executive Director, adds a new subsection (c) that provides that those holders of water rights for irrigation use or those types of industrial use that are now considered agricultural use do not have to obtain an amendment to their permits. However, holders of existing certified filings or certificates of adjudication that were classified as industrial or irrigation before September 1, 2001, but are now classified as agricultural, may choose to file an application for an amendment to change the use to an agricultural use. Such applications are considered by the commission as minor amendments not requiring notice. The proposed amendment is necessary to implement TWC, §11.122.

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

The proposed amendments to §297.71, Cancellation in Whole or in Part, include the addition of qualifiers to the exemption from cancellation for water rights used in accordance with the approved regional water plan. The proposed 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 are proposed for deletion in that section. The amendments are necessary to implement TWC, §11.173.

The proposed 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 proposed to be moved to §297.71 in order to implement TWC, §11.173 and §11.177, which made these factors exemptions from cancellation. Other proposed amendments make clerical corrections and renumber the paragraphs.

The proposed 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 is necessary to implement TWC, §11.146.

Subchapter J: Water Supply Contracts and Amendments

The proposed 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.

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 and HB 247. The proposed amendments will apply to all existing and new water rights holders in the state. There are currently over 6,000 permitted water rights in the state.

The proposed amendments which implement certain provisions of SB 2 would eliminate irrigation, and in its place create agricultural, as a type of use for which an entity could obtain a permit to use state water. The proposed amendments would also clarify regulation concerning forfeiture and cancellation of water rights, including adding the exemption from water rights cancellation for long-term public water or electrical generation supplies consistent with the state water plan and for reservoirs as part of a water rights holder's long-term water planning. These proposed amendments do not introduce new permit requirements and are not anticipated to result in adverse fiscal implications for affected units of state and local government.

The proposed amendments which implement certain provisions of SB 2 would deny new water rights permits, amendments, or renewals to persons who do not complete and return ground and surface water use surveys conducted by the TWDB. This provision would only affect units of state and local

government that do not complete and submit the required surveys. For those entities that do not comply with this provision, the authorization to continue to use state water may be denied. Affected units of state and local government are already required to complete and return water use surveys. The commission anticipates the only potential additional cost due to implementation of this provision would be from the denial of water rights to those units of government that decide not to complete and return the surveys. However, the commission anticipates the number of noncomplying units of government will be very small, if any.

The proposed amendments would also implement certain provisions of SB 2 and HB 247, both of which implemented new surface water permit exemptions allowing a person to construct on the person's property in an unincorporated area a dam or reservoir with normal storage of not more than 200 acre-feet of water for commercial or noncommercial wildlife management, including fishing, but not including fish farming. Those bills also changed the domestic and livestock exemption to allow reservoirs to store more than 200 acre-feet of water as long as on average in any 12-month period the reservoir did not store more than 200 acre-feet of water. Persons claiming this exemption and storing more than 200 acre-feet of water at times will have to maintain monthly water use records. The commission does not anticipate units of state or local government will be fiscally impacted by these provisions, because these permit exemptions apply only to reservoirs located on privately-owned property. The impact to commission revenues from the wildlife management and livestock permit exemptions is not anticipated to be significant, because the commission does not anticipate a significant increase in the number of exempt wildlife management reservoirs over and above the number of

reservoirs already exempt from permitting under the domestic and livestock exemption. The majority of these reservoirs would have already been exempt under existing domestic and livestock exemptions.

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. Additionally, the creation of the wildlife management exemption is intended to allow small farm and ranch operations to diversify their economic base by the use of their land for commercial wildlife management activities.

The proposed amendments implement certain provisions of SB 2 and HB 247. The proposed amendments will apply to all existing and new water rights holders in the state. There are currently over 6,000 permitted water rights in the state.

The proposed amendments which implement certain provisions of SB 2 would eliminate irrigation, and in its place create agricultural, as a type of use for which an entity could obtain a permit to use state water. The proposed amendments would also clarify regulation concerning forfeiture and cancellation of water rights, including adding the exemption from water rights cancellation for long-term public water or electrical generation supplies consistent with the state water plan and for reservoirs as part of a water rights holder's long-term water planning. These proposed amendments do not introduce new

permit requirements and are not anticipated to result in adverse fiscal implications for affected individuals and businesses.

The proposed amendments which implement certain provisions of SB 2 would deny new water rights permits, amendments, or renewals to persons who do not complete and return ground and surface water use surveys conducted by the TWDB. This provision would only affect individuals and businesses that do not complete and submit the required surveys. For those entities that do not comply with this provision, the authorization to continue to use state water may be denied. Affected individuals and businesses are already required to complete and return water use surveys. The commission anticipates the only potential additional cost due to implementation of this provision would be from the denial of water rights to those that decide not to complete and return the surveys. However, the commission anticipates the number of noncomplying entities will be very small, if any.

The proposed amendments would also implement certain provisions of SB 2 and HB 247, both of which implemented new surface water permit exemptions allowing a person to construct on the person's property in an unincorporated area a dam or reservoir with normal storage of not more than 200 acre-feet of water for commercial or noncommercial wildlife management, including fishing, but not including fish farming. Those bills also changed the domestic and livestock exemption to allow reservoirs to store more than 200 acre-feet of water as long as on average in any 12-month period the reservoir did not store more than 200 acre-feet of water. Individuals and businesses that receive these exemptions would save approximately \$700 in one-time permit application fees in the year they would have applied for a permit if the reservoir was not exempt due to implementation of the proposed

amendments. Additionally, land owners that receive the wildlife management exemption could decide to charge a fee for the use of their reservoirs for fishing and hunting.

Persons claiming the domestic and livestock exemption and storing more than 200 acre-feet of water at times will have to maintain monthly water use records. The commission does not anticipate the recordkeeping requirement will cost affected individuals and businesses more than \$500 a year.

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 and HB 247. The proposed amendments will apply to all existing and new water rights holders in the state. There are currently over 6,000 permitted water rights in the state.

The proposed amendments which implement certain provisions of SB 2 would eliminate irrigation, and in its place create agricultural, as a type of use for which an entity could obtain a permit to use state water. The proposed amendments would also clarify regulation concerning forfeiture and cancellation of water rights, including adding the exemption from water rights cancellation for long-term public water or electrical generation supplies consistent with the state water plan and for reservoirs as part of a water rights holder's long-term water planning. These proposed amendments do not introduce new permit requirements and are not anticipated to result in adverse fiscal implications for affected small and micro-businesses.

The proposed amendments which implement certain provisions of SB 2 would deny new water rights permits, amendments, or renewals to persons who do not complete and return ground and surface water use surveys conducted by the TWDB. This provision would only affect small and micro-businesses that do not complete and submit the required surveys. For those entities that do not comply with this provision, the authorization to continue to use state water may be denied. Affected small and micro-businesses are already required to complete and return water use surveys. The commission anticipates the only potential additional cost due to implementation of this provision would be from the denial of water rights to those that decide not to complete and return the surveys. However, the commission anticipates the number of noncomplying entities will be very small, if any.

The proposed amendments would also implement certain provisions of SB 2 and HB 247, both of which implemented new surface water permit exemptions allowing a person to construct on the person's property in an unincorporated area a dam or reservoir with normal storage of not more than 200 acre-feet of water for commercial or noncommercial wildlife management, including fishing, but not including fish farming. Those bills also changed the domestic and livestock exemption to allow reservoirs to store more than 200 acre-feet of water as long as on average in any 12-month period the reservoir did not store more than 200 acre-feet of water. Small and micro-businesses that receive these exemptions would save approximately \$700 in one-time permit application fees in the year they would have applied for a permit if the reservoir was not exempt due to implementation of the proposed amendments. Additionally, small and micro-businesses that receive the wildlife management exemption could decide to charge a fee for the use of their reservoirs for fishing and hunting.

Persons claiming the domestic and livestock exemption and storing more than 200 acre-feet of water at times will have to maintain monthly water use records. The commission does not anticipate the recordkeeping requirement will cost affected small and micro-businesses more than \$500 a year.

The following is an analysis of the cost per employee for a small or micro-business to comply with the proposed rulemaking. A small business is defined as a business with 100 or fewer employees, while a micro-business is defined as having fewer than 20 employees. A small business that receives a domestic or livestock exemption will have to spend approximately \$5.00 per employee in recordkeeping costs to comply with the proposed amendments. A micro-business that receives a domestic or livestock exemption will have to spend approximately \$25 per employee in recordkeeping costs to comply with 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 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, and 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, 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 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 (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 proposed rules is to implement HB 247 and portions of SB 2. More specifically, the proposed 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 proposed 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 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: DEFINITIONS

§297.1

STATUTORY AUTHORITY

The amendment is 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 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.

The proposed amendment implements 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. Other statutes affected by these rules are TWC, §§11.036, 11.138, 11.1351, and 11.1381.

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

(5) [(3)] **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) [(4)] **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 [irrigation], or other uses of ground or surface waters may be included at times.)

(7) [(5)] **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) [(6)] **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) [(7)] **Certificate of adjudication** - An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of [the] Texas Water Code (TWC), §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) [(8)] **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) [(9)] **Claim** - A sworn statement filed under [pursuant to] Texas Water Code, §11.303.

(12) [(10)] **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) [(11)] **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) [(12)] **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) [(13)] **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) [(14)] **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) [(15)] **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) [(16)] **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) [(17)] **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) [(18)] **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) [(19)] **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) [(20)] **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) [(21)] **Hydropower use** - The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

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

(25) [(23)] **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) [(24)] **Irrigation [use]** - 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) [(25)] **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 and salinity management and leaching requirements associated with irrigation.

(28) [(26)] **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) [(27)] **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) [(28)] **Mining use** - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(31) [(29)] **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) [(30)] **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 [pursuant to] 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) [(31)] **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 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) [(32)] **One-hundred-year flood** - The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% [1%] chance of occurring in any given year.

(36) [(33)] **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) [(34)] **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) [(35)] **Priority** - As between appropriators, the first in time is the first in right, TWC [Texas Water Code], §11.027, unless determined otherwise by an appropriate court or state law.

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

(40) [(37)] **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) [(38)] **Register** - The *Texas Register*.

(42) [(39)] **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) [(40)] **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) [(41)] **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 TWC, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

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

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

(48) [(44)] **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) [(45)] **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) [(46)] **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) [(47)] **Stormwater or floodwater** - Water flowing in a watercourse as the result of recent rainfall.

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

(53) [(49)] **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) [(50)] **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) [(51)] **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) [(52)] **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) [(53)] **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) [(54)] **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) [(55)] **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) [(56)] **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) [(57)] **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) [(58)] **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) [(59)] **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 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 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.

The proposed amendments implement 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. Other statutes affected by these rules are TWC, §§11.036, 11.138, 11.1351, and 11.1381.

**§297.15. Permit For Use of Water from Exempt Dam or Reservoir for Nonexempt Purposes
[Additional Uses from a Domestic and Livestock Reservoir], Texas Water Code,
§11.143.**

A Texas Water Code (TWC), §11.143, permit authorizes anyone owning a dam or reservoir on the person's [his or her] own property with normal storage of [which impounds or contains] 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 [use].)

Reservoirs on navigable streams are not exempt under TWC [the Texas Water Code], §11.142.

Application requirements and procedures are less detailed than those required for TWC [the Texas Water Code], §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 [the Texas Water Code], §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 [the Texas Water Code], §11.143, or proceed under the provisions of TWC [the Texas Water Code], §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. [For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code, §16.051. See Texas Water Code, §11.085.]

(b) - (k) (No change.)

SUBCHAPTER C: USE EXEMPT FROM PERMITTING

§297.21

STATUTORY AUTHORITY

The amendment is 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 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.

The proposed amendment implements 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. Other statutes affected by these rules are TWC, §§11.036, 11.138, 11.1351, and 11.1381.

§297.21. Domestic and Livestock and Wildlife Permit Exemptions [Use].

(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 [Texas Water Code], §11.142, a person may construct on the person's [his] 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 described by this subsection is not required to obtain a permit for the dam or reservoir if the person can demonstrate through monthly records 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) (No change.)

(d) The [incidental] 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 parks and 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 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 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.

The proposed amendments implement 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. Other statutes affected by these rules are TWC, §§11.036, 11.138, 11.1351, and 11.1381.

§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) - (2) (No change.)

(3) the proposed appropriation:

(A) - (C) (No change.)

(D) considers the assessments performed under Texas Water Code (TWC), §§11.147(d) and (e), and 11.150 - 11.152 [effects of any hydrological connection between surface water and groundwater]; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant [an] 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; [and]

(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

[Texas Water Code], §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, [Texas Water Code] §§11.147, 11.150, [and] 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 [use], approximately 75% [seventy-five percent (75%)] of the water requested must be available approximately 75% [seventy-five percent (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, [pursuant to Texas Water Code] §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) - (g) (No change.)

§297.43. Beneficial Uses.

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

(1) - (2) (No change.)

(3) agriculture [irrigation];

(4) - (7) (No change.)

[(8) stock raising];

(8) [(9)] public parks;

(9) [(10)] game [games] preserves;

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

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

(b) - (c) (No change.)

(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, [Texas Water Code] §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, [Texas Water Code] §11.123.

(e) (No change.)

§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 (relating to Forfeiture and Revocation of Water Right). [notice and hearing. See §295.72 of this title (relating to Applications for Extension of Time) and §295.202 of this title (relating to Reports).]

§297.52. Suppliers of Water for Agriculture [Irrigation].

Persons supplying state water for agriculture [irrigation] 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 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 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.

The proposed amendment implements 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. Other statutes affected by these rules are TWC, §§11.036, 11.138, 11.1351, and 11.1381.

§297.61. Amendments by Executive Director.

(a) - (b) (No change.)

(c) Without obtaining an amendment, the holder of a permit, certified filing, or certificate of adjudication that includes industrial or irrigation use may use or supply water for an agricultural use that was classified as industrial or irrigation before September 1, 2001.

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

§§297.71, 297.73, 297.74

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 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.

The proposed amendments implement 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. Other statutes affected by these rules are TWC, §§11.036, 11.138, 11.1351, and 11.1381.

§297.71. Cancellation in Whole or in Part.

(a) (No change.)

(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) (No change.)

(2) a significant portion of the water right has been used in accordance with a specific recommendation for meeting a water need included in [being held to meet longterm water supply needs as demonstrated by the water right holder or as reflected in regional water planning in accordance with] the applicable regional water plan approved under [pursuant to] Texas Water Code, §16.053;

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

(4) the deposit of the water right in the Texas Water Bank and the water right is protected from cancellation in accordance with TWC, [Texas Water Code] §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) (No change.)

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

(1) (No change.)

(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 [While] or In Part);

[(3) whether 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 in accordance with Chapter 288, Subchapter B of this title (relating to Drought Contingency Plans), and consistent with projections of future water needs contained in the state water plan;]

[(4) whether the water right was obtained as a result of the construction of a reservoir funded, in whole or in part, by the water right holder as a part of the water right holder's long-term water planning;]

(3) [(5)] 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) [(6)] whether the water right has been deposited into the Texas Water Bank or Water Trust as provided by TWC, §15.7031 and §15.704 [Texas Water Code §§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) [(7)] whether the water right has been reserved for instream uses or beneficial inflows for bays and estuaries.

(c) - (e) (No change.)

§297.74. Forfeiture and Revocation of Water Right.

(a) - (c) (No change.)

(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 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 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.

The proposed amendment implements 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. Other statutes affected by these rules are TWC, §§11.036, 11.138, 11.1351, and 11.1381.

§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 [term or temporary] permit to the extent of the person's [his or her] maximum annual diversions of water for the term of the contract; or

(2) the supplier shall obtain a [term or temporary] 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 [pursuant to] such permit or amendment.