

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §288.1 and §288.30.

The amendment to §288.1 is adopted *with change* to the proposed text as published in the February 23, 2018, issue of the *Texas Register* (43 TexReg 1013) and, therefore, will be republished. The amendment to §288.30 is adopted *without change* to the proposed text and, therefore, will not be republished.

### **Background and Summary of the Factual Basis for the Adopted Rules**

In 2017, the 85th Texas Legislature passed House Bill (HB) 1648. HB 1648 relates to the designation of a water conservation coordinator by a retail public water utility to implement a water conservation plan. Under current law, retail public utilities that provide potable water service to 3,300 or more connections are required to submit a water conservation plan to the executive administrator of the Texas Water Development Board (Board). According to TCEQ's rules, a plan must be submitted to the Board starting May 1, 2009, and every five years thereafter, and the plan must comply with the minimum requirements established in the Board's rules. The Board is required to notify the TCEQ if the Board determines an entity has not complied with the plans or submission of plans and the commission will take appropriate enforcement action.

HB 1648 added provisions under Texas Water Code (TWC), §13.146, for the TCEQ to require retail public utilities that provide potable water to 3,300 or more connections to: 1) designate a person as the water conservation coordinator responsible for implementing the

water conservation plan; and 2) identify, in writing, the water conservation coordinator to the executive administrator of the Board.

This adopted rulemaking amends §288.1 and §288.30 to include the requirements specified in HB 1648. This rulemaking under HB 1648 adds provisions requiring retail public utilities that provide potable water to 3,300 or more connections to: 1) designate a person as the water conservation coordinator responsible for implementing the water conservation plan; and 2) identify, in writing, the water conservation coordinator to the executive administrator of the Board.

In September 2017, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 1648, HB 3735, Senate Bill (SB) 864, and SB 1430 (85th Texas Legislature, 2017). The executive director based these rules on consideration of the legislation and consideration of comments received from the stakeholders.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also adopts new and amended sections in 30 TAC Chapter 80, Contested Case Hearings; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 297, Water Rights, Substantive to implement HB 3735, SB 864, and SB 1430.

## **Section by Section Discussion**

### *§288.1, Definitions*

Section 288.1 defines words and terms used within Chapter 288. The commission adopts

nonsubstantive changes to reorganize and renumber definitions in order to maintain alphabetical order. The commission also adopts §288.1(23) to add a definition for "Water conservation coordinator" and renumbers the subsequent paragraphs accordingly. In response to comments regarding §288.1(23), the definition for "Water conservation coordinator" was revised by substituting the term "retail public water supplier" for "retail public utility" to make this provision consistent with the entirety of Chapter 288. Chapter 288 refers to "retail public water supplier" when referring to a "retail public utility" that provides retail potable water service, as opposed to sewer service, and that is subject to the requirements of Chapter 288.

#### *§288.30, Required Submittals*

Section 288.30 outlines the requirements for water conservation plan and drought contingency plan submittals. The commission adopts §288.30(10)(B) to require that retail public water suppliers that provide potable water to 3,300 or more connections designate a person as the water conservation coordinator responsible for implementing the water conservation plan and identify, in writing, the water conservation coordinator, including contact information for that person, to the executive administrator of the Board. In addition, the commission adopts that notification of the initial designated water conservation coordinator be provided as specified by the Board and any changes to the water conservation coordinator be provided within 90 days of the effective date of the change. The commission re-letters the subsequent subparagraphs accordingly.

### **Final Regulatory Impact Analysis Determination**

The commission reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and determined that this rulemaking is not a "Major environmental rule." HB 1648 was enacted to require that a retail public utility have a water conservation coordinator to implement its water conservation plan. This is a procedural requirement with the specific intent to aid the retail public utility in implementing its water conservation plan in order to have a more efficient plan. Therefore, the purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way 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 this rulemaking is not to protect the environment or reduce risks to human health from environmental exposures (*see* Texas Government Code, §2001.0225(g)(3)).

Even if this rulemaking was a "Major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not adopted solely under the TCEQ's general rulemaking authority. This rulemaking is adopted to implement specific state statute enacted in HB 1648.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the

Draft Regulatory Impact Analysis Determination.

### **Takings Impact Assessment**

The commission evaluated these adopted rules and performed analysis of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007 (*see* Texas Government Code, §2001.0225(g)(3)).

The specific purpose of these adopted rules is to implement HB 1648 which requires that a retail public utility providing potable water service to 3,300 or more connections designate a water conservation coordinator responsible for implementing the water conservation plan and identify that person to the executive administrator of the Board. The intent is to aid the retail public utility in implementing its water conservation plan in order to have a more efficient plan.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property. The requirement is that a retail public utility designate a water conservation coordinator to implement the water conservation plan. This designation will not impact real property.

If it could be argued that this action constitutes a taking, the action would be exempt from the requirements of Texas Government Code, Chapter 2007, Subchapter C, because under Texas Government Code, §2007.003(13) this is an action that is taken in response to a real and substantial threat to public health and safety, is designed to significantly advance the

health and safety purpose, and does not impose a greater burden than is necessary to achieve the health and safety purpose. Conservation of water is important in order to have adequate drinking water and water for other purposes.

### **Consistency with the Coastal Management Program**

The commission reviewed the adopted rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and, therefore, required 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 Advisory Committee and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding consistency with the CMP.

### **Public Comment**

The commission offered a public hearing on March 20, 2018. The comment period closed on March 26, 2018. The commission received comments on Chapter 288 from Sledge Law

Group PLLC on behalf of Benbrook Water Authority (BWA).

BWA suggested changes to the rules.

## **Response to Comments**

### *General Comments*

#### *Comment*

BWA commented that the proposed amendments to §288.1 and §288.30 do a good job of mirroring the language in TWC, §13.146, as amended by HB 1648.

#### ***Response***

**The commission appreciates this comment.**

### *Updates to TCEQ and Board Websites*

#### *Comment*

BWA recommended that the commission or the Board include on its website an updated list of each retail public water supplier's designated water conservation coordinator, to be available to the public for review.

#### ***Response***

**This comment is beyond the scope of this rulemaking because the legislation being implemented does not require this action. No changes were made in response to this comment.**

*§288.1, Definitions*

*Comment*

BWA commented that in §288.1(23) and §288.30(10) there is inconsistency in the use of the term "retail public utility," as referenced in TWC, §13.146, amended by HB 1678, and in §288.1(23), and the use of the term "retail public water supplier," as referenced in §288.30(10).

*Response*

**The commission agrees with this comment and has made non-substantive changes to §288.1(23) substituting the term "retail public water supplier" for "retail public utility" to make this provision consistent with the entirety of Chapter 288. Chapter 288 refers to "retail public water supplier" when referring to a "retail public utility" that provides retail potable water service, as opposed to sewer service.**

*Proposed §288.30*

*Comment*

BWA supported the proposed amendment to §288.30(10) that requires the designation of a water conservation coordinator as a submission to the Board separate and apart from the submission of a water conservation plan to the Board. BWA believed that this process of designating a water conservation coordinator as a one-time submission to the Board, unless changed at a future date, separate and apart from being an element of a water conservation plan, which is submitted to the Board once every five years, is the easiest, least complex way



to implement the statute.

***Response***

**The commission acknowledges this comment.**

***Comment***

BWA commented that the proposed language in §288.30(10)(B) should be revised to state that a retail public water supplier may also identify as its designated water conservation coordinator a position and the contact information for that position in lieu of a specific individual to avoid having to notify the Board each time there is employee turnover in the position designated as water conservation coordinator.

***Response***

**The statute, as amended in HB 1648, specifically states that "a person," as opposed to a position, be designated as a water conservation coordinator. No changes were made in response to this comment.**

## **SUBCHAPTER A: WATER CONSERVATION PLANS**

### **§288.1**

#### **Statutory Authority**

This amendment is adopted under the authority of Texas Water Code (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; and TWC, §5.013(a)(1), concerning the commission's authority over water and water rights. This amendment is also adopted under TWC, §13.146, concerning water conservation plans.

The amendment implements House Bill 1648 (85th Texas Legislature, 2017) and TWC, §13.146(1) - (3), which relates to the requirement for retail public utility to have a water conservation coordinator.

#### **§288.1. Definitions.**

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Agricultural or Agriculture--Any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management; and

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) Best management practices--Voluntary efficiency measures that save a quantifiable amount of water, either directly or indirectly, and that can be implemented within a specific time frame.

(4) Conservation--Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(5) Commercial use--The use of water by a place of business, such as a hotel, restaurant, or office building. This does not include multi-family residences or agricultural, industrial, or institutional users.

(6) Drought contingency plan--A strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

(7) Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, and the development of power by means other than hydroelectric, but does not include agricultural use.

(8) Institutional use--The use of water by an establishment dedicated to public service, such as a school, university, church, hospital, nursing home, prison, or government facility. All facilities dedicated to public service are considered institutional regardless of ownership.

(9) Irrigation--The agricultural use of water for the irrigation of crops, trees, and pastureland, including, but not limited to, golf courses and parks which do not receive water from a public water supplier.

(10) Irrigation water use efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth, salinity management, and leaching requirements associated with irrigation.

(11) Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field re-pressuring.

(12) Municipal use--The use of potable water provided by a public water supplier as well as the use of sewage effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses.

(13) Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease, and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(14) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(15) Public water supplier--An individual or entity that supplies water to the public for human consumption.

(16) Regional water planning group--A group established by the Texas Water Development Board to prepare a regional water plan under Texas Water Code, §16.053.

(17) Residential gallons per capita per day--The total gallons sold for residential use by a public water supplier divided by the residential population served and then divided by the number of days in the year.

(18) Residential use--The use of water that is billed to single and multi-family residences, which applies to indoor and outdoor uses.

(19) Retail public water supplier--An individual or entity that for compensation supplies water to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants when that water is not resold to or used by others.

(20) Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(21) Total use--The volume of raw or potable water provided by a public water supplier to billed customer sectors or nonrevenue uses and the volume lost during conveyance, treatment, or transmission of that water.

(22) Total gallons per capita per day (GPCD)--The total amount of water diverted and/or pumped for potable use divided by the total permanent population divided

by the days of the year. Diversion volumes of reuse as defined in this chapter shall be credited against total diversion volumes for the purposes of calculating GPCD for targets and goals.

(23) Water conservation coordinator--The person designated by a retail public water supplier that is responsible for implementing a water conservation plan.

(24) Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

(25) Wholesale public water supplier--An individual or entity that for compensation supplies water to another for resale to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants as an incident of that employee service or tenancy when that water is not resold to or used by others, or an individual or entity that conveys water to another individual or entity, but does not own the right to the water which is conveyed, whether or not for a delivery fee.



(26) Wholesale use--Water sold from one entity or public water supplier to other retail water purveyors for resale to individual customers.

## **SUBCHAPTER C: REQUIRED SUBMITTALS**

### **§288.30**

#### **Statutory Authority**

This amendment is adopted under the authority of Texas Water Code (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; and TWC, §5.013(a)(1), concerning the commission's authority over water and water rights.

The amendment implements House Bill 1648 (85th Texas Legislature, 2017) and TWC, §13.146(2) and (3), which relate to the requirement for retail public utility to have a water conservation coordinator.

#### **§288.30. Required Submittals.**

In addition to the water conservation and drought contingency plans required to be submitted with an application under §295.9 of this title (relating to Water Conservation and Drought Contingency Plans), water conservation and drought contingency plans are required as follows.

(1) Water conservation plans for municipal, industrial, and other non-irrigation uses. The holder of an existing permit, certified filing, or certificate of adjudication for the

appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial, and other non-irrigation uses shall develop, submit, and implement a water conservation plan meeting the requirements of Subchapter A of this chapter (relating to Water Conservation Plans). The water conservation plan must be submitted to the executive director not later than May 1, 2005. Thereafter, the next revision of the water conservation plan for municipal, industrial, and other non-irrigation uses must be submitted not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any revised plans must be submitted to the executive director within 90 days of adoption. The revised plans must include implementation reports. The requirement for a water conservation plan under this section must not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(2) Implementation report for municipal, industrial, and other non-irrigation uses. The implementation report must include:

(A) the list of dates and descriptions of the conservation measures implemented;

(B) data about whether or not targets in the plans are being met;

(C) the actual amount of water saved; and

(D) if the targets are not being met, an explanation as to why any of the targets are not being met, including any progress on that particular target.

(3) Water conservation plans for irrigation uses. The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 10,000 acre-feet a year or more for irrigation uses shall develop, submit, and implement a water conservation plan meeting the requirements of Subchapter A of this chapter. The water conservation plan must be submitted to the executive director not later than May 1, 2005. Thereafter, the next revision of the water conservation plan for irrigation uses must be submitted not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any revised plans must be submitted to the executive director within 90 days of adoption. The revised plans must include implementation reports. The requirement for a water conservation plan under this section must not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(4) Implementation report for irrigation uses. The implementation report must include:

(A) the list of dates and descriptions of the conservation measures implemented;

(B) data about whether or not targets in the plans are being met;

(C) the actual amount of water saved; and

(D) if the targets are not being met, an explanation as to why any of the targets are not being met, including any progress on that particular target.

(5) Drought contingency plans for retail public water suppliers. Retail public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter (relating to Drought Contingency Plans) to the executive director after adoption by its governing body. The retail public water system shall provide a copy of the plan to the regional water planning group for each region within which the water system operates. These drought contingency plans must be submitted as follows.

(A) For retail public water suppliers providing water service to 3,300 or more connections, the drought contingency plan must be submitted to the executive director not later than May 1, 2005. Thereafter, the retail public water suppliers providing water service to 3,300 or more connections shall submit the next revision of the plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any revised plans must be submitted to the executive director within 90 days of adoption by the community water system. Any new retail public water suppliers providing water service to 3,300 or more connections shall prepare and adopt a drought contingency plan within 180 days of commencement of operation, and submit the plan to the executive director within 90 days of adoption.

(B) For all the retail public water suppliers, the drought contingency plan must be prepared and adopted not later than May 1, 2005, and must be available for inspection by the executive director upon request. Thereafter, the retail public water suppliers shall prepare and adopt the next revision of the plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any new retail public water supplier providing water service to less than 3,300 connections shall prepare and adopt a drought contingency plan within 180 days of commencement of operation, and shall make the plan available for inspection by the executive director upon request.

(6) Drought contingency plans for wholesale public water suppliers. Wholesale public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter to the executive director not later than May 1, 2005, after adoption of the drought contingency plan by the governing body of the water supplier. Thereafter, the wholesale public water suppliers shall submit the next revision of the plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any new or revised plans must be submitted to the executive director within 90 days of adoption by the governing body of the wholesale public water supplier. Wholesale public water suppliers shall also provide a copy of the drought contingency plan to the regional water planning group for each region within which the wholesale water supplier operates.

(7) Drought contingency plans for irrigation districts. Irrigation districts shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter to the executive director not later than May 1, 2005, after adoption by the governing body of the irrigation district. Thereafter, the irrigation districts shall submit the next revision of the plan not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any new or revised plans must be submitted to the executive director within 90 days of adoption by the governing body of the irrigation district. Irrigation districts shall also provide a copy of the plan to the regional water planning group for each region within which the irrigation district operates.

(8) Additional submissions with a water right application for state water. A water conservation plan or drought contingency plan required to be submitted with an application in accordance with §295.9 of this title must also be subject to review and approval by the commission.

(9) Existing permits. The holder of an existing permit, certified filing, or certificate of adjudication shall not be subject to enforcement actions nor shall the permit, certified filing, or certificate of adjudication be subject to cancellation, either in part or in whole, based on the nonattainment of goals contained within a water conservation plan submitted with an application in accordance with §295.9 of this title or by the holder of an existing permit, certified filing, or certificate of adjudication in accordance with the requirements of this section.

(10) Submissions to the executive administrator of the Texas Water Development Board.

(A) Water conservation plans for retail public water suppliers. For retail public water suppliers providing water service to 3,300 or more connections, a water conservation plan meeting the minimum requirements of Subchapter A of this chapter and using appropriate best management practices must be developed, implemented, and submitted to the executive administrator of the Texas Water Development Board not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any revised plans must be submitted to the executive administrator within 90 days of adoption by the community water system. Any new retail public water suppliers providing water service to 3,300 or more connections shall prepare and adopt a water conservation plan within 180 days of commencement of operation, and submit the plan to the executive administrator of the Texas Water Development Board within 90 days of adoption.

(B) Water conservation coordinators for retail public water suppliers. Retail public water suppliers that provide potable water to 3,300 or more connections shall designate a person as the water conservation coordinator responsible for implementing the water conservation plan; and identify, in writing, the water conservation coordinator, including the contact information for that person, to the executive administrator of the Texas Water Development Board. Notification of the initial designated water conservation coordinator shall be provided as specified by the Texas Water Development Board and any



changes to the water conservation coordinator shall be provided within 90 days of the effective date of the change.

(C) Water conservation plans. Each entity that is required to submit a water conservation plan to the commission shall submit a copy of the plan to the executive administrator of the Texas Water Development Board not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

(D) Annual reports. Each entity that is required to submit a water conservation plan to the Texas Water Development Board or the commission, shall file a report not later than May 1, 2010, and annually thereafter to the executive administrator of the Texas Water Development Board on the entity's progress in implementing the plan.

(E) Violations of the Texas Water Development Board's rules. The water conservation plans and annual reports shall comply with the minimum requirements established in the Texas Water Development Board's rules. The Texas Water Development Board shall notify the commission if the Texas Water Development Board determines that an entity has not complied with the Texas Water Development Board rules relating to the minimum requirements for water conservation plans or submission of plans or annual reports. The commission shall take appropriate enforcement action upon receipt of notice from the Texas Water Development Board.