

The Texas Commission on Environmental Quality (commission) proposes amendments to §§304.1 - 304.3, 304.11 - 304.13, 304.15, 304.16, 304.21, 304.31 - 304.34, 304.42, 304.44, 304.62, and 304.63.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed rulemaking would clarify that Chapter 304 applies to all watermaster programs, other than the Rio Grande Water Division, created in accordance with Texas Water Code (TWC), Chapter 11, and all watermasters appointed by the executive director under TWC, Chapter 11. The proposed rulemaking would delete requirements regarding the repealed Wagstaff Act (TWC, §11.028), would make changes for corrective and administrative purposes and to provide clarity, would change the watermaster's reporting requirements to the water right holders, from quarterly to annually.

#### SECTION BY SECTION DISCUSSION

Throughout the proposed rulemaking, the transport of water and the use of watercourses would be added to the activities regulated by the rules to be consistent with 30 TAC Chapter 297 and TWC, Chapter 11.

Also throughout the rulemaking, minor changes would be made to provide consistency in the language used in the rules and to conform to the standards set out in the *Texas Legislative Council Drafting Manual*, November 2004.

The proposed amendment to §304.1, Applicability, would clarify that Chapter 304 applies to any watermaster program, other than the Rio Grande Water Division, created under TWC, Chapter 11 and any matters related to water rights within each water division or segment of a water division.

The proposed amendment to §304.2, Appointment of Watermaster, would clarify that under TWC, Chapter 11, the executive director can appoint a watermaster for each water division or segment of a water division.

The proposed amendment to §304.2, Appointment of Watermaster, would clarify that an agent is one who is designated by a water right holder to act on the holders behalf.

The proposed amendment to §304.3, Definitions, would change the definition of return flow to be consistent with the definition of return water or return flow found in §297.1, Definitions, and would define a water division to include the entire water division and any segments thereof. The proposed amendment would also clarify that the definition of watermaster relates to the person appointed by the executive director under TWC, Chapter 11 and that the definitions in §297.1 are applicable to this chapter. The amendment to this section would change the reference from the Texas Water Commission to the Texas Commission on Environmental Quality.

The proposed amendment to §304.11, Difference in Operations, would conform to the Texas Register requirements and the standards set out in the *Texas Legislative Council Drafting Manual*, November 2004.

The proposed amendment to §304.12, Identification of Diversion Facilities, Outlet Works, and Points of Return, would add the term “. . . or watercourses.” to clarify that the transport of water is an activity regulated by the watermaster in his administration of bed and banks authorizations and the execution of his duties.

The proposed amendment to §304.13, Requirement for Measuring Devices, would conform to the Texas Register requirements and the standards set out in the *Texas Legislative Council Drafting Manual*, November 2004.

The proposed amendment to §304.15, Declarations of Intent to Divert or Release Water, would change the section title to “Declarations of Intent to Divert, Transport, or Release Water. In addition, the proposed amendment would clarify that the transport of water is an activity regulated by the watermaster in his administration of bed and banks authorizations and the execution of his duties.

The proposed amendment to §304.16, Records of Diversions, Releases, and Impoundments, would change the section title to Records of Diversions, Transport, Releases, and Impoundments. The proposed amendment would clarify that the transport of water is an activity regulated by the watermaster in his administration of bed and banks authorizations and the execution of his duties.

The proposed amendment to §304.21, Allocation of Available Waters, would delete requirements relative to TWC, §11.028 (Wagstaff Act), which has been repealed, and would renumber the subsequent subsections. The proposed amendment would also correct the references to other

commission rules by adding a reference to §297.57, Emergency Suspension of Permit Conditions, and deleting the reference to §297.61, Amendments by Executive Director. In addition, the proposed amendment would delete the provision that a failure to comply with a watermaster order is a violation of the TWC since the provision is duplicative of the regulations found in Chapter 304, Subchapter D.

The proposed amendment to §304.31, General, would clarify that a failure to comply with the commission's rules or the watermaster's or commission orders could result in enforcement proceedings.

The proposed amendment to §304.32, Violations, would clarify that a failure to comply with the commission's rules or a watermaster or commission order could result in enforcement proceedings.

The proposed amendment to §304.33, Enforcement Actions, would add "transport" to paragraph (2) to clarify that the watermaster may take action for a violation of a bed and bank authorization and to incorporate minor editorial changes to ensure the language conforms to the Texas Register requirements.

The proposed amendment to §304.34, Field of Citation by Watermaster, would incorporate minor editorial changes to ensure the language conforms to the Texas Register requirements. In addition, the proposed amendment to the figure in subsection (d) would add the terms "use" and "transport" to clarify that a violation of a bed and bank authorization is a violation subject to a field citation issued by the watermaster.

The proposed amendment to §304.42, Reports, would change the watermaster reporting requirements to the water right holders, from quarterly to annually.

The proposed amendment to §304.44, Appointment of an Agent, would add the words “transport” and “water” to the activities regulated by the rule to be consistent with Chapter 297 and TWC, Chapter 11.

The proposed amendment to §304.62, Determination of Assessment Rates, would provide specificity regarding the fees that are currently assessed for various uses authorized by statute. The proposed amendment would also provide consistency with existing permits use types. Explanatory statements regarding the specified uses were added to provide clarity.

The proposed amendment to §304.63, incorporate minor editorial changes to ensure the language conforms to Texas Register requirements.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed rules are in effect, minor fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. A change from quarterly reports from the watermaster to the water right holders, to a single annual report under the proposed rulemaking could save the agency as much as \$1,200 in terms of reduced preparation costs. No fiscal impact is anticipated for other units of state or local governments. The proposed rulemaking would amend various sections of Chapter 304, so that rules regarding watermaster programs are more easily

understood and consistent with rules found in Chapter 297. The rulemaking would have no effect on the amount of fees watermasters assess water right holders under a watermaster program.

The proposed rules would clarify that Chapter 304 applies to any watermaster, other than the Rio Grande Water Division, program created under TWC, Chapter 11, and any matters related to water rights within each water division or segment of a water division. This would include the Concho River Watermaster Program created by HB 2815, 79th Legislature, 2005. The proposed rulemaking also clarifies that the executive director, under TWC, Chapter 11, can appoint a watermaster for each water division or segment of a water division. The proposed rulemaking would also amend activities and definitions found in Chapter 304 so that the chapter is consistent with the activities and definitions found in 30 TAC Chapters 295 and 297 regarding transport of water, use of watercourses, return flow, return water, and water division. The proposed rulemaking would also delete requirements relative to the repealed Wagstaff Act, clarify that enforcement proceedings may result if there is a failure to comply with commission rules or a watermaster or commission order, and change the quarterly reporting requirement for watermasters to an annual reporting requirement. Some fees, which have been assessed under the current rules as part of more general rate descriptions, would be specifically identified in assessment formulas under the proposed rulemaking. These specific rates will allow watermaster programs to become more consistent with water rights permits issued under Chapter 297. Since these uses have been charged as part of a general, combined fee in the past, and the proposed rulemaking does not impact the amount or rate of the fee assessment, no fiscal impact for local governments is anticipated as a result of the proposed rules.

#### PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes will be more consistency with other water rights rules and more streamlined watermaster operations, which would allow watermasters to focus more attention and time on water rights issues.

No fiscal impact is anticipated for individuals or businesses under the proposed rules. Fees that have been charged under the current rules will continue to be charged under the proposed rules. However, the proposed rulemaking will provide more clarity regarding the specific fees charged to water right holders.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Fees that have been charged under the current rules will continue to be charged under the proposed rulemaking. However, the proposed rules would provide more clarity regarding the specific fees charged to water right holders.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

## DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules are not subject to §2001.0225 because they do not meet the definition of a "major environmental rule" as defined in the Texas Government Code. A "major environmental rule" is 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The primary purposes of this proposed rulemaking action are: 1) to clarify that Chapter 304 is applicable to the Concho River Watermaster Program created by HB 2815; 2) to clarify the existing fee structure to establish specific rates for currently permitted general uses that were enacted by the legislature; 3) to delete references to the repealed Wagstaff Act; 4) to change the watermaster's reporting frequency to the water right holders from quarterly to annually; 5) to clarify that the watermaster regulates the use of watercourses; 6) to provide consistency between the commission's rules regulating water rights by changing the definition of return flows in Chapter 304 to that currently found in Chapter 297; 7) to clarify the definition of agent; 8) to clarify that the definition of water division includes any segments of a water division; and 9) to provide consistency in the language used in the commission's other water rights rules and to conform to the standards set out in the *Texas Legislative Council Drafting Manual*.

Regarding the Concho River, the 79th Legislature enacted HB 2815 creating the Concho River Watermaster Program by adding TWC, Chapter 11, Subchapter K. TWC, §11.561 provides that “{a} provision of {the Water Code} or a rule adopted by the commission that relates to watermasters and does not conflict with the provisions of {subchapter K} applies to the program established under this subchapter.” Therefore, since Chapter 304 contains rules adopted by the commission that relate to a watermaster, it is already applicable to the Concho River Watermaster Program to the extent that it does not conflict with HB 2815. Section 304.1 states that it is currently “applicable to each water division created by the commission pursuant to the Texas Water Code, §11.325, outside of the Rio Grande Water Division, and to all water rights and matters related to water rights within each such water division . . . .” Changing the reference from §11.325 to Chapter 11 would clarify that Chapter 304 is applicable to any water division or watermaster program, other than the Rio Grande Water Division, created under TWC, Chapter 11.

In addition, this rulemaking proposes to clarify existing general assessment fees for agricultural and other specific uses that were added by the legislature as separate water rights and are issued in existing water rights. This rulemaking also proposes to delete references to the Wagstaff Act, originally codified in TWC, §11.028, which was repealed by the legislature in 1997. Therefore, this proposed rulemaking seeks to streamline, clarify, and update existing rules in response to legislative action.

Furthermore, this proposed rulemaking addresses administrative issues concerning the watermaster program and does not address environmental risks or exposures. For example, this rulemaking would add references to “transport” and “watercourses” to clarify that the watermaster regulates the use of

watercourses in his division. These authorizations are issued by the commission under §297.16. Once they are issued, the watermaster administers these authorizations within his area. This rulemaking would also change the definition of water division to clarify that the definition also includes any segments of a water division. In addition, the rulemaking proposes to provide consistency between the commission's rules on water rights by changing the definition of return flows in Chapter 304 to the definition currently used in Chapter 297. Changes are also proposed to add and correct references to other commission rules and statutes regulating water rights. The proposed rulemaking would also make stylistic changes in conformance with the *Texas Legislative Council Drafting Manual* and would reduce the watermaster's reporting requirements to the water right holders from quarterly to annually. Therefore, this proposed rulemaking does not constitute a major environmental rule, and is not subject to a formal regulatory analysis.

The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that the proposed government action would have no impact on private real property.

The purpose of this proposed rulemaking is to streamline and clarify the watermaster program and to update existing rules in response to legislative action. In order to achieve this purpose, the commission is proposing the following actions: 1) clarify the applicability section to so that it is clear that Chapter

304 applies to any water division or watermaster program, other than the Rio Grande Water Division created under TWC, Chapter 11; 2) amend the existing fee structure to establish specific rates for currently permitted general uses that were enacted by the legislature; 3) delete references to the repealed Wagstaff Act; 4) change the frequency of the watermaster's reporting to the water right holders from quarterly to annually; 5) add references to "transport" and "watercourse" to clarify that the watermaster administers bed and bank authorizations once issued by the commission; 6) change the definition of return flows in Chapter 304 to that currently stated in other commission rules to provide consistency in regulating water rights; 7) to clarify the definition of agent; 8) amend the definition of water division to include segments of a water division; 9) add references to other commission rules and statutes regulating water rights; and 10) make other revisions to provide consistency in the language used in the commission's other water rights rules and to conform to the standards set out in the *Texas Legislative Council Drafting Manual*. These actions would not impact private real property rights.

As defined by Texas Government Code, §2007.002(1), the commission is a "governmental entity" covered by the Texas Private Real Property Rights Preservation Act (the Act) codified in Chapter 2007. This proposed rulemaking is a governmental action to which the Act applies since Texas Government Code, §2007.003(a)(1) makes the Act applicable to "the adoption . . . of a rule . . . ." Texas Government Code, §2007.002(4) provides that "(p)ivate real property" means an interest in real property recognized by common law, including a . . . groundwater or surface water right of any kind...." However, this proposed rulemaking, if adopted, would not result in a burden or impact on private real property rights, nor restrict or limit any owner's right to such property that would exist in the absence of this rulemaking.

Regarding the Concho River Watermaster Program, this proposed rulemaking would clarify that the commission's existing Chapter 304 rules already apply to the program as required by statute. The 79th Legislature enacted HB 2815 and established the Concho River Watermaster Program effective September 1, 2005. Newly enacted TWC, §11.561 states that "(a) provision of (the Water Code) or a rule adopted by the commission that relates to watermasters and does not conflict with the provisions of (Water Code, Chapter 11, subchapter K) applies to the (Concho River Watermaster Program)." This proposed rulemaking would clarify that the existing rules found in this chapter are already applicable to the Concho River Watermaster Program as dictated by HB 2815, as well as any other water division created under TWC, Chapter 11, other than the Rio Grande Water Division. Therefore, these proposed amendments do not affect an owner's private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rules. The adoption of the proposed changes to Chapter 304 would have no impact on private real property since, by statute, Chapter 304 already applies to the Concho River Watermaster Program if it does not conflict with TWC, Chapter 11, Subchapter K. Also, the changes are administrative in nature and do not affect the actual water right or interbasin use.

Regarding the other proposed changes, the establishment of a fee structure, the deletion of provisions relating to the repealed Wagstaff Act, the addition of references to applicable rules and statutes, the changes in the definitions of water division and return flows, the change in the watermaster reporting to the water right holders from quarterly to annually, and stylistic changes are administrative changes to existing rules and these changes have no impact on private real property since they are administrative in nature. The addition of the terms "transport" and "watercourses" do not affect

private real property since bed and banks authorizations are authorizations to use watercourses for delivering water down beds and banks as specified in TWC, §11.042. The other proposed changes streamline, clarify, and update the commission's rules as well as provide consistency with the commission's other regulations. Therefore, since the proposed rulemaking is administrative in nature, it would neither impose a burden nor have an impact on private real property.

Furthermore, promulgation and enforcement of these proposed rules would not result in a statutory or a constitutional taking of private real property. The rulemaking, if adopted, would not restrict or limit the owner's rights to property nor reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. A water right is a private real property right, however, water right holder's rights are regulated under existing statutory law, which this rulemaking does not change.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rules are neither identified in the Coastal Coordination Council Act Implementation Rules, 31 TAC §505.11, nor would they affect any action/authorization as identified in §505.11. Therefore, the proposed rulemaking is not subject to the Coastal Management Program.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas, 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-031-

304-CE. Comments must be received no later than 5:00 p.m., December 12, 2005. Copies of the proposed rules can be obtained from the commission's *Web site* at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Patricia Hooper of the Field Operations Division at (512) 239-0436.

## SUBCHAPTER A: INTRODUCTORY PROVISIONS

### §§304.1 - 304.3

#### STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, Rules; §11.042, Delivering Water Down Banks and Beds; §11.325, Water Divisions; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The proposed amendments implement TWC, §5.103, 11.042, 11.325 - 11.327, 11.453 - 11.455, 11.555, and 11.561.

#### **§304.1. Applicability.**

Other than the Rio Grande Water Division, the [The] provisions of this chapter are applicable to each water division created by the commission or watermaster program created by or under [pursuant to the] Texas Water Code, Chapter 11 [§11.325], each watermaster appointed by the executive director under Texas Water Code, Chapter 11 [outside of the Rio Grande Water Division], and to all water rights, permits, authorizations, orders, and any other matters related to water rights within each [such] water division or segments of a water division. Water rights and matters inside the Rio Grande Water Division are governed by Chapter 303 of this title (relating to Operation of the Rio

Grande). All other rules promulgated by the commission are also applicable to the water rights subject to this chapter unless in conflict with the provisions of this chapter, in which event the provisions of this chapter will [shall] govern.

**§304.2. Appointment of Watermaster.**

Under Texas Water Code, Chapter 11, the [The] executive director may appoint one watermaster for each water division, segment of a water division, or the same person may be appointed watermaster for two or more water divisions or segments. In a water division in which the office of watermaster is vacant, the executive director has the powers of a watermaster.

**§304.3. Definitions.**

The following words and terms, when used in this chapter, [shall] have the following meanings, unless the context clearly indicates otherwise. In addition, the definitions in §297.1 of this title (relating to Definitions) are applicable to this chapter.

(1) **Account**--The record of diversion, transport, and use of state water and watercourses maintained by the watermaster for each purpose of use authorized for each owner's separate portion of a water right, or the record of impoundment and releases for each owner's separate portion of an on-channel reservoir authorized under a water right, except those reservoirs exempted in

accordance with [the] Texas Water Code, §11.142. An account will also be established for each separate arrangement by a contractual buyer to purchase state water.

(2) **Agent**--A person that designated by a water right holder [who wishes] to act on [in] behalf of a water right holder in regard to diversion use, transport, or impoundment of state water, payment of a watermaster assessment, or, for a contractual buyer, in regard to diversion, transport, use, or impoundment of state water.

(3) **Allocation**--The division of available flow between water right holders by the watermaster. This also includes regulation of diversions by water right holders in order to meet demands for exempt domestic and livestock users.

(4) **Assessment**--The cost to be levied by the commission to water right holders to finance watermaster operations.

(5) **Contractual buyer**--A person that [who] impounds, or diverts water under a contractual permit, or under a particular water right under [pursuant to a] contract with the holder of that water right, where such contract has been accepted for filing by the executive director.

(6) **Declaration of intent**--A statement submitted by a diverter to the watermaster describing an intent under a specific water right or contractual purchase arrangement to divert or

transport water, or to make a dedicated release of stored water, for a specified period of time and in association with an authorized facility.

(7) **Dedicated release**--The release of lawfully stored water from a reservoir, under a specific water right, for specific authorized uses downstream.

(8) **Diversion facility**--Any dam, pump, canal, or other such device used to take water, for other than exempt uses, from a watercourse or impoundment.

(9) **Diverter**--Any water right holder, agent, or contractual buyer who impounds, takes, diverts, transports, or makes a dedicated release of state water.

(10) **Measuring device**--A device designed for the measurement of rates of flow or [and/or] quantities of water.

(11) **Report of diversion, transport, release, or impoundment**--A report that [which] the diverter is required to submit to the watermaster after recording the amount of water actually diverted, transported, or released during the period of a declaration of intent, or a report for the impoundment of water, as well as any additional information required by the watermaster. The watermaster may specify a report period that is different from the declaration of intent period.

(12) **Return water or return flow**--That portion of state water diverted from a water supply and beneficially used and which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent [The entry into a stream or reservoir of water, following its use for municipal, industrial, irrigation or other purposes].

(13) **Salt water diversion**--Diversion of state water from the Gulf of Mexico or its bays and arms, or any watercourse or reservoir subject to tidal influence, or when the water right specifies diversion of salt or brackish water; and where, for such cases, the diversion has no significant adverse effect on the supply of water for other authorized diverters, and the diversion does not require protection from junior appropriators.

(14) **Water division**--A specific area of the state, designated by the commission under [pursuant to the] Texas Water Code, §11.325 for the purpose of administering water rights. The term "water division" includes the entire water division and any segments thereof.

(15) **Watermaster**--The person appointed by the executive director under Texas Water Code, Chapter 11, [pursuant to the Texas Water Code, §11.326(a),] to administer water rights in a given water division, segment of a water division, or group of water divisions.

(16) **Water right**--A right acquired under the laws of the state and the rules of the Texas Commission on Environmental Quality [Water Commission] to impound, divert, transport, or

[and/or] use state water. Contractual permits and water contracts are not included under this definition.

(17) **Water right holder**--A person or entity that [who] owns a water right. In the case of divided interests, this term will apply to each separate owner.

**SUBCHAPTER B: REGULATION OF THE USE OF STATE WATER OR WATERCOURSES**

**§§304.11 - 304.13, 304.15, 304.16**

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, Rules; §11.042, Delivering Water Down Banks and Beds; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The proposed amendments implement TWC, §§5.103, 11.042, 11.326, 11.327, 11.453 - 11.455, 11.555, and 11.561.

**§304.11. Difference in Operations.**

The executive director may establish different strategies, timetables [time tables], procedures, and other requirements for different water divisions or for different portions of a water division.

**§304.12. Identification of Diversion Facilities, Outlet Works, and Points of Return.**

Each diverter shall advise the watermaster of all diversion facilities, reservoir controlling works, and significant return flow points to be employed in the use of state water or watercourses.

This includes borrowed and rented pumps. The watermaster shall assign an identification number for each diversion facility and the controlling works of each reservoir authorized under a water right within the water division. Also, the watermaster may assign an identification number for any point of discharge or other point at which water is returned to a watercourse or reservoir.

**§304.13. Requirement for Measuring Devices.**

(a) Each diverter, and each person that [who] makes a significant return flow, shall install and maintain a measuring device at such point or points as may be determined by the watermaster to be necessary for proper and efficient administration of water rights. All such measuring devices are [shall be] subject to approval of the watermaster. The measuring devices must [shall] measure within 5.0% accuracy, unless otherwise approved by the watermaster. The diverter shall provide reasonable access to such measuring device. The diverter, or person that [who] makes a return flow, shall be liable for all expenses incurred in the acquisition, installation, maintenance, and operation of such measuring devices. In the event a measuring device becomes inoperable, the diverter, or person that [who] makes a return flow, at the direction of the watermaster, shall provide an alternate method of measurement, or estimation acceptable to the watermaster.

(b) Unless required by a permit, certificate of adjudication, or other water right, the following types of diversions and return flows associated with such diversions shall be exempt from the requirement to install and maintain measuring devices; provided, however, that the watermaster may

require any such diverter, or any person making return flows, to provide an alternate method of estimating diversions or return flows acceptable to the watermaster:

(1) diversions of water by spreader dams;

(2) diversions of water for hydroelectric generation;

(3) salt water diversions;

(4) diversions of water for direct input from a cooling pond or [and/or] cooling reservoir into an electric steam power plant for cooling purposes and return flows of such water to a cooling pond;

(5) wastewater effluent for which the return flow is being measured and reported in a manner consistent with commission standards relative to wastewater discharge regulations; and

(6) any other diversion or return flow of water that the watermaster may deem appropriate.

**§304.15. Declarations of Intent to Divert, Transport, or Release Water.**

(a) Prior to diverting state water, transporting water, or making a dedicated release, a diverter shall submit to the watermaster a declaration expressing the diverter's intent in regard to the anticipated diversion, transport, or release. Such a declaration of intent must be submitted within the time limitations established by the watermaster. Each diverter shall divert or release water only in accordance with the statements in the declaration of intent.

(b) Each declaration of intent to divert or transport water must [shall] identify the specific account under which water is to be diverted; the amount of water to be diverted or transported; a schedule for the diversions; the diversion facility to be used; and the rate at which water will be diverted. Diversion may [shall] only be made using authorized facilities, or at points associated with the water right under which the diversion is to be made. Use of water under an irrigation water right may [shall] be only for use on the tract(s) authorized by the water right.

(c) Each declaration of intent to make dedicated releases for downstream uses must [shall] identify the specific account(s) under which water is to be released; the schedule of releases; the amount of water to be released; the specific account(s) under which the water is to be used; the actual rate at which water will be released; and the identification and location of the user. Dedicated releases will be protected only if the preceding data is provided. Dedicated releases may [shall] only be diverted at points authorized by the water right under which the release is made, or an associated approved water contract.

(d) In regard to declarations of intent under either subsection (b) or (c) of this section, the watermaster may require any diverter to provide such additional information as may be necessary for the proper and efficient administration of water rights.

(e) The watermaster shall establish the duration of time for which declarations of intent will remain in effect and may change the duration as conditions warrant. After the end of the duration of a declaration of intent, no further diversion, transport, or release of state water shall be made under that account until a new declaration of intent has been submitted to the watermaster.

(f) A diverter may modify a declaration of intent in regard to the duration, the amount of water to be diverted, the diversion rate, or other specific elements in advance of the desired change.

(g) The watermaster from time to time may determine that it is necessary for the proper and efficient administration of water rights that diversions, impoundments of inflows, or releases of dedicated flow in certain areas, or by certain diverters, may not be made without prior approval by the watermaster. Any such determination will [shall] be effective for the period designated by the watermaster.

(h) Salt water diversions and the recirculation of water at a power plant are exempted from any requirements under this section. The watermaster may also exempt any other facility or water right from any requirement under this section due to extenuating circumstances.

**§304.16. Records of Diversions, Transport, Releases, and Impoundments.**

(a) Each diverter that [who] has submitted a declaration of intent shall submit to the watermaster a report including the actual amount of water diverted, transported, or released during the period of the subject declaration of intent. Water right owners with accounts for impoundment will submit reports of daily inflows, reservoir levels, transported volumes, diversions, and releases to the watermaster. The watermaster may specify a report period. The report period may be different from the period of the declaration of intent. The watermaster shall provide forms to be used for the reports. Each diversion or impoundment facility, including borrowed and rented pumps, used during the period of the declaration of intent shall be designated on the report by the identification number assigned by the watermaster. Reports must be complete and signed by the diverter. Reports must be received or postmarked within seven days from the termination of the period of the declaration of intent, or other report period specified by the watermaster. If such report is incomplete or not timely filed, the watermaster may cancel any existing declaration of intent for that account and allow no further impoundment, transport, diversion, or dedicated release until the report is properly filed.

(b) To the extent that water was available for diversion during the period of a declaration of intent, the subject account will be charged as follows.

(1) If the actual diversion is within 10% of the amount stated in the declaration of intent, the charge will be the actual amount diverted.

(2) If the actual diversion is greater than 110% of the amount stated in the declaration of intent, the charge will be the amount actually diverted plus twice the amount greater than 110%.

(3) If the actual diversion is less than 90% of the amount stated in the declaration of intent, the charge will be 90% of the stated amount.

(4) For a declaration of intent that was modified, including cancellation or extension, the charge will consist of the sum of two parts, one for the period before modification, and one for the period after modification. For each of the two periods, the charge will be determined by applying paragraph (1), (2), or (3) of this subsection relative to the amount declared for the particular period. If a modified declaration of intent is subsequently modified further, resulting in multiple parts, the procedure described in this subsection will be applied to each part.

(c) Any amount charged under subsection (b) of this section will apply against the yearly authorization, but only the amount of water actually diverted will apply toward perfection of a water right.

(d) The watermaster shall have the discretion to waive the accounting provisions contained in subsections (b) and (c) of this section for excessive or inadequate diversions due to circumstances beyond the control of the diverter.

(e) In addition to the report to be submitted to the watermaster under [pursuant to] subsection (a) of this section, each water right holder or his agent shall submit to the executive director a written report of the amount of water actually diverted and used during the preceding calendar year under a specific water right in accordance with §295.202 of this title (relating to Reports). This report is required even if no water is used. The form for this report can either be one furnished by the executive director, or be a form approved by the executive director prior to the submission of the report.

## **SUBCHAPTER C: ALLOCATION OF AVAILABLE WATERS**

### **§304.21**

#### **STATUTORY AUTHORITY**

The amendment is proposed under TWC, §5.103, Rules; §5.506, Emergency Suspension of Permit Conditions Relating to Beneficial Inflows to Affected Bays and Estuaries and Instream Uses; §11.042, Delivering Water Down Banks and Beds; §11.148, Emergency Suspension of Permit Conditions; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The proposed amendment implements TWC, §§5.103, 5.506, 11.042, 11.148, 11.326, 11.327, 11.453 - 11.455, 11.555, and 11.561.

#### **§304.21. Allocation of Available Waters.**

(a) The allocation of water between water rights holders shall be on the basis of seniority[, which may be modified as provided in subsection (b) of this section]. The watermaster shall allocate waters in such a way as to maximize the beneficial utilization of state water, to minimize the potential impairment of senior water rights by the diversions of junior water rights holders, and to prevent waste or use in excess of quantities to which the holders of water rights are lawfully entitled.

(b) In administering water rights, the watermaster shall take into account any exceptions to the priority system as directed by the commission relative to the Wagstaff Act, Texas Water Code (TWC), §11.028].

(b) [(c)] The executive director may request suspension of any or all special streamflow or minimum release requirements. Such a request will [shall] be considered under §297.57 of this title (relating to Emergency Suspension of Permit Conditions) or §297.61 of this title (relating to Amendments by Executive Director).

(c) [(d)] When available flow is not sufficient to meet the demands of existing declarations of intent for downstream senior rights, demands for domestic and livestock purposes that are not included under any water right, or other minimum streamflow requirements that the commission determines necessary for purposes other than protection of downstream senior and superior water rights, the watermaster may:

(1) cancel or modify, as needed, any existing declaration of intent made under [pursuant to] §304.15 of this title (relating to Declarations of Intent to Divert, Transport, or Release Water);

(2) order that water right holders with reservoir(s) allow inflows to pass through such reservoir(s) to the extent necessary to honor downstream senior water rights, demands for domestic

and livestock purposes, minimum streamflow requirements, minimum release requirements, and other conditions;

(3) order that persons with reservoirs exempt from permitting under Texas Water Code [TWC], §11.142, allow inflows to pass through such reservoirs for the protection of downstream domestic and livestock users;[. Failure to comply with a watermaster's order under this subsection is a violation of TWC, §11.081.]

(4) order that diverters limit or cease diversions to the extent necessary to honor downstream senior water rights, demands for domestic and livestock purposes, minimum streamflow requirements, minimum release requirements, and other conditions; or [and/or]

(5) take any other action necessary to ensure that downstream senior water rights, demands for domestic and livestock purposes, minimum streamflow requirements, minimum release requirements, and other conditions, are administered in accordance with the laws of Texas.

## **SUBCHAPTER D: ENFORCEMENT REGARDING WATERMASTER OPERATIONS**

### **§§304.31 - 304.34**

#### STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, Rules; §7.002, Enforcement Authority; §11.042, Delivering Water Down Banks and Beds; §11.081, Unlawful Use of State Water; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The proposed amendments implement TWC, §§5.103, 7.002, 11.042, 11.081, 11.326, 11.327, 11.453 - 11.455, 11.555, and 11.561.

#### **§304.31. General.**

The watermaster or executive director may pursue appropriate enforcement action when there is a violation of or failure to comply with the Texas Water Code, the commission's rules, the terms of a water right, authorization, or the orders issued by the commission or watermaster [or a commission order or rules].

**§304.32. Violations.**

(a) It is [shall be] a violation for any person to do the following:

(1) divert, transport, use, or make a dedicated release of state water, either personally or through another, without proper authorization under the Texas Water Code or any applicable final judgment rendered by a court of competent jurisdiction, or without submitting to the watermaster a declaration of intent in accordance with §304.15(a) or (g) of this title (relating to Declarations of Intent to Divert, Transport, or Release Water);

(2) impound without proper authorization under the Texas Water Code or any applicable final judgment rendered by a court of competent jurisdiction;

(3) fail to modify a declaration of intent in advance of a desired change as provided in §304.15(f) of this title [(relating to Declaration of Intent to Divert, or Release Water)];

(4) fail to provide a measuring device as required in §304.13 of this title (relating to Requirement for Measurement Devices);

(5) fail to provide an outlet as required in §304.14 of this title (relating to Requirement for Outlets for Passage of Water);

(6) refuse to allow, or to interfere with, the inspection of any land, natural watercourse, artificial waterway, impoundment, return flow point, or diversion facility by an employee of the commission that would assist the commission in the discharge of its duties;

(7) break, tamper with, or mutilate any seal or other device used to enforce orders of the commission, executive director, court, or watermaster; or

(8) fail to comply with any statute, rule, or commission or watermaster order [of the commission].

(b) The list of violations in subsection (a) of this section is not exclusive. In addition to other violations of Texas Water Code, Chapter 11, and the commission's rules, a failure to comply with a commission or watermaster order under this section is a violation of Texas Water Code, §11.081.

### **§304.33. Enforcement Actions.**

When a violation under §304.32 of this title (relating to Violations) occurs, the watermaster or the executive director may seek voluntary compliance, or may pursue appropriate enforcement action. In the absence of voluntary compliance:

(1) the watermaster may refuse to recognize a declaration of intent;

(2) the watermaster may lock headgates or pumping facilities or take other necessary actions to effectively cease diversion, impoundment, transport, or release of state water under the account associated with the violation; provided, however, that for violations of §304.32(a)(4) or (5) [§ 304.32(a)(4) or (a)(5)] of this title [(relating to Violations)], the diverter will [shall] be given at least ten [10] days notice prior to any such action by the watermaster;

(3) the executive director may seek a hearing before the commission culminating with the issuance of an appropriate order; if such an order is subsequently violated, the matter may be referred to the attorney general for appropriate action in a court of competent jurisdiction;

(4) the executive director may refer the violation to the attorney general for appropriate legal remedy in a court of competent jurisdiction, which may include a penalty assessment to the maximum extent allowed by law;

(5) the watermaster may issue a field citation in accordance with §304.34 of this title (relating to Field Citation by Watermaster); or [and/or]

(6) the executive director may seek any other appropriate remedies or action available at law.

**§304.34. Field Citation by Watermaster.**

(a) Upon witnessing a violation set forth in subsection (d) of this section, the watermaster or the watermaster's deputy, may issue the alleged violator a field citation. The field citation will allege that a violation has occurred and require that the alleged violator pay the administrative penalty and take remedial action as provided in the citation.

(b) The alleged violator may either pay the administrative penalty assessed by the field citation without admitting or denying the alleged violation or request a hearing on the alleged violation.

(c) If the alleged violator fails to either pay the administrative penalty or take remedial action under [pursuant to] a field citation issued under subsection (a) of this section, the executive director may proceed with enforcement action in accordance with Chapters 70 and 80 of this title (relating to Enforcement and Contested Case Hearings).

(d) Violations for which the watermaster may issue a field citation are as follows.

**Figure: 30 TAC §304.34(d)**

**[Figure: 30 TAC §304.34(d)]**

<b>Violation</b>	<b>1st time noted within previous 24 months</b>	<b>2nd time noted within previous 24 months</b>	<b>3rd time noted within previous 24 months</b>
<b>1. <u>Diversion, use, or transport</u> without a watermaster approved declaration of intent (applicable to water right holders only)</b>	<b>On-site inspection notice (warning)</b>	<b>Citation/fine of \$200 for minors*; \$500 for majors**</b>	<b>Referral for formal enforcement action</b>
<b>2. Failure to provide a measuring device or alternative method of measurement</b>	<b>On-site inspection notice (warning)</b>	<b>Citation/fine of \$200 for minors*; \$500 for majors** unless corrected within 30 days</b>	<b>Referral for formal enforcement action</b>
<b>3. Water right holder does not pass water which the holder is not entitled to hold or impound in accordance with special conditions of water rights or watermaster</b>	<b>On-site inspection notice (warning)</b>	<b>Citation/fine of \$200 for minors*; \$500 for majors**</b>	<b>Referral for formal enforcement action</b>
<b>4. Late report of diversion, <u>transport, use,</u> release, or impoundment</b>	<b>On-site inspection notice (warning)</b>	<b>Citation/fine of \$200 for minors*; \$500 for majors**</b>	<b>Referral for formal enforcement action</b>

\*minor: A water right of 5,000 acre-feet or less

\*\*major: A water right of greater than 5,000 acre-feet

## SUBCHAPTER E: ADMINISTRATION

### §304.42, §304.44

#### STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, Rules; §11.042, Delivering Water Down Banks and Beds; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The proposed amendments implement TWC, §§5.103, 11.042, 11.326, 11.327, 11.453 - 11.455, 11.555, and 11.561.

#### **§304.42. Reports.**

The watermaster shall submit an annual [a quarterly] report to each water right holder who has an account or his agent [who has a diversion account]. A water right holder or agent may apply in writing to the watermaster for correction of any alleged errors in the report. Any such application must be received by the watermaster within 20 business days following the date the report from the watermaster was postmarked.

**§304.44. Appointment of an Agent.**

Any person purporting to act for any water right holder, in regard to diversion, transport, use, or impoundment of state water, or payment of a watermaster assessment, or for a contractual buyer, in regard to diversion, transport, use, or impoundment of state water, shall submit to the watermaster a document signed by such water right holder confirming such authority and specifying the duration of such authority.

## **SUBCHAPTER G: FINANCING WATERMASTER OPERATIONS**

### **§304.62, §304.63**

#### **STATUTORY AUTHORITY**

The amendments are proposed under TWC, §5.103, Rules; §11.042, Delivering Water Down Banks and Beds; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.329, Compensation and Expenses of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; §11.558, Fees; and §11.561, Applicability of Other Law and Commission Rules.

The proposed amendments implement TWC, §§5.103, 11.042, 11.326, 11.327, 11.329, 11.453 - 11.455, 11.555, 11.558, and 11.561.

#### **§304.62. Determination of Assessment Rates.**

(a) After a commission order is issued approving the assessment income needed for the watermaster operations for the assessment period under consideration, the executive director shall calculate assessment rates for water use, transport, and storage for each water division, or group of divisions, based on the following formula.

**Figure: 30 TAC §304.62(a)**

**[Figure: 30 TAC §304.62(a)]**



**AF<sub>n</sub>, AF<sub>n</sub>:** Total diversion, or storage, authorization for all water rights to be assessed in each water division or group of water divisions, for each of the above categories of use, which are defined as follows:

**Municipal and Domestic** - The total amount of water authorized for diversion under a water right for this purpose, including non-exempt domestic and livestock uses.

**Industrial, Mining, Recreation, or Salt Water Diversions** - The total amount of water authorized for consumptive use for each of these categories of use under a water right. In the event there is no specific authorization for consumptive use, the assessment will [shall] be based on the total amount of water authorized for diversion under the water right. Diversions that do not conform to the definition for salt water diversion in §304.4 of this title (relating to Definitions) will be assessed at the rate for the category of use(s) authorized by the water right. For any diversion that would fit the salt water diversion definition except for the fact that the watermaster may be required to protect that water right against junior appropriators, the water right holder or agent may achieve conformity with the definition, and be assessed at the salt water rate, by providing to the executive director, at least 60 days in advance of assessment billing, an affidavit waiving such protection. Such an affidavit will [shall] be subject to approval by the executive director and must [shall] specify the duration for waiving such protection, but must [shall] not be for less than one assessment accounting period, and will [shall] be coterminous with assessment periods as establish by the commission.

**Nonconsumptive Industrial, Mining, or Recreation** - under a given water right where part of the authorization for one of these uses is specified as being consumptive, the remainder will be considered nonconsumptive.

**Irrigation, Hydroelectric (Priority and Non-priority), Recharge, Spreader Dam Diversions, Stock Raising, Game Preserves, Public Parks or Secondary Use** - the total amount of water authorized for diversion for each of these categories of use under a water right.

**On-channel Storage** - the total conservation storage authorized for impoundment under a water right. This category includes only on-channel reservoirs authorized under the Texas Water Code, except those reservoirs exempted in accordance with [the] Texas Water Code, §11.142.

**Ag-wetland** - the total amount of water authorized in a water right for diversion for this use. This term also includes the total amount of water authorized in a water right for the diversion for “wetland” use.

**Reuse** - the amount of water authorized in a water right for diversion for reuse. This assessment will be in addition to the assessment for the other uses authorized in the water right.

**Multi-use** - the total amount of water authorized under a water right for more than one use where the amount of water is not allocated to each individual use.

**Bed and Banks** - the total amount authorized for the transportation of water without the reuse of return flows. This term also includes the total amount authorized for the transportation of privately owned groundwater and groundwater based effluent.

**Other** - the total amount of water authorized for diversion in a water right for a use not otherwise listed.

(b) After the assessment rate for municipal use has been determined, the assessment rates for the other uses or for storage must [shall] be calculated as the mathematical product of the municipal assessment rate and the rate factor for each use or for storage.

#### **§304.63. Assessment of Cost.**

(a) To determine the amount of assessment for each assessment account, computations will [shall] be made by adding together a base charge as specified in the commission order adopted in accordance with §304.61 of this title (relating to Costs of Administration) and, as applicable, either or both of the following:

(1) a user fee, which is the mathematical product of the total assessment account and the appropriate assessment rate as determined by §304.62 of this title (relating to Determination of

Assessment Rates); provided, however, that if the water right authorizes more than one type of use, and if the maximum amount of water authorized to be used annually for all uses (the maximum total authorization) is less than the sum of the maximum amounts authorized to be used annually for each use (the sum of all authorizations), then, in calculating the fee for each account the number to be used for the authorized amount must [shall] be the product of the maximum total authorization and a fraction whose numerator is the amount of water authorized for that use, and whose denominator is the sum of all authorizations; and also provided that the water right holder or the executive director may apply to the commission for, and the commission may grant, an order providing, for assessment purposes only, that different portions of the total amount of water authorized be applied to the various authorized uses; and

(2) a storage fee for on-channel storage, which is calculated by multiplying the total amount of water authorized for conservation storage under that assessment account by the storage assessment rate as determined by §304.62 of this title [(relating to Determination of Assessment Rates)]. For any water right authorizing storage and more than one type of use for the same owner, the storage fee for that owner's total storage authorization must [shall] be applied to the assessment account for any one of the uses associated with that owner.

(b) The assessment must [shall] be paid to the executive director in advance of expenditures. The executive director shall specify the dates by which payments will [shall] be due, and may provide for payments in installments. Penalties and interest for the late payment of fees will [shall] be assessed in accordance with Chapter 12 of this title (relating to Payment of Fees). If fees are paid in

installments, penalties and interest for late payment will [shall] be computed on the amount of the installment due. The executive director shall transmit all collections to the state treasurer to be held in a special fund to provide for the cost of the watermaster operation.

(c) Water may [shall] not be diverted, taken, stored, transported, or used by any diverter or agent while any assessment payment is delinquent.

(d) Either the water right owner or agent shall pay the assessment, but only one person per assessment account shall be authorized to pay assessments.