

The Texas Commission on Environmental Quality (commission) proposes amendments to §297.46 and §297.71.

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

The 79th Legislature, 2005, passed House Bill (HB) 1225. This proposed rulemaking is necessary to implement that bill. This proposed 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 proposed 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 proposed amendment to §297.46, Consideration of Public Welfare, deletes an obsolete reference to 30 TAC Chapter 261, which has been repealed.

The proposed 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) implements HB 1225, as amended by the 79th Legislature, which will encourage water conservation.

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

Nina Chamness, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

The proposed rulemaking would implement HB 1225, which amended TWC, §11.173(b). HB 1225 encourages water conservation by exempting a state water right from cancellation for nonuse if that nonuse was the result of water conservation measures. Additionally, the proposed rulemaking amends Chapter 297 to reflect current agency practices.

Current agency practice reflects the provisions of the proposed rulemaking and has no fiscal implications to local government water right holders.

#### 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 seen in the proposed rules will be increased

efforts to conserve water and greater consistency between agency rules and the TWC.

The proposed rulemaking implements provisions of TWC, §11.173(b), and encourages water conservation by exempting a state water right from cancellation for nonuse if that nonuse was the result of water conservation measures. Additionally, the proposed rulemaking amends Chapter 297 to reflect current agency practices.

Current agency practice reflects the provisions of the proposed rulemaking and has no fiscal implications 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. Current agency practice reflects the provisions of the proposed rules and has no fiscal implications 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

These proposed amendments are not a “major environmental rule” as defined by Texas Government

Code, §2001.0225(g)(3), because they are not proposed to protect the environment or reduce risks to human health from environmental exposure. The purpose of the proposed 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 proposed rulemaking is required.

Furthermore, these proposed 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 agency.

#### TAKINGS IMPACT ASSESSMENT

These proposed amendments do not affect private real property. These changes exempt conserved water from cancellation. The purpose of the proposed 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 proposed amendments do not burden private real property because allowing a further exemption from cancellation protects private real property. There are no alternatives to these proposed amendments because the proposed amendments implement state law.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal 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 will, therefore, require 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-057-297-PR. Comments must be received by 5:00 p.m. April 10, 2006. For further information, please contact Julie Wood, Water Rights Permitting and Availability Section, at (512) 239-1282.

## **SUBCHAPTER E: ISSUANCE AND CONDITIONS OF WATER RIGHTS**

### **§297.46**

#### **STATUTORY AUTHORITY**

The amendment is proposed 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 proposed 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. [In making this determination, the commission shall consider the social, economic and environmental impact statement submitted with an application if required by Chapter 261, Subchapters B and D, of this title (relating to Environmental, Social and Economic Impacts Statements).]

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

**§297.71**

**STATUTORY AUTHORITY**

The amendment is proposed 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 proposed amendment implements TWC, §11.173(d)(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 proposed 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 [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, [the] Food Security Act of 1985 [, Pub. L. No. 99-198, Secs. 1231-1236, 99 Stat. 1354, 1509-1514 (1985)] or a similar governmental program;

(2) - (4) (No change.)

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

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