

The Texas Commission on Environmental Quality (commission) adopts amendments to §§288.1 - 288.5, 288.20 - 288.22, and 288.30. Sections 288.1 - 288.5, 288.20 - 288.22, and 288.30 are adopted *with changes* to the proposed text as published in the April 23, 2004 issue of the *Texas Register* (29 TexReg 3912).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2003, the 78th Legislature passed House Bill (HB) 2660, HB 2663, and Senate Bill (SB) 1094. HB 2660 amended Texas Water Code (TWC), §11.1271, and mandated that the commission require certain existing surface water right holders and future surface water right applicants to include specific, quantified five-year and ten-year targets for water savings in their water conservation plans by May 1, 2005. Amended TWC, §11.1271, also requires five-year and ten-year targets for water savings in the water conservation plans of future surface water right applicants and holders of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial, and other uses, and 10,000 acre-feet a year or more for irrigation uses. Finally, TWC, §11.1271, includes the deadline for the regulated community to submit its revised water conservation plans and implementation reports to the executive director.

HB 2663 amended TWC, §11.1272, to establish target quantified goals for drought contingency plans of wholesale and retail public water suppliers and irrigation districts to be achieved in periods of water shortages and drought by May 1, 2005. TWC, §11.1272, requires wholesale and retail public water suppliers and irrigation districts to amend their drought contingency plans to include quantified targets for water use reductions; however, these quantified targets are only guidelines.

SB 1094 created the Water Conservation Implementation Task Force (task force). This task force is required to advise the Texas Water Development Board (Board) and the commission on standardized methodology for reporting and using municipal per capita water use data. To accomplish that goal, the task force developed and on January 26, 2004 approved a definition for municipal use in gallons per capita per day. On July 26, 2004, the task force amended its definition of municipal use in gallons per capita per day by adding indirect reuse to the term.

As required by HB 2660 and HB 2663, the commission is working in conjunction with the Board to implement this legislation. Additionally, the commission proposes to include the definition of “Municipal use in gallons per capita per day,” as approved and amended by the task force, in these amendments to ensure consistency in the use of the term between the Board and the commission.

SECTION BY SECTION DISCUSSION

Throughout this rulemaking, the commission has made wording changes to bring the existing rule language into agreement with agency rule writing standards.

Subchapter A, Water Conservation Plans

The commission adopts amendments to this subchapter to implement HB 2660.

Amended §288.1, Definitions, adds a definition for municipal use in gallons per capita per day. HB 2660 requires target goals to be in “municipal use in gallons per capita per day” and the commission adopts the addition of this definition, as amended and adopted by the task force, to ensure consistency

between the commission and the Board in the use of this term. The commission understands that the task force may recommend a separate calculation that will credit indirect reuse against municipal use in gallons per capita per day. Subsequent definitions are renumbered to accommodate the new term.

Amended §288.2, Water Conservation Plans for Municipal Uses by Public Water Suppliers, contains revisions to the rule that apply to water conservation plans for municipal uses by public water suppliers.

Section 288.2(a) was modified in response to a comment to include language that requires that if the plan does not provide information for each requirement in this subsection, the public water supplier shall include in the plan an explanation of why the requirements are not applicable.

Amended §288.2(a)(1)(B) specifies that the current requirement for specification of conservation goals will remain in effect until May 1, 2005, to account for water conservation plans for municipal use by public water suppliers that are prepared before the statutory deadline of May 1, 2005.

New §288.2(a)(1)(C) adds the requirement that the public water supplier specify in its water conservation plans for municipal uses specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for “municipal use in gallons per capita per day” beginning May 1, 2005. Subsequent subparagraphs (C) - (J) are moved to (D) - (K) to accommodate the new subparagraphs. In response to comments, the commission added language to this subparagraph to clarify that the goals established by public water suppliers under this subparagraph are not enforceable.

In §288.2(a)(1)(K) the commission changed “regional water plan” to “regional water plans” in response to a comment.

New §288.2(c) requires a public water supplier for municipal use to review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. In response to comments, the commission added language to this subsection to specify that after the statutory deadline of May 1, 2005 the next revision of the water plan must be reviewed and updated not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

Amended §288.3, Water Conservation Plans for Industrial or Mining Use, contains revisions to the rule that apply to water conservation plans for industrial or mining use.

Section 288.3(a) was modified in response to a comment to include language that requires that if the plan does not provide information for each requirement in this subsection, the industrial or mining water user shall include in the plan an explanation of why the requirements are not applicable.

Amended §288.3(a)(2) specifies that the current requirement for specification of conservation goals will remain in effect until May 1, 2005, to account for water conservation plans for industrial or mining uses that are prepared before the statutory deadline of May 1, 2005.

New §288.3(a)(3) adds the requirement for industrial or mining water users to specify in their water conservation plans specific, quantified five-year and ten-year targets for water savings and the basis for the development of such goals beginning May 1, 2005. Paragraphs (3) - (6) are renumbered as (4) - (7) to accommodate the new paragraph. In response to comments, the commission added language to this paragraph to clarify that the goals established by industrial or mining water users under this paragraph are not enforceable.

New §288.3(b) requires industrial or mining water users to review and update their water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. In response to comments, the commission added language to this subsection to specify that after the statutory deadline of May 1, 2005 the next revision of the water plan must be reviewed and updated not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

Amended §288.4, Water Conservation Plans for Agricultural Use, contains the revisions to the rule that apply to water conservation plans for agricultural use.

Section 288.4(a) was modified in response to a comment to include language that requires that if the plan does not provide information for each requirement in this subsection, the agricultural water user shall include in the plan an explanation of why the requirements are not applicable.

Amended §288.4(a)(1)(B) states that the current requirement to specify conservation goals will remain in effect until May 1, 2005, to account for water conservation plans for agricultural uses that are prepared before the statutory deadline of May 1, 2005.

New §288.4(a)(1)(C) adds the requirement for an agricultural water user to specify in its water conservation plans specific, quantified five-year and ten-year targets for water savings and the basis for the development of such goals beginning May 1, 2005. Subsequent subparagraphs (C) - (F) are moved to (D) - (G) to accommodate the new subparagraph. In response to comments, the commission added language to this subparagraph to clarify that the goals established by agricultural water users under this subparagraph are not enforceable.

Amended §288.4(a)(2)(D) states that the current requirement to specify conservation goals will remain in effect until May 1, 2005, to account for water conservation plans for individual irrigation users that are prepared before the statutory deadline of May 1, 2005.

New §288.4(a)(2)(E) adds the requirement for individual irrigation users to specify in their water conservation plans specific, quantified five-year and ten-year targets for water savings, including, where appropriate, quantitative goals for irrigation water use efficiency and a pollution abatement and prevention plan beginning May 1, 2005. Subsequent subparagraphs (E) - (J) are moved to (F) - (K) to accommodate the new subparagraph. In response to comments, the commission added language to this subparagraph to clarify that the goals established by an individual irrigation water user under this subparagraph are not enforceable.

Amended §288.4(a)(3)(B) states that the current requirement to specify conservation goals would remain in effect until May 1, 2005, to account for water conservation plans for systems providing agricultural water to more than one user that are prepared before the statutory deadline of May 1, 2005.

New §288.4(a)(3)(C) adds the requirement for systems providing agricultural water to more than one user to specify in their water conservation plans specific, quantified five-year and ten-year targets for water savings including maximum allowable losses for the storage and distribution system.

Subparagraphs (C) - (J) are moved to (D) - (K) to accommodate the new subparagraph. In response to comments, the commission added language to this subparagraph to clarify that the goals established by a system providing agricultural water to more than one user under this subparagraph are not enforceable.

New §288.4(c) requires agricultural water users to review and update their water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. In response to comments, the commission added language to this subsection to specify that after the statutory deadline of May 1, 2005 the next revision of the water plan must be reviewed and updated not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

Amended §288.5, Water Conservation Plans for Wholesale Water Suppliers, contains revisions to the rule that would apply to water conservation plans for wholesale water suppliers. Section 288.5 was modified in response to a comment to include language that requires that if the plan does not provide

information for each requirement in this section, the wholesale water supplier must include in the plan an explanation of why the requirements are not applicable.

Amended §288.5(1)(B) specifies that the current requirement for specification of conservation goals remain in effect until May 1, 2005, to account for water conservation plans of wholesale water suppliers that are prepared before the statutory deadline of May 1, 2005.

New §288.5(1)(C) adds the requirement that wholesale water suppliers specify in their water conservation plans, specific, quantified five-year and ten-year targets for water savings including, where appropriate, target goals for municipal use in gallons per capita per day for the wholesaler's service area, maximum acceptable unaccounted-for water, and the basis for the development of the goals beginning May 1, 2005. Subparagraphs (C) - (I) are moved to (D) - (J) to accommodate the new subparagraph. In response to comments, the commission added language to this subparagraph to clarify that the goals established by wholesale water suppliers under this subparagraph are not enforceable.

New §288.5(3) requires the wholesale water supplier to review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. In response to comments, the commission added language to this paragraph to specify that after the statutory deadline of May 1, 2005 the next revision of the water plan must be reviewed and updated not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

Subchapter B, Drought Contingency Plans

The commission adopts the amendments to this subchapter to implement HB 2663.

Amended §288.20, Drought Contingency Plans for Municipal Uses by Public Water Suppliers, contains revisions to the rule that apply to drought contingency plans for municipal uses by public water suppliers.

Section 288.20(a) was amended by changing the language from “. . .provide information in response to each of the following” to “. . .include the following minimum elements.” This change was made in response to comments.

New §288.20(a)(1)(F) adds the requirement that public water suppliers include in their drought contingency plans specific, quantified targets for water use reductions to be achieved during periods of water shortages or drought. Subparagraphs (F) - (I) are moved to (G) - (J) to accommodate the new subparagraph. In response to comments, the commission deleted the proposed language that the executive director, working with the executive administrator of the Board, would establish guidelines for drought contingency plans. Additionally, in response to comments, the commission added language to this subparagraph to clarify that the goals established by an entity under this subparagraph are not enforceable.

Amended §288.21, Drought Contingency Plans for Irrigation Use, contains revisions to the rule that apply to drought contingency plans for irrigation use.

Section 288.20(a) was amended by changing the language from “. . .provide information in response to each of the following” to “. . .include the following minimum elements.” This change was made in response to comments.

New §288.21(a)(1)(D) adds the requirement that irrigation users include in their drought contingency plans specific, quantified targets for water use reductions to be achieved during periods of water shortages or drought. Subparagraphs (D) - (H) are moved to (E) - (I) to accommodate the new subparagraph. In response to comments, the commission deleted the proposed language that the executive director, working with the executive administrator of the Board, would establish guidelines for drought contingency plans. Additionally, in response to comments, the commission added language to this subparagraph to clarify that the goals established by an entity under this subparagraph are not enforceable.

Amended §288.22, Drought Contingency Plans for Wholesale Water Suppliers, contains the revisions to the rule that apply to drought contingency plans for wholesale water suppliers.

New §288.22(a)(6) adds the requirement that wholesale water suppliers include in their drought contingency plans specific and quantified targets for water use reductions to be achieved during periods of water shortages or drought. Paragraphs (6) - (9) are renumbered as (7) - (10) to accommodate the new paragraph. In response to comments, the commission deleted the proposed language that the executive director, working with the executive administrator of the Board, would establish guidelines for drought contingency plans. Additionally, in response to comments, the commission added language

to this paragraph to clarify that the goals established by an entity under this paragraph are not enforceable.

Subchapter C, Required Submittals

The commission adopts the amendments to this subchapter to implement HB 2660 and HB 2663.

Amended §288.30, Required Submittals, contains the submittal requirements that apply to both water conservation plans and drought contingency plans.

Amended §288.30(1) changes the water conservation plan submittal date to the executive director from no later than September 1, 1999, to no later than May 1, 2005, for the holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial, and other non-irrigation uses. In response to comments, the commission specified that after May 1, 2005, the next revision of the water conservation plan must be submitted not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Amended §288.30(1) also specifies that any revised water conservation plan submitted to the executive director within 90 days of adoption must include implementation reports.

For readability, the commission moved the requirements that must be included in the implementation reports to a new §288.30(2) and renumbered the subsequent paragraphs. Additionally, in response to comments, the commission added additional requirements to paragraph (2), including data about

whether or not targets in the plans are being met; the actual amount of water saved; and, if the targets are not being met, an explanation as to why any of the targets are not being met, including any progress on that particular target.

Amended §288.30(3) changes the water conservation plan submittal date to the executive director from no later than September 1, 1999, to no later than May 1, 2005, for the holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 10,000 acre-feet a year or more for irrigation use. In response to comments, the commission specified that after May 1, 2005, the next revision of the water conservation plan must be submitted not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Amended §288.30(2) also specifies that any revised water conservation plan submitted to the executive director within 90 days of adoption must include implementation reports.

For readability, the commission moved the requirements that must be included in the implementation reports to a new §288.30(4) and renumbered the subsequent paragraphs. Additionally, in response to comments, the commission added additional requirements to paragraph (4), including data about whether or not targets in the plans are being met; the actual amount of water saved; and, if the targets are not being met, an explanation as to why any of the targets are not being met, including any progress on that particular target.

Amended §288.30(5)(A) changes the drought contingency plan submittal date to the executive director from no later than September 1, 1999, to no later than May 1, 2005, for retail public water suppliers

that provide water service to 3,300 or more connections. In response to comment, the commission added language to this subparagraph to specify that the next revision of the plan, after May 1, 2005, will be due not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

Amended §288.30(5)(B) changes the drought contingency plan preparation and adoption date and availability for inspection of all retail public water suppliers from no later than September 1, 1999, to no later than May 1, 2005. In response to comment, the commission added language to this subparagraph to specify that the next revision of the plan, after May 1, 2005, will be due not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

Amended §288.30(6) changes the drought contingency plan submittal date to the executive director from no later than September 1, 1999, to no later than May 1, 2005, for all wholesale public water suppliers. In response to comment, the commission added language to this paragraph to specify that the next revision of the plan, after May 1, 2005, will be due not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

Amended §288.30(7) changes the drought contingency plan submittal date to the executive director from no later than September 1, 1999, to no later than May 1, 2005, for all irrigation districts. In response to comment, the commission added language to this subparagraph to specify that the next revision of the plan, after May 1, 2005, will be due not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 §2001.0225. A "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 sector of the state.

The adopted amendments have two specific goals. First, the adopted amendments will require that wholesale and retail public water suppliers, irrigation districts, and other entities include identifiable and quantifiable target goals in their drought contingency plans. Second, the adopted amendments will require that all water conservation plans include specific, quantified five-year and ten-year targets for water conservation. The adopted amendments create new requirements for wholesale and retail public water suppliers, irrigation districts, and some water rights holders; however, the new requirements are insignificant and will not adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, the commission concludes that the rule amendments do not constitute a major environmental rule.

Furthermore, even if the adopted rulemaking did meet the definition of a "major environmental rule," the amendments are not subject to Texas Government Code, §2001.0225, because it does not meet any

of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, 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.

In this case, the adopted amendments to Chapter 288 do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the adopted rules do not exceed an express requirement of state law, rather they implement HB 2660 and HB 2663 from the 78th Legislature. Third, the amendments would not exceed a delegation agreement or contract between the state and an agency of the federal government. Fourth, the commission does not adopt these rules under the general powers of the agency but rather under the authority of TWC, §11.1271, which mandates the commission to require certain existing surface water right holders and future surface water right applicants to include specific and quantified five-year and ten-year targets for water savings within their water conservation plans by May 1, 2005, and TWC, §11.1272, which requires the commission and the Board by joint rule to identify quantified target goals for drought contingency plans of wholesale and retail public water suppliers and irrigation districts by May 1, 2005. These rules are also adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state. Therefore, the commission does not adopt the rules solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rule amendments because the adopted amendments are not a taking as defined in Chapter 2007, nor are they a constitutional taking of private real property. The specific purpose of the adopted amendments is twofold. First, they require that wholesale and retail public water suppliers, irrigation districts, and other entities include specific, quantified target goals in their drought contingency plans. Second, the adopted amendments require that all water conservation plans include specific, quantified five-year and ten-year targets for water conservation. Additionally, these adopted rules do not apply to private real property. These adopted rules only require certain existing surface water right holders and future surface water right applicants to include specific and quantified five-year and ten-year targets for water savings within their water conservation plans by May 1, 2005, and require the commission and the Board by joint rule to identify quantified target goals for drought contingency plans of wholesale and retail public water suppliers and irrigation districts by May 1, 2005.

Promulgation and enforcement of these adopted rules will not affect private real property which is the subject of the rules because the adopted amendments will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. The adopted rules only apply to requirements of drought contingency plans and water conservation plans. Property values will not be decreased, because the rule amendments will not limit the use of real property.

Thus, these rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that this rulemaking does not impact any CMP goal or policy. This rulemaking will change the submission date for water conservation plans and drought contingency plans from September 1, 1999 to May 1, 2005 and will establish a new requirement that entities subject to Chapter 288 must specify five-year and ten-year quantified targets for water savings in their water conservation plans. Additionally, this rulemaking will require that entities review and update their water conservation plans, as appropriate, at least every five years, based on an assessment of previous five-year and ten-year targets and any other new or updated information. Finally, this rulemaking will require the entities subject to Chapter 288 to include in their drought contingency plan specific and quantified targets for water use reduction during periods of water shortages and drought.

PUBLIC COMMENT

The public comment period closed at 5:00 p.m. on May 24, 2004. The commission did not hold a public hearing on these rules. The following provided written comments during the comment period: Freese and Nichols, Inc. (Freese); Lower Colorado River Authority (LCRA); Lloyd, Gosselink, Blevins, Rochelle, Baldwin and Townsend, P.C. (Lloyd Gosselink); National Wildlife Federation (NWF); Representative Robert R. Puente (Representative Puente); Sierra Club, Lone Star Chapter (Sierra Club); Tarrant Regional Water District (TRWD); Texas Rural Water Association (TRWA); and 437 individuals.

Representative Puente, Freese, LCRA, Lloyd Gosselink, the Sierra Club, NWF, TRWA, TRWD, and 437 individuals generally supported the proposed rules but raised issues or suggested changes to the rules as specified in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General Comments

Representative Puente, the Sierra Club, NWF, and 431 individuals supported the inclusion of the terms “specific, quantified” targets for water savings as proposed.

The commission appreciates this support. The rules will continue to reflect the wording of “specific, quantified” target for water savings as stated in HB 2660 and HB 2663.

NWF and 435 individuals commented that developers of water conservation plans should assess all reasonable water conservation measures and if an entity chooses not to include any reasonable measure, the commission should require that the conservation plan include an explanation as to why.

The commission agrees with the comment. In §§288.2(a), 288.3(a), 288.4(a), and 288.5(a), the commission added language that requires that if the plan does not provide information for each element, the water user shall include in the plan an explanation of why the requirement is not applicable. The commission made this change to ensure that the water suppliers have adequately considered each of the requirements in the rules in preparation of their water conservation plan and provided the commission with information as to which requirements may not be appropriate for specific entities or geographic areas.

NWF commented that the plan preparers should be required to consider the target goals developed by agencies. NWF believes that the rules should expressly require preparers of water conservation and drought contingency plans to give specific consideration to the guidelines and model plans prepared by the commission and the Board.

The commission disagrees with this comment. TWC, §11.1271(d), as amended by HB 2660, explicitly states that the commission and the Board shall jointly identify quantified target goals for water conservation that the water suppliers and other entities may use as guidelines in preparing water conservation plans. The statute does not provide for the proposed requirement that water users consider the commission and the Board's joint guidelines in developing their own target and

goals for their water conservation plan. HB 2660 further states that these goals are not enforceable. Thus, the commission made no change to the rules in response to this comment.

TRWD commented that the proposed rules would significantly impact the ability to provide a cost-effective, reliable water supply within the mandates of the authorizing legislation and existing contractual agreements. TRWD further commented that the projection that there will be no significant fiscal implication for any unit of state government is unrealistic. Additionally, the rules will require very aggressive expenditures by state and local governments to assess newly identified conservation measures and to frequently prepare, approve, and submit amended conservation plans, among other things. Wholesale suppliers would be required to unnecessarily duplicate the work of its customers, increasing the cost to those customers. Entities that do not have conservation specialists on staff will incur consultant and legal fees to verify compliance. There also will be a cost to the agencies that receive and review plans every time they are updated. TRWD also commented that the proposed rules are not consistent with the discussions of the task force and are premature with regard to certain recommendations that the task force has remaining opportunities to consider. TRWD stated that given that the task force is to advise the agencies with regard to methodologies and reporting in order to achieve consistency, further action on the rulemaking should be deferred until the recommendations of the task force are more complete and the proposed rules can be conformed within the time frames provided in the legislation that is being implemented.

The commission disagrees that the proposed rules would significantly impact the ability to provide a cost-effective, reliable water supply within the mandates of authorizing legislation and existing

contractual agreements. The rules simply require that the water conservation plans include five-year and ten-year target goals and be reviewed and updated at least every five years. Local governments would incur minimal costs to modify their water conservation plans and develop specific conservation targets, but those costs would be offset by lower drinking water and wastewater demands on water supply and wastewater treatment systems. While it is true that if a wholesale water supplier had only one customer, their goals would probably be similar or the same. However, most wholesalers have more than one customer and therefore, would have different goals than an individual customer. Additionally, SB 1094 requires the task force to set recommended guidelines for water savings goals. While a wholesale water supplier does not need to use these guidelines, most wholesale water suppliers would be able to use these goals to establish their five-year and ten-year goals without the assistance of a hired consultant or attorney. The commission disagrees that there will be a cost for reviewing these plans to the commission that is above and beyond its normal operating cost. Throughout its comment, TRWD references best management practices (BMPs) that are being considered by the task force; however, these rules do not require any water user to implement any specific BMP suggested by the task force. Additionally, HB 2660 requires that the commission and the Board take actions necessary to comply with TWC, §11.1271, by September 1, 2004. Thus, the commission proposed these rules to meet the deadline established in HB 2660. The commission made no change to the rules in response to these comments.

TRWD also commented that the rules should account for local effects, such as climate and demographics and that targets and goals, although recognized as an important component of achieving appropriate conservation objectives, are not to be the subject of enforcement.

This comment refers to the work of the task force. The commenter stated that the legislation should account for local effect, such as climate and demographics. The legislation that the commenter refers to is SB 1094, which established the task force. Specifically, SB 1094 requires the task force to develop the guidelines for goals that account for local effects, such as climate and demographics. These rules implement HB 2660 and HB 2663 which amend TWC, §11.1271, and only require that entities set five-year and ten-year goals. The commission added language to §§288.2(a)(1)(C); 288.3(a)(3); 288.4(a)(1)(C), (2)(E), and (3)(C); 288.5(1)(C); 288.20(a)(1)(F); 288.21(a)(1)(D); and 288.22(a)(6) to specify that the goals established by an entity under these rules are not enforceable.

TRWD commented that the commission states its intent to “ensure that entities preparing water conservation plans assess all reasonable water conservation measures in deciding what options to include” and to “ensure that all appropriate conservation measures are included.” However, the sheer size and number of management practices that the task force is considering, in addition to those that may not yet be identified, demonstrate that requiring a water supplier to assess all of them is unreasonably burdensome. Nor is it the appropriate or the authorized role of the commission to dictate what particular practices must be included in an entity’s plan, beyond those that are openly identified and debated as minimum necessary plan components. The task force’s members have emphasized in

discussions that an entity preparing a plan can use its own management discretion to select among conservation options. The commission's intent to "ensure," require, or enforce the inclusion, in a plan, of "all" of the conservation measures that the commission determines to be "appropriate" is inconsistent with the task force's work and with HB 2660. Although the quoted language appears in the preamble, the preamble is an important measure of the regulatory intent of the rules. The commenter stated that the preamble should be revised to emphasize the discretion of the entities preparing their plans and the clear legislative intent that targets and goals not be enforceable.

The commission agrees that the target and goals are not enforceable. The commission included the language that TRWD cites in its comment in the proposal preamble in an effort to solicit as wide a range of comments as possible in order to develop these rules. The commission deleted this language from the adoption preamble. The commission also added language to §§288.2(a)(1)(C); 288.3(a)(3); 288.4(a)(1)(C), (2)(E), and (3)(C); 288.5(1)(C); 288.20(a)(1)(F); 288.21(a)(1)(D); and 288.22(a)(6) to specify that the goals established by an entity under these rules are not enforceable. Finally, the commission included language in the RESPONSE TO COMMENTS section of this preamble to illustrate that water suppliers are free to track additional measures if they feel that there is a better method to track water conservation measures.

One individual commented that all plans and developers of water resources should be required to develop drought contingency and emergency plans to assure that all waters of the state have adequate environmental flows at all possible times.

The commission adopted rules that require plans for which it has authority. The legislature under SB 1639, created the Study Commission on Water for Environmental Flows (study commission). Among other duties, the study commission is to make recommendations to the next legislature on how best to provide flows for the environment. The commission made no changes to the rules in response to this comment.

One individual commented that unless the commission makes specific and clear attempts to guide water planners away from the reuse of water as a significant part of their mandatory water conservation and drought contingency plans, the resulting impact on downstream users and the springs, rivers, and bays will be catastrophic. The individual commented that the rule language must ensure that the environmental flows provided or enhanced by return flows are not diminished as a result of the development of water conservation and drought contingency plans because during drought situations these return flows may be the only water available to sustain downstream habitats and downstream human use. The individual commented that the commission should enforce environmental goals by requiring each water right permit, new or old, to return minimum flows.

The commission disagrees with this comment. The rules require water suppliers to identify specific, quantified five-year and ten-year targets for water savings. The statute does not authorize the commission to mandate how water suppliers will meet their five-year and ten-year targets. In some instances, water suppliers may determine that the use of return flows is an appropriate water conservation measure. Additionally, the commission responds that the subject

of environmental flows is beyond the scope of this rulemaking. The commission made no changes to the rules in response to this comment.

Regarding the DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION of the proposed preamble, TRWD commented that the commission's finding of no impact is based on its judgment that the "new requirements are insignificant and will not adversely affect the economy. . . productivity. . . the environment, or the public health and safety of the state or a sector of the state." TRWD stated that the commission also asserts that an impact review is not even applicable. Whether or not the commission is required to perform an impact analysis, when the commission does such a review, it has a duty to provide a candid assessment of the rule's impact on the regulated community, the environment, and the economy. TRWD also stated that the commission failed to perform such assessment for those rules. It is obvious that these rules are part of a program involving the Board's BMPs guidelines that will dramatically change how Texas approaches water development and conservation. These changes will come at great cost and, eventually, changes in lifestyle. It is unknown because of lack of analysis whether these rules and guidelines will change the cost of water sufficiently to make Texas less competitive for business.

The executive director is only required to perform a regulatory impact analysis of rules that are major environmental rules. There are two prongs to the test to determine if a rule is a major environmental rule. First, for a rule to be a major environmental rule, its specific intent must be to protect the environment or reduce risks to human health from environmental exposure. The second prong is that the rule must adversely affect in a material way the economy, a sector of the

economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The specific intent of these rules is to protect the environment by requiring that wholesale and retail public water suppliers, irrigation districts, and other entities include identifiable and quantified target goals in their drought contingency plans; and by requiring that all water conservation plans include specific, quantified five-year and ten-year targets for water conservation. However, the executive director determined that the rules are not a major environmental rule because the rules will not adversely affect, in a material way, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. To make this determination the executive director evaluated the cost to state and local governments, the public, small and micro-businesses, and local employment.

The executive director determined that there will not be a significant fiscal impact to units of local government as a result of these rules because the executive director estimates that the water conservation plans currently being submitted by municipal, agricultural, and mining users have an average time frame of five years. Since most of the submitted plans already include water conservation targets and have an average time frame of five years, it is estimated that minimal effort will be involved in implementing specific, quantified five-year and ten-year targets. The estimated increase in workload ranges from five to ten hours, on average, for each of the approximately 300 entities required to submit a plan. For drought contingency plans, the amendments require only specific, quantified targets for reductions.

The major difference between a water conservation plan and a drought contingency plan is that water conservation plans require specific, quantified five-year and ten-year targets and drought contingency plans require only a specific, quantified target with no specified time frame.

Approximately 1,300 entities, some of which are local governments, are required to submit water conservation plans. As many entities are already submitting targets in their drought contingency plans, it is estimated that the additional work involved as a result of these amendments will be minimal.

The executive director also determined that the impact to the public would be minimal because for each year of the first five years the proposed amendments are in effect, the public benefits anticipated from the amendments are water conservation and improved planning to ensure that water demands can be met. The rules should further the reductions of water demand on public water supplies and the wastewater load on wastewater treatment plants, thus reducing or deferring capital infrastructure costs to local governments that provide water and wastewater services.

The executive director determined that the impact to small and micro-business would be minimal because the amendments just add one aspect to existing requirements for small and micro-businesses to prepare water conservation plans and/or drought contingency plans and those requirements are not anticipated to be significant. Because the small and micro-businesses that are impacted by these rules are already required to prepare water conservation plans that include five-year targets, it is estimated that minimal effort will be involved in implementing these

specific, quantified targets for water conservation plans with an estimated increase in workload ranging from five to ten hours, on average, for each entity required to submit a plan. It is estimated that there will be no significant fiscal impact to small and micro-businesses to implement the amendments.

Finally, according to TRWD, these rules will dramatically change how Texas approaches water development and conservation. TRWD also believes the changes will come at a great cost because the cost of water may make Texas less competitive for businesses, and the rules will lead to changes in lifestyle. The commission acknowledges that there may be increased costs or changes to lifestyles as an indirect result of these rules. However, as each entity is able to determine the water conservation goals and drought contingency measures appropriate for their use, each entity can evaluate the cost (financial and socio-economic) that are appropriate for the specific entity. Therefore, these costs should not be included in the regulatory impact analysis.

Thus, the executive director determined that the rules are not a major environmental rule and a regulatory impact analysis is not required.

§288.1, Definitions

Freese recommended that the commission add a definition for conservation pollution prevention and abatement plan.

The commission declines to add this definition to Chapter 288 because a conservation pollution prevention and abatement plan is unique to the specific water rights holder. The conservation pollution prevention and abatement plan may include any number of elements including the topography, climate, and demographics; however, each element may not be appropriate for every water rights holder. A definition would not be able to adequately encompass all situations.

Representative Puente and the Sierra Club supported the use of the definition of municipal use in gallons per capita per day in §288.1(11) as developed and approved by the task force on January 26, 2004.

The commission appreciates the comments.

TRWD commented that the proposed definition of municipal use in gallons per capita per day in §288.1(11) provides an acceptable measure of goals for water conservation and drought contingency activities for retail water utility operations. This definition, however, does not readily, or accurately, apply to the conservation and drought contingency activities of wholesale water suppliers. Reuse strategies by some wholesale suppliers involving high levels of wastewater treatment followed by recapture from aquifers or surface bodies will be inaccurately counted as diversion of additional quantities of water because the definition requires a calculation based on total volume diverted. The effectiveness of reuse strategies is not measured by daily demands by end-use (retail) customers. In addition, many wholesale suppliers also serve end-use customers as retail utilities. In these circumstances, the conservation and drought contingency activities undertaken by an entity for its own

retail customers may be unfairly diluted by less successful strategies on the part of retail water utilities purchasing wholesale quantities of the “water diverted or pumped” by that entity.

The commission appreciates the comment supporting municipal use in gallons per capita per day; however, the commission disagrees that the definition does not readily, or accurately, apply to the conservation and drought contingency activities of wholesale water suppliers because a wholesaler may supply water for a municipal use. If a wholesale water supplier provides water to a municipal user, then the wholesale water supplier is required under §288.5(1)(C) to include specific, quantified five-year and ten-year municipal targets in its water conservation plan. However, if a wholesale water supplier does not provide water to a municipal user then the wholesale water supplier does not need to include specific, quantified five-year and ten-year municipal targets in the water conservation plan but would still need to include five-year and ten-year targets for water savings.

On July 26, 2004 the task force amended its definition of municipal use in gallons per capita per day to include indirect reuse. The commission agrees with the commenter that reuse can be a highly effective and important tool for water conservation. Therefore, to be consistent with the definition recommended by the task force, the commission modified the definition of municipal use in gallons per capita per day to include the following statement: “Indirect reuse volumes shall be credited against total diversion volumes for the purposes of calculating gallons per capita per day for targets and goals.”

TRWD recommended adding a definition for treatment because the definition of municipal use in gallons per capita per day in §288.1(11) includes the following language: “water diverted or pumped *for treatment* for potable use by a public water system.” (Emphasis added). Without a definition of treatment the definition fails to include all water supplies that are pumped or diverted for potable use.

The commission disagrees with these comments. The definition of municipal use in gallons per capita per day reflects the definition recommended by the task force. The term “treatment” is being used as it is commonly and ordinarily used. Thus, the commission declines to make any change in response to this comment.

TRWA recommended revising the first sentence of the proposed definition of municipal use in gallons per capita per day in §288.1(11) to read as follows: “The total average daily amount of water diverted or pumped for potable use by a *retail* public water supply system.” (Emphasis added.)

The definition of municipal use in gallons per capita per day reflects the definition recommended by the task force. The commission made no change to the definition in response to this comment.

TRWD commented that the definition for municipal use in gallons per capita per day in §288.1(11) falls short of the work of the task force. Freese commented that the proposed definition does not accurately reflect the work of the task force and suggested that industrial sales be removed from the calculation. TRWD commented that authorized bed and banks water reuse projects are a critical aspect of some suppliers’ water conservation efforts that must be recognized in the methodology for determining per

capita, per day consumption. In addition to failing to capture the conservation component for bed and banks reuse, the definition fails to capture issues related to excluding wholesale water sales.

The commission disagrees that industrial sales should be removed from the calculation. The definition of municipal use in gallons per capita per day reflects the definition recommended by the task force. The definition is based on a calculation that is made by dividing the water diverted or pumped for treatment for potable use by population served and by crediting indirect reuse volumes against total diversion volumes. The commission cannot alter the calculation as approved by the task force.

On July 26, 2004 the task force amended its definition of municipal use in gallons per capita per day to include indirect reuse. Reuse can be a highly effective and important tool for water conservation. Therefore, to be consistent with the definition recommended by the task force, the commission modified the definition of municipal use in gallons per capita per day to include the following statement: “Indirect reuse volumes shall be credited against total diversion volumes for the purposes of calculating gallons per capita per day for targets and goals.”

A wholesale water supplier may supply water for municipal use; however, if a wholesale water supplier provides water to a municipal user, then the wholesale water supplier is required under §288.5(1)(C) to include specific, quantified five-year and ten-year municipal targets in its water conservation plan. Alternatively, if a wholesale water supplier does not provide water to a municipal user, then the wholesale water supplier does not need to include specific, quantified

five-year and ten-year municipal targets in its water conservation plan but it would still need to include five-and ten-year targets for water savings. Additionally, as long as the minimum requirement is met, wholesale water suppliers are free to monitor additional measures if they feel that there is a better method to track the effectiveness of their water conservation measures. The commission made no change to the definition in response to this comment.

LCRA commented that the definition of municipal use in gallons per capita per day in §288.1(11) does not explicitly include or exclude reuse of treated water in the calculation. Freese commented that the task force did not clarify the definition of reuse. Freese recommended that indirect reuse be included as a water conservation strategy. Additionally, Freese commented that indirect reuse would also need to be considered in the calculation of water use for tracking five-year and ten-year target goals.

On July 26, 2004 the task force amended its definition of municipal use in gallons per capita per day to include indirect reuse. Reuse can be a highly effective and important tool for water conservation. Therefore, to be consistent with the definition recommended by the task force, the commission modified the definition of municipal use in gallons per capita per day to include the following statement: “Indirect reuse volumes shall be credited against total diversion volumes for the purposes of calculating gallons per capita per day for targets and goals.”

NWF supported the addition of a definition of municipal use in gallons per capita per day in §288.1(11) and agreed that it should be consistent with the definition developed by the task force. NWF believes

that it would be helpful to indicate in the rules the normal time period over which the calculation should be made and suggested that a calendar year would be the appropriate time period to use.

The commission appreciates the comments supporting the definition of municipal use in gallons per capita per day. The definition of municipal use in gallons per capita per day reflects the definition recommended by the task force. The assumption used by the task force in developing the calculation is that per capita use is calculated on a 12-month period. The commission cannot alter the definition that the task force recommended. The commission made no change to the rule in response to this comment.

NWF recommended adding a definition of specific, quantified to make clear that within a water use category, such as municipal, each major type of water use, such as institutional, residential, and commercial, must be fully addressed by considering appropriate conservation measures and developing a target goal for that type of water use. NWF stated that such a requirement would, in the case of the municipal use category, provide supporting information for meeting the express statutory requirement for an overarching municipal use goal stated in gallons per capita per day.

The commission disagrees with these comments. The commission declines to add a definition for specific or quantified because these terms are being used as they are commonly and ordinarily used. The statute does not authorize the proposed recommendation by the commenter that the rules include a target goal for each major type of water use in each water use category. Thus, the commission declines to make any change in response to this comment.

Lloyd Gosselink expressed concern that the definition of municipal use in gallons per capita per day in §288.1(11) is problematic. According to Lloyd Gosselink, municipal use in gallons per capita per day suggests that all potable water consumed should be allocated to the calculation of municipal use in gallons per capita per day for purposes of water conservation planning. Lloyd Gosselink stated that by taking this position the commission has failed to recognize that potable water, while mainly used for direct consumption by residential customers, may in some instances be used to serve large industrial facilities. Lloyd Gosselink further stated that large uses of potable water for industrial uses will impact the calculation of municipal use in gallons per capita per day but actually have no direct correlation to per capita usage. Freese suggested that municipal water use and industrial water use should be accounted and reported separately.

The commission included the definition of municipal use in gallons per capita per day because it encompasses the total water use, including potable water use by industrial customers. Per capita water use figures should be used by a water supplier to track its own water use trends and not be used as a comparison between water suppliers. The rules do not prohibit a water user from including additional targets or goals for specific categories. For example, a plan could contain a goal in municipal use in gallons per capita per day for the total amount of water and still contain separate goals for municipal water use and industrial water use as long as the plan meets the minimum requirements of these rules. Additionally, many entities already have programs in place that include industrial uses that will now be included in the per capita calculation. The commission made no change to the rule in response to this comment.

Lloyd Gosselink stated that the commission's definition of municipal use in gallons per capita per day in §288.1(11) stems from the definition of municipal use found in 30 TAC §297.1(32). Lloyd Gosselink requested that if the commission intends to use municipal use in gallons per capita per day as an indicator of per capita demand, the industrial demands for potable water should be excluded from this definition so that realistic conservation goals on a per capita basis are achievable.

The commission disagrees with this comment. The definition of municipal use in gallons per capita per day is from the task force recommendation and not from Chapter 297. Additionally, many entities already have programs in place that include industrial uses that will now be included in the per capita calculation. Thus, the commission does not agree that industrial demand for potable water should be excluded from the definition. The commission made no change to the rule in response to this comment.

Lloyd Gosselink stated that the definition of reuse in §288.1(17) excludes water that is “disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.” Lloyd Gosselink requested that the definition be revised to reflect both direct and indirect reuse projects in promoting water conservation goals.

The commission acknowledges that the definition for reuse in §288.1(17) excludes what is generally referred to as indirect reuse. However, Chapter 288 does not prohibit or otherwise place barriers to indirect reuse of water. The commission made no change to the definition in response to this comment.

§288.2, Water Conservation Plans for Municipal Uses by Public Water Suppliers

NWF commented that §288.2(a) should be revised to require entities preparing conservation plans to consider all measures listed in subsection (a)(3) and to provide a rationale when deciding not to include any one of the measures in the plan. NWF believes that the change would be consistent with legislative intent and encourage better informed decisions; help to ensure that entities preparing water conservation plans assess all reasonable water conservation measures in deciding what options to include; and assist in ensuring that the commission has adequate information for reviewing applications for new or amended permits to ensure that all appropriate conservation measures are included. Thus, NWF suggested the following language: “(a) A water conservation plan for municipal water use by public water suppliers shall include each of the elements set out in Paragraph (1) of this Subsection, each element set out in Paragraph (2) of this Subsection if that Paragraph applies to the entity preparing the plan, and, except to the extent that the entity preparing the plan demonstrates that the element is not appropriate for inclusion, each element set out in Paragraph (3) of this Subsection.”.

The commission agrees with the comment, however, declines to use the language suggested by the commenter. In §288.2(a), the commission added language that requires the public water supplier to include in the water conservation plan an explanation of why the requirement is not applicable, if it does not provide information for each requirement listed in paragraphs (1) - (3). The commission made this change to ensure that the public water supplier has adequately considered each of the requirements in preparing its water conservation plan, and to provide the commission with information regarding which requirements may not be appropriate for specific entities or geographic areas.

TRWD commented that §288.2(a)(1)(C) should be revised to include the express legislative intent that the targets identified not be enforceable.

The commission agrees with this comment and added this language to §§288.2(a)(1)(C); 288.3(a)(3); 288.4(a)(1)(C), (2)(E), and (3)(C); 288.5(1)(C); §88.20(a)(1)(F); 288.21(a)(1)(D); and 288.22(a)(6). While the goals that are identified by the entities are not enforceable by the commission, the requirement that an entity have goals is enforceable by the commission.

TRWA commented that the language in §288.2(a)(1)(K) appears to be purely stylistic but inexplicably changes approved regional water plans from plural to singular. The original rule correctly recognizes that service areas for some public water suppliers cover more than one planning region. TRWA commented that the commission's stylistic change of "Regional Water Planning Groups" to regional water planning groups" retains the plural number. TRWA stated that as proposed, the rule fails to recognize that more than one regional water plan may impact a public water supplier.

The commission agrees with this comment. In §288.2(a)(1)(K), the commission modified the language and changed "approved regional water plan" to "approved regional water plans."

NWF recommended that §288.2(a)(3) should not limit the commission's authority by tying it to the goal stated in the conservation plan. NWF further commented that although the commission does not have authority to set the numerical target goal for a water conservation plan, the commission does have a duty, under TWC, §11.134, to ensure that the conservation plan meets minimum water conservation

requirements, regardless of the goal stated in the conservation plan. NWF suggested that the second sentence of §288.2(a)(3) be amended to read “The commission may require that any of the following strategies be implemented by the water supplier if the commission determines that the strategy is necessary to achieve the goals of the water conservation plan or *to satisfy the minimum requirements of TWC, §11.134:*”.

Under TWC, §11.134, the commission may only issue a water rights application if certain criteria are met. Currently, before the commission grants a new water right the commission verifies that the elements in TWC, §11.134, are met using the criteria in 30 TAC Chapters 295 and 297. The commission determined that adding the suggested language to Chapter 288 is redundant. Therefore, the commission made no change to the rule in response to this comment.

NWF commented that the language in §288.2(c) should be revised to eliminate the ambiguous requirement that conservation plans must be updated every five years “*as appropriate.*” NWF stated that the inclusion of the language “as appropriate” appears to make the otherwise mandatory requirement a discretionary one because it is not clear when an update would be considered “appropriate.”

The commission disagrees with this comment. The language that follows “as appropriate” in §288.2(c) explains that the review and update must be based on an assessment of previous five-year and ten-year targets and any other new or updated information. Therefore, if a system experiences a change before the five-year cycle ends, it may be appropriate for the plan to be

updated at that time. For example, if a system is on target to reach its water conservation goals and a new manufacturing plant connects to the system and that slows the progress toward the goal, then the system could consider updating its plan before it reaches the end of five years. The commission made no changes to the rule in response to this comment.

NWF commented that §288.2(c) should require the entity preparing an update to a water conservation plan to take into consideration the guidelines for quantified target goals and the model conservation programs prepared by the agencies. NWF suggested that this subsection be revised to read as follows: “(c) A public water supplier for municipal use shall review and update its water conservation plan on a periodic basis, at least every five years, based on an assessment of previous five-year and ten-year targets and any new or updated information, including consideration of water savings achieved since the last update and consideration of the guidelines for quantified target goals and the model water conservation programs established by the executive director working with the executive administrator of the Texas Water Development Board.”

The commission disagrees with this comment. TWC, §11.1271(d), requires that the commission and Board jointly identify quantified target goals for water conservation that water suppliers and other entities *may* use as *guidelines* in preparing water conservation plans. (Emphasis added.)

The statute, however, clearly states that the quantified target goals established by the water supplier are not enforceable by the commission. Additionally, TWC, §11.1271(e), requires the commission and the Board to jointly develop model water conservation programs for different types of water suppliers that *suggest* BMPs for achieving the highest practicable levels of water

conservation and efficiency achievable for each specific type of water supplier. (Emphasis added.)

The statute does not authorize the commission to require that water suppliers use the guidelines.

Thus, the commission made no change to the rule in response to this comment.

TRWA commented that §288.2(c) requires updates of water conservation plans by public water suppliers every five years on the basis of periodic review of targeted goals and on the basis of “any other new or updated information.” TRWA stated that HB 2660 clearly intended that the specific targets be goals and not subject to commission enforcement and therefore, requests that this rule be clarified to read “. . .or updated information *determined appropriate by the public water supplier.*”

TRWA believes that this clarification better delineates the matters enforceable by the commission from those which the legislature left to the informed discretion of local water suppliers.

The commission agrees with this comment that the local water suppliers are the appropriate entity to determine “new and updated information.” However, in certain permitting instances, like an application for water rights, the commission reserves the right to request additional information to process the application. For example, TWC, §11.134(b)(4), requires the commission to grant the application only if the applicant provided evidence that reasonable due diligence will be used to avoid waste and achieve water conservation as defined by TWC, §11.002(8)(B). Section 297.48, Waste Prevention, prohibits the waste of water and requires a water right holder using state water to use those measures necessary to ensure the beneficial use of water without waste in accordance with these rules and the terms and conditions of the water right and applicable law. Section 297.50, Consideration of Water Conservation Plans, requires the commission to evaluate water

conservation plans based on the information provided by the water right applicant. This section also requires a water conservation plan submitted with an application requesting an appropriation for new or additional state water to include data and information which: 1) supports the applicant's proposed use of water with consideration of the water conservation goals of the water conservation plan; 2) evaluates conservation as an alternative to the proposed appropriation; and 3) evaluates other feasible alternatives to new water development, including, but not limited to, waste prevention, recycling and reuse, water transfer and marketing, reservoir system operations, and optimum water management practices and procedures. The commission made no changes to the rule in response to this comment.

One individual commented that an entity should list how it will save water by listing some of the many possible measures as part of its goal. The individual stated that if the entity chooses not to include any of the many reasonable measures, then it should explain why none of the measures would work.

The commission added language to §§288.2(a), 288.3(a), 288.4(a), and 288.5(a) that requires that if the plan does not provide information for each requirement, the water user shall include in the plan an explanation of why the requirement is not applicable. The commission made this change to ensure that the water user adequately considered each of the requirements in the rule in preparation of its water conservation plan and to provide the commission with information as to which requirements may not be appropriate for specific entities or geographic areas.

Regarding §288.2(c), TRWD commented that the commission proposes that plans must be “review {ed} and updat{ed}” at least every five years. To the extent that this rule, alone or in conjunction with other rules, could be interpreted to require amendments to plans with this frequency, the rule is overly prescriptive. TRWD added that it also is overly prescriptive to suggest that “any other new or updated information” might warrant a plan revision.

The commission disagrees that the rule is overly prescriptive. The commission included the five-year requirement based on the five-year and ten-year goals required in a water conservation plan by TWC, §11.1271(c). Additionally, TWC, §11.1271(f), requires the commission to establish deadlines for submission of any required amendments. Thus, the commission selected five years to correspond to the goals required by the statute. The commission made no change to the rule in response to this comment.

§288.3, Water Conservation Plans for Industrial or Mining Use

NWF commented that the language in §288.3(a) is ambiguous. NWF recommended that the introductory language be revised to read similar to the following: “(a) A water conservation plan for industrial or mining uses shall include elements (1) – (5) and, unless demonstrated not to be appropriate.”

The commission agrees with the comment, however, declines to use the language suggested by the commenter. The commission added language that requires that if the plan does not provide information for each requirement listed in paragraphs (1) - (3), the industrial or mining water

user shall include in the plan an explanation of why the requirement is not applicable. The commission made this change to ensure that the industrial or mining water user has adequately considered each of the requirements in the rule in preparation of its water conservation plan, and to provide the commission with information as to which requirements may not be appropriate for specific entities or geographic areas.

NWF commented that a new §288.3(b) should be added to this section to make it clear that the commission has the discretion to require additional conservation measures under TWC, §11.134, and to ensure that the conservation plan meets minimum water conservation requirements. NWF suggested the following language: “(b) The commission may require that any of the elements set out in Subsection (a) of this Section be implemented by the water user if the commission determines it is necessary to achieve the goals of the water conservation plan or to satisfy the minimum requirements of TWC, §11.134.” Additionally, NWF commented that proposed §288.3(b) should be relettered to subsection (c) to accommodate this change.

Under TWC, §11.134, the commission may only issue a water rights application if certain criteria are met. Currently, before the commission grants a new water right the commission verifies that the elements in TWC, §11.134, are met using the criteria in 30 TAC Chapters 295 and 297. The commission determined that adding the suggested language to Chapter 288 is redundant. Therefore, the commission made no change to the rule in response to this comment.

NWF commented that proposed §288.3(b) should require the entity preparing an update to a water conservation plan to take into consideration the guidelines for quantified target goals and the model conservation programs prepared by the agencies, and suggested that proposed §288.3(b) be rewritten as follows: “An industrial or mining water user shall review and update its water conservation plan on a periodic basis, at least every five years, based on an assessment of previous five-year and ten-year targets and any new or updated information, including consideration of water savings achieved since the last update and consideration of the guidelines for quantified target goals and the model water conservation programs established by the executive director working with the executive administrator of the Texas Water Development Board.”

The commission disagrees with this comment. TWC, §11.1271(d), requires the commission and the Board to jointly identify quantified target goals for water conservation that water suppliers and other entities *may* use as *guidelines* in preparing water conservation plans. (Emphasis added.)

The statute, however, clearly states that the quantified target goals established by the water supplier are not enforceable by the commission. Additionally, TWC, §11.1271(e), requires the commission and the Board to jointly develop model water conservation programs for different types of water suppliers that *suggest* BMPs for achieving the highest practicable levels of water conservation and efficiency achievable for each specific type of water supplier. (Emphasis added.)

The statute does not authorize the commission to require that water suppliers use the guidelines. Thus, the commission made no change to the rule in response to this comment.

§288.4, *Water Conservation Plans for Agricultural Use*

NWF commented that the language in §288.4(a) is ambiguous. NWF recommended that the introductory language be revised to read basically as follows: “(a) A water conservation plan for agricultural use of water shall include, as applicable for the type of use and user, the elements set out in Paragraphs (1)(A)-(C); (2)(A), (B), and (D); and (3)(A)-(E), (H)-(I), and (K) of this Section; and, unless shown not to be appropriate, the elements set out in Paragraphs (1)(D)-(G); (2)(C) and (F)-(K); and (3)(F)-(G) and (J) of this Section.”

The commission agrees with the comment, however, declines to use the language suggested by the commenter. In §288.4(a), the commission added language that requires that if the plan does not provide information for each requirement listed in paragraphs (1) - (3), the agricultural water user shall include in the plan an explanation of why the requirement is not applicable. The commission made this change to ensure that the agricultural water user has adequately considered each of the requirements in the rule in preparation of its water conservation plan and to provide the commission with information as to which requirements may not be appropriate for specific entities or geographic areas.

NWF commented that a new §288.4(c) should be added to this section to make it clear that the commission has the discretion to require additional conservation measures under TWC, §11.134, and to ensure that the conservation plan meets minimum water conservation requirements. NWF suggested the following language: “The commission may require that any of the elements set out in Subsection (a) of this Section be implemented by the water user if the commission determines it is necessary to achieve the goals of the water conservation plan or to satisfy the minimum requirements of TWC,

§11.134.” Additionally, NWF commented that proposed §288.4(c) should be relettered to subsection (d) to accommodate this change.

Under TWC, §11.134, the commission may only issue a water rights application if certain criteria are met. Currently, before the commission grants a new water right the commission verifies that the elements in TWC, §11.134, are met using the criteria in 30 TAC Chapters 295 and 297. The commission determined that adding the suggested language to Chapter 288 is redundant. Therefore, the commission made no change to the rule in response to this comment.

NWF commented that proposed §288.4(c) should require the entity preparing an update to a water conservation plan to take into consideration the guidelines for quantified target goals and the model conservation programs prepared by the agencies, and suggested that proposed §288.4(c) be rewritten as follows: “An agricultural water user shall review and update its water conservation plan on a periodic basis, at least every five years, based on an assessment of previous five-year and ten-year targets and any new or updated information, including consideration of water savings achieved since the last update and consideration of the guidelines for quantified target goals and the model water conservation programs established by the executive director working with the executive administrator of the Texas Water Development Board.”

The commission disagrees with this comment. TWC, §11.1271(d), requires the commission and the Board to jointly identify quantified target goals for water conservation that water suppliers and other entities *may use as guidelines* in preparing water conservation plans. (Emphasis added.)

The statute, however, clearly states that the quantified target goals established by the water supplier are not enforceable by the commission. Additionally, TWC, §11.1271(e), requires the commission and the Board to jointly develop model water conservation programs for different types of water suppliers that *suggest* BMPs for achieving the highest practicable levels of water conservation and efficiency achievable for each specific type of water supplier. (Emphasis added.) The statute does not authorize the commission to require that water suppliers use the guidelines. Thus, the commission made no change to the rule in response to this comment.

Regarding §288.4(a)(3), TRWD commented that the commission proposes that systems providing agricultural water to more than one user must specify maximum allowable losses for the storage and distribution system. The commenter stated that targets and goals must be established for on-farm efficiency. TRWD suggested that while some requirements exist today for these type of activities, generally requiring establishment of targets and goals without more detail may give the commission too much discretion in requiring specific targets that negatively impact irrigated agriculture.

The commission disagrees with this comment because on-farm efficiency is outside the scope of this rulemaking. This rule is limited to the irrigation system providing agricultural water use to more than one user. It does not address the individual farm. Additionally, the commission disagrees that these rules give the commission too much discretion in requiring specific targets because the specific targets are to be established by the agricultural water user and not the commission. Thus, the commission made no change in response to this comment.

§288.5, Water Conservation Plans for Wholesale Water Suppliers

NWF commented that §288.5 is ambiguous. NWF recommends that the introductory language be revised to read basically as follows: “(a) A water conservation plan for a wholesale water supplier shall include all applicable elements set out in Paragraph (1) and, unless demonstrated not to be appropriate, all applicable elements set out in Paragraph (2) of this Subsection.”

The commission agrees with the comment, however, declines to use the language suggested by the commenter. In §288.5, the commission added language that requires that if the plan does not provide information for each requirement listed in paragraphs (1) and (2), the wholesale water supplier shall include in the plan an explanation of why the requirement is not applicable. The commission made this change to ensure that the wholesale water supplier has adequately considered each of the requirements in the rule in preparation of its water conservation plan and to provide the commission with information as to which requirements may not be appropriate for specific entities or geographic areas.

Regarding §288.5(1), TRWD commented that the commission proposes to require that the conservation plans of wholesale water suppliers “where appropriate,” include target goals for municipal use in gallons per capita per day for the wholesaler’s service area, and the basis for development of these goals. The rule, however, provides no guidance for determining where or when including target goals on that basis would be appropriate. According to TRWD, a wholesale water supplier is generally bound to provide all of the water that is required, up to the amounts called for under its contracts, and has no ability to shape or respond to conservation targets and goals in its customers’ retail systems,

beyond those measures already provided for under the commission's rules. TRWD asked if it is the commission's opinion that the implementing legislation for these rules provides authority to override contractual commitments, and if the commission considered the cost ramifications and possible debt maintenance issues with such a requirement.

Under the current rules, wholesale water suppliers have been required to implement water conservation measures. The proposed rules do not impose a new requirement; they just require the wholesale water supplier to include specific and quantified water conservation targets and goals.

Regarding §288.5(1), TRWD commented that for a wholesale water supplier with a large and varied service area, it appears to be unnecessarily duplicative and expensive for the wholesale supplier to be required to gather the same information that is either being provided by its customers directly to the agencies implementing the planning rules or to the regional planning groups, or to be required to gather information from small customers who might be otherwise exempt from the conservation planning rules. Wholesale customers who pay their supplier's costs, as well as their own direct costs, are in this way being subjected to redundant regulations. TRWD suggested that it would be appropriate to provide that a wholesale supplier satisfies the statutory requirement that its targets include municipal use in gallons per capita per day by identifying its service area and incorporating its customers' targets and goals by reference.

The commission disagrees that it will be expensive to develop specific five-year and ten-year targets. Local governments would incur minimal costs to modify their water conservation plans and develop specific conservation targets, but those costs would be offset by lower drinking water and wastewater demands on water supply and wastewater treatment systems. Additionally, the commission disagrees that wholesale customers that pay their supplier's cost, as well as their own direct costs, are subject to redundant regulations. While the rules require water conservation plans that contain targets and goals from both suppliers and their customers, each entity must develop its own targets and goals based on the information specific to its service area. While the commission does not recommend that a wholesale water supplier incorporate by reference the targets of its customers, the wholesaler has discretion to set any specific, quantified five-year and ten-year targets for water savings for its entire service area. The commission stresses that it is important for wholesale water suppliers and their customers to work together to develop and reach each entity's targets and goals. The commission made no change to the rule in response to this comment.

Regarding §288.5(1)(C), TRWA commented that the rule as proposed requires wholesale water suppliers to develop specific "target goals for municipal use in gallons per capita per day." TRWA believes that the definition of "municipal use in gallons per capita per day" is appropriate as proposed for retail water utilities, but not for wholesale water suppliers. Accordingly, TRWA recommended adding a clarifying phrase as follows: ". . . municipal use in gallons per capita per day *by the wholesaler's retail public water supply purchasers.*"

The commission declines to make the change recommended by the commenter. The definition of municipal use in gallons per capita per day reflects the definition recommended by the task force.

The commission agrees that a wholesale water supplier may not supply water for municipal use.

If a wholesale water supplier does not provide water to a municipal user then the wholesale water supplier does not need to include specific, quantified five-year and ten-year municipal targets in its water conservation plan but would still need to include five-year and ten-year targets for water savings. However, if a wholesale water supplier provides water to a municipal user, then the wholesale water supplier is required under §288.5(1)(C) to include specific, quantified five-year and ten-year municipal targets in its water conservation plan.

NWF recommended that §288.5(2) should not limit the commission's authority by tying it to the actual conservation plan. NWF further commented that although the commission does not have authority to set the numerical target goal for a water conservation plan, the commission does have a duty, under TWC, §11.134, to ensure that the conservation plan meets minimum water conservation requirements, regardless of the contents of the proposed conservation plan. NWF suggested that the second sentence of §288.5(a)(2) be amended to read as follows: "The commission may require that additional strategies, including those listed below, be implemented by the water supplier if the commission determines that the strategy is necessary to achieve the goals of the water conservation plan or *to satisfy the minimum requirements of TWC, §11.134*."

Under TWC, §11.134, the commission may only issue a water rights application if certain criteria are met. Currently, before the commission grants a new water right, the commission verifies that the elements in TWC, §11.134, are met using the criteria in Chapters 295 and 297. The commission determined that adding the suggested language is redundant. Therefore, the commission made no change to the rule in response to this comment.

Freese commented that the commission should add the word “agricultural” to §288.5(2)(B) to clarify the intended user of the plan.

The commission agrees with this comment and added the word “agricultural” to §288.5(2)(B).

NWF commented that the proposed language in §288.5(3) should be revised to eliminate the ambiguous requirement that conservation plans must be updated every five years, “*as appropriate.*” NWF stated that the inclusion of the language “as appropriate” appears to make the otherwise mandatory requirement a discretionary one.

The commission disagrees with this comment. The language that follows “as appropriate” in §288.5(3) explains that the review and update must be based on an assessment of previous five-year and ten-year targets and any other new or updated information. Therefore, if a system experiences a change before the five-year cycle ends, it may be appropriate for the plan to be updated at that time. For example, if a system is on target to reach its water conservation goals and a new manufacturing plant connects to the system and that slows the progress toward the

goal, then the system could consider updating its plan before it reaches the end of five years. The commission made no changes to the rule in response to this comment.

NWF commented that §288.5(3) should require the entity preparing an update to a water conservation plan to take into consideration the guidelines for quantified target goals and the model conservation programs prepared by the agencies. NWF suggested that this paragraph be revised to read as follows: “(3) A wholesale water supplier shall review and update its water conservation plan on a periodic basis, at least every five years, based on an assessment of previous five-year and ten-year targets and any new or updated information, including consideration of water savings achieved since the last update and consideration of the guidelines for quantified target goals and the model water conservation programs established by the executive director working with the executive administrator of the Texas Water Development Board.”

The commission disagrees with this comment. TWC, §11.1271(d), requires the commission and the Board to jointly identify quantified target goals for water conservation that water suppliers and other entities *may* use as *guidelines* in preparing water conservation plans. (Emphasis added.)

The statute, however, clearly states that the quantified, target goals established by the water supplier are not enforceable by the commission. Additionally, TWC, §11.1271(e), requires the commission and the Board to jointly develop model water conservation programs for different types of water suppliers that *suggest* BMPs for achieving the highest practicable levels of water conservation and efficiency achievable for each specific type of water supplier. (Emphasis added.)

The statute does not authorize the commission to require that water suppliers use the guidelines.

Thus, the commission made no change to the rule in response to this comment.

Regarding §288.5(3), TRWA commented that the commission proposes that plans must be “review[ed] and updat[ed]” at least every five years. TRWA commented that to the extent that this rule could be interpreted to require amendments to plans with this frequency, the rule is overly prescriptive. It also is overly prescriptive to suggest that “any other new or updated information” might warrant a plan revision.

The commission disagrees that the rule is overly prescriptive. The commission included the five-year requirement based on the five-year and ten-year goals required in a water conservation plan by TWC, §11.1271(c). Additionally, TWC, 11.1271(f), requires the commission to establish deadlines for submission of any required amendments. Thus, the commission selected five years to correspond to the goals required by the statute. The commission made no change to the rule in response to this comment.

§288.20, Drought Contingency Plans for Municipal Uses by Public Water Suppliers

Regarding §288.20(a), NWF commented that the proposed language creates inappropriate ambiguity about whether drought contingency plans must only provide information about minimum elements or must include those elements. NWF suggested the following language: “(a) A drought contingency plan for a retail public water supplier, where applicable, shall *include the following*.”.

The commission agrees that the language as written in §288.20(a) could be ambiguous. Therefore, to clarify that the information in paragraphs (1) - (3) is required in all drought contingency plans, where applicable, the commission agrees to change the language in §288.20(a) to read as follows:

“A drought contingency plan for a retail public water supplier, where applicable, shall include the following minimum elements.”

TRWA commented that §288.20(a)(1)(F) includes a provision that “{t}he executive director, working with the executive administrator of the Texas Water Development Board, will establish guidelines for drought contingency plans.” TRWA suggested that the proposed language may be misleading by suggesting that the “guidelines” must be incorporated in the respective drought contingency plans.

TRWA recommended deletion of this language from each of the proposed rules.

The commission agrees that this language could be misleading and removed it from §288.20(a)(1)(F).

TRWD commented that §288.20(a)(1)(F) should be revised to include the express legislative intent that the targets identified are not enforceable.

The commission agrees with this comment and added this language to §§288.2(a)(1)(C); 288.3(a)(3); 288.4(a)(1)(C), (2)(E), and (3)(C); 288.5(1)(C); 288.20(a)(1)(F); 288.21(a)(1)(D); and 288.22(a)(6). While the goals that are identified by the entities are not enforceable by the commission, the requirement that an entity have goals is enforceable by the commission.

NWF stated that an entity preparing a drought contingency plan should be required to consider the guidelines and model water conservation programs that the legislature directed the agencies to develop. NWF suggested the following language for §288.20(a)(1)(F) to ensure that consideration: “(F) The drought contingency plan must include specific, quantified targets for water use reductions to be achieved during periods of water shortage and drought. The entity preparing the plan shall establish the targets and, in doing so, shall document consideration of the guidelines and the model programs for drought contingency established by the executive director, working with the executive administrator of the Texas Water Development Board.”

The commission disagrees with this comment. TWC, §11.1272(d), requires the commission and the Board to jointly identify quantified target goals that water suppliers and other entities *may* use as *guidelines* in preparing drought contingency plans. (Emphasis added.) Additionally, TWC, §11.1271(e), requires the commission and the Board to jointly develop model drought contingency programs for different types of water suppliers that *suggest* BMPs for accomplishing the highest practicable levels of water-use reductions achievable during periods of water shortages and drought for each specific type of water supplier. (Emphasis added.) The statute does not authorize the commission to require that water suppliers use the guidelines; nor does the statute allow the commission to require that the water suppliers use the model developed by the agencies. Thus, the commission has made no change to the rule in response to this comment.

NWF commented that in §288.20(c) the inclusion of the language requiring updates “as appropriate” creates unnecessary ambiguity and that drought contingency plans should be updated every five years, and therefore, NWF recommended that the words “as appropriate” be deleted.

The commission disagrees with this comment. The language that follows “as appropriate” in §288.20(c) explains that the review and update must be based on any other new or updated information and gives the example of the adoption or revision of the regional water plan. Additionally, the rule language already requires that the plan be updated “at least every five years.” The commission made no changes to the rule in response to this comment.

§288.21, Drought Contingency Plans for Irrigation Use

NWF commented that the proposed language in §288.21(a) creates inappropriate ambiguity about whether drought contingency plans must only provide information about minimum elements or must include those elements. NWF recommended that the language be revised as follows: “(a) A drought contingency plan for an irrigation use, where applicable, shall include the following:”.

The commission agrees that the language as written in §288.21(a) could be ambiguous. Therefore, to clarify that the information in paragraphs (1) - (3) is required in all drought contingency plans, where applicable, the commission agrees to change the language in §288.21(a) to read as follows: “A drought contingency plan for an irrigation use, where applicable, shall include the following minimum elements:”.

NWF commented that under §288.21(a)(1)(D) an entity preparing a drought contingency plan should be required to consider the guidelines and the model programs that the legislature directed the agencies to develop. NWF proposes the following language to ensure that consideration: “(D) The drought contingency plan must included specific, quantified targets for water use reductions to be achieved during periods of water shortage and drought. The entity preparing the plan shall establish the targets and, in doing so, shall document consideration of the guidelines and model programs for drought contingency established by the executive director, working with the executive administrator of the Texas Water Development Board.”

The commission disagrees with this comment. TWC, §11.1272(d), requires the commission and the Board to jointly identify quantified target goals that water suppliers and other entities *may* use as *guidelines* in preparing drought contingency plans. (Emphasis added.) Additionally, TWC, §11.1271(e), requires the commission and the Board to jointly develop model drought contingency programs for different types of water suppliers that *suggest* BMPs for accomplishing the highest practicable levels of water-use reductions achievable during periods of water shortages and drought for each specific type of water supplier. (Emphasis added.) The statute does not authorize the commission to require that water suppliers use the guidelines; nor does the statute authorize the commission to require that the water suppliers use the model developed by the agencies. Thus, the commission made no change to the rule in response to this comment.

NWF commented that the inclusion of the language requiring updates “as appropriate” in §288.21(b) creates unnecessary ambiguity. NWF added that drought contingency plans should be updated every five years and, therefore, recommended that the words “as appropriate” be deleted.

The commission disagrees with this comment. The language that follows “as appropriate” in §288.21(b) explains that the review and update must be based on any other new or updated information and gives the example of the adoption or revision of the regional water plan. Additionally, the rule language already requires that the plan be updated “at least every five years.” The commission made no changes to the rule in response to this comment.

§288.22, Drought Contingency Plans for Wholesale Water Suppliers

TRWA commented that §288.22(a)(6) includes a provision that “[t]he executive director, working with the executive administrator of the Texas Water Development Board, will establish guidelines for drought contingency plans.” TRWA believes that it is inappropriate to include this language in a rule because it accomplishes no regulatory purpose. In fact, the rule as proposed may be misleading by suggesting that the “guidelines” must be incorporated in the respective drought contingency plans. TRWA recommends deletion of this language from each of the proposed rules.

The commission agrees that this language could be misleading and removed it from §288.22(a)(6).

TRWA commented that §288.22(a)(6) should be revised to specify that the guidelines for wholesale supply drought contingency plans must take existing contractual requirements into consideration.

TRWA added that such contractual requirements generally confine what a wholesale supplier may do in response to drought conditions.

The commission deleted the language that explains that the commission and the Board will establish guidelines for drought contingency plans. This rulemaking deals solely with amendments to Chapter 288 and the guidelines to be developed by the commission and the Board are not included in this chapter. Thus, content to be included in the guidelines for drought contingency plans is beyond the scope of this rulemaking. The commission made no changes to the rule in response to this comment.

NWF commented that under §288.22(a)(6) an entity preparing a drought contingency plan should be required to consider the guidelines the legislature directed the agencies to develop. NWF proposed the following language to ensure that consideration: “(6) The drought contingency plan must include specific, quantified targets for water use reductions to be achieved during periods of water shortage and drought. The entity preparing the plan shall establish the targets and, in doing so, shall document consideration of the guidelines and model programs for drought contingency established by the executive director, working with the executive administrator of the Texas Water Development Board.”.

The commission disagrees with this comment. TWC, §11.1272(d), requires the commission and the Board to jointly identify quantified target goals that water suppliers and other entities may use as guidelines in preparing drought contingency plans. The statute does not authorize the

commission to require that water suppliers use the guidelines. Thus, the commission made no change to the rule in response to this comment.

NWF commented that the inclusion of the language requiring updates “as appropriate” in §288.22(c) creates unnecessary ambiguity. NWF added that drought contingency plans should be updated every five years and, therefore, recommended that the words “as appropriate” be deleted.

The commission disagrees with this comment. The language that follows “as appropriate” in §288.21(b) explains that the review and update must be based on any other new or updated information and gives the example of the adoption or revision of the regional water plan. Additionally, the rule language already requires that the plan be updated “at least every five years.” The commission made no changes to the rule in response to this comment.

§288.30, Required Submittals

Representative Puente, the Sierra Club, and NWF urged the commission to provide additional specificity to the implementation reporting requirements of water conservation plans. As an example, Representative Puente, the Sierra Club, and NWF suggested that the implementation reports should include data about whether or not targets in the plans are being met and, if applicable, an explanation as to why any of the targets are not being met, including any progress on that particular target. NFW and 436 individuals commented that the implementation reports should include a reporting of actual savings achieved.

The commission agrees with this comment. The commission modified the language of §288.30 to include additional requirements in the implementation report for municipal, industrial, other non-irrigation uses, and irrigation uses. The new requirements are: data about whether or not targets in the plans are being met; the amount of water saved; and if applicable, an explanation as to why any of the targets are not being met, including any progress on that particular target.

Additionally, the commission renumbered the subsequent paragraphs to accommodate the new rule language.

NWF, the Sierra Club, and 436 individuals commented that the timing for required revisions to water conservation plans should ensure that updated information is available for use by regional water planning groups in preparing updates to regional water plans. Because updates to regional water plans and updates to water conservation plans are on five-year cycles, unless some adjustment is made, regional water planning groups will continue to have difficulty including the required information and complying with statutory requirements. NWF, the Sierra Club, and 436 individuals proposed that the commission require that, after the initial May 1, 2005 updates under the new requirements, the next update to water conservation plans be submitted no later than May 1, 2009 and in five-year increments after that. NWF suggested specific language for §288.30(1) - (5): “Thereafter, revised plans, which must be submitted to the executive director within 90 days of adoption, are due to the executive director no later than May 1, 2009, and every five years thereafter. The revised plans must include implementation reports listing the dates, descriptions, and approximate savings of the conservation measures implemented and, if conservation goals are not being met, an explanation of the reasons goals are not being met.”

The commission agrees that it is important for updated information to be available for use by regional water planning groups in preparing updates to regional water plans. Therefore, the commission modified the language in §288.30(1) - (5) to ensure that the submittal dates for water conservation plans and drought contingency plans coincide with the planning schedules of the regional water planning groups. The next revision of the plans will be due May 1, 2005 with the following revision due not later than May 1, 2009 and every five years thereafter.

Regarding §288.30(2), NWF commented that the timing of the submission of future water conservation plans should be adjusted to better facilitate regional water planning. NWF also believes that information about water savings achieved should be included in implementation reports. Accordingly, NWF recommended that the third and fourth sentences of this provision be revised to read as follows: “Thereafter, revised plans, which must be submitted to the executive director within 90 days of adoption, are due to the executive director no later than May 1, 2009, and every five years thereafter. The revised plans must include implementation reports listing the dates, descriptions, and approximate savings of the conservation measures implemented and, if conservation goals are not being met, an explanation of the reasons goals are not being met.”

The commission agrees that it is important for updated information to be available for use by regional water planning groups in preparing updates to regional water plans. Therefore, the commission has modified the language in §288.30(1) - (5) to ensure that the submittal dates for water conservation plans and drought contingency plans coincide with the planning schedules of

the regional water planning groups. The next revision of the plans will be due May 1, 2005 with the following revision due not later than May 1, 2009 and every five years thereafter.

Regarding §288.30(3)(A), NWF commented that the timing of the submission of future drought contingency plans should be adjusted to better facilitate regional water planning and to coincide with the deadlines for filing updates to water conservation plans. Accordingly, NWF recommended that the second sentence of this provision be revised to read as follows: “Thereafter, revised plans, which must be submitted to the executive director within 90 days of adoption by the community water system, are due to the executive director no later than May 1, 2009, and every five years thereafter.”

The commission agrees that it is important for updated information to be available for use by regional water planning groups in preparing updates to regional water plans. Therefore, the commission modified the language in §288.30(1) - (5) to ensure that the submittal dates for water conservation plans and drought contingency plans coincide with the planning schedules of the regional water planning groups. The next revision of the plans will be due May 1, 2005 with the following revision due not later than May 1, 2009 and every five years thereafter.

Regarding §288.30(4), NWF commented that the timing of submission of future drought contingency plans should be adjusted to better facilitate regional water planning and to coincide with the deadlines for filing updates to water conservation plans. Accordingly, NWF recommended that the second sentence of this provision be revised to read as follows: “Thereafter, new or revised plans, which must be submitted to the executive director within 90 days of adoption by the governing body of the

wholesale public water supplier, are due to the executive director no later than May 1, 2009, and every five years thereafter.”

The commission agrees that it is important for updated information to be available for use by regional water planning groups in preparing updates to regional water plans. Therefore, the commission modified the language in §288.30(1) - (5) to ensure that the submittal dates for water conservation plans and drought contingency plans coincide with the planning schedules of the regional water planning groups. The next revision of the plans will be due May 1, 2005 with the following revision due not later than May 1, 2009 and every five years thereafter.

Regarding §288.30(5), NWF commented that the timing of submission of future drought contingency plans should be adjusted to better facilitate regional water planning. Accordingly, NWF recommends that the second sentence of this provision be revised to read as follows: “Thereafter, new or revised plans, which must be submitted to the executive director within 90 days of adoption by the governing body of the irrigation district, are due to the executive director no later than May 1, 2009, and every five years thereafter.”

The commission agrees that it is important for updated information to be available for use by regional water planning groups in preparing updates to regional water plans. Therefore, the commission modified the language in §288.30(1) - (5) to ensure that the submittal dates for water conservation plans and drought contingency plans coincide with the planning schedules of the

regional water planning groups. The next revision of the plans will be due May 1, 2005 with the following revision due not later than May 1, 2009 and every five years thereafter.

SUBCHAPTER A: WATER CONSERVATION PLANS

§§288.1 - 288.5

STATUTORY AUTHORITY

These amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and TWC, §11.1271, which provides the commission with the authority to require applicants for a new or amended water right to adopt conservation measures; and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

§288.1. Definitions.

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

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

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

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

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

(D) raising or keeping equine animals;

(E) wildlife management; and

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

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

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

(4) **Drought contingency plan** – A strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

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

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

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

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

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

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

(11) **Municipal use in gallons per capita per day** – The total average daily amount of water diverted or pumped for treatment for potable use by a public water supply system. The calculation is made by dividing the water diverted or pumped for treatment for potable use by population served. Indirect reuse volumes shall be credited against total diversion volumes for the purpose of calculating gallons per capita per day for targets and goals.

(12) **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.

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

(14) **Public water supplier** – An individual or entity that supplies water to the public for human consumption.

(15) **Regional water planning group** – A group established by the Texas Water Development Board to prepare a regional water plan under Texas Water Code, §16.053.

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

(17) **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.

(18) **Water conservation plan** – A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for

maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

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

§288.2. Water Conservation Plans for Municipal Uses by Public Water Suppliers.

(a) A water conservation plan for municipal water use by public water suppliers must provide information in response to the following. If the plan does not provide information for each requirement, the public water supplier shall include in the plan an explanation of why the requirement is not applicable.

(1) **Minimum requirements.** All water conservation plans for municipal uses by public drinking water suppliers must include the following elements:

(A) a utility profile including, but not limited to, information regarding population and customer data, water use data, water supply system data, and wastewater system data;

(B) until May 1, 2005, specification of conservation goals including, but not limited to, municipal per capita water use goals, the basis for the development of such goals, and a time frame for achieving the specified goals;

(C) beginning May 1, 2005, specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for municipal use, in gallons per capita per day. The goals established by a public water supplier under this subparagraph are not enforceable;

(D) metering device(s), within an accuracy of plus or minus 5.0% in order to measure and account for the amount of water diverted from the source of supply;

(E) a program for universal metering of both customer and public uses of water, for meter testing and repair, and for periodic meter replacement;

(F) measures to determine and control unaccounted-for uses of water (for example, periodic visual inspections along distribution lines; annual or monthly audit of the water system to determine illegal connections; abandoned services; etc.);

(G) a program of continuing public education and information regarding water conservation;

(H) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(I) a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin in order to optimize available water supplies; and

(J) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff indicating official adoption of the water conservation plan by the water supplier; and

(ii) a description of the authority by which the water supplier will implement and enforce the conservation plan; and

(K) documentation of coordination with the regional water planning groups for the service area of the public water supplier in order to ensure consistency with the appropriate approved regional water plans.

(2) Additional content requirements. Water conservation plans for municipal uses by public drinking water suppliers serving a current population of 5,000 or more and/or a projected population of 5,000 or more within the next ten years subsequent to the effective date of the plan must include the following elements:

(A) a program of leak detection, repair, and water loss accounting for the water transmission, delivery, and distribution system in order to control unaccounted-for uses of water;

(B) a record management system to record water pumped, water deliveries, water sales, and water losses which allows for the desegregation of water sales and uses into the following user classes:

(i) residential;

(ii) commercial;

(iii) public and institutional; and

(iv) industrial;

(C) a requirement in every wholesale water supply contract entered into or renewed after official adoption of the plan (by either ordinance, resolution, or tariff), and including any

contract extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements in this chapter. If the customer intends to resell the water, the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with the provisions of this chapter.

(3) Additional conservation strategies. Any combination of the following strategies shall be selected by the water supplier, in addition to the minimum requirements in paragraphs (1) and (2) of this subsection, if they are necessary to achieve the stated water conservation goals of the plan. The commission may require that any of the following strategies be implemented by the water supplier if the commission determines that the strategy is necessary to achieve the goals of the water conservation plan:

(A) conservation-oriented water rates and water rate structures such as uniform or increasing block rate schedules, and/or seasonal rates, but not flat rate or decreasing block rates;

(B) adoption of ordinances, plumbing codes, and/or rules requiring water-conserving plumbing fixtures to be installed in new structures and existing structures undergoing substantial modification or addition;

(C) a program for the replacement or retrofit of water-conserving plumbing fixtures in existing structures;

(D) reuse and/or recycling of wastewater and/or graywater;

(E) a program for pressure control and/or reduction in the distribution system and/or for customer connections;

(F) a program and/or ordinance(s) for landscape water management;

(G) a method for monitoring the effectiveness and efficiency of the water conservation plan; and

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

(b) A water conservation plan prepared in accordance with 31 TAC §363.15 (relating to Required Water Conservation Plan) of the Texas Water Development Board and substantially meeting the requirements of this section and other applicable commission rules may be submitted to meet application requirements in accordance with a memorandum of understanding between the commission and the Texas Water Development Board.

(c) Beginning May 1, 2005, a public water supplier for municipal use shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. The public water supplier for municipal use shall review and update the next revision of its water conservation plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

§288.3. Water Conservation Plans for Industrial or Mining Use.

(a) A water conservation plan for industrial or mining uses of water must provide information in response to each of the following elements. If the plan does not provide information for each requirement, the industrial or mining water user shall include in the plan an explanation of why the requirement is not applicable.

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

(2) until May 1, 2005, specification of conservation goals, the basis for the development of such goals, and a time frame for achieving the specified goals;

(3) beginning May 1, 2005, specific, quantified five-year and ten-year targets for water savings and the basis for the development of such goals. The goals established by industrial or mining water users under this paragraph are not enforceable;

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

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

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

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

(b) Beginning May 1, 2005, an industrial or mining water user shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. The industrial or mining water user shall review and update the next revision of its water conservation plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

§288.4. Water Conservation Plans for Agricultural Use.

(a) A water conservation plan for agricultural use of water must provide information in response to the following subsections. If the plan does not provide information for each requirement, the agricultural water user must include in the plan an explanation of why the requirement is not applicable.

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

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

(B) until May 1, 2005, specification of conservation goals, the basis for the development of such goals, and a time frame for achieving the specified goals;

(C) beginning May 1, 2005, specific, quantified five-year and ten-year targets for water savings and the basis for the development of such goals. The goals established by agricultural water users under this subparagraph are not enforceable;

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

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

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

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

(2) For an individual irrigation user:

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

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

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

(D) until May 1, 2005, specification of conservation goals including, where appropriate, quantitative goals for irrigation water use efficiency and a pollution abatement and prevention plan;

(E) beginning May 1, 2005, specific, quantified five-year and ten-year targets for water savings including, where appropriate, quantitative goals for irrigation water use efficiency and a pollution abatement and prevention plan. The goals established by an individual irrigation water user under this subparagraph are not enforceable;

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

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

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

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

(J) tailwater recovery and reuse; and

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

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

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

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

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

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

(B) until May 1, 2005, specification of water conservation goals, including maximum allowable losses for the storage and distribution system;

(C) beginning May 1, 2005, specific, quantified five-year and ten-year targets for water savings including maximum allowable losses for the storage and distribution system. The goals established by a system providing agricultural water to more than one user under this subparagraph are not enforceable;

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

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

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

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

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

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

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

(K) documentation of coordination with the regional water planning groups in order to ensure consistency with appropriate approved regional water plans.

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

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

(c) Beginning May 1, 2005, an agricultural water user shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. An agricultural water user shall review and update the next revision of its water conservation plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

§288.5. Water Conservation Plans for Wholesale Water Suppliers.

A water conservation plan for a wholesale water supplier must provide information in response to each of the following paragraphs. If the plan does not provide information for each requirement, the wholesale water supplier shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. All water conservation plans for wholesale water suppliers must include the following elements:

(A) a description of the wholesaler's service area, including population and customer data, water use data, water supply system data, and wastewater data;

(B) until May 1, 2005, specification of conservation goals including, where appropriate, target per capita water use goals for the wholesaler's service area, maximum acceptable unaccounted-for water, the basis for the development of these goals, and a time frame for achieving these goals;

(C) beginning May 1, 2005, specific, quantified five-year and ten-year targets for water savings including, where appropriate, target goals for municipal use in gallons per capita per day for the wholesaler's service area, maximum acceptable unaccounted-for water, and the basis for the development of these goals. The goals established by wholesale water suppliers under this subparagraph are not enforceable;

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

(E) a monitoring and record management program for determining water deliveries, sales, and losses;

(F) a program of metering and leak detection and repair for the wholesaler's water storage, delivery, and distribution system;

(G) a requirement in every water supply contract entered into or renewed after official adoption of the water conservation plan, and including any contract extension, that each

successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements of this chapter. If the customer intends to resell the water, then the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with applicable provisions of this chapter;

(H) a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin. The reservoir systems operations plans shall include optimization of water supplies as one of the significant goals of the plan;

(I) a means for implementation and enforcement, which shall be evidenced by a copy of the ordinance, rule, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier; and a description of the authority by which the water supplier will implement and enforce the conservation plan; and

(J) documentation of coordination with the regional water planning groups for the service area of the wholesale water supplier in order to ensure consistency with the appropriate approved regional water plans.

(2) Additional conservation strategies. Any combination of the following strategies shall be selected by the water wholesaler, in addition to the minimum requirements of paragraph (1) of this section, if they are necessary in order to achieve the stated water conservation goals of the plan. The commission may require by commission order that any of the following strategies be implemented by the water supplier if the commission determines that the strategies are necessary in order for the conservation plan to be achieved:

(A) conservation-oriented water rates and water rate structures such as uniform or increasing block rate schedules, and/or seasonal rates, but not flat rate or decreasing block rates;

(B) a program to assist agricultural customers in the development of conservation pollution prevention and abatement plans;

(C) a program for reuse and/or recycling of wastewater and/or graywater; and

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

(3) Review and update requirements. Beginning May 1, 2005, the wholesale water supplier shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. A wholesale water

supplier shall review and update the next revision of its water conservation plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

SUBCHAPTER B: DROUGHT CONTINGENCY PLANS

§§288.20 - 288.22

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and TWC, §11.1272, which provides the commission with the authority to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans; and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

§288.20. Drought Contingency Plans for Municipal Uses by Public Water Suppliers.

(a) A drought contingency plan for a retail public water supplier, where applicable, must include the following minimum elements.

(1) Minimum requirements. Drought contingency plans must include the following minimum elements.

(A) Preparation of the plan shall include provisions to actively inform the public and affirmatively provide opportunity for public input. Such acts may include, but are not

limited to, having a public meeting at a time and location convenient to the public and providing written notice to the public concerning the proposed plan and meeting.

(B) Provisions shall be made for a program of continuing public education and information regarding the drought contingency plan.

(C) The drought contingency plan must document coordination with the regional water planning groups for the service area of the retail public water supplier to ensure consistency with the appropriate approved regional water plans.

(D) The drought contingency plan must include a description of the information to be monitored by the water supplier, and specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria.

(E) The drought contingency plan must include drought or emergency response stages providing for the implementation of measures in response to at least the following situations:

(i) reduction in available water supply up to a repeat of the drought of record;

(ii) water production or distribution system limitations;

(iii) supply source contamination; or

(iv) system outage due to the failure or damage of major water system components (e.g., pumps).

(F) The drought contingency plan must include specific, quantified targets for water use reductions to be achieved during periods of water shortage and drought. The entity preparing the plan shall establish the targets. The goals established by the entity under this subparagraph are not enforceable.

(G) The drought contingency plan must include the specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:

(i) curtailment of non-essential water uses; and

(ii) utilization of alternative water sources and/or alternative delivery mechanisms with the prior approval of the executive director as appropriate (e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.).

(H) The drought contingency plan must include the procedures to be followed for the initiation or termination of each drought response stage, including procedures for notification of the public.

(I) The drought contingency plan must include procedures for granting variances to the plan.

(J) The drought contingency plan must include procedures for the enforcement of mandatory water use restrictions, including specification of penalties (e.g., fines, water rate surcharges, discontinuation of service) for violations of such restrictions.

(2) Privately-owned water utilities. Privately-owned water utilities shall prepare a drought contingency plan in accordance with this section and incorporate such plan into their tariff.

(3) Wholesale water customers. Any water supplier that receives all or a portion of its water supply from another water supplier shall consult with that supplier and shall include in the drought contingency plan appropriate provisions for responding to reductions in that water supply.

(b) A wholesale or retail water supplier shall notify the executive director within five business days of the implementation of any mandatory provisions of the drought contingency plan.

(c) The retail public water supplier shall review and update, as appropriate, the drought contingency plan, at least every five years, based on new or updated information, such as the adoption or revision of the regional water plan.

§288.21. Drought Contingency Plans for Irrigation Use.

(a) A drought contingency plan for an irrigation use, where applicable, must include the following minimum elements.

(1) Minimum requirements. Drought contingency plans for irrigation water suppliers must include policies and procedures for the equitable and efficient allocation of water on a pro rata basis during times of shortage in accordance with Texas Water Code, §11.039. Such plans shall include the following elements as a minimum.

(A) Preparation of the plan shall include provisions to actively inform and to affirmatively provide opportunity for users of water from the irrigation system to provide input into the preparation of the plan and to remain informed of the plan. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the water users and providing written notice to the water users concerning the proposed plan and meeting.

(B) The drought contingency plan must document coordination with the regional water planning groups to ensure consistency with the appropriate approved regional water plans.

(C) The drought contingency plan must include water supply criteria and other considerations for determining when to initiate or terminate water allocation procedures, accompanied by an explanation of the rationale or basis for such triggering criteria.

(D) The drought contingency plan must include specific, quantified targets for water use reductions to be achieved during periods of water shortage and drought. The entity preparing the plan shall establish the targets. The goals established by the entity under this subparagraph are not enforceable.

(E) The drought contingency plan must include methods for determining the allocation of irrigation supplies to individual users.

(F) The drought contingency plan must include a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of water allocation policies.

(G) The drought contingency plan must include procedures for use accounting during the implementation of water allocation policies.

(H) The drought contingency plan must include policies and procedures, if any, for the transfer of water allocations among individual users within the water supply system or to users outside the water supply system.

(I) The drought contingency plan must include procedures for the enforcement of water allocation policies, including specification of penalties for violations of such policies and for wasteful or excessive use of water.

(2) Wholesale water customers. Any irrigation water supplier that receives all or a portion of its water supply from another water supplier shall consult with that supplier and shall include in the drought contingency plan, appropriate provisions for responding to reductions in that water supply.

(3) Protection of public water supplies. Any irrigation water supplier that also provides or delivers water to a public water supplier(s) shall consult with that public water supplier(s) and shall include in the plan, mutually agreeable and appropriate provisions to ensure an uninterrupted supply of water necessary for essential uses relating to public health and safety. Nothing in this provision shall be construed as requiring the irrigation water supplier to transfer irrigation water supplies to non-irrigation use on a compulsory basis or without just compensation.

(b) Irrigation water users shall review and update, as appropriate, the drought contingency plan, at least every five years, based on new or updated information, such as adoption or revision of the regional water plan.

§288.22. Drought Contingency Plans for Wholesale Water Suppliers.

(a) A drought contingency plan for a wholesale water supplier must include the following minimum elements.

(1) Preparation of the plan shall include provisions to actively inform the public and to affirmatively provide opportunity for user input in the preparation of the plan and for informing wholesale customers about the plan. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the public and providing written notice to the public concerning the proposed plan and meeting.

(2) The drought contingency plan must document coordination with the regional water planning groups for the service area of the wholesale public water supplier to ensure consistency with the appropriate approved regional water plans.

(3) The drought contingency plan must include a description of the information to be monitored by the water supplier and specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria.

(4) The drought contingency plan must include a minimum of three drought or emergency response stages providing for the implementation of measures in response to water supply conditions during a repeat of the drought-of-record.

(5) The drought contingency plan must include the procedures to be followed for the initiation or termination of drought response stages, including procedures for notification of wholesale customers regarding the initiation or termination of drought response stages.

(6) The drought contingency plan must include specific, quantified targets for water use reductions to be achieved during periods of water shortage and drought. The entity preparing the plan shall establish the targets. The goals established by the entity under this paragraph are not enforceable.

(7) The drought contingency plan must include the specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:

(A) pro rata curtailment of water deliveries to or diversions by wholesale water customers as provided in Texas Water Code, §11.039; and

(B) utilization of alternative water sources with the prior approval of the executive director as appropriate (e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.).

(8) The drought contingency plan must include a provision in every wholesale water contract entered into or renewed after adoption of the plan, including contract extensions, that in case of a shortage of water resulting from drought, the water to be distributed shall be divided in accordance with Texas Water Code, §11.039.

(9) The drought contingency plan must include procedures for granting variances to the plan.

(10) The drought contingency plan must include procedures for the enforcement of any mandatory water use restrictions including specification of penalties (e.g., liquidated damages, water rate surcharges, discontinuation of service) for violations of such restrictions.

(b) The wholesale public water supplier shall notify the executive director within five business days of the implementation of any mandatory provisions of the drought contingency plan.

(c) The wholesale public water supplier shall review and update, as appropriate, the drought contingency plan, at least every five years, based on new or updated information, such as adoption or revision of the regional water plan.

SUBCHAPTER C: REQUIRED SUBMITTALS

§288.30

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and TWC, §11.1271, which provides the commission with the authority to require applicants for a new or amended water right to adopt conservation measures; and TWC, §11.1272, which provides the commission with the authority to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans; and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

§288.30. Required Submittals.

In addition to the water conservation and drought contingency plans required to be submitted with an application under §295.9 of this title (relating to Water Conservation and Drought Contingency Plans), water conservation and drought contingency plans are required as follows.

- (1) Water conservation plans for municipal, industrial, and other non-irrigation uses.

The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial, and other non-

irrigation uses shall develop, submit, and implement a water conservation plan meeting the requirements of Subchapter A of this chapter (relating to Water Conservation Plans). The water conservation plan must be submitted to the executive director not later than May 1, 2005. Thereafter, the next revision of the water conservation plan for municipal, industrial, and other non-irrigation uses must be submitted not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any revised plans must be submitted to the executive director within 90 days of adoption. The revised plans must include implementation reports. The requirement for a water conservation plan under this section must not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(2) Implementation report for municipal, industrial, and other non-irrigation uses. The implementation report must include:

(A) the list of dates and descriptions of the conservation measures implemented;

(B) data about whether or not targets in the plans are being met;

(C) the actual amount of water saved; and

(D) if the targets are not being met, an explanation as to why any of the targets are not being met, including any progress on that particular target.

(3) Water conservation plans for irrigation uses. The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 10,000 acre-feet a year or more for irrigation uses shall develop, submit, and implement a water conservation plan meeting the requirements of Subchapter A of this chapter. The water conservation plan must be submitted to the executive director not later than May 1, 2005. Thereafter, the next revision of the water conservation plan for irrigation uses must be submitted not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any revised plans must be submitted to the executive director within 90 days of adoption. The revised plans must include implementation reports. The requirement for a water conservation plan under this section must not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(4) Implementation report for irrigation uses. The implementation report must include:

(A) the list of dates and descriptions of the conservation measures implemented;

(B) data about whether or not targets in the plans are being met;

(C) the actual amount of water saved; and

(D) if the targets are not being met, an explanation as to why any of the targets are not being met, including any progress on that particular target.

(5) Drought contingency plans for retail public water suppliers. Retail public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter (relating to Drought Contingency Plans) to the executive director after adoption by its governing body. The retail public water system shall provide a copy of the plan to the regional water planning group for each region within which the water system operates. These drought contingency plans must be submitted as follows.

(A) For retail public water suppliers providing water service to 3,300 or more connections, the drought contingency plan must be submitted to the executive director not later than May 1, 2005. Thereafter, the retail public water suppliers providing water service to 3,300 or more connections shall submit the next revision of the plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any revised plans must be submitted to the executive director within 90 days of adoption by the community water system. Any new retail public water suppliers providing water service to 3,300 or more connections shall prepare and adopt a drought contingency plan within 180 days of commencement of operation, and submit the plan to the executive director within 90 days of adoption.

(B) For all the retail public water suppliers, the drought contingency plan must be prepared and adopted not later than May 1, 2005 and must be available for inspection by the

executive director upon request. Thereafter, the retail public water suppliers shall prepare and adopt the next revision of the plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any new retail public water supplier providing water service to less than 3,300 connections shall prepare and adopt a drought contingency plan within 180 days of commencement of operation, and shall make the plan available for inspection by the executive director upon request.

(6) Drought contingency plans for wholesale public water suppliers. Wholesale public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter to the executive director not later than May 1, 2005, after adoption of the drought contingency plan by the governing body of the water supplier. Thereafter, the wholesale public water suppliers shall submit the next revision of the plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any new or revised plans must be submitted to the executive director within 90 days of adoption by the governing body of the wholesale public water supplier. Wholesale public water suppliers shall also provide a copy of the drought contingency plan to the regional water planning group for each region within which the wholesale water supplier operates.

(7) Drought contingency plans for irrigation districts. Irrigation districts shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter to the executive director not later than May 1, 2005, after adoption by the governing body of the irrigation district. Thereafter, the irrigation districts shall submit the next revision of the plan not later than May 1, 2009,

and every five years after that date to coincide with the regional water planning group. Any new or revised plans must be submitted to the executive director within 90 days of adoption by the governing body of the irrigation district. Irrigation districts shall also provide a copy of the plan to the regional water planning group for each region within which the irrigation district operates.

(8) Other submissions. A water conservation plan or drought contingency plan required to be submitted with an application in accordance with §295.9 of this title must also be subject to review and approval by the commission.

(9) Existing permits. The holder of an existing permit, certified filing, or certificate of adjudication shall not be subject to enforcement actions nor shall the permit, certified filing, or certificate of adjudication be subject to cancellation, either in part or in whole, based on the nonattainment of goals contained within a water conservation plan submitted with an application in accordance with §295.9 of this title or by the holder of an existing permit, certified filing, or certificate of adjudication in accordance with the requirements of this section.