

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §297.16 and §297.18.

Section 297.16 is adopted *with changes* to the proposed text as published in the November 20, 2009, issue of the *Texas Register* (34 TexReg 8198). Section 297.18 is adopted *without changes* to the proposed text and will not be republished.

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

In 2009, the 81st Legislature passed House Bill (HB) 4231, relating to the conveyance or transfer in Texas of water imported into this state from a source located outside Texas. HB 4231 amends Texas Water Code (TWC), §11.042 and §11.085. TWC, §11.042 is amended to add §11.042(a-1), which authorizes the use of the bed and banks of a stream in Texas to convey water imported from a source located wholly outside of the state. TWC, §11.085 is amended to add §11.085(v)(5), which provides an exemption from the requirements of TWC, §11.085(b) - (u) for water imported from a source located wholly outside of the state. The commission's substantive rules related to water rights are in Chapter 297.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission adopts amendments to 30 TAC Chapter 295, Water Rights, Procedural.

#### SECTION BY SECTION DISCUSSION

The commission adopts amendments to §297.16, Conveyance of Water Down Bed and Banks, to require authorization to use the bed and banks to convey imported water and define the terms for such an authorization. Adopted §297.16(d) requires authorization to use the bed and banks to convey imported

water and defines the terms for such an authorization. Adopted §297.16(d) reflects the requirements of TWC, §11.042(a-1) created by HB 4231. Adopted §297.16(e) specifies that conveyances of imported water authorized by §297.16(d) are not subject to the requirements of subsections (a) - (c) of §297.16. Existing subsections (d) and (e) are relettered to accommodate the addition of new requirements in adopted §297.16. In response to comments, the commission moved the provision from subsection (c) to subsection (d) and added subsection (e) to specify that authorizations for imported water in subsection (d) are not subject to the requirements in subsections (a) - (c) of this section.

The commission proposes to amend §297.18 to add an exemption for imported water from interbasin transfer provisions defined in that section. This change is required to implement HB 4231.

The commission adopts amendments to §297.18(c)(5) to replace the reference of "§295.17" with §297.17," which is the correct section.

The commission adopts amendments to §297.18(d)(2) to correct the title of the reference to Chapter 288.

The commission adopts amendments to §297.18(k)(2) to correct the reference to §297.17.

Adopted §297.18(k)(4) will exempt imported water from the application requirements defined in §297.18(b) - (j) for interbasin transfers. Adopted §297.18(k)(4) also reflects TWC, §11.085(v)(5) created by HB 4231. Existing §297.18(k)(4) is renumbered as §297.18(k)(5). These changes are necessary to implement HB 4231.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the adopted amendments and performed an analysis of whether the adopted amendments require a regulatory impact analysis under Texas Government Code, §2001.0225. The adopted amendments are not a "major environmental rule" under Texas Government Code, §2001.0225. The purpose of the rulemaking is to implement HB 4231 to authorize with prior authorization from the TCEQ, the use of the bed and banks of a stream in Texas to convey water imported from a source located wholly outside of the state, and to exempt that transfer from the requirements for interbasin transfers in TWC, §11.085. This will make transfer of water to Texas from out of state a simpler procedure and will help provide additional water resources for the state. The specific intent of allowing the use of the bed and banks of a river to convey water from out of state and exempting these transfers from interbasin transfer requirements is not to protect the environment or reduce risks to human health from environmental exposure, and the rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, or the public health and safety of the state or a sector of the state's sources. Also, these rules do not exceed a standard set by federal law not required by state law, exceed an express requirement of state law, exceed a requirement of a federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program, and are not being adopted solely under the general powers of the agency instead of under a specific state law. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

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 amendments and performed an analysis of whether the adopted amendments constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted amendments is to implement HB 4231, which authorizes, with prior authorization from the TCEQ, the use of the bed and banks of a stream in Texas to convey water imported from a source located wholly outside of the state and to exempt those transfers from the requirements for interbasin transfers in TWC, §11.085. The adopted amendments would substantially advance this stated purpose by adding this authorization to the TCEQ's rules. Promulgation and enforcement of the adopted amendments would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations 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 percent or more beyond that which would otherwise exist in the absence of the regulations. The use of the bed and banks of state watercourses to transport water is already authorized by state law for in-state water. There are no other reasonable or practicable alternatives to this rulemaking because it is required by statute.

#### 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 Rule, 31 TAC §505.11(b)(4), relating to Actions and Rules Subject to the Coastal Management Program, and will, therefore, require that the 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 January 5, 2010 in Austin, Texas. At the hearing the commission received comments from the National Wildlife Federation (NWF). The comment period closed on January 11, 2010.

The commission received written comments from: Lloyd Gosselink on behalf a coalition of the firm's clients, including cities, regional water districts, and river authorities (Coalition); the National Wildlife Federation on behalf of the NWF, the Caddo Lake Institute, Lone Star Chapter of the Sierra Club, Texas Conservation Alliance, and the Environmental Defense Fund (collectively referred to as the Commenting Parties); the Tarrant Regional Water District (TRWD); and, the Texas Parks and Wildlife Department (TPWD). TPWD stated that it adopts and fully supports the changes proposed by the Commenting Parties.

The Coalition and the Commenting Parties generally support the rules. The Coalition, the Commenting

Parties, TPWD, and TRWD all suggested changes to the rule as described in the RESPONSE TO COMMENTS section of the preamble.

#### RESPONSE TO COMMENTS

##### *§297.16, Conveyance of Water Down Bed and Banks*

The TWPD and the Commenting Parties requested that a specific reference to the issue of invasive species, as a subset of water quality issues, be added to §297.16. The TPWD and the Commenting Parties stated that during the Senate Committee on Natural Resources hearing on HB 4231 the Senate sponsor of the bill noted that potential invasive species issues were intended to be addressed in agency rulemaking related to authorizations for importation of water.

**TWC, §11.042(a-1)(2), as amended by HB 4231, provides that the commission can include special conditions adequate to prevent a significant impact to the quality of water of the state. In §295.114(b)(4), the commission included a requirement that the applicant provide a description of the water quality of the discharged water, and, if applicable, the permit number and name of any related discharge permit. This provision is sufficient to include invasive species and the potential impact of invasive species can be evaluated in the technical review of an application as necessary. No change was made in response to this comment.**

The Coalition and TRWD stated that the requirement in proposed §297.16(c) is consistent with the statutory language but that the placement of this provision in §297.16, which establishes requirements for other types of bed and banks conveyances, may inadvertently impose additional regulatory requirements on HB 4231 conveyances. TRWD further stated that the Legislature expressly made these conveyances a

stand alone section to make clear that additional requirements did not apply to imported water conveyances. The Coalition requests that §297.16(c) be placed in a new section. TRWD requests that §297.16(c) be made a stand alone section within the rules.

**The commission agrees that the placement of this provision in the proposed rulemaking could lead to the interpretation that other requirements in this section may apply to imported water. The commission agrees that these requirements are not necessary. Any water quality concerns that arise may be addressed by language included in the rule that provides that the agency has the authority to include special conditions adequate to prevent a significant impact to the quality of water in the state. To clarify that conveyances of imported water under TWC, §11.042(a-1) are not subject to the requirements in other subsections of §297.16, the proposed rule is being changed. Instead of adding this provision as subsection (c), it will be added as subsection (d) with the following language added as subsection (e): "Authorizations under subsection (d) of this section are not subject to the requirements of subsections (a) - (c) of this section."**

## **SUBCHAPTER B: CLASSES OF WATER RIGHTS**

### **§297.16, §297.18**

#### **STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC. The amendments are also adopted under TWC, §11.042(a-1), which authorizes, with prior authorization from the TCEQ, the use of the bed and banks of a stream in Texas to convey water imported from a source located wholly outside of the state, and TWC, §11.085(v)(5), which exempts a transfer of water from a source located wholly outside the boundaries of the state for use in this state, transported by using the bed and banks of any flowing natural stream located in this state.

The adopted amendments implement TWC, §11.042(a-1) and §11.085(v)(5).

#### **§297.16. Conveyance of Water Down Bed and Banks.**

(a) A person who wishes to discharge treated wastewater derived from privately owned groundwater into a stream or other state watercourse and then subsequently divert and reuse such water must obtain prior authorization from the commission for the discharge, conveyance and diversion of this water. The authorization may allow for the diversion by the discharger of existing discharges, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these discharges. Special conditions may also be

included in the permit to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of discharged wastewater derived from privately owned groundwater must obtain authorization to divert and reuse such increases in discharges before the increase occurs.

(b) Except as provided by Subchapter I of this chapter (relating to Conveying Stored Water) for the conveyance of stored or conserved water, a person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. The authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing water rights, instream uses, and freshwater inflows to bays and estuaries.

(c) Water discharged into a watercourse or stream under this section shall not cause a degradation of water quality as provided by §307.5 of this title (relating to Antidegradation). Authorizations under this section and water quality authorizations may be approved in a consolidated permit proceeding. Nothing in this chapter affects the obligation to obtain and comply with a permit under Texas Water Code, Chapter 26 or other applicable law.

(d) With prior authorization, a person, association of persons, corporation, water control and improvement district, or irrigation district supplying water imported from a source located wholly outside the boundaries of this state, except water imported from a source located in the United Mexican States, may use the bed and banks of any flowing natural stream in the state to convey water for use in this state.

The authorization must:

(1) allow for the diversion of only the amount of water put into a watercourse or stream, less carriage losses; and

(2) include special conditions adequate to prevent a significant impact to the quality of water in this state.

(e) Authorizations under subsection (d) of this section are not subject to the requirements of subsections (a) - (c) of this section.

(f) Nothing in this section shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission before September 1, 1997.

**§297.18. Interbasin Transfers, Texas Water Code, §11.085.**

(a) No person may take or divert any state water from a river basin and transfer such water to any other river basin without first applying for and receiving a water right or an amendment to a water right authorizing the transfer.

(b) An increase in the authorized amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin transfer for purposes of this section.

(c) In addition to the other requirements of this chapter relating to the review of and action on an application for a new or amended water right, the commission shall weigh the effects of the proposed transfer by considering:

(1) the need for the water in the basin of origin and in the proposed receiving basin based on the period for which the water supply is requested, but not to exceed fifty years;

(2) factors identified in the applicable approved regional water plans which address the following:

(A) the availability of feasible and practicable alternative supplies in the receiving basin to the water proposed for transfer;

(B) the amount and purposes of use in the receiving basin for which the water is needed;

(C) proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right in the basin of origin, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on the historical uses of the water right for which amendment is sought.

(3) proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(4) the continued need to use the water for the purposes authorized under the existing water right if an amendment to an existing water right is sought;

(5) comments received from county judges required to be provided notice of the application as provided by §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139)); and

(6) information required to be submitted by the applicant.

(d) The commission may grant, in whole or in part, an application for an interbasin transfer only to the extent that:

(1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period as defined by the factors provided in subsection (c) of this section; and

(2) the applicant for the interbasin transfer has prepared drought contingency and water conservation plans meeting the requirements of Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements) and has implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant.

(e) The commission may grant new or amended water rights under this section with or without specific terms or periods of use and with specific conditions under which a transfer of water may occur.

(f) If an interbasin transfer of water is based on a contractual sale of water, the new or amended water right authorizing the transfer shall contain a condition for a term or period not greater than the contract term, including any extension or renewal of the term.

(g) The parties to a contract for an interbasin transfer of water may include provisions for compensation and mitigation. If the party from the basin of origin is a governmental entity, each county judge located in whole or in part in the basin of origin may provide comment on the appropriate compensation and mitigation for the interbasin transfer.

(h) A new water right or amendment to an existing water right for a proposed interbasin transfer of water is junior in priority to water rights in the basin of origin granted before the time an administratively complete application for the transfer is filed with the chief clerk in accordance with §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness). If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.

(i) A new water right or amendment to an existing water right for a transfer of water from a river basin in which two or more river authorities or water districts have written agreements or permits that provide for the coordinated operation of their respective reservoirs to maximize the amount of water for beneficial use within their respective water service areas shall be junior in priority to water rights granted in that basin before the time an administratively complete application for the interbasin transfer is filed with the chief clerk in accordance with §281.17 of this title. If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.

(j) An appropriator of water for municipal purposes in the basin of origin may, at the appropriator's option, be a party in any hearings under this section. Nothing in this provision shall be construed as adversely affecting the ability of any other potentially affected person to obtain party status.

(k) The provisions that are contained in subsections (b) - (j) of this section that are in addition to those generally required for an application for a new or amended water right do not apply to:

- (1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;
- (2) a request for an emergency transfer of water as provided by §297.17 of this title;
- (3) a proposed transfer from a basin to its adjoining coastal basin;
- (4) a proposed transfer of water that is:
  - (A) imported from a source located wholly outside the boundaries of this state; except water that is imported from a source located in the United Mexican States;
  - (B) for use in this state; and
  - (C) transported by using the bed and banks of any flowing natural stream in this state; or
- (5) a proposed interbasin transfer from the basin of origin to a county or municipality or the municipality's retail service area that is partially within the basin of origin for use in the part of the county or municipality and the municipality's retail service area not within the basin of origin. The further transfer and use of this water outside of such county or municipal retail service area as existing at the time of the transfer or as may exist in the future other than back to the basin of origin shall not be exempt

under this paragraph. For purposes of this paragraph, a county, municipality, or municipality's retail service area refers to a geographic area.