

The Texas Commission on Environmental Quality (commission) adopts amendments to §297.46 and §297.71. Sections 297.46 and 297.71 are adopted *without changes* to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1605), and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 79th Legislature, 2005, passed House Bill (HB) 1225. This adopted rulemaking is necessary to implement that bill. This rulemaking is also necessary to update the rules to reflect the agency's current practices, to adhere to the style and formatting requirements in the *Texas Legislative Council Drafting Manual*, November 2004, and to conform with Texas Register and agency guidelines.

The 79th Legislature passed HB 1225 in response to recommendations by the Water Conservation Implementation Task Force, which was created by the 78th Legislature, 2003. HB 1225 added a provision to Texas Water Code (TWC), §11.173(b) which exempts a state water right from cancellation for nonuse if the nonuse was the result of water conservation measures. This measure will encourage the conservation of water in the state.

A corresponding rulemaking that includes changes to 30 TAC Chapter 295, Water Rights, Procedural, is published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

The adopted amendment to §297.46, Consideration of Public Welfare, deletes an obsolete reference to 30 TAC Chapter 261, which has been repealed.

The adopted amendment to §297.71, Cancellation in Whole or in Part, adds subsection (b)(7) that provides an additional exemption from cancellation for those water rights that are not used due to implementation of water conservation measures. Subsection (b)(7) implements HB 1225, as amended by the 79th Legislature, which will encourage water conservation.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

These adopted amendments are not a “major environmental rule” as defined by Texas Government Code, §2001.0225(g)(3), because they are not adopted to protect the environment or reduce risks to human health from environmental exposure. The purpose of the rulemaking is to comply with state law. TWC, §11.173(b), exempts a state water right from cancellation for nonuse if the nonuse was the result of water conservation measures. This change is not expressly to protect the environment and reduce risks to human health and the environment. Therefore, no regulatory analysis on the costs of the rulemaking is required.

Furthermore, these amendments do not exceed an express requirement of state law or exceed a requirement of a delegation agreement or contract between the state and federal government, and are not adopted under the general authority of the agency.

TAKINGS IMPACT ASSESSMENT

These adopted amendments do not affect private real property. These changes exempt conserved water from cancellation. The purpose of the rulemaking is to comply with state law. TWC, §11.173(b), exempts a state water right from cancellation for nonuse if the nonuse was the result of water

conservation measures.

These amendments do not burden private real property because allowing a further exemption from cancellation protects private real property. There are no alternatives to these amendments because the amendments implement state law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that this is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), concerning rules subject to the Texas Coastal Management Program (CMP), and therefore, requires that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is editorial and procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

PUBLIC COMMENT

The public comment period closed at 5:00 p.m. on April 10, 2006. The commission received no comments.

SUBCHAPTER E: ISSUANCE AND CONDITIONS OF WATER RIGHTS

§297.46

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights, and under TWC, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§297.46. Consideration of Public Welfare.

The commission may grant an application for a new or amended water right only if it finds that it would not be detrimental to the public welfare.

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

§297.71

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights, and under TWC, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. Specifically, TWC, §11.173, provides the commission with the authority to cancel water rights. The commission must amend its substantive rules to ensure that the commission's rules are consistent with commission decisions and statutory law.

The amendment implements TWC, §11.173(b)(5), which exempts from cancellation water rights for which nonuse was due to implementation of water conservation measures under a water conservation plan submitted by the holder of the water right. Additionally, the amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§297.71. Cancellation in Whole or in Part.

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

cancellation in whole or in part as provided by this subchapter.

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

(1) the water right holder's participation in the Conservation Reserve Program authorized by 16 United States Code, §§3831 -3836, Food Security Act of 1985 or a similar governmental program;

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

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

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

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

water plan;

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

(7) the implementation of water conservation measures under a water conservation plan submitted by the holder of the permit, certified filing, or certificate of adjudication as evidenced by implementation reports submitted by the holder.