

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §297.27 and the repeal of §297.30.

The amendment to §297.27 and the repeal of §297.30 are adopted *without changes* as published in the August 28, 2009, issue of the *Texas Register* (34 TexReg 5887) and will not be republished.

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

In 2009, the 81st Legislature passed Senate Bill (SB) 1711, relating to the exempt use of reservoirs for sediment control or to satisfy certain environmental and safety requirements at surface mining operations.

SB 1711 amends Texas Water Code (TWC), §11.142(d), by providing an exemption from the commission's water rights permitting process for state water used to satisfy environmental and safety regulations for fire or dust suppression as applicable to a surface coal mining operation. The commission's rules related to water rights are in Chapter 297, Water Rights, Substantive.

#### SECTION BY SECTION DISCUSSION

*§297.27, Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations*

The commission adopts the amendment to §297.27 to add exemptions from the water rights permitting process for state water used from sediment control ponds to satisfy environmental and safety regulations for fire and dust suppression as applicable to a surface coal mining operation. Adopted §297.27(b)(1) authorizes the use of water stored in exempt sediment control reservoirs within a surface coal mining operation for sediment control purposes without obtaining a water rights permit. Adopted §297.27(b)(2) authorizes the use of water stored in exempt sediment control reservoirs within a surface coal mining

operation for fire or dust suppression without obtaining a water rights permit. These amendments are required by TWC, §11.142(d), as amended by SB 1711, 81st Legislative Session, 2009.

*§297.30, Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations*

The commission adopts the repeal of §297.30, because it is duplicative of the text contained in §297.27.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules 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 "major environmental rule" as defined in the statute.

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, 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 specific intent of the adopted amendment is to amend §297.27(b) of the commission's rules to be consistent with TWC, §11.142(d), as amended during the 81st Legislative Session. The statute was amended to exempt reservoirs used as part of a surface coal mining operation from water use permitting requirements if the water is used for compliance with laws, rules, or regulations relating to fire or dust suppression. The purpose of this statutory amendment was to remove the regulatory impediment to compliance with fire or dust suppression laws, rules, and regulations. The adopted rules are administrative in nature and will not 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 commission concludes that the adopted rulemaking does not meet the definition of a major environmental rule.

In addition to the fact that the adopted rulemaking does not meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a). Texas Government Code, §2001.0225(a) applies only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) was adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards governing the right to impound and use surface water in the State of Texas. Second, the adopted rulemaking is required by SB 1711 and does not exceed the requirements of SB 1711. Third, the adopted rulemaking does not 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. Finally, the rules will be adopted under the express authority of SB 1711, which requires the commission to adopt any rules required to implement the act. Therefore, the rules are not adopted solely under the commission's general powers.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules to Chapter 297 and performed an assessment of whether the rules would constitute a taking under Chapter 2007 of the Texas Government Code. The primary purpose of the adopted rules is to implement an amendment to the TWC exempting the use of water from a sediment control reservoir as part of a surface coal mining operation from state water rights permitting requirements if the water is used for compliance with laws, rules, or regulations relating to fire or dust suppression. The adopted rules would substantially advance this purpose by amending §297.27(b) to add this exempt use, and making non-substantive changes to update an obsolete reference to Vernon's Texas Civil Statutes and repeal §297.30, a duplicate rule.

Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted amendment removes a requirement to obtain a permit for a use of water from certain exempt reservoirs. Removal of this regulatory requirement by adding the exempt use does not burden, restrict, or limit the owner's right to property, or reduce its value.

In addition, because the adopted regulations are less stringent than existing rules, they do not burden,

restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these rules will not constitute takings under the Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rule, 31 TAC §505.11(b)(4), 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 the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is consistent with CMP goals and policies because the rulemaking is unlikely to be of environmental significance to the coastal natural resource areas.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

#### PUBLIC COMMENT

The commission held a public hearing on September 22, 2009 in Austin, Texas. The comment period closed on September 28, 2009. Two individuals attended the public hearing but did not present an oral statement for the record on the proposed rulemaking. The commission received comments from Lloyd

Gosselink, Attorneys at Law on behalf of its surface mining clients (Clients) and from the Texas Mining and Reclamation Association (TMRA), an industry trade association representing approximately 100 member companies and individuals involved in Texas mining and reclamation.

The Clients and TMRA state that they support the proposed rules.

#### RESPONSE TO COMMENTS

The Clients offer support for the rules and thank the staff for their work in preparing and implementing them.

**The commission acknowledges the Clients' support for the adoption of these rules.**

TMRA stated that it is fully supportive of the rulemaking and appreciate the agency's efforts to process the rulemaking expeditiously.

**The commission acknowledges TMRA's support for the adoption of these rules.**

**SUBCHAPTER C: USE EXEMPT FROM PERMITTING**

**§297.27**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Senate Bill 1711, 81st Legislature, 2009.

The adopted amendment implements TWC, §11.142.

**§297.27. Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations.**

(a) Permit Exemption for Use of State Water for Irrigation of Certain Historic Cemeteries.

(1) Without obtaining a water use permit from the commission, a tax-exempt non-profit corporation that owns a cemetery may divert from a stream not more than 200 acre-feet of water each year to irrigate the grounds of the cemetery if the cemetery:

(A) borders the stream; and

(B) is more than 100 years old.

(2) If the executive director, or a watermaster who has jurisdiction over the stream from which a cemetery diverts water under this section, determines that the diversion will harm a person downstream of the cemetery who acquired a water right before May 23, 1995, the executive director or the watermaster may order the cemetery to restrict the diversion to the extent and duration of the harm. The executive director may also request appropriate commission action.

(3) Any person dissatisfied with the action taken by the executive director or the watermaster pursuant to paragraph (2) of this subsection may appeal to the commission for relief.

(b) Permit Exemption to Use State Water for Sediment Control, Fire Suppression, or Dust Suppression Purposes within a Surface Coal Mining Operation. Without obtaining a permit from the commission, a person may construct or maintain a reservoir as part of a surface coal mining operation under Natural Resources Code, Chapter 134, if the water in the reservoir is used solely for:

(1) sediment control; or

(2) compliance with applicable laws, rules, or regulations relating to fire or dust suppression.

**SUBCHAPTER C: USE EXEMPT FROM PERMITTING**

**STATUTORY AUTHORITY**

The repeal is adopted under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Senate Bill 1711, 81st Legislature, 2009.

The adopted repeal implements TWC, §11.142.