

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §50.31, relating to the types of permits the executive director may issue pursuant to his authority arising under Chapter 50 without changes as published in the October 9, 1998, *Texas Register* (23 TexReg 10276 et seq.).

EXPLANATION OF ADOPTED RULE

The commission adopts the deletion of §50.31(c)(8) to ensure consistency for requirements of actions common to many programs such as motions for reconsideration (MFR). Since the municipal solid waste (MSW) specific MFR requirements are being removed from MSW rules and replaced with a reference to §50.39, the deletion of §50.31(c)(8) clarifies that MFRs are available for MSW and are to be done under Chapter 50. The commission also adopts the renumbering of §§50.31(c)(9)-(11) to accommodate for the deletion of subparagraph (8).

The commission also adopts the deletion of §50.31(c)(12) in order to remove the redundant reference to emergency and temporary orders. See, §50.31(c)(6). For purposes of clarification, the commission notes that the executive director's authority to issue final approval of specific types of applications arises under statutes and rules. Chapter 50, subchapter C authorizes the executive director to issue final approval of certain applications and for such applications, the procedures in subchapter C apply. The executive director's authority to issue emergency and temporary orders arises under other statutes and rules, not Chapter 50.

Additionally, this rulemaking addresses questions raised after the most recent rulemaking on §50.31 by confirming that an uncontested application for an interbasin transfer for which no evidentiary hearing is required may be granted by the executive director as authorized by Texas Water Code §5.122.

Although the recent rulemaking appropriately deleted interbasin transfer from the list because related uncontested applications may be authorized by the executive director, the rules preamble was confusing as to the purpose for the deletion. No further rulemaking is necessary.

FINAL REGULATORY ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a) in that the rules implement state law, do not exceed any express requirements of state law, do not involve any delegation agreements between the state and federal government, and there is no applicable federal law or federal contract. The rule changes §50.31 to state what the rule said prior to an inadvertent repeal of a subsection, and deletes a redundancy in the exceptions from Chapter 50 Subchapter C.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule pursuant to Texas Government Code, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to place a subsection back into a rule which was inadvertently repealed in a prior rulemaking. Also, the rulemaking deletes a redundancy in Subchapter C. These changes do not adversely affect or burden

real property, but simply allow the executive director to sign certain types of permits under certain situations.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission has reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

PUBLIC COMMENTS

A public hearing on this proposal was held at 10:00 a.m. on October 29, 1998, in Room 201S of the TNRCC central office, 12124 Park 35 Circle, Building E, Austin, Texas 78753. In addition, a 30-day comment period of October 9 to November 9, 1998, was provided. No comments were received on this rule proposal.

STATUTORY AUTHORITY

These amendments are adopted under Texas Water Code, §5.115, which allows the commission to delegate issuance of permits to the executive director, and §11.139 and §5.501-5.516 of the Code.

SUBCHAPTER C : ACTION BY EXECUTIVE DIRECTOR

§50.31

§50.31. Purpose and Applicability.

(a) - (b) (No change.)

(c) This subchapter does not apply to:

(1) - (7) (No change.)

(8) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting);

(9) concentrated animal feeding operations (CAFOs) under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations);

(10) an application for creation of a municipal management district under Local Government Code, Chapter 375; and

(d) (No Change.)

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§288.1, 288.2, 288.4, 288.5, and a new §288.20, related to Drought Contingency Plans for Municipal Uses by Public Water Suppliers, a new §288.21, related to Drought Contingency Plans for Irrigation Use, a new §288.22, related to Drought Contingency Plans for Wholesale Water Suppliers, and a new §288.30, related to Required Plans. Sections 288.1, 288.2, 288.4, 288.5, 288.20, 288.21, 288.22, and 288.30 are adopted with changes to the proposed text as published in the October 9, 1998 issue of the *Texas Register* (23 TexReg 102780).

EXPLANATION OF ADOPTED RULE

The purpose of the adopted amendments and new sections is to establish criteria and minimum requirements for drought contingency plans for wholesale and retail public water suppliers and irrigation districts necessary to implement the Texas Water Code, §11.1272, as enacted by Senate Bill 1, 75th Legislature (1997). The new sections include both procedural and substantive requirements that must be addressed by drought contingency plans. The new rules also establish deadlines for irrigation districts, and wholesale and retail public water suppliers to submit drought contingency plans. A staggered deadline is provided for public water supply systems to allow smaller systems with more limited resources additional time to prepare their plans and allow for their participation in a technical assistance program jointly sponsored by the commission and the Texas Water Development Board. Staggering this requirement also allows the commission to review a manageable number of plans based upon the agency's available resources. Specifically, retail public water suppliers with less than 3,300 connections must develop their plans by September 1, 2000, and must make the plans available to the

TNRCC upon request. Larger retail public water suppliers, wholesale public water suppliers, and irrigation districts must submit drought contingency plans to the TNRCC by September 1, 1999.

The adopted new rules also establish deadlines for existing water right holders of 10,000 acre-feet a year or more for irrigation uses, and 1,000 acre-feet a year or more for other uses, to submit water conservation plans to the executive director as required by Texas Water Code, §11.1271, as amended by Senate Bill 1. Under the new rule, all applicable water rights holders must submit water conservation plans by September 1, 1999.

The adopted new rules amend the title of Chapter 288 to include drought contingency plans and establishes three subchapters relating to water conservation plans, drought contingency plans, and submission requirements, respectively. Additionally, the new §288.20(a)(1) provides minimum criteria for drought contingency plans for Public Water Suppliers. Section 288.20(a)(1)(F) provides that the drought contingency plan include an assessment of water management strategies to be used when flows are at 75 percent of normal and when flows are at 50 percent of normal. The rules do not require some corresponding drought management action to occur when flows reach these levels. Rather, they simply provide for an assessment of available water supplies and the need to undertake such actions. These percentages correspond to those provided in Senate Bill 1 and for which the commission must provide water right holders information on the amount of water available to them when flows are at these levels. They also correspond to those provided in Texas Water Development Board rules for the purposes of regional water planning. The commission intends that the terms “flows are at 75 percent of normal,” and “flows are at 50 percent of normal,” have the same definitions and usage as those terms have in the

Texas Water Development Board's regional planning rules, 31 TAC §357 *et. seq.* in order to have consistency between the two sets of rules.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a). Specifically, it does not exceed a standard set by federal law since there are no corresponding federal requirements; it does not exceed any express requirements of state law but, rather, the rule is specifically required by Texas Water Code, §11.1271, and §11.1272; does not involve any delegation agreements or contracts; and the rule is being proposed for adoption under specific authority provided in §§11.1271 and §11.1272 as well as the general powers of the commission provided under Chapter 5 of the Texas Water Code. The requirements for plans that are added to the rules are necessary to implement Senate Bill 1, 75th Legislature (1997).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to adopt criteria and deadlines for submission of water conservation and drought contingency plans necessary to implement existing statutory requirements for certain water right holders and wholesale and retail public water suppliers and irrigation districts to develop such plans. The rules will substantially advance this specific purpose by specifying the minimum requirements that must be

addressed in water conservation and drought contingency plans, and specifying a date for submission of plans. Promulgation and enforcement of these rules will not burden private real property. Rather, they implement statutory requirements providing for the reasonable conservation and management of a state natural resource to which persons have been granted a usufructuary interest and over which the state retains supervisory oversight in trust for the public to ensure the protection of the public health, safety, and welfare.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission has reviewed the adopted rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the CMP.

HEARINGS AND COMMENTERS

A public hearing was held in Austin on October 29, 1998. The comment period closed November 9, 1998.

Written comments suggesting changes to the rules were provided by the Association of Electric Companies of Texas, Inc. (AECT), the company Azurix, the Brazos River Authority, the City of Dallas, the City of Fort Worth, Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law, the Law Offices of Louis T. Rosenberg, P.C. for Bexar Metropolitan Water District (Bexar Met), the City

of North Richland Hills, the Public Interest Counsel of the Texas Natural Resource Conservation Commission, the San Antonio Water System, Tarrant Regional Water District (Tarrant Regional), the Texas and Southwestern Cattle Raisers' Association (Cattle Raisers), the Texas Water Conservation Association (TWCA), the Texas Water Development Board, the City of Tyler, and the Wharton County Water Council. The following paragraphs summarize the written and oral comments received.

The City of Tyler objected that the Fiscal Note in the proposed rules did not consider the cost to the citizens of the State for retrofitting water conserving plumbing. The city asserted that the cost of a retrofit plumbing program would greatly exceed \$140,000.

The commission notes that the subsection concerning retrofitting of water conserving plumbing fixtures, §288.2(a)(3)(C), was not proposed for amendment. That provision of the current rules is not part of the minimum requirements for a water conservation plan. A retro-fit program is an additional water conservation strategy that may be considered, in addition to the minimum requirements, if additional strategies are necessary to achieve water conservation goals. Under the rules adopted today, holders of existing water rights permits that meet or exceed the statutory amounts, are required to submit a water conservation plan to the executive director where it will under go a staff review to ensure that each element of the minimum requirements of §288.2(a)(1) are met. Under §288.2(a)(3)(C) only the commission may require a retrofit strategy, and then only if the commission determines that the retrofit strategy is necessary to achieve the goals of the water conservation plan. The commission would only review a water conservation plan as part of

an application for a new or amended water right under §§288.30(6) and 295.9, not as part of a submission to the executive director under §288.30(1).

AECT suggested that the title to Chapter 288 be revised to add a reference to Drought Contingency Plans.

The commission agrees, and accordingly, the title has been revised.

The San Antonio Water System proposed that the definition of municipal use in §288.1(9) should be modified to ensure that reuse of treated effluent is included in the definition. They suggest that the definition in §297.1 incorporates the concept. The City of North Richland Hills also supported the concept of the unrestricted right of reuse of wastewater effluent.

The commission disagrees with the comment, in part, because the suggested change to §297.1 could greatly expand existing water rights for municipal use by authorizing reuse that may not be currently authorized in such water rights. The commission intends that the term municipal use, as used in Chapter 288, includes the reuse of treated effluent for all municipal purposes including supplying that treated effluent as part of its regular water system operations to commercial or industrial customers. The commission notes that the word reuse is expressly defined in the current rules, and that recycling and reuse of water is expressly part of the definitions of conservation and water conservation plan. The commission also notes that no amendment to the municipal use definition in Chapter 288 was proposed.

An individual commented that the proposed definition of public water supplier exceeded statutory authority, including noncommunity water systems that were neither wholesale or retail providers, because they were not in the business of providing water. The City of Dallas requested that the rules include a definition of wholesale water supplier.

The commission agrees. The legislature used the terms wholesale and retail public water suppliers, (emphasis added) which implies compensation for the service of supplying water. The adopted rules, in §288.30 regarding who must supply water conservation and drought contingency plans, have dropped the use of terms not used in the statute. The adopted rules now are crafted in terms of wholesale and retail public water suppliers. Both those terms are defined in §288.1, Definitions. The definitions of both wholesale and retail public water suppliers now include the concept of compensation for the water supplier. The commission intends to exclude from both terms noncommunity water systems where water may be supplied to the public, but there is no charge or compensation for the water or the water service.

AECT suggested that §288.2(a)(1)(F) be revised to delete reference to public education regarding the drought contingency plan. AECT supported public education programs about drought contingency plans. However, they felt that since subchapter A deals with water conservation plans, only water conservation plans should be mentioned in this subchapter. AECT felt that elimination of the public education component for drought contingency plans would not reduce the amount of public outreach since §288.20(a)(1) requires informing and educating the public. The City of Dallas suggested that

§288.20(a)(1) add language requiring a program of continuing public education and information regarding the public water supplier's water conservation and drought contingency plans.

The commission has deleted the requirement for public education of the drought contingency plan from subchapter A. As was pointed out by AECT, this subchapter deals with water conservation plans. The commission has clarified §288.20(a) to separate the requirements for public involvement in the preparation of the drought contingency plan from the requirement to inform and educate the public about the drought contingency plan on an on-going basis.

The Texas Water Development Board objected to the use of the term "Regional Planning Groups" in §288.2(a)(1)(J) instead of the term "Regional Water Planning Groups."

The commission agrees with this comment. Accordingly, use of the term "regional planning groups" has been replaced by "regional water planning groups" throughout the adopted rules.

The Cattle Raisers objected to §288.4(a)(1)(C) requirements of a metering device to measure water diverted from the surface water supply. The commenter stated that although conservation plans are only required to be submitted to the TNRCC for holders of water rights of 10,000 acre feet or more for irrigation purposes, the rule would apparently require every irrigation user to install a metering device. Because of the expense of installing and maintaining a metering device, the Cattle Raisers suggested deleting the requirement for a metering device.

The commission disagrees with the comment because the rules do not necessarily require a meter, but some reliable method of measuring water diversion and use for purposes of ensuring water conservation and the prevention of waste which may or may not include a meter. Accordingly, the rule has been revised to make this clear. In addition, §288.4 is intended to state what must be in a water conservation plans for irrigation uses. That section does not state who has to submit an irrigation use water conservation plan. Individuals or entities that must submit a water conservation plan for irrigation use are set out in §288.30, required plans. Only the holders of existing permits, certified filings, or certificates of adjudication for the appropriation of surface water in the amount of 10,000 acre-feet a year or more for irrigation use, or applicants for a new water right under §295.9, must comply with §288.4. Existing surface water right holders for irrigation uses of under 10,000 acre-feet a year are not required to file a water conservation plan, or otherwise comply with §288.4. In order to provide flexibility as to the measurement of the amount of water diverted, the commission will continue to allow measurement methods in lieu of water meters. However, as provided in the prior rules, the measuring device or method must have an accuracy of plus or minus 5 percent. The water conservation plan for irrigation use must contain a description of the measuring device or method.

The Wharton County Water Council objected to §288.4 requirements that metering devices and documentation of coordination with the Regional Planning Groups be required for all underground irrigation wells.

The commission does not intend that the water conservation rule would apply to underground, or groundwater, wells. Only surface water right holders are potentially subject to §288.4, water conservation plans for irrigation use. The commission has not made any changes in response to this comment.

Henry, Lowerre, Johnson, Hess and Frederick objected to the introductory language of §§288.5, 288.20, 288.21, and 288.22. The commenters thought that the language “shall provide information in response to each of the following” could be construed as requiring only a discussion of these elements rather than substantive requirements that must be implemented. The commenter suggested replacing that language with “shall include the following elements.”

The commission agrees in part, and has made some modifications to the rule. The commission notes that §288.5(1) includes mandatory language that all water conservation plans for wholesale water suppliers, “shall include the following elements:” That mandatory language is restricted to subparagraph (1) because the commission intends that subparagraph (1) contain required elements for all wholesale water supplier water conservation plans. Subparagraph (2) is intended to contain additional strategies that a wholesaler might want to consider, but will not always be required. Nevertheless, subparagraph (2) expressly states that the commission may require any of these additional strategies, if the commission determines that the strategies are necessary to obtain the goals of the water conservation plan. The commission, rather than the executive director, can only make this determination as part of a plan submitted with a water right application for new or

additional state water under §295.9, relating to water conservation and drought contingency plans.

The commenter’s suggested language of “shall include the following elements,” was not used in the introductory paragraph to §§288.20, and 288.21, because those sections have subparagraphs that will not apply to all drought contingency plans. For example in §288.20, drought contingency plans for Municipal Uses by Public Water Suppliers, subsection (2) [proposed subsection (4)] only applies to privately-owned water utilities. The commission chose not to use language such as “shall include the following elements, where applicable,” in order to avoid water suppliers not including a required element on grounds that it did not apply. The commission wants to make very clear which elements must be provided by all public water suppliers. The commission did intend, however, in all cases, that drought contingency plans be developed with public involvement and must be coordinated with Regional Water Planning Groups. Because of the language that the commenter pointed out, this intent might not be clear to every reader. Therefore, the commission has modified these sections to place the requirements for public involvement and coordination with the Regional Water Planning Groups in subsection (1) after the “shall include the following elements” language. In §288.22, all subparagraphs were intended to apply to all drought contingency plans for irrigation use, therefore the commenter’s suggested change was made.

The commission had proposed the deletion of the current §288.5(1)(F), relating to water conservation plans for wholesale water suppliers. That subsection had provided that new or renewed wholesale

water supply contracts must have a requirement that the customer implement a water conservation plan. Tarrant Regional supported repeal of the current §288.5(1)(F). The City of Dallas and Henry, Lowerre, Johnson, Hess and Frederick opposed the deletion of §288.5(1)(F). The City of Dallas further suggested that wholesale water customers should coordinate the development of their water conservation and drought contingency plans with their water supplier and that the wholesaler's and customer's drought contingency plans should be consistent.

The commission has elected to retain the current §288.5(1)(F) in the rules adopted today. In many cases there will be few water conservation strategies that a wholesaler can effectively implement without a direct relationship with the ultimate water customer. For example, a city can adopt water conservation ordinances. Other types of water suppliers can use customer service agreements, that require a customer to use water conservation practices as a condition of receiving water service. The ultimate customer is a necessary ingredient to an effective water conservation strategy because they are the ones with discretionary water usage that is the target of the water conservation strategy. Providing that those who purchase water from a wholesaler implement a water conservation plan, ensures that some supplier in the chain finally has a direct relationship with the ultimate water customer. The commission notes that in many cases wholesalers and customers will coordinate the plan development to ensure their plans are consistent. That way the process will be both effective and efficient for both wholesalers and customers. However, the commission does not want to forestall a customer from developing their own effective water conservation plans that are consistent with Chapter 288. Therefore, to allow for additional

flexibility for the customer to tailor water conservation plans to their own circumstances, the commission declines to go beyond the current rule.

Tarrant Regional objected to renumbered §288.5(1)(F), current rule §288.5(1)(H), in that a coordinated system reservoir operations plan to optimize available water supplies may conflict with a plan that also incorporates other goals such as cost of water production and desirable water quality. The operations plan should look at best management of the resources, not just optimization of the supply.

The commission understands that in developing an operations plan for multiple reservoirs, trade-offs between several goals such as maximization of supply, cost of production and water quality must be considered. The commission's intent on this provision is that in a plan for coordinated operation of reservoirs, optimization of water supplies be considered as a significant goal to optimize.

Tarrant Regional objected to the perceived requirement in §288.5(1)(H) that documentation of coordination with the Regional Water Planning Group be included in the conservation plan. Tarrant Regional had a similar objection to §288.22(a)(2) related to drought contingency plans. Tarrant Regional felt that it would be more reasonable to allow separate documentation of coordination.

The commission agrees with the comment, but finds that changes to the rule in response to the comment are unnecessary. The executive director will accept a water conservation or drought contingency plan where the formal elements of the plan are in one document, and the description

or documentation of public involvement and coordination with the relevant Regional Water Planning Group are in separate documents.

Several commenters questioned how water right holders or public water suppliers and irrigation districts would coordinate their water conservation or drought plans with the Regional Water Planning Groups. The City of Tyler commented that amendments to Chapter 288 should not be adopted until the Regional Water Planning Groups have had an opportunity to develop and implement their individual guidelines. The City of Fort Worth commented that the Regional Water Planning Groups may not be in a position to review conservation and drought contingency plans before May 31, 1999.

The commission has not made any changes to the rules in response to these comments. The commission notes that the Texas Water Code §16.054 specifically allows the submission of local water conservation plans and drought plans to the regional water planning groups and requires the regional water planning group to consider any submitted plans when they prepare the regional water plan. The Texas Water Code §§11.1271 and 11.1272 also required local water conservation and drought contingency plans to be consistent with the appropriate approved regional water plan. Therefore there is a dilemma as to which should be prepared first. The commission is of the opinion that the water conservation and drought plans will effect projections and planning assumptions about the anticipated levels of water usage. Therefore it will be essential to the regional planning groups that they have the benefit of the local water conservation and drought contingency plans prior to the preparation of the regional plans. Once the first round of regional plans are approved, any future revisions to water conservation or drought contingency plans

should be prepared in coordination with the regional planning groups, since each effects the other.

AECT commented that the water conservation rules of subchapter A apply only to surface water.

AECT suggested language be inserted into the rule to clarify the applicability of this subchapter.

The commission has not made any changes to the rule in response to this comment. The commission agrees that subchapter A as currently written only applies to water conservation plans for water that originated as surface water. However, the commission disagrees that clarifying language is needed. Section 288.30 clearly states those individuals or entities required to file water conservation plans. Only surface water right holders are required to file water conservation plans that comply with subchapter A.

The Public Interest Counsel for the Texas Natural Resource Conservation Commission commented that the public involvement provisions of the proposed drought contingency rules, §288.20(a)(1), §288.21(a)(1), §288.22(a)(1), do not contain any specific notice requirements despite the statutory requirements of §11.1272 requiring public input into the development of these plans. The Public Interest Counsel recommended that a baseline form and procedure be established for notice requirements for public participation in the development of drought contingency plans.

The commission agrees that a minimum acceptable procedure for notice and public participation should be established. The commission notes that a campaign of news releases and public service

announcements can result in more actual public notice and involvement than a set of uniform minimum notice requirements. The commission also notes the difficulty with providing a uniform procedure for the different types of wholesale, retail public water suppliers, and irrigation districts. For example, for a city that is a retail public water supplier, having the plan adopted at a city council meeting, with opportunity for public comment, and notice as provided by the Open Meetings Act would be an acceptable minimum level of public involvement. An investor owned utility, not subject to the Open Meetings Act, would not be able to utilize the same sort of public process. An investor owned utility might want to provide notice of the proposed plan in monthly water bills, along with an announcement about a time and place for a meeting for the customers to come and provide comment on the proposed plan to the utility management. In order to provide guidance as to a possible baseline form and procedures for notice and public participation while maintaining flexibility for local officials to use a public involvement process that will best provide for actual public input, the commission may establish suggested baseline procedure in a regulatory guidance document. Accordingly, no changes have been made in the proposed rules.

The City of Fort Worth commented that the proposed rules did not address how existing state agency-approved water conservation and drought contingency plans are to be handled.

The commission has not made any changes in response to this comment. The commission notes that many existing water conservation plans developed for prior Texas Water Development Board requirements or for previous commission water rights applications will meet nearly all of the requirements for water conservation and drought management plans. However, some additional

materials must be developed or documented as required by Senate Bill 1. For example, the public participation requirements, the requirements to coordinate development with the Regional Water Planning Groups, and an assessment of water management strategies for when flows are 50 and 75 percent of normal are additional requirements for drought contingency plans for municipal uses. These additional tasks will have to be performed and submitted to the commission.

TWCA objected to §288.20(a)(3)(C) dealing with water management strategies in drought contingency plans for when flows are at 75 percent of normal and 50 percent of normal, and recommended that this requirement be deleted. TWCA felt that public water suppliers should be provided with flexibility to develop their own triggering criteria based on the unique characteristics of their system.

The commission has not made any changes in response to this comment. The commission does not intend the flows of 75 percent of normal and 50 percent of normal to be “trigger levels” that separate different drought management strategies. Rather, the commission intends that the drought contingency plan have water management strategies that will be in place for those flow levels. The commission intends that local public water suppliers, in coordination with the appropriate Regional Water Planning Groups, are free to tailor the trigger levels for drought stages to meet local conditions, for purposes of Chapter 288 drought contingency plans. The commission notes that Texas Water Code §16.053 requires the Regional Water Planning Groups to develop regional water plans that have specific provision for water management strategies to be used when flows are 50 and 75 percent of normal. The legislature considers water management

strategies at the 50 and 75 percent level to be important. Therefore, the commission, by this rule, is requiring local plans to include consideration of strategies for those scenarios.

The City of Fort Worth and Tarrant Regional objected to §288.20(a)(3)C) relating to water management strategies for when flows are 75 and 50 percent of normal. The methodology for calculation of these level is unclear especially as applied to a reservoir system or for a customer of a wholesale supplier.

The commission has made no changes to the rule in response to this comment. The commission acknowledges the difficulties in making these calculation for a reservoir system or for a customer of a wholesale supplier. However, the legislature charged the Regional Water Planning Groups, many presumably relying on reservoir systems for water supply, with developing regional water plans with water management strategies at those flow levels. See Texas Water Code §16.053. The legislature also required the commission to inform water right holders, including those with rights based on a reservoir, with information on the amount of water available at those flows. As was stated in the preamble to the proposed rules, and is restated in this preamble, the commission intends that the methodology for calculating these levels be consistent with the Texas Water Development Board's rules and the regional planning process. To that end, the commission, in consultation with the Texas Water Development Board, will develop a regulatory guidance document to provide clarification as to the methodology for calculation of these levels including methods for the calculation for reservoir systems and for customers of wholesale suppliers.

Tarrant Regional objected to provisions of §288.20(a)(3)(F)(ii) and §288.22(a)(3)(E)(ii) that require the prior approval of the executive director for using alternative water sources. Tarrant Regional felt the

method of executive director approval was unspecified and may be problematical given the new, more complicated requirements for emergency permits.

The commission has made no changes in response to this comment. The method of approval will depend on what alternative water source is proposed by the local public water supplier. If the supplier is seeking an emergency permit for surface water, then the new §295.91, application for emergency water use, will apply. If the alternative water source is any of the examples listed in the rule, e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, then the approval procedures are governed by the Chapter 290 regulations. Those Chapter 290 regulation approval procedures are detailed in TNRCC Regulatory Guidance RG-226.

The Cattle Raisers suggested that §288.21 be clarified to provide that the irrigation district or other water supplier is the person responsible for developing and submitting the drought contingency plan.

The commission has not made any changes in response to this comment. Subchapter B is designed to set out the requirements for drought contingency plans, regardless of who must prepare the plan or what is the jurisdiction for requiring the plan. Subchapter C contains the requirements for who and under what circumstances a plan must be submitted. The commission's intention, in keeping with Texas Water Code §11.1272, is that irrigation districts or wholesale and retail public water suppliers are responsible for developing and implementing drought contingency plans. These requirements are clear in Subchapter C, therefore no changes to the rule were made.

The TWCA objected to provisions of §288.22(a)(3)(F) dealing with wholesale water contracts, and they suggested modifying the provision to read: “Provisions in a wholesale water contract for curtailment of water during a drought should be in accordance with Texas Water Code §11.039.” Tarrant Regional objected to §288.22(a)(3) as being more restrictive than required by statute or case law. The San Antonio Water System stated that it understood §288.21(a)(3) would not preclude an irrigation manager from recognizing an irrigator’s effort to conserve water by exempting from pro rata reductions those who have made a prior effort to reduce water use.

The commission has modified the rule to clarify its intent. The commission intends that drought contingency plans for wholesale water suppliers under §288.22(a)(3) must include contracts that provide in times of drought for allocation of water among customers in accordance with Texas Water Code §11.039.

Eight commenters objected to the proposed deadlines for preparation of the water conservation or drought contingency plans. The proposed rules required all required water conservation plans to be submitted to the executive director not later than May 31, 1999. Under the proposed rules, community water systems providing water service to 3,300 or more connections, wholesale public water suppliers and irrigation districts must also submit drought contingency plans to the executive director by May 31, 1999. Smaller community water systems, those serving under 3,300 connections, would have until May 31, 2000 to prepare a drought contingency plan and have it available for inspection.

TWCA and the Brazos River Authority objected to the May 31, 1999 deadlines and suggested that they be increased to September 1, 1999. The City of North Richland Hills suggested a deadline of September 30, 1999 would be appropriate. AECT proposed a deadline of December 31, 1999 for water conservation plans. The City of Fort Worth suggested a deadline of twelve months from the date of adoption of the rules. The Cities of Tyler and Dallas proposed a deadline of May 31, 2000 for large systems. Tarrant Regional objected to the deadlines as proposed but did not suggest an alternate deadline.

Commenters gave several reasons for the proposed delay of the deadlines. Inadequate time to possibly hire a consultant, develop the plan, solicit necessary public input, and coordinate with regional water planning groups was the most frequent reason given for a later due date. Larger systems felt that they have more complicated systems, and therefore they will require more time to complete a plan than small systems. One commenter felt that the Regional Water Planning Groups may not be ready to review plans. AECT commented that the early deadline might be appropriate for drought contingency plans, however water conservation plans address long term efficient water use during normal water supply conditions, not during water shortages and droughts.

The commission has changed the due dates in response to these comments. The adopted rules provide that all water conservation plans and drought contingency plans for large systems must be submitted to the executive director by September 1, 1999. Retail public water suppliers with fewer than 3,300 connections will have to September 1, 2000 with which to develop a drought contingency plan. The commission is extending the deadlines to provide greater time to solicit

public input and coordinate with Regional Water Planning Groups. The commission is reminded of 1996, 1997, and 1998 when significant portions of the state were experiencing drought conditions at least part of the year. Further delay of the requirements for water conservation and drought contingency plans does not seem to the commission to be prudent in the face of even a slight risk of future water shortages. The commission notes that affected cities, industries and individuals have been on notice since the passage of Senate Bill 1 in May of 1997 that some form of water conservation and drought plans would be required. The commission notes that the requirements for the plans are similar to existing rules for water conservation and drought contingency plans that have been in commission rules since 1992. Larger systems, while possibly being more complicated, also have greater staff and budget resources with which to develop water conservation and drought contingency plans. While water conservation plans are directed at long term efficient water use during normal water supply conditions, a plan that reduces the long term water demand will also provide some relief to a water system experiencing a temporary reduction in its available water supply.

The Cattle Raisers suggested that §288.30(2) be modified so that the provider, not necessarily the end user, of the water is the person responsible for developing and submitting the water conservation plan. The Cattle Raisers also suggested clarifying that the threshold for filing is an individual water right of 10,000 acre feet a year or more. An accumulation of smaller water rights that totaled over 10,000 acre feet a year or more would not be subject to the requirement.

The commission has made no changes to the rule in response to this comment. Texas Water Code §11.1271 requires the commission to require holders of an existing permit, certified filing, or certificate of adjudication to develop and implement a water conservation plan. Section 288.30(2) implements this statutory duty. The commission agrees that this requirement applies to individual water rights of 10,000 acre feet a year or more, not to an accumulation of smaller rights held by an individual, the sum of which exceeds 10,000 acre feet a year or more. The rule is clear enough on this point, so no changes have been made.

Five commenters objected to the level of review and agency oversight of either water conservation plans, drought contingency plans, or both. The TWCA, the City of North Richland Hills, and Tarrant Regional objected to community water systems of 3,300 or more connections, wholesale public water suppliers, and irrigation districts having to submit drought contingency plans to the executive director for review. Tarrant Regional suggested that plans be available for inspection. The TWCA also suggested that these plans be made available for inspection, or submitted to the executive director upon request. Azurix recommended that water conservation plans be filed with the agency for information purposes only. In a similar comment, the AECT objected to the language of §288.30(6). The AECT suggested alternative language for that subsection that stated the water conservation plan would be subject to review by the commission but not subject to commission approval.

The commission has made no changes in response to these comments. Water conservation plans and drought contingency plans that are required by §288.30 to be submitted to the executive director will undergo a staff review to ensure that the submitted plans in fact do address all of the

minimum requirements of Chapter 288. The commission in §288.30(6) reserves the right to perform a more extensive review by staff and commission for water conservation and drought plans submitted in accordance with §295.9, with an application for a new or amendment water right, or during times of drought for purposes of technical assistance for public water systems identified as “at risk.”

TWCA objected to new community water systems with 3,300 or more connections having 90 days from adoption of any new or revised plans to submit the plan to the executive director. The TWCA suggests giving new community water systems 180 days from commencement of operations to prepare and adopt a plan.

The rule has been modified to increase the time for new public water suppliers to prepare plans from 90 days to 180 days from commencement of operation, with the submittal date being 90 days after adoption. Revised plans for systems that already have submitted a prior plan to the agency must be submitted within 90 days of adoption by the local public water supplier.

AECT noted that there are situations where wholesale water suppliers not only deliver water to which they hold a water right, but they may also provide the service of transporting and delivering water to other water right holders.

The commission has not made any changes in response to this comment. The commission agrees with the commenter. Neither the water conservation requirements of Subchapter A or the

drought contingency plan requirements of Subchapter B are intended to reach or apply to situations where an individual or entity is transporting or delivering water under a contracted delivery service agreement where the transporter does not own the underlying water right.

AECT suggested that language be added to the proposed rule to clarify that non-attainment of the goals contained in water conservation plans will not result in enforcement action or will not be the basis for either the partial or full cancellation of the water right.

The commission has included the suggested language in the rule. The commission does not intend to be the ultimate enforcer of locally prepared water conservation and drought contingency plans. That responsibility rests with the local water supplier, or irrigation district.

Tarrant Regional commented that the rules are unclear how a multiple-purpose use will be reflected in conservation planning. Tarrant Regional suggested that where both municipal and irrigation purpose are authorized, conservation planning for the highest priority use should be sufficient.

The commission has made no change to the rule in response to this comment. The commission notes that the opportunities for water conservation differ with differing types of use. If a water right is granted for agricultural and municipal purposes, to require only water conservation for one type of use would necessarily miss water conservation opportunities when the water was used for the other purpose. The water right holder will have to develop and implement plans for all permitted uses.

Bexar Met commented that only one water conservation plan should be required of an entity for all permits pending or approved and should be centrally filed in one location only.

The commission has made no changes to the rule in response to this comment. The commission intends that the agency have only a single set of requirements for water conservation and drought contingency plans for all permits or other requirements for these plans. These plans will be filed in one location within the agency. However, because of agency resource limitations, the agency will subject water conservation and drought plans submitted to it under Texas Water Code §§11.1271 and 11.1272 to a lesser review than a review of plans submitted with applications for new or amended water rights.

Azurix commented that no rules should be adopted for drought contingency plans, rather the agency should only provide guidance for suggested drought contingency plans.

The commission has made no changes in response to this comment. The Texas Water Code §11.1272 expressly requires the commission by rule to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans.

STATUTORY AUTHORITY

The amended sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; under Texas Water Code §11.1271 which requires the commission to adopt rules establishing

criteria and deadlines for submission of water conservation plans; and under Texas Water Code

§11.1272 which requires the commission by rule to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans.

SUBCHAPTER A : WATER CONSERVATION PLANS

§§288.1, 288.2, 288.4, 288.5

§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) **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.

(2) **Drought contingency plan** - A strategy or combination of strategies for temporary supply management 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).

(3) **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, including commercial feedlot operations, commercial fish production, and the development of power by means other than hydroelectric.

(4) **Irrigation use** - The 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 through a municipal distribution system.

(5) **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 and salinity management and leaching requirements associated with irrigation.

(6) **Mining use** - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(7) **Municipal per capita water use** - The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(8) **Municipal use** - The use of potable water within or outside a municipality and its environs whether supplied by a person, privately owned utility, political subdivision, or other entity as well as the use of sewage effluent for certain purposes, including the use of treated water for domestic purposes, fighting fires, sprinkling streets, flushing sewers and drains, watering parks and parkways, and recreational purposes, including public and private swimming pools, the use of potable water in

industrial and commercial enterprises supplied by a municipal distribution system without special construction to meet its demands, and for the watering of lawns and family gardens.

(9) **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.

(10) **Public Water Supplier** - an individual or entity that supplies water to the public for human consumption.

(11) **Regional Water Planning Group** - A group established by the Texas Water Development Board to prepare a regional water plan pursuant to Texas Water Code §16.053.

(12) **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 as an incident of that employee service or tenancy when that water is not resold to or used by others.

(13) **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.

(14) **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).

(15) **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.

§288.2. Water Conservation Plans for Municipal Uses by Public Water Suppliers.

(a) A water conservation plan for municipal water use by public water suppliers shall provide information, where applicable, in response to the following.

(1) **Minimum requirements.** All water conservation plans for municipal uses by public drinking water suppliers shall include the following elements:

(A) - (E) (No Change.)

(F) a program of continuing public education and information regarding water conservation ;

(G) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(H) a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin in order to optimize available water supplies; and

(I) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier; and

(ii) a description of the authority by which the water supplier will implement and enforce the conservation plan.

(J) documentation of coordination with the Regional Water Planning Groups for the service area of the public water supplier in order to insure consistency with the appropriate approved regional water plans.

(2) Additional content requirements. Water conservation plans for municipal uses by public drinking water suppliers serving a current population of 5,000 or more and/or a projected population of 5,000 or more within the next ten years subsequent to the effective date of the plan shall include the following elements:

(A) (No Change.)

(B) a record management system to record water pumped, water deliveries, water sales and water losses which allows for the desegregation of water sales and uses into the following user classes:

(i) - (iii) (No Change.)

(iv) industrial.

(C) (No Change.)

(3) (No Change.)

(b) (No Change.)

§288.4. Water Conservation Plans for Irrigation Use.

(a) A water conservation plan for irrigation uses of water shall provide information, where applicable, in response to each of the following subsections.

(1) For an individual user:

(A) - (B) (No Change.)

(C) a description of the device(s) and/or methods within an accuracy of plus or minus 5%, to be used in order to measure and account for the amount of water diverted from the source of supply;

(D) (No Change.)

(E) water-conserving irrigation equipment and application system or method including, but not limited to, surge irrigation, low pressure sprinkler, drip irrigation, and nonleaking pipe;

(F) - (G) (No Change.)

(H) land improvements for retaining or reducing runoff, and increasing the infiltration of rain and irrigation water including, but not limited to, land leveling, furrow diking, terracing, and weed control;

(I) - (J) (No Change.)

(2) For a system providing irrigation water to more than one user:

(A) a system inventory for the supplier's:

(i) - (ii) (No Change.)

(iii) a user profile including square miles of the service area, the number of customers taking delivery of water by the system, the types of crops, the types of irrigation systems, the types of drainage systems, and total acreage under irrigation, both historical and projected.

(B) - (H) (No Change.)

(I) any other water conservation practice, method or technique which the supplier shows to be appropriate for achieving conservation; and

(J) documentation of coordination with the Regional Water Planning Groups in order to insure consistency with the appropriate approved regional water plans.

(b) (No Change.)

§288.5. Water Conservation Plans for Wholesale Water Suppliers.

A water conservation plan for a wholesale water supplier shall provide information, where applicable, in response to each of the following paragraphs.

(1) Minimum requirements. All water conservation plans for wholesale water suppliers shall include the following elements:

(A) - (E) (No Change.)

(F) a requirement in every wholesale water supply contract entered into or renewed after official adoption of the water conservation plan, and including any contract extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements of this chapter. If the customer intends to resell the water, then the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in

the resale of the water will be required to implement water conservation measures in accordance with applicable provisions of this chapter;

(G) a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin in order to optimize available water supplies;

(H) a means for implementation and enforcement which shall be evidenced by: a copy of the ordinance, rule, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier; and a description of the authority by which the water supplier will implement and enforce the conservation plan; and

(I) documentation of coordination with the Regional Water Planning Groups for the service area of the wholesale water supplier in order to insure consistency with the appropriate approved regional water plans.

(2) (No Change.)

SUBCHAPTER B : DROUGHT CONTINGENCY PLANS

§§288.20-288.22

STATUTORY AUTHORITY

The amended sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code §11.1272 which requires the commission by rule to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans.

The rules implement Texas Water Code §11.1272.

§288.20. Drought Contingency Plans for Municipal Uses by Public Water Suppliers.

(a) A drought contingency plan for a retail public water supplier, where applicable, shall provide information in response to each of the following:

(1) Minimum requirements. Drought contingency plans shall include the following minimum elements:

(A) Public involvement. Provision shall be made to actively inform the public and affirmatively provide opportunity for public input into the preparation of the plan. Such acts may

include, but are not limited to, having a public meeting at a time and location convenient to the public and providing written notice to the public concerning the proposed plan and meeting.

(B) Public Education. Provision shall be made for a program of continuing public education and information regarding the drought contingency plan.

(C) Coordination with Regional Water Planning Groups. The drought contingency plan must document coordination with the Regional Water Planning Groups for the service area of the retail public water supplier in order to insure consistency with the appropriate approved regional water plans.

(D) specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria;

(E) drought or emergency response stages providing for the implementation of measures in response to at least the following situations:

(i) reduction in available water supply up to a repeat of the drought of record;

(ii) water production or distribution system limitations;

(iii) supply source contamination; or

(iv) system outage due to the failure or damage of major water system components (e.g., pumps).

(F) an assessment of water management strategies to be used when flows are at 75 percent of normal and when flows are at 50 percent of normal;

(G) a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of drought response stages;

(H) procedures for notification of the public of the initiation or termination of drought response stages;

(I) specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:

(i) curtailment of non-essential water uses; and

(ii) utilization of alternative water sources and/or alternative delivery mechanisms with the prior approval of the executive director as appropriate (e.g., interconnection with

another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.)

(J) procedures for granting variances to the plan; and

(K) procedures for the enforcement of any mandatory water use restrictions including specification of penalties (e.g., fines, water rate surcharges, discontinuation of service) for violations of such restrictions.

(2) Privately-owned water utilities. Privately-owned water utilities shall prepare a drought contingency plan in accordance with this section and shall incorporate such plan into their tariff.

(3) Wholesale water customers. Any water supplier that receives all or a portion of its water supply from another water supplier shall consult with that supplier and shall include in the drought contingency plan appropriate provisions for responding to reductions in that water supply.

(b) The water supplier shall notify the executive director within five (5) business days of the implementation of any mandatory provisions of the drought contingency plan.

(c) The retail public water supplier shall review and update, as appropriate, the drought contingency plan, at least every five (5) years, based on new or updated information, such as the adoption or revision of the regional water plan.

§288.21. Drought Contingency Plans for Irrigation Use.

(a) A drought contingency plan for an irrigation use, where applicable, shall provide information in response to each of the following:

(1) Minimum requirements. Drought contingency plans for irrigation water suppliers shall include policies and procedures for the equitable and efficient allocation of water on a pro rata basis during times of shortage in accordance with Texas Water Code §11.039. Such plans shall include the following elements as a minimum:

(A) User involvement. Provision shall be made to actively inform and to affirmatively provide opportunity for users of water from the irrigation system to provide input into the preparation of the plan and to remain informed of the plan. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the water users and providing written notice to the water users concerning the proposed plan and meeting.

(B) Coordination with Regional Water Planning Groups. The drought contingency plan must document coordination with the Regional Water Planning Groups in order to insure consistency with the appropriate approved regional water plans.

(C) water supply criteria and other considerations for determining when to initiate or terminate water allocation procedures, accompanied by an explanation of the rationale or basis for such triggering criteria;

(D) methods for determining the allocation of irrigation supplies to individual users;

(E) a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of water allocation policies;

(F) procedures for use accounting during the implementation of water allocation policies;

(G) policies and procedures, if any, for the transfer of water allocations among individual users within the water supply system or to users outside the water supply system; and

(H) procedures for the enforcement of water allocation policies including specification of penalties for violations of such policies and for wasteful or excessive use of water.

(2) Wholesale water customers. Any irrigation water supplier that receives all or a portion of its water supply from another water supplier shall consult with that supplier and shall include in the drought contingency plan appropriate provisions for responding to reductions in that water supply.

(3) Protection of public water supplies. Any irrigation water supplier that also provides or delivers water to a public water supplier(s) shall consult with that public water supplier(s) and shall include in the plan mutually agreeable and appropriate provisions to ensure an uninterrupted supply of water necessary for essential uses relating to public health and safety. Nothing in this provision shall be construed as requiring the irrigation water supplier to transfer irrigation water supplies to non-irrigation use on a compulsory basis or without just compensation.

(b) Irrigation water users shall review and update, as appropriate, the drought contingency plan, at least every five (5) years, based on new or updated information, such as adoption or revision of the regional water plan.

§288.22. Drought Contingency Plans for Wholesale Water Suppliers.

(a) A drought contingency plan for a wholesale water supplier shall include the following minimum elements:

(1) Public involvement. Provision shall be made to actively inform the public and to affirmatively provide opportunity for user input in the preparation of the plan and for informing wholesale customers about the plan. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the public and providing written notice to the public concerning the proposed plan and meeting.

(2) Coordination with Regional Water Planning Groups. The drought contingency plan must document coordination with the Regional Water Planning Groups for the service area of the wholesale public water supplier in order to insure consistency with the appropriate approved regional water plans.

(3) specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria;

(4) a minimum of three drought or emergency response stages providing for the implementation of measures in response to water supply conditions during a repeat of the drought-of-record;

(5) a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of drought response stages;

(6) procedures for notification of wholesale customers regarding the initiation or termination of drought response stages;

(7) the specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:

(A) pro rata curtailment of water deliveries to or diversions by wholesale water customers as provided in Texas Water Code §11.039; and

(B) utilization of alternative water sources with the prior approval of the executive director as appropriate (e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.);

(8) a provision in every wholesale water contract entered into or renewed after adoption of the plan, including contract extensions, that in case of a shortage of water resulting from drought, the water to be distributed shall be divided in accordance with Texas Water Code §11.039.

(9) procedures for granting variances to the plan; and

(10) procedures for the enforcement of any mandatory water use restrictions including specification of penalties (e.g., liquidated damages, water rate surcharges, discontinuation of service) for violations of such restrictions.

(b) The wholesale public water supplier shall notify the executive director within five (5) business days of the implementation of any mandatory provisions of the drought contingency plan.

(c) The wholesale public water supplier shall review and update, as appropriate, the drought contingency plan, at least every five (5) years, based on new or updated information, such as adoption or revision of the regional water plan.

SUBCHAPTER C : REQUIRED SUBMITTALS

§288.30

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; under Texas Water Code §11.1271 which requires the commission to adopt rules establishing criteria and deadlines for submission of water conservation plans; and under Texas Water Code §11.1272 which requires the commission by rule to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans.

The rules implement Texas Water Code §§11.1271, 11.1272.

§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) 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. The water conservation plan shall be submitted to the executive director not later than September 1, , 1999. The requirement for a water conservation plan under this rule shall not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(2) 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 shall be submitted to the executive director not later than September 1, 1999. The requirement for a water conservation plan under this rule shall not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(3) Retail public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this Chapter 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 shall be submitted as follows:

(A) For retail public water suppliers providing water service to 3,300 or more connections, the drought contingency plan shall be submitted to the executive director not later than September 1, 1999. Thereafter, any revised plans shall 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 plans within 180 days of commencement of operation, and submit the plan to the executive director within 90 days of adoption; and

(B) For all other retail public water suppliers , the drought contingency plan shall be prepared and adopted not later than September 1, 2000 and shall be available for inspection by the executive director upon request. Thereafter, 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.

(4) 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 September 1, 1999, after adoption of the drought contingency plan by the governing body of the water supplier. Thereafter, any new or revised plans shall 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.

(5) Irrigation districts shall submit a drought contingency plan meeting the requirements of Subchapter B of this Chapter to the executive director not later than September 1, 1999, after adoption by the governing body of the irrigation district. Thereafter, any new or revised

plans shall 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.

(6) A water conservation plan or drought contingency plan required to be submitted with an application in accordance with §295.9 of this title (relating to Water Conservation and Drought Contingency Plans) shall also be subject to review and approval by the commission.

(7) 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 non-attainment 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.

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §293.16; the repeal of §§293.21-293.25, Subchapter C; new §293.36, §293.37, Subchapter D; amendments to §§293.131, 293.132, and 293.134; and new §293.137, relating to Procedure for Creation and Dissolution of a Groundwater Conservation District and the Appointment of its Temporary Directors, without changes to the proposed text as published in of the October 9, 1998, issue of the *Texas Register* (23TexReg 10284) and will not be republished. New §293.21, Subchapter C, and §293.36, Subchapter D, are adopted with changes.

EXPLANATION OF ADOPTED RULE

The purpose of the adopted repeals of §§293.21-293.25 is to repropose these sections in Chapter 294, which is the section which is currently titled “Underground Water Management Areas,” and covers two designated Management Areas and four Critical Areas. The commission believes that these sections are more appropriate in Chapter 294.

The purpose of the adopted new sections is to implement the requirements in Senate Bill 1 (1997), amending Texas Water Code Chapter 36, relating to the creation of groundwater conservation districts in areas which have been designated as Priority Groundwater Management Areas (PGMA). These rules provide procedures for district creation, for appointment of temporary directors, and for commission action if a groundwater conservation district does not submit or implement a management plan. Also, these rules provide procedures for a groundwater conservation district to expand its management authority within its territory. Primarily, the rules track the statutory requirements.

New §293.16(a) provides that if a district created by the commission wants to expand its authority to manage water-bearing formations which are within its territorial boundaries, it may file a motion to amend the commission order which meets the criteria of §293.16(b). Pursuant to adopted §293.16(c), no further confirmation election need be held. Districts have expressed the need to regulate all aquifers within their territorial limits.

New §293.21 relates to commission creation of groundwater conservation districts in priority groundwater management areas. The commission has changed the title of this subsection to take out the words “on its own motion,” pursuant to staff comment. The purpose of this change is to better reflect the language of the statute concerning commission creation of groundwater conservation districts.

Section 293.21(a) would provide that the executive director prepare a report meeting specified requirements and file it with the chief clerk, and the chief clerk shall set the petition for hearing.

Pursuant to adopted §293.21(b), the hearing procedures are those set out in Texas Water Code, §36.014. Adopted new §293.21(c) provides that the order is mailed to each city having extraterritorial jurisdiction and/or each county in the district, and adopted new §293.21(d) provides that the governing board provide certain information to the executive director.

New §293.36 provides procedures for appointment of temporary directors for these districts. Under adopted new §293.36(a), the commission shall order the commissioners’ court of the counties in the area to appoint temporary directors and hold an election within 90 days. If this is not done, the commission shall appoint the directors. Under adopted new §293.36(b), the commission also appoints temporary directors if it grants a petition to create a district under Texas Water Code §36.015 or if it

dissolves the board of the district. Under §293.36(c), if the temporary directors fail to qualify, or a vacancy occurs, the commission or the county commissioners' court shall appoint someone to fill the vacancy. Section 293.36(d) provides that temporary directors serve until the initial directors are elected or voters fail to approve creation of the district. Section 293.36(e) provides that appointment of temporary directors also be pursuant to §§293.31-293.35 of this chapter. Section 293.36(f) provides that if a commission-created district contains more than one county, the commission shall apportion the number of temporary directors to each county based on each county's proportionate amount of total estimated groundwater use within the proposed district.

Adopted new §293.37 provides that the Texas Water Development Board will provide the commission an estimate of total groundwater use in each county comprising the area studied as a proposed PGMA.

Section 293.131 is amended to provide that subsection (a) applies only to Texas Water Code, Chapter 36 districts. That section provides that a groundwater conservation district can be dissolved if it is found not to be operational under Texas Water Code §36.302 and has no outstanding indebtedness. If the procedures set out in §293.137 are followed, Texas Water Code §36.302 allows dissolution for failure to file or implement a management plan. All assets will be sold and the proceeds given to the county or counties in proportion to the surface land area in each county served by the district. Section 293.131(b), setting out procedures for dissolution, is adopted to amend the section to state that the section applies only to Chapter 49 districts. The rest of §293.131(b) and §§293.132-293.136 are not changed.

New §293.137 sets out procedures for commission action for failure of a groundwater conservation district to submit or implement a management plan. Section 293.137(a) provides that the commission may require certain actions of the district or order the district to refrain from taking certain actions, dissolve the board, remove the district's taxing authority, dissolve the district, or recommend action to the legislature to address operational problems. Section 293.137(b) provides that the executive director will investigate any violations and write a report to the commission including actions the executive director would recommend taking. Adopted subsection (c) provides that the executive director will attempt to resolve noncompliances with the board of the district, and if unsuccessful, shall follow Chapter 70, Subchapter C of this title. New adopted §293.137(d) would set out notice requirements for any hearing on the violations, and adopted §293.137(e) provides that the commission will appoint temporary directors if it dissolves the board. Adopted subsection (f) provides that the commission shall file a certified copy of the order with the county, and if the district was legislatively created, with the secretary of state. Adopted subsection (f) provides that appeals for any commission order shall be in the district court in any of the counties in which the district is located.

The commission also adopts the repeal of §§293.21-293.25 in order to adopt these sections in Chapter 294, which is the section which is currently titled Underground Water Management Areas, and covers two designated Management Areas and four Critical Areas. The commission believes that these sections are more appropriate in Chapter 294.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a) in that the rules are specifically required by state law, Chapter 36 of the Texas Water Code, do not exceed any express requirements of state law, and do not involve any delegation agreements between the state and the federal government, and there are no applicable federal law or contracts. While some of these rules interpret statutory procedural requirements, these procedural requirements are not outside the scope of the statute. The additional procedural requirements under these rules are necessary to implement SB 1 requirements for PGMA designation and district creation. The rules relating to adding aquifers to groundwater districts do not exceed state law requirements, but implement a method for amending commission orders delineating districts, following existing statutory procedures for these orders.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to adopt new requirements, pursuant to state law, for creating groundwater conservation districts in Priority Groundwater Management Areas (“PGMAs”) and for taking certain actions if the district does not prepare or implement a management plan. Also, the new rules contain a process for adding aquifer areas to the district’s authority within the district’s territory. The PGMA process and

groundwater conservation district creation is for the purpose of protecting groundwater which is threatened.

These new rules will not burden private real property because these rules only add procedural requirements to a process which was already in existence in the statutes. Additionally, these rules do not create districts on their own. The locality will decide whether a district should be created. The PGMA process and district creation do not create a burden on real property because the process is for the protection of real property, groundwater. Additionally, even if the rules could be construed as creating a burden on private real property, the rules are being proposed in response to a real and substantial threat to public health and safety, the rules significantly advance the health and safety purpose, and impose no greater burden than is necessary to achieve that purpose. These rules help preserve and protect groundwater supplies, which are necessary to public health and safety. The district creation process is an efficient method of ensuring that there supplies remain and are uncontaminated.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission has reviewed this adopted rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Action as and Rules Subject to the Coastal Management Program, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the CMP.

HEARINGS AND COMMENTERS

A public comment hearing on this proposal and rules review was held in Austin on October 29, 1998. The public comment period closed November 9, 1998. There were no oral comments relating to this rulemaking.

Written comments to the rules were provided by Azurix and the Association of Electric Companies of Texas (AECT). The following paragraphs summarize the written comments received.

Azurix expressed concern about §293.16, which outlines a process for adding aquifers to an existing district's authority. Azurix contends that adding aquifers to an existing authority is the same as creating a new district because new landowners will be added. Therefore, Azurix argues that the same procedures should be followed as for a new district.

The commission disagrees and responds that §293.16 would only allow a process for adding aquifers which are in the same territorial limits as contained in the existing district. Adding aquifers to an existing district is not the same as creating another district. The district has been created and confirmed by an election of the district's residents. As such, all residents within the existing area are responsible for the payment of ad valorem taxes to finance district operations. If the scope of a district's authority is limited to consider only one aquifer within the district's jurisdiction, the district cannot manage other aquifers outside of this scope. Although these other aquifers are within the district's boundaries, the district has no ability to manage these aquifers for the residents who are currently supporting the district. The TNRCC notes that the process

proposed under §294.44 pertains to adding territory within a PGMA to an existing district.

Under §294.44, the added territory is not within an existing district.

Azurix comments on §293.21, which relates to Commission Creation of Groundwater Conservation District in Priority Groundwater Management Areas (PGMAs). Azurix urges the commission to be deliberate and judicious in its decision to create new districts, and to include public input and legal due process before creating a district.

The commission appreciates this comment and will follow the process in the statute for creating districts which includes, adequate public input and due process.

The Association of Electric Companies of Texas, Inc. (AECT) comments on §293.21(a)(5), concerning Contents of the Executive Director's Report on District Creation, that the commission should define "physical culture."

The commission responds that the term "physical culture," as used in §293.21(a)(5) in reference to the Executive Director's groundwater district creation report in a priority groundwater management area, means that the referenced map will show surface water courses and water bodies and available topographical features.

AECT comments on §293.36(a)(2), concerning the Appointment of Temporary Directors by the Commission, that the section should read that the commission will appoint additional directors "if an

inadequate number of” temporary directors than required under paragraph three have been appointed at the expiration of 90 days. The section now reads that the commission shall appoint additional directors if “fewer” temporary directors have been appointed than required under paragraph three.

The commission is not changing this section because it believes that “fewer” than required is clearer than “an inadequate number” than required.

The title to §293.21 was changed to take out “on its own Motion” pursuant to staff comment. The deletion of this phrase better tracks the language of the statute and reflects the fact that the commission can create these districts as part of the PGMA process.

STATUTORY AUTHORITY

The repeals, amendments, and new sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMA, and take actions if a groundwater conservation district does not submit or implement a management plan. These rules implement Texas Water Code Chapter 36 Subchapters B and I.

SUBCHAPTER B : CREATION OF WATER DISTRICTS

§293.16

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan. These rules implement Texas Water Code Chapter 36 Subchapters B and I.

§293.16. Expansion of an Existing Groundwater Conservation District's Management Authority.

(a) Any district, created by the commission pursuant to statute to manage groundwater supplies, may expand its authority to manage water-bearing formations which are within its territorial boundaries by filing with the commission a motion to amend the commission order creating the district.

(b) The petition to amend the order creating the district shall describe which water formations are being proposed for management, specifically addressing the criteria listed in Texas Water Code §36.015(a) and the following criteria:

(1) identify the aquifer and its areal extent within the district, including a map if different from the boundaries of the district;

(2) describe the physical, stratigraphic and hydrologic relationships of the aquifer to those of the aquifer(s) identified for management in the original order including the relationships to surficial geologic units and the base of usable quality groundwater in the district;

(3) describe the characteristics of the aquifer including general quality, availability and use within the district and its storage and transmissive properties; and

(4) identify the nature of projects and management issues to be undertaken to address concerns of the aquifer, including necessity and feasibility of the work.

(c) If a confirmation election has been held in the territorial boundaries of the district, no further confirmation election need be held to add these water-bearing formations to the district.

(d) The notice and hearing provisions of Texas Water Code, §36.014, shall be followed to add aquifers to an existing district.

SUBCHAPTER C : DESIGNATION OF UNDERGROUND WATER MANAGEMENT AREAS

§§293.21-293.25

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan. These rules also implement Texas Water Code Chapter 36 Subchapters B and I.

§293.21. Designation of Groundwater Management Area Through Rulemaking.

§293.22. Petition for Adoption of Rules Designating a Groundwater Management Area.

**§293.23. Commission Consideration of Petition for Adoption of Rules Designating a
Groundwater Management Area.**

**§293.24. Notice of Commission Consideration of Final Adoption Rules Designating a
Groundwater Management Area.**

§293.25. Alteration of Groundwater Management Area.

**SUBCHAPTER C : CREATION OF GROUNDWATER CONSERVATION DISTRICTS IN
PRIORITY GROUNDWATER MANAGEMENT AREAS**

§293.21

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan. These rules also implement Texas Water Code Chapter 36 Subchapters B and I.

§293.21. Commission Creation of Groundwater Conservation Districts in Priority Groundwater Management Areas .

(a) Following commission issuance of an order under §294.42(i) of this title (relating to Commission Action Concerning PGMA Designation) and filing of the executive director's report under §294.43(b)(2) of this title (relating to Landowners Actions in a PGMA), the commission after notice and hearing may create a groundwater conservation district and appoint temporary directors to call and hold a confirmation election. Contents of executive directors report, to be filed with the chief clerk, shall include:

- (1) the name of the proposed district;
- (2) the area and boundaries of the proposed district, including a map generally outlining the boundaries of the proposed district;
- (3) the purpose or purposes of the proposed district;
- (4) a statement of the general nature of any projects needed and recommended to be undertaken by the district, including the necessity and feasibility of the work;
- (5) a map showing the proposed district's boundaries, metes and bounds, area, physical culture, and computation sheet for survey closure;
- (6) a geologic/hydrologic report including as appropriate:
 - (A) the purpose or purposes of the proposed district and its management planning objectives/goals;
 - (B) a description of the existing area, conditions, topography, economic endeavors which rely heavily upon groundwater, and any proposed improvements;

(C) a description of the groundwater resources, including the characteristics (i.e., recharge/discharge features, depth of usable groundwater, etc.) of individual aquifers within the proposed district;

(D) complete justification for the creation of the proposed district supported by evidence that the district is feasible, practicable, necessary, and will benefit all of the land to be included in the district;

(E) the existing and projected land use in the proposed district;

(F) the existing and projected groundwater quality, quantity, availability, and usage within the proposed district, including any foreseeable quality, quantity, availability, and usage issues as identified in the executive director's Priority Groundwater Management Area report;

(G) the existing and projected population;

(H) an evaluation of the effect the proposed district and its programs will have within the district; and

(I) financial information including the following:

(i) the projected maintenance tax rate, under Texas Water Code, §36.020, which should not exceed 50 cents on each \$100 of assessed valuation;

(ii) the proposed budget of revenues and expenses for the district; and

(iii) an evaluation of the effect the district and its programs will have on the total tax assessments on all land within the district, including a discussion of current and projected tax rates.

(7) affidavits by those persons nominated by the county commissioners court(s) as temporary directors, showing compliance with applicable statutory requirements of qualifications and eligibility for temporary directors, and in accordance with Texas Water Code, §§36.051(b) , 36.058, and 36.059(b) for appointment of directors.

(b) The chief clerk shall set the petition for hearing by the commission and issue notice thereof. The notice and hearing provisions of Texas Water Code, §36.014, shall be followed for creation of a district.

(c) A copy of the order of the commission creating a district shall be mailed by first-class mail by the chief clerk to each city having extraterritorial jurisdiction and/or to each county.

(d) The governing board of the district shall provide information to the executive director in accordance with §293.14 of this title (relating to District Reporting Actions Following Creation).

SUBCHAPTER D : APPOINTMENT OF DIRECTORS

§293.36, §293.37

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan. These rules also implement Texas Water Code Chapter 36 Subchapters B and I.

§293.36. Appointment of Temporary Directors by Commission for a Groundwater Conservation District.

(a) If the commission creates a district in a priority groundwater management area (PGMA) under this chapter:

(1) the commission shall provide in its order creating the district that the commissioners' court of the county or counties that contain the area of the district appoint temporary directors and that an election be called by the temporary directors to confirm the creation of the district and to elect permanent directors.

(2) the commissioners' court of the county or counties that contain the area of the district shall, within 90 days after receiving notification by the commission under paragraph (1) of this subsection, appoint temporary directors, for the district's board. The commissioners court shall not make any appointments after the expiration of the 90-day period. If fewer temporary directors have been appointed at the expiration of the period than required under paragraph (3) of this subsection, the commission shall appoint the additional directors.

(3) the commissioners' court of the county or counties that contain the area of the district shall appoint the temporary directors using the method set out in Texas Water Code, §36.0161. For districts containing two or more counties, the district shall apportion the appointments of the temporary directors in the manner provided by the commission under §293.36(f) of this subsection .

(b) If the commission grants a petition to create a district under Texas Water Code §36.015 or if the commission dissolves a district's board under Texas Water Code §36.303, it shall appoint the temporary directors.

(c) If a temporary director appointed by the commission or a county commissioners' court fails to qualify, or if a vacancy occurs in the office of temporary director, the commission or the county commissioners' court, as appropriate, shall appoint an individual to fill the vacancy.

(d) Temporary directors appointed under this subsection shall serve until the initial directors are elected and have qualified for office or until the voters fail to approve the creation of the district.

(e) Appointment of temporary directors by the commission shall be pursuant to §§293.31-293.35 of this title (relating to Appointment of Directors).

(f) If a district created by the commission in a PGMA contains two or more counties, the commission shall apportion the number of temporary directors to each county based on each county's proportionate amount, to the nearest whole number, of the total estimated groundwater use within the proposed district. The commission shall provide this information in its order proposing a district under §294.42(i) of this title (relating to Commission Action Concerning Priority Groundwater Management Area Designation).

§293.37. Estimation of Groundwater Use.

At the time the executive director requests a study from the Texas Water Development Board pursuant to §294.41(c) of this title (relating to Executive Director's Report Concerning Priority Groundwater Management Area Designation), the executive director will request the board to provide the commission an estimate of total groundwater use in each county comprising the area studied as a proposed PGMA.

SUBCHAPTER L : DISSOLUTION OF DISTRICTS

§§293.131, 293.132, 293.134, 293.137

STATUTORY AUTHORITY

The amended and new sections are adopted under Texas Water Code, § 5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMA's, and take actions if a groundwater conservation district does not submit or implement a management plan. These rules also implement Texas Water Code Chapter 36 Subchapters B and I.

§293.131. Authorization for Dissolution of Water District by the Commission.

(a) Chapter 36 of the Texas Water Code, §§306.301-306.310 authorizes the commission to dissolve any district as defined in Texas Water Code, §36.001(1), a groundwater conservation district, which is not operational as determined under Texas Water Code, §36.302 and has no outstanding bonded indebtedness.

(1) A groundwater conservation district that is composed of territory entirely within one county may be dissolved even if it has outstanding indebtedness that matures after the year in which the district is dissolved.

(2) The procedures set out in §293.137 of this title (relating to Commission Action for Failure of a Groundwater Conservation District to Submit a Management Plan or to Implement a Certified Plan through its Operations) shall apply to these actions.

(3) Upon the dissolution of a groundwater conservation district by the commission, all assets of the district shall be sold at public auction and the proceeds given to the county if it is a single county district. If it is a multi-county district, the proceeds shall be divided with the counties in proportion to the surface land area in each county served by the district.

(b) Texas Water Code, Chapter 49, Subchapters I and K, §§49.321-49.327 authorize the commission to dissolve any district as defined in Texas Water Code, §49.001(1), which is inactive for a period of five consecutive years and has no outstanding bonded indebtedness.

(1) Proceedings for the dissolution of a district may be initiated by the executive director upon his own initiative or upon the receipt of an application filed with the executive director by the owners of land or interests in land within the district which is sought to be dissolved, a member or members of the board of directors of the district, or any other party who can demonstrate an interest in having the district dissolved.

(2) The application must include a petition on the part of the party requesting dissolution including a statement of the reasons that a dissolution is desirable or necessary, and contain a statement that the district has been financially dormant for the preceding five-year period for water

districts and has performed no functions for the five previous preceding years and has no outstanding bonded indebtedness.

(3) If the petition is submitted by a landowner, a director of the district, or other interested party, the application must contain certified copies of dormancy affidavits submitted pursuant to Water Code §49.197, for five years for water districts preceding the year in which the application is submitted.

(4) Evidence that the district has no outstanding bonded indebtedness may be filed as prepared testimony with the application and may consist of statements or testimony from the district's attorney, engineer, or officer and shall include an affidavit of the state comptroller of public accounts certifying that the district has never registered any bonds with the comptroller.

(5) Applications shall include a list of assets and liabilities of the district.

(6) The executive director may initiate procedures to dissolve a district without financial dormancy affidavits on file if:

(A) The district has failed to comply with the reporting requirements of this chapter for the previous five year period;

(B) attempts to contact directors, interested parties or anyone with knowledge of district's financial activity have failed; and,

(C) the state comptroller of public accounts has submitted a certificate certifying that the district has never registered any bonds with the comptroller.

§293.132. Notice of Hearing.

A notice of the hearing upon the proposed dissolution of a district will be given by the chief clerk and will describe the reasons for the proceeding, as required by Water Code, §36.305 for groundwater conservation districts and §49.322 for other water districts. The notice will be published once each week for two consecutive weeks before the day of hearing in a newspaper having general circulation in the county or counties in which the district is located. The first publication will be 30 days before the day of the hearing. Notice of the hearing will be given by the chief clerk by first class mail addressed to the directors of the district according to the last record on file with the executive director.

§293.134. Order of Dissolution.

For districts created under Texas Water Code, Chapter 49, following the hearing, the commission will enter an appropriate order that the district be dissolved or that the district not be dissolved if it finds that the district has performed none of the functions for which it was created for a

period of five consecutive years before the day of the proceeding and the district has no outstanding bonded indebtedness. If the district is ordered dissolved, the order shall contain a provision that the assets of the district shall escheat to the State of Texas and shall be administered by the state treasurer and disposed of in the manner provided by Property Code, Chapter 74.

§293.137. Commission Action for Failure of a Groundwater Conservation District to Submit a Management Plan or to Implement a Certified Plan through its Operations.

(a) If a board of a groundwater conservation district fails to submit a management plan or receive certification of its management plan as required under Texas Water Code §36.1072, or fails to submit or receive certification of an amendment to the management plan as required under Texas Water Code §36.1073, or the state auditors office determines that a district is not actively engaged in achieving the objectives of its certified management plan and therefore not operational in accordance with Texas Water Code §36.302(c) and (f), the commission shall after notice and hearing take action the commission considers appropriate, including:

(1) issuing an order requiring the district to take certain actions or to refrain from taking certain actions;

(2) dissolving the board in accordance with Texas Water Code §§36.305 and 36.307;

(3) removing the district's taxing authority;

(4) dissolving the district in accordance with Texas Water Code §§36.304, 36.305, and 36.308; or

(5) recommending to the legislature in the commission's report concerning the designation of Priority Groundwater Management Areas required by Texas Water Code §35.018, actions the commission deems necessary to address operational problems identified in the state auditors report under Texas Water Code §36.302(c) and accomplish comprehensive management in the district.

(b) The executive director shall investigate the facts and circumstances of any violations of any rule or order of the commission or any provisions of Texas Water Code Chapter 36 identified under Texas Water Code §36.302(c), §36.1072 and §36.1073 and shall prepare and file a written report with the commission and district and include any actions the executive director believes the commission should take under subsection (a) of this section.

(c) The executive director shall attempt to resolve any noncompliance set out in subsection (b) of this section with the board. If unable to resolve the violation, the executive director shall follow the procedures for commission enforcement actions set out in Chapter 70, Subchapter C of this title (relating to Enforcement).

(d) Before taking any action listed in subsection (a)(1)-(4) of this section, the commission shall:

(1) give notice of the hearing which briefly describes the reasons for the proceeding.

(2) publish notice once each week for two consecutive weeks before the day of the hearing in a newspaper of general circulation in the county or counties in which the district is located. The first publication shall be 30 days before the day of hearing.

(3) give notice of the hearing by first-class mail addressed to the directors of the district according to the last record on file with the executive director.

(e) If the commission enters an order to dissolve the board, the commission shall notify the county commissioners court of each county which contains territory in the district and the commission shall appoint temporary directors under Texas Water Code §36.016 to serve until an election for a new board can be held under Texas Water Code §36.017; provided, however, that district confirmation shall not be required for continued existence of the district and shall not be an issue in the election.

(f) The commission shall file a certified copy of the order of dissolution of the district in the deed records of the county or counties in which the district is located. If the district was created by a special Act of the legislature, the commission shall file a certified copy of the order of dissolution with the secretary of state.

(g) Appeals from any commission order issued under this subsection shall be filed and heard in the district court of any of the counties in which the district land is located.

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts the repeal of §§294.20-294.22, 294.24, and 294.25, new §§294.21-294.25, 294.30, 294.32, 294.34, 294.35, 294.40-294.44, relating to procedures for designation of underground management areas by rulemaking. Sections 294.40 and §294.42 will be adopted with changes to the proposed text as published in the October 9, 1998, issue of the *Texas Register* (23 TexReg 10290). The repeal of §§294.20-294.22, 294.24, 294.25, new 294.21-294.25, 294.30-294.32, 294.34, 294.35, 294.41, 294.43, and 294.44 are adopted without changes and will not be republished

The new rules in Subchapter D, §§294.30, 294.31, 294.34, and 294.35, were in Chapter 293 Subchapter C. The adopted rules simply change the Subchapter to Subchapter D, and change “critical area” to “priority groundwater management area” in the title of the Subchapter and in the text of the rules and renumber existing related rules. The repeal and adoption of these rules reflects the redesignation of these areas by the legislature as priority groundwater management areas pursuant to Senate Bill 1 (1997). The commission additionally adopts new Chapter 294 Subchapter E, related to designation of priority groundwater management areas (“PGMAs”).

EXPLANATION OF PROPOSED RULE

The rules related to underground management areas are being added to Chapter 294 and moved from Chapter 293 because Chapter 294 relates to underground management areas and similar designations. The adopted rules related to changing “critical area” to “priority groundwater management area” make this change because recent legislation, Senate Bill 1, 75th Legislature (1997), changed critical areas to PGMAs. The adopted new rules related to procedures for designation of PGMAs implement changes

made to Texas Water Code Chapter 35 in Senate Bill 1. Concurrently, the commission proposes the review of 30 TAC Chapter 294, in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, and is publishing the proposed notice of review in the Rules Review Section of the *Texas Register*.

In general, these rules track the statute. Adopted new Subchapter C relates to the designation of groundwater management areas. These rules are presently in §§293.21-293.25 of this title. Adopted §294.21 provides the procedure for designating these areas through rulemaking. Adopted §294.22 sets out requirements for adoption of rules designating these areas by a petition. Section 294.23 provides that the commission consider this petition within 60 days and initiate a rulemaking or deny the petition. Adopted §294.24 provides for notice of commission consideration of designation, and adopted §294.25 would provide procedures for alteration of groundwater management areas by the commission or on petition for a rulemaking proceeding.

Amended Subchapter C changes the Subchapter designation to Subchapter D of Chapter 294.

Subchapter D designates four areas as a Priority Groundwater Management Area. These sections simply change “critical area” to “priority groundwater management area.” The commission is making this change because recent legislation, Senate Bill 1, 75th Legislature, (1997), changed the name of these areas.

New Subchapter E relates to procedures for designation of PGMAs and implements changes made to Texas Water Code Chapter 35 in Senate Bill 1. Proposed §294.40 defines executive administrator and

Priority Groundwater Management Area (PGMA). Another definition, “affected person,” is being added to clarify who may ask for a hearing in a PGMA designation. This definition incorporates the final two sentences of the Chapter 55 definition of “affected person.”

Adopted §294.41 relates to the executive director’s report concerning proposed PGMA’s. Section 294.41(a) provides that the executive director and executive administrator shall meet at least once a year to identify areas experiencing groundwater problems, and §294.41(b) provides that a report shall be prepared if the executive director concludes that an area should be considered for PGMA designation.

Adopted §294.41(c) provides that the executive director will begin the PGMA study by requesting a study from the Texas Water Development Board which addresses certain criteria. Adopted §294.41(d) provides that notice must be given to several different groups of the proposed PGMA designation and that those persons may provide information to the executive director which will be considered.

Adopted subsection (e) states that the executive director will also request a study from the Texas Department of Parks and Wildlife which addresses certain criteria. Under adopted §294.41(f), the executive director must complete the report on or before the 240th day following the date of the request for the study. The executive director will also provide notice by filing the report with the commission, making the report available for public inspection in each county in which the proposed PGMA is located, publishing notice in the Texas Register, and mailing notice to the persons who received notice of the initiation of the study. Adopted §294.41(h) provides the executive director may hold public meetings and solicit information for the study, and adopted §294.41(i) provides that if the executive director recommends that no PGMA be designated, no further action by the commission or executive

director is necessary. However, any person who received mailed notice can file a motion for reconsideration under §50.39 of this title.

Adopted §294.42 relates to commission action concerning a PGMA designation recommendation.

Adopted §294.42(a) provides that the commission shall consider the recommendation using the procedures set out in the subchapter. Adopted §294.42(b) provides that the commission shall call an evidentiary hearing to consider the proposed designation, whether a district should be created over all or part of the PGMA, or whether the land in the PGMA should be added to an existing district. The commission changed this subsection from the proposed version to clarify that the commission is not required to recommend that a district be created. Under adopted §294.42(c), the hearing must be held in one of the counties in which the PGMA is proposed, or the nearest convenient location. Under adopted §294.42(d), hearing procedures are set out. Adopted §294.42(e) provides that the commission ruling on designation may not be appealed. Section 294.42(f) provides that notice must be given by newspaper 30 days prior to the hearing, and the requirements of that notice are set out in proposed §294.42(g). Under adopted §294.42(h), the commission shall also give written notice to the persons who received notice of the PGMA study 30 days prior to the hearing. Adopted §294.42(i) sets out what should be in any commission order, and requires that the commission address whether a district would be beneficial, there is a public need for a district, and whether a district would further the public welfare. New §294.42(j) provides that the Administrative Procedures Act, Texas Government Code Annotated, §2001 et seq., does not apply to these hearings.

Adopted §294.43 relates to landowner actions regarding district creation in a designated PGMA. Under adopted §294.43(a), if the commission finds that a district or districts should be created, landowners may create districts under Texas Water Code, Chapter 36, have the area annexed to an adjoining district, or create districts through the legislative process. Under adopted §294.43(b), the executive director must identify those areas which the commission has decided need a district but which have not formed a district and report this to the commission with recommendations for action. Notice provisions for this report are set out.

Adopted §294.44 relates to adding a PGMA to an existing district. Under adopted §294.44(a), the commission will submit to the affected district a copy of an order recommending that a PGMA be added to an existing district, and the affected district's board to conduct a vote and advise the commission. Adopted §294.44(b) provides that if the board votes to accept the PGMA into their district, the board may request state agencies to administer an education program concerning water resources, management and annexation, and shall call an election on the issue. Adopted §294.44(c) provides that the board shall give notice of the election and proposition. Adopted §294.44(d) sets out how the ballot shall read for the election. Adopted §294.44(e) provides what occurs after the election, including a requirement that the board file a copy of the election results with the commission. Adopted §294.44(f) provides that if the voters approve adding the PGMA to the district, the board shall provide reasonable representation on the board. Under adopted §294.44(g), if the proposition is defeated, another election may not be called within one year. Adopted §294.44(h) provides for payment of costs of the election, and §294.44(i) provides that if the election is defeated, the commission may make recommendations to the legislature in its biennial report concerning possible legislative action.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a) in that the rules are specifically required by state law, there is no applicable federal law, do not exceed any express requirements of state law, and do not involve any delegation agreements or contracts. Additionally, some of these rules already exist and are simply being moved to a new chapter, or are being amended to change the term “critical area” to “priority groundwater management area.” While some of the rules interpret the statute’s procedural requirements, they are not outside the scope of the statute. Additional procedural rules are necessary to implement SB 1 PGMA creation requirements.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code §2007.043. The following is a summary of that Assessment. The specific purpose of part of this rulemaking is to move rules which provide procedures for designation of underground management areas by rulemaking. These regulations were in Chapter 293 and are being moved verbatim to Chapter 294, which is a more appropriate Chapter for these rules. These new rules will not burden private real property because these rules already exist and are simply being moved to place these rules in a more appropriate Chapter.

The amendments to rules which simply change the words “critical area” to “priority groundwater management area” are to implement the change in term in amendments to Chapter 35 of the Texas Water Code and do not burden private real property because they have no affect on real property.

The new rules concerning procedures for designating PGMAs, which are to implement recent amendments to Chapter 35 of the Texas Water Code, do not burden private real property because a similar procedure was already in place in the critical area process, and, the designation of a PGMA is for the protection and preservation of groundwater. Additionally, PGMAs have no regulatory authority which could constitute a burden.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission has reviewed this adopted rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Action as and Rules Subject to the Coastal Management Program, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the CMP.

HEARINGS AND COMMENTERS

A public hearing was held in Austin on October 29, 1998. The comment period closed November 9, 1998.

There were no oral comments on this rulemaking. Written comments were submitted by Azurix and the Association of Electric companies of Texas, Inc. (AECT). The following paragraphs summarize the written comments received.

Azurix comments on §294.42(b), concerning an evidentiary hearing on a proposed PGMA designation. This section states that the commission is to consider whether a district should be created, and whether all or part of a PGMA should be added to an existing district. Azurix asks that another subpart be added to clarify that the commission should also consider whether a district should be created at all.

The commission agrees with this recommendation and believes that §294.42(b) could be clearer that a district does not have to be created. Therefore, we have changed §294.42(b)(2) to state that the commission must consider at an evidentiary hearing “whether a district should be created, and if so, whether it should include all or part of the PGMA.” This is clearly what is intended in the statute.

Azurix also believes that §294.42 is vague on what the term “affected persons” means in the context of being named a party at a PGMA hearing. It suggests that the term be defined as it is in 30 TAC § 55.3.

The commission generally agrees with this comment, but does not believe that the entire definition of “affected person” in Chapter 55 is appropriate because these hearings are not contested cases under the Administrative Procedures Act. However, the first two sentences of the definition

would be appropriate and would add some clarity to the definition of “affected person” in a PGMA hearing. Therefore, the commission is changing §294.40 to add a definition of “affected person” to include the first two sentences of §55.3. The third sentence require an analysis of the factors set out in Chapter 5 of the Water Code for who is an “affected person” in a contested case. Since a PGMA hearing would involve limited issues these requirements should not be necessary.

The Association of Electric Companies of Texas, Inc. (AECT) comments on sections 294.31(b), and 294.32(b), that the boundary description of these PGMA's should be changed to reflect district creation in those areas.

The commission disagrees with this comment. The commission is aware that a portion of the Briscoe, Swisher, and Hale County PGMA within Hale County was added to the High Plains UWCD No. 1 in August, 1993, and that portions of Dallam County within the Dallam County PGMA were added to the North Plains GWCD No. 2 in May, 1993. The Briscoe, Swisher, and Hale County PGMA, and the Dallam County PGMA, were designated by commission rule in 1990, and the references to the boundaries of the High Plains UWCD No. 1 and the North Plains GWCD No. 2 are to the boundaries of the districts as they existed at that date. The current boundaries of the two districts do not affect the designated boundaries of the two PGMA's.

STATUTORY AUTHORITY

The repeals and new sections are adopted under Texas Water Code, § 5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 35, which relates to the creation of PGMA's.

CHAPTER 294

UNDERGROUND WATER MANAGEMENT AREAS

SUBCHAPTER C : CRITICAL AREAS

§§294.20-294.22, 294.24, 294.25

The repeals are adopted under the Texas Water Code, §35.012, which provides the Texas Natural Resource Conservation Commission with the authority to designate Priority Groundwater Management Areas to protect groundwater resources.

These rules will implement Texas Water Code Chapter 35, §§35.007-35.013.

§294.20. Definitions.

§294.21. Designation of Briscoe, Hale and Swisher County Critical Area.

§294.22. Designation of Dallam County Critical Area.

§294.24. Designation of Hill Country Critical Area.

§294.25. Designation of Reagan, Upton, and Midland County Critical Area.

SUBCHAPTER C : DESIGNATION OF GROUNDWATER MANAGEMENT AREAS

§§294.21-294.25

The new sections are adopted under the Texas Water Code, §35.012, which provides the Texas Natural Resource Conservation Commission with the authority to designate Priority Groundwater Management Areas to protect groundwater resources.

These rules will implement Texas Water Code Chapter 35, §§35.007-35.013.

§294.21. Designation of Groundwater Management Area Through Rulemaking.

(a) These sections only apply to the designation of groundwater management areas as authorized by Texas Water Code, §35.004.

(b) Designation of a groundwater management area is a separate proceeding from that for creation of a groundwater conservation district.

(c) In accordance with Texas Water Code, §35.004, on its own motion or on receiving a petition, the commission may initiate a rulemaking to designate a groundwater management area. Through the rulemaking process, the commission will determine the boundaries of such a management area with the objective of providing the most suitable area for the management of the groundwater resources of the part of the state where a groundwater conservation district is or may be located. To

the extent feasible, the management area will coincide with the boundaries of a groundwater reservoir or a subdivision thereof. The commission may also consider other factors in determining the boundaries of the management area, such as the boundaries of other political subdivisions and the appropriateness of the size and configuration of the management area to a groundwater conservation district's performance of its duties under Texas Water Code, §§36.101-36.122.

(d) Upon the request of the commission or any person interested in a petition to designate a groundwater management area, the executive director will prepare available evidence relating to the configuration of a groundwater management area. The evidence prepared by the executive director shall include information concerning the existence, configuration, and characteristics of a groundwater reservoir or subdivision thereof. The evidence prepared by the executive director shall be made part of the rulemaking record.

(e) The commission shall designate groundwater management areas using the procedures applicable to rulemaking under the Administrative Procedure Act (Subchapter B, Chapter 2001, Government Code) except where such procedures conflict with those set forth in the Texas Water Code, Chapter 35.

(f) A petition for designation of an underground water management area must be submitted to the executive director and be accompanied by a \$100 application fee and petition recording fee of \$1.00 per page.

§294.22. Petition for Adoption of Rules Designating a Groundwater Management Area.

(a) A petition may be submitted to the executive director for the sole purpose of requesting that the commission designate a management area for all or part of one or more counties.

(b) A petition submitted pursuant to this section must be signed by:

(1) a majority of the landowners in the proposed management area; or

(2) if there are more than 50 landowners in the proposed management area, the petition must be signed by at least 50 of those landowners.

(c) A petition submitted pursuant to this section must contain the following statement:

“Petitioners request that the Texas Natural Resource Conservation Commission designate a groundwater management area to include all or part of _____ County (Counties). The management area shall be designated with the objective of providing the most suitable area for the management of groundwater resources of the part of the state in which a district is to be located. Petitioners understand that this petition requests only the designation of a management area, but that all or part of the land in the management area designated may later be added to an existing groundwater conservation district or become a new groundwater conservation district as provided by Texas Water Code, Chapter 36.”

(d) A petition shall include a map that shows the location of the proposed management area and may include any other information desired by the petitioners concerning the proposed management area.

(e) The petitioners shall submit the petition to the executive director.

(f) The petitioners shall supply any additional information requested by the commission or the executive director.

§294.23. Commission Consideration of Petition for Adoption of Rules Designating a Groundwater Management Area.

Within 60 days of the receipt of a Petition To Designate a Groundwater Management Area the commission shall initiate a rulemaking proceeding or deny the petition. If the commission denies the petition, it shall issue an order which sets forth the reasons for denying the petition.

§294.24. Notice of Commission Consideration of Final Adoption of Rules Designating a Groundwater Management Area.

(a) In addition to the notice prescribed by the Administrative Procedure Act (Subchapter B, Chapter 2001, Government Code), the petitioners shall have notice published in at least one newspaper with general circulation in the county or counties in which the proposed management area is to be

located. Notice must be published not later than the 30th day before the date set for the commission to consider the final adoption of the rules designating the management area.

(b) The notice must include:

(1) a statement of the general purpose and effect of designating the proposed management area;

(2) a map generally outlining the boundaries of the proposed management area or notice of the location at which a copy of the map may be examined or obtained; and

(3) the time and place at which the commission will consider the final adoption of rules designating the management area.

(c) If the commission initiates the rulemaking proceeding on its own motion, the chief clerk shall give the same notice as required to be given by the petitioner under this section.

§294.25. Alteration of Groundwater Management Area.

(a) In accordance with Texas Water Code, §35.004, on its own motion or on receiving a petition, the commission, after notice and hearing, may initiate a rulemaking proceeding to alter the boundaries of a designated management area as required by changed or future conditions and as

justified by factual data. A petition for alteration of management area boundaries must allege in detail the facts and circumstances making alteration necessary and be accompanied by a \$100 application fee and petition recording fee of \$1.00 per page.

(b) A petition or request under subsection (a) of this section shall be subject to the provisions and procedures of Subchapter C of this Chapter.

(c) A petition submitted pursuant to this section must be signed by:

(1) if there are less than 50 landowners in the proposed management area, a majority of the landowners in the proposed area for addition to the management area; or

(2) if there are more than 50 landowners in the proposed management area, the petition must be signed by at least 50 landowners in the proposed management area.

SUBCHAPTER D : PRIORITY GROUNDWATER MANAGEMENT AREAS

§§294.30-294.32, 294.34, 294.35

STATUTORY AUTHORITY

The new sections are adopted under the Texas Water Code, §35.012, which provides the Texas Natural Resource Conservation Commission with the authority to designate Priority Groundwater Management Areas to protect groundwater resources.

These rules will implement Texas Water Code Chapter 35, §§35.007-35.013.

§294.30. Definitions.

The following words and terms when used in this Subchapter shall have the following meaning unless the context indicates otherwise:

(1) **Bolson** - Waterbearing formations consisting of unconsolidated sands and gravels.

(2) **Priority Groundwater Management Area** - An area of the state that is experiencing or that is expected to experience, based on information available to the commission and the water development board, within the immediately following 25-year period, critical groundwater problems including shortage of surface or underground water, land subsidence, resulting from underground water withdrawal, and contamination of underground water supplies.

§294.31. Designation of Briscoe, Hale and Swisher County Priority Groundwater Management Area.

(a) Areas of Briscoe, Hale and Swisher County, as described in this section, are designated as a Priority Groundwater Management Area.

(b) The Briscoe, Hale and Swisher County Priority Groundwater Management Area is composed of portions of Briscoe and Hale Counties and all of Swisher County. The portion of Briscoe County below the Caprock Escarpment and the portion of Hale County within the High Plains Underground Water Conservation District Number 1 are excluded from the Priority Groundwater Management Area. All remaining areas in Hale and Briscoe counties are included within the Priority Groundwater Management Area.

(c) A General Description of Boundaries of the Briscoe, Hale and Swisher County Priority Groundwater Management Area is as follows:

(1) beginning at northwest corner of Swisher County, the northern boundary extends to the east and is coterminous with the Swisher-Randall and Swisher-Armstrong County line; and

(2) the boundary continues eastward along the Briscoe-Armstrong County line to the junction with the eastern boundary of Subdivision Number 1 of the Underground Water Reservoir,

High Plains Area, Ogallala Formation, South of the Canadian River, in Briscoe County, as delineated by the Texas Board of Water Engineers in 1950; and

(3) the boundary continues southerly along this boundary in Briscoe County to the southern Briscoe County line; then

(4) west along Briscoe-Floyd and Swisher-Floyd County lines; then

(5) south along the Hale-Floyd County line to the intersection with the boundary of the High Plains Underground Water Conservation District Number 1; then

(6) generally west for approximately twelve miles; then

(7) south along the High Plains Underground Water Conservation District boundary in Hale County line; then

(8) west along the Hale-Lubbock County line to the intersection of the Hale and Lamb County lines; then

(9) north along the Hale-Lamb County line to the intersection of the Hale and Castro County lines; then

(10) east for approximately six miles along the Hale-Castro County line; then

(11) north along the eastern boundary between Hale and Castro Counties to the northwest corner of Swisher County.

(d) The boundaries of the Briscoe, Hale and Swisher County Priority Groundwater Management Area are outlined in the map attached as Exhibit A to this section. **Figure §294.31(d).**

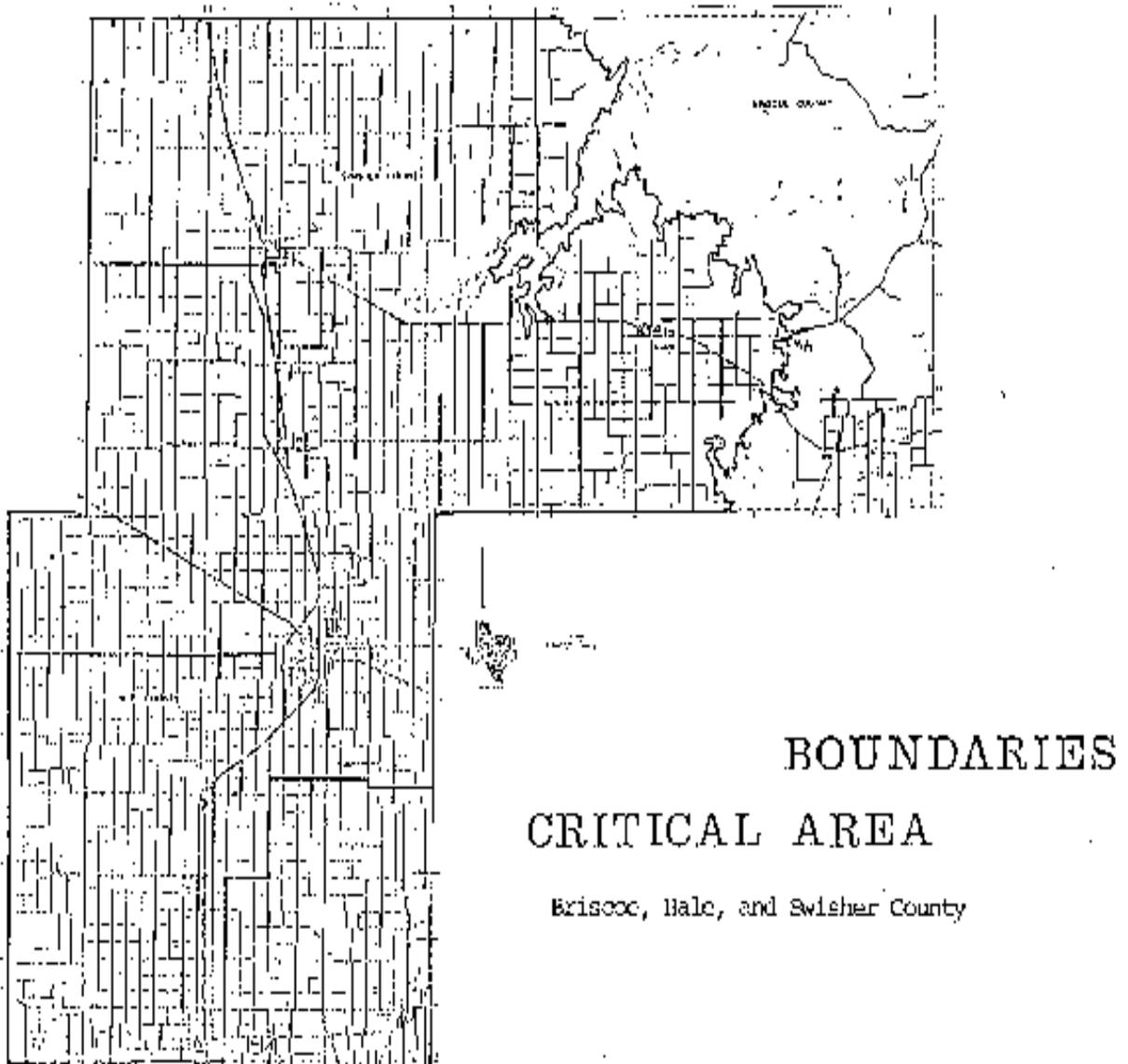


EXHIBIT A

294.31(d)

§294.32. Designation of Dallam County Priority Groundwater Management Area.

(a) An area of Dallam County, as described in this section, is designated as a Priority Groundwater Management Area.

(b) The Dallam County Priority Groundwater Management Area is composed of Dallam County except for the area within the Dallam County Underground Water Conservation District Number 1, which is excluded from the Priority Groundwater Management Area.

(c) A General Description of Boundaries of Dallam County Priority Groundwater Management Area is as follows:

(1) starting at the northeastern corner of Dallam County, the eastern boundary is coterminous with the Dallam County - Sherman County Line; then

(2) the boundary continues west along the Dallam-Hartley County Line to the border between Texas and New Mexico; then

(3) north along the western Dallam County - New Mexico state line to the northwest corner of Dallam County; then

(4) the boundary turns eastward along the Dallam County-Oklahoma state line to the junction with the boundary of the Dallam County Underground Water Conservation District Number 1; then

(5) the boundary follows the district boundary until it again intersects with the Dallam County-Oklahoma State line; then

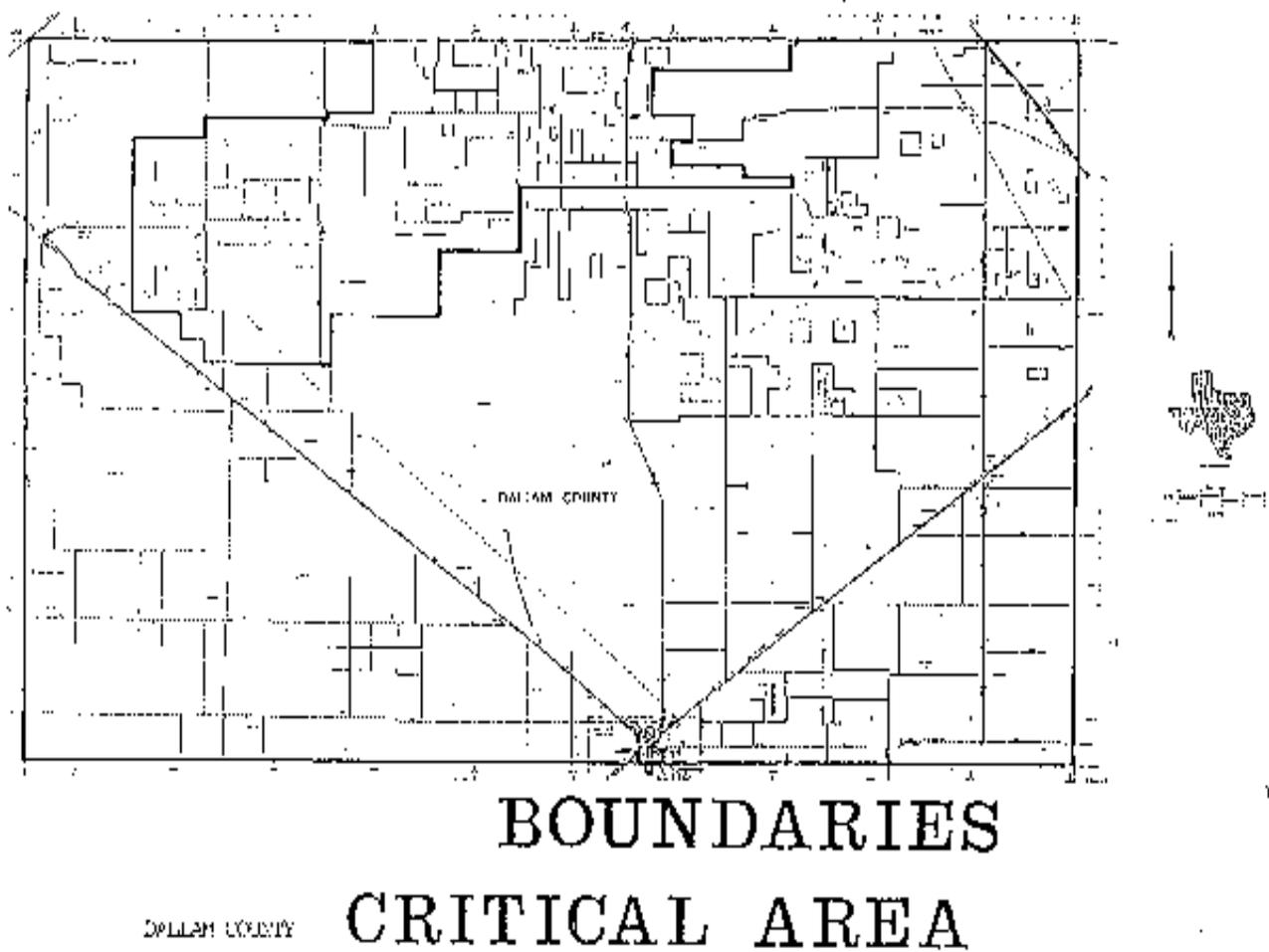
(6) the boundary continues east to the northeast corner of Dallam County.

(d) The boundaries of the Dallam County Priority Groundwater Management Area and outlined in the map attached as Exhibit A to this section.

Figure §294.32(d).

EXHIBIT A

Figure: 30 TAC 294.32(d)



§294.34. Designation of Hill Country Priority Groundwater Management Area.

(a) All of the areas of Bandera, Blanco, Gillespie, Kendall and Kerr Counties, and portions of Comal, Hays and Travis County, are designated as a Priority Groundwater Management Area.

(b) A General Description of Boundaries of the Hill Country Priority Groundwater Management Area is as follows:

(1) starting at the northwest corner of Kerr County, the northern boundary is coterminous with the Kerr-Kimble County line and continues eastward to Gillespie County; then

(2) northward along the Gillespie-Kimble County Line to Mason County;

(3) the northern boundary is conterminous with the Gillespie-Mason, Gillespie-Llano, Blanco-Llano, and Blanco-Burnet County Lines; then

(4) the boundary then continues eastward to the Travis County Line; then

(5) continues north to the Colorado River; then

(6) continues southeast along the Colorado River to the western boundary of the Barton Spring-Edward Aquifer Conservation District; then

(7) continues southerly along this boundary and continues along the northern-western boundary of the Edwards Underground Water District to the Medina County Line; then

(8) is coterminous with the Bandera-Medina and Bandera-Uvalde County Lines; then

(9) continues westward along the Bandera-Uvalde County Line to Real County; then

(10) continues northward and is coterminous with the Bandera-Real, Kerr-Real, and Kerr-Edwards County Lines to the starting point, the northwest corner of Kerr county.

(c) The boundaries of the Hill Country Priority Groundwater Management Area are delineated on the map attached as Exhibit A to this section. **Figure §294.34(c).**

EXHIBIT A

Figure: 30 TAC §294.34(c)



Location Map
Hill Country Critical Area

§294.35. Designation of Reagan, Upton, and Midland County Priority Groundwater

Management Area.

(a) Portions of southeastern Midland County, northeastern Upton County and northern Reagan County are designated as a Priority Groundwater Management Area.

(b) A General Description of Boundaries of the Reagan, Upton and Midland County 1 Priority Groundwater Management Area is as follows:

(1) beginning at the northwest corner of Reagan County, which is also the point where Glasscock, Reagan, Upton and Midland Counties meet; then

(2) east along the county line to the Sterling County line; then

(3) south along the line Reagan-Sterling County line to the Section 1, S-46675, Block A, T.&P. RR Survey; then

(4) west along Section 41, S-37369 of said Blocks; then

(5) to Section 3, S-46677 of said Block and Survey; then

(6) west to the eastern line of Block F, Longview & Sabine Valley Ry County; then

(7) south southeast along said Block to the lower line of Section 21, S-46695, Black A, T&P RRC Surveys; then

(8) west southwest to the northwest corner of Section 11, S-37120, G.C. & S.F. Ry County Survey; then

(9) south along the eastern line of Sections 12 and 13 of said Survey continuing to the northern line of Block 58 of University Land; then

(10) west and south along the eastern line of Section 29 of said Block and Survey continuing along Section 3, Block 10 of said Survey; then

(11) to the Reagan-Upton County line; then

(12) west to the western line of Block 58 of said Survey; then

(13) west along the northern line of Sections 1 and 2, Block G, G.C. & S.F. Ry County Survey continuing along Sections 8, 12, and 13, Block A to Section 1, Block 3 ½, M.K. & T. RR County; then

(14) north along the eastern edge of Section 6, Block 1, J.E. Hamilton Survey to the south line of Block Y G.C. & S.F. Ry County Survey; then

(15) north northwest along the eastern side of Sections 81, 76, and 65, Block Y; then

(16) west southwest to the corner of the Section; then

(17) north northwest between Blocks E and D and Blocks 42 and 41 continuing to the Upton-Midland County line; then

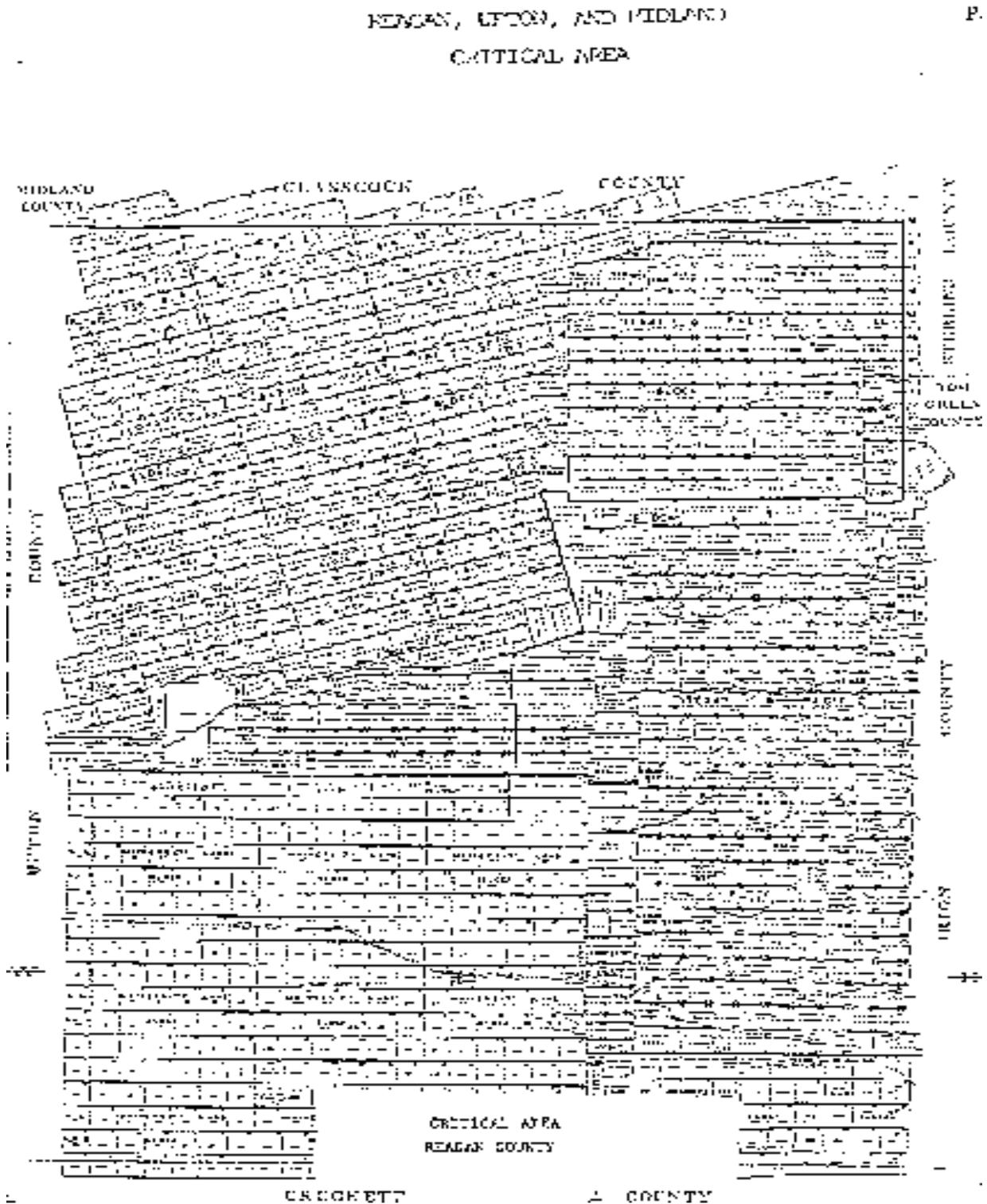
(18) continuing north northwest to the northwest corner of Section 6, #88353, Block 41, Texas and Pac RY County; then

(19) east northeast to the Midland-Glassrock County line; then south along the county line to the starting point.

(c) The boundaries of the Reagan, Upton, and Midland County Priority Groundwater Management Area are delineated on the maps attached as Exhibit A to this section. **Figure §294.35(c).**

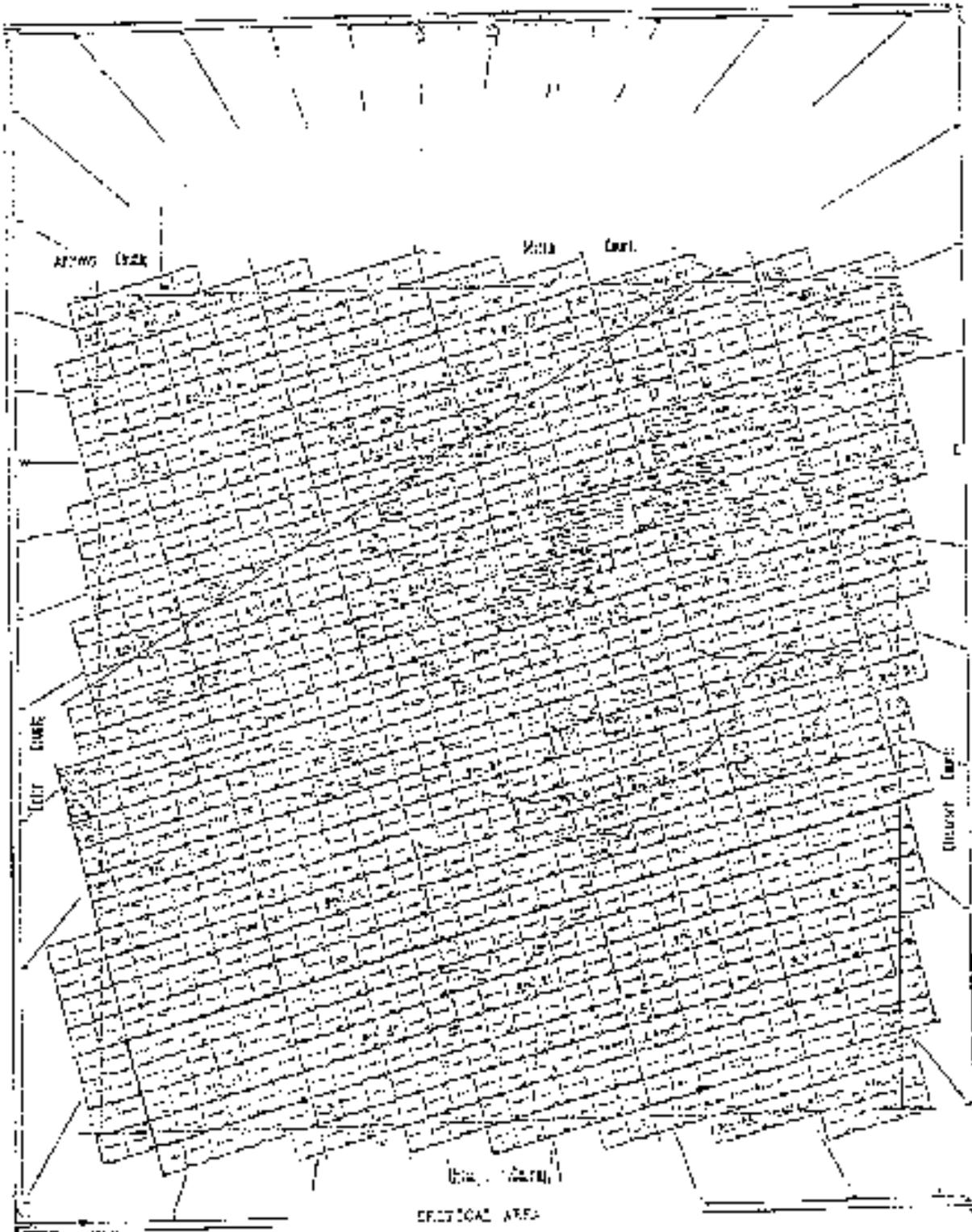
Figure: 30 TAC §294.35(c)

EXHIBIT A



REDGON, UFTEN, AND MIDLAND

CRITICAL AREA



CRITICAL AREA
MIDLAND COUNTY

REAGAN, TOLON, AND MIDLAND

CRITICAL AREA



SUBCHAPTER E : DESIGNATION OF PRIORITY GROUNDWATER MANAGEMENT

AREAS

§§294.40-294.44

STATUTORY AUTHORITY

The new sections are adopted under the Texas Water Code, §35.012, which provides the Texas Natural Resource Conservation Commission with the authority to designate Priority Groundwater Management Areas to protect groundwater resources.

These rules will implement Texas Water Code Chapter 35, §§35.007-35.013.

§294.40. Definitions.

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

(1) **Affected person** - A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(2) **Executive Administrator** - the Executive Administrator of the Texas Water Development Board.

(3) **Priority groundwater management area (PGMA)** - an area designated and delineated by the commission as an area that is experiencing or is expected to experience, within the immediately following 25 year period, critical groundwater problems, including shortages of surface water or groundwater, land subsidence resulting from groundwater withdrawal, and contamination of groundwater supplies.

§294.41. Executive Director's Report Concerning Priority Groundwater Management Area Designation.

(a) The executive director, the executive administrator and the executive director of the Texas Parks and Wildlife Department or their designees shall meet at least once a year to identify, based on information gathered by the commission and the Texas Water Development Board, those areas of the state that may be experiencing or expected to experience critical groundwater problems within the immediately following 25-year period.

(b) If the executive director concludes that an area of the state should be considered for designation as a (PGMA), the executive director shall prepare a report to the commission.

(c) The executive director shall begin preparation of a PGMA report by requesting a study from the executive administrator. The study must:

- (1) include an appraisal of the hydrogeology of the area and matters within the Texas Water Development Board's planning expertise relevant to the area;
 - (2) assess the area's immediate, short-term, and long-term water supply and needs; and
 - (3) be completed and delivered to the executive director on or before the 180th day following the date of the request. If the study is not delivered within this 180-day period, the executive director may proceed with the preparation of the report under subsection (b) of this section.
- (d) Before the executive director requests a study from the executive administrator under subsection (c) of this section, the executive director shall provide written notice of consideration of the area for designation as a PGMA, and the opportunity to comment or provide studies or information, to the governing body of each county, regional water planning group, adjacent groundwater district, municipality, river authority, water district, or other entity which supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission, and of each irrigation district, located either in whole or in part in the proposed PGMA. Not later than the 45th day after the date of the notice, a person required to receive notice under this subsection may submit to the executive director any existing information or studies that address the potential effect on an area of being identified as experiencing or expected to experience critical groundwater problems. The executive director shall consider this information in making its recommendation.

(e) The executive director shall also request a study from the executive director of Parks and Wildlife Department for the purpose of preparing the report required by this Subchapter. The study must:

(1) evaluate the potential effects of the designation of a PGMA on an area's natural resources; and

(2) be completed and delivered to the executive director on or before the 180th day following the date of the request. If the study is not delivered within this 180-day period, the executive director may proceed with the preparation of the report under subsection (b) of this section.

(f) The executive director's report shall include:

(1) the recommended delineation of the boundaries of any proposed PGMA in the form of a proposed order to be considered for adoption by the commission;

(2) the reasons and supporting information for or against designating the area as a PGMA;

(3) if the designation of a PGMA is recommended, a recommendation regarding whether a district should be created in the PGMA or whether the PGMA should be added to an existing district;

(4) a recommendation as to actions that should be considered to conserve natural resources;

(5) an evaluation of information or studies submitted to the executive director under subsections (c)-(e) of this section; and

(6) any other information that the executive director considers helpful to the commission.

(g) The executive director must complete the report and file it with the commission on or before the 240th day following the date on which the executive administrator was requested to produce a study. In addition, the executive director shall provide the following notice:

(1) At the same time the executive director files the report with the commission, the executive director shall make the report available for public inspection by providing a copy of the report to at least one public library and the county clerk's office in each county in which the proposed PGMA is located and to all groundwater conservation districts adjacent to the area of the proposed PGMA.

(2) The executive director shall also publish notice in the *Texas Register* that this report has been prepared, explaining the executive director's recommended action, and stating where the report may be obtained.

(3) This notice shall be published in the *Texas Register*, and mailed to the same persons who received notice of the initiation of the PGMA study under §294.41(d) of this title (relating to Executive Director's Report Concerning Priority Groundwater Management Area Designation), within 30 days that the report is filed with the commission.

(h) To prepare this report, the executive director may make necessary studies, hold public meetings, solicit and collect information, or use information already prepared by the executive director or the executive administrator for other purposes.

(i) If the executive director recommends that no PGMA designation be made in the area studied, no further action by the executive director or the commission is necessary. However, a person who receives mailed notice under §294.31(g)(3) of this title may file a motion for reconsideration under §50.39 of this title (relating to Motion for Reconsideration).

§294.42. Commission Action Concerning PGMA Designation.

(a) The commission shall consider the executive director's proposed designation of PGMA's using the procedures set out in this subchapter.

(b) The commission shall call an evidentiary hearing to consider:

(1) the proposed designation of a PGMA;

(2) whether a district should be created, and if so, whether it should include all or part of a PGMA; or

(3) whether all or part of the land in the PGMA should be added to an existing district.

(c) Evidentiary hearings shall be held in one of the counties in which the PGMA is proposed to be located, or in the nearest convenient location, if adequate facilities are not available in those counties.

(d) At the hearing, the commission, or a judge, if the hearing is remanded to SOAH, shall hear testimony and receive evidence from affected persons. The executive director may request that the hearing be remanded to SOAH. The commission or the judge shall consider the executive director's report and supporting information and the testimony and evidence received at the hearing. If the commission or judge considers further information necessary, the commission or judge may request such information from any source.

(e) The designation or non-designation of a PGMA may not be appealed nor may it be challenged under Texas Government Code §2001.038.

(f) The commission shall have notice of the hearing published in at least one newspaper with general circulation in the county or counties in which the area proposed for designation as a PGMA or the area within a PGMA being considered for district creation or for addition to an existing district is

located. Notice must be published not later than the 30th day before the date set for the commission to consider the designation of the PGMA, and the need for the creation of a district in a PGMA, or the addition of land in a PGMA to an existing district.

(g) Notice of the hearing must include:

(1) if applicable, a statement of the general purpose and effect of designating the proposed PGMA;

(2) if applicable, a statement of the general purpose and effect of creating a district in the PGMA;

(3) if applicable, a statement of the general purpose and effect of adding all or part of the land in the PGMA to an existing district;

(4) a map generally outlining the boundaries of the area being considered for PGMA designation or if different the area within the proposed PGMA being recommended for district creation or for addition to an existing district, or notice of the location at which a copy of the map may be examined or obtained;

(5) a statement that the executive director's report concerning the PGMA or proposed PGMA is available at the commission's main office in Austin, Texas, and at regional offices of the

commission for regions which include territory within the PGMA or proposed PGMA and that the report is available for inspection during regular business hours;

(6) a description of the name of the locations in the affected area at which the commission has provided copies of the executive director's report to be made available for public inspection;

(7) the name and address of each public library, each county clerk's office, and each district to which the commission has provided copies of the executive director's report; and

(8) the date, time, and place of the hearing.

(h) The commission shall also give written notice of the date, time, place, and purpose of the hearing to the governing body of each county, regional water planning group, adjacent groundwater district, municipality, river authority, water district, or other entity which supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission, and of each irrigation district, located either in whole or in part in the PGMA or proposed PGMA. This notice shall be given before the 30th day preceding the date set for the hearing.

(i) At the conclusion of its hearing and considerations, the commission shall issue an order stating its findings and conclusions:

(1) If the commission decides that a PGMA should be designated, the commission shall designate and delineate the boundaries of the PGMA.

(2) If the commission designates the area as a PGMA, and it finds that the land and other property in the PGMA would benefit from the creation of one or more districts, that there is a public need for one or more districts, and that the creation of one or more districts would further the public welfare, the commission shall include in its order the finding that creation of one or more district is needed.

(3) If the commission designates the area as a PGMA, and if land in a PGMA is located adjacent to one or more existing districts, the commission may include in its order a finding that the PGMA be added to an existing district designated by the commission. In its order, the commission must find that the land and other property in the PGMA and the land in the existing district will benefit from the addition of the area, that there is a public need to add the PGMA to the existing district, and that the addition of the land to the existing district would further the public welfare.

(4) If the commission fails to find that a district would be a benefit to the land and other property within the PGMA, that there is a public need for the district, or that creation of the district or annexation to an existing district will further the public welfare, the commission's order shall state that a district should not be created within the boundaries of the PGMA.

(j) The Administrative Procedures Act, Texas Government Code Annotated, §2001 et seq., does not apply to evidentiary hearings held under this subsection.

§294.43. Landowner Actions in a PGMA.

(a) Following the issuance of a commission order under §294.42 (i)(2) of this title (relating to Commission Action Concerning PGMA Designation) designating a PGMA and finding that one or more districts should be created in the PGMA and prior to the close of next regular session of the legislature, landowners in the PGMA may:

(1) create one or more districts under Chapter 293 of this title (relating to Water Districts);

(2) have the area annexed to a district that adjoins the area; or

(3) create one or more districts through the legislative process.

(b) The executive director shall identify the areas subject to any order of the commission under subsection (a) of this section that have not been incorporated into a district and shall delineate proposed boundaries of a district, or area to be annexed to include those areas, and initiate a report including recommendations to the commission for the annexation of the identified areas to an adjacent existing district under §294.44 of this title (relating to Adding a PGMA for an Existing District) or for the

creation of one or more districts under provisions of §293.21 of this title (relating to Commission Creation of Groundwater Conservation Districts in Priority Groundwater Management Area on its Own Motion). This report shall be completed and filed with the commission within 120 days after notice of initiation of the report is given under paragraph (1) of this subsection.

(1) The executive director shall provide written notice of the delineation of the boundaries and the initiation of the report to the governing body of each county, regional water planning group, adjacent groundwater district, municipality, river authority, water district, or other entity which supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission, and of each irrigation district, located either in whole or in part within the proposed district boundaries.

(2) At the same time notice is given under paragraph (1) of this subsection, the executive director shall notify the Texas Agricultural Extension Service of the proposed district boundaries and initiation of the executive director's report to begin an educational program within the identified areas with the assistance and cooperation of the Texas Water Development Board, the commission, other state agencies, and existing districts to inform the residents of the status of the area's water resources and management options including possible formation of a district.

§294.44. Adding a PGMA to an Existing District.

(a) If the commission orders, pursuant to §294.42(i)(3) of this title (relating to Commission Action Concerning PGMA Designation), that the PGMA or a portion of the PGMA be added to an existing district it shall give notice to the board of the existing district.

(1) The commission shall submit a copy of the order to the board of the district to which it is recommending the PGMA be added and to any other existing districts adjacent to the PGMA.

(2) The board shall vote on the addition of the PGMA to the district and shall advise the commission of the outcome.

(b) If the board votes to accept the addition of the PGMA to their district, the board:

(1) may request the Texas Agricultural Extension Service, the commission, the Texas Water Development Board, and other state agencies to administer an educational program to inform the residents of the status of the area's water resources and management options including possible annexation into a district;

(2) shall call an election within the PGMA as delineated by the commission to determine if the PGMA will be added to their district; and

(3) shall designate election precincts and polling places for the elections in the board's order calling for an election under this subsection.

(c) The board shall give notice of the election and the proposition to be voted on. The board shall publish notice of the election at least one time in one or more newspapers with general circulation within the boundaries of the PGMA. The notice must be published before the 30th day preceding the date set for the election.

(d) The ballots for the election shall be printed to provide for voting for or against the proposition: "The inclusion of _____ (briefly describe the PGMA) in the _____ District." If the district has outstanding debts or taxes, the proposition shall include the following language: "and assumption by the described area of a proportional share of the debts or taxes of the district."

(e) Immediately after the election, the presiding judge of each polling place shall deliver the returns of the election to the board, and the board shall canvass the returns for the election within the PGMA and declare the results. If a majority of the voters in the PGMA voting on the proposition vote against adding the PGMA to the district, the board shall declare that the PGMA is not added to the district. The board shall file a copy of the election results with the commission.

(f) If the voters approve adding the PGMA to the district, the board of the district to which the PGMA is added shall provide reasonable representation on that board compatible with the district's existing scheme of representation.

(g) If the proposition is defeated, another election to add the PGMA to an existing district may not be called before the first anniversary of the date on which the election on the proposition was held.

(h) The costs of an election to add a PGMA to an existing district at which the voters approve adding the PGMA to the district shall be paid by the existing district. The costs of an election to create a district or add a PGMA area to an existing district at which the proposition fails shall be paid by the commission.

(i) If the proposition is defeated, the commission may recommend to the legislature under Texas Water Code §35.018(c) in its biennial report whether legislative action should be taken to address the need for groundwater management in the PGMA.

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§295.5, 295.9, 295.13, 295.21, 295.22, 295.91, 295.111, 295.133, 295.134, 295.155 and 295.156 and adopts new §§295.16, 295.112, 295.113, and 295.161 relating to Water Rights, Procedural. Sections §§295.5, 295.9, 295.13, 295.91, 295.111, 295.112, 295.113, 295.155, and 295.161 are adopted with changes. Sections 295.16, 295.21, 295.22, 295.133, 295.134 and 295.156 are adopted without changes to the proposed text as published in the October 9, 1998, *Texas Register* (23 TexReg), and will not be republished.

The amendments to §§295.5, 295.9, 295.13, 295.21, 295.22, 295.91, and 295.111 and new §§295.16, 295.112, 295.113, are contained in Subchapter A, Requirements for Water Right Applications. The purpose of the rules is to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010), and to put into rule, where necessary, agency regulatory guidance contained in “A Regulatory Guidance Document for Application to Divert, Store or Use State Water” (RG-141 June 1995).

The amendments to §295.133 and §295.134 are contained in Subchapter B, Water Use Permit Fees. The purpose of the rules is to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

Additionally, the amendments of §295.155 and §295.156 and the adoption of new §295.161 are contained in Subchapter C, Notice Requirements for Water Use Permit Applications. The purpose of

the rules is to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

EXPLANATION OF ADOPTED RULE

The title of Subchapter A is changed to clarify that the subchapter includes all classes of water rights administered by the commission, including certificates of adjudication, claims, and certified filings as well as permits. This section simply tracks the statute.

Amendments to §295.5, Amount and Purpose of Diversion and Use, implement changes made to Texas Water Code §11.134 by Senate Bill 1 (1997) authorizing multiple purposes of use for the same appropriative amount by requiring this information to be provided in the application, if appropriate.

Amendments to §295.9, Conservation Plan, do not institute new substantive requirements for water right applications. Rather, they reflect proposed changes to related rules contained in Chapter 288 of this title. Specifically, the drought contingency components previously required in water conservation plans under Chapter 288 to be submitted with a water right application have been separated into a new subchapter specific to drought contingency plans in order to implement new Texas Water Code §11.1272 enacted by Senate Bill 1 (1997). This separation and reorganization of Chapter 288 requires adding “drought contingency plans” to the title and relevant portions of §295.9 to continue the requirement that drought contingency measures also be submitted with the application.

Amendments to §295.13, Interbasin Transfers, implement changes made to Texas Water Code §11.085 by Senate Bill 1 by adding corresponding additional application content requirements for an application for an interbasin transfer, unless exempted by Texas Water Code §11.085(v). These changes are necessary because §11.085 contains new requirements for interbasin transfers.

New §295.16, Consistency With State and Regional Water Plans, implements changes made to Texas Water Code, §11.134 and §11.1501 by Senate Bill 1, and tracks the language of the statute by providing that the application shall contain information describing how the application addresses a water supply need consistent with the state water plan and the applicable approved regional water plan or, in the alternative, whether present conditions exist that warrant a waiver of this requirement.

Amendments to §295.21, Aquifer Storage and Retrieval Projects, implement changes made to Texas Water Code §11.153 by Senate Bill 1 by deleting the list of specific aquifers where such projects may be authorized and providing that such projects may be authorized for aquifers where completed pilot projects or historically demonstrated projects have been shown to be feasible. This change tracks statutory language.

Amendments to §295.22, Additional Requirements for the Underground Storage of Surface Water for Subsequent Retrieval and Beneficial Use, implement changes made to Texas Water Code §§11.154 and 11.155 by Senate Bill 1 by changing the terms “critical area” and “underground water” to “priority groundwater management area” and “groundwater,” respectively.

Amendments to §295.91, Application for Emergency Water Use Authorization, implement changes made to Texas Water Code §11.139 by Senate Bill 1 by providing additional, statutory application content requirements for the emergency appropriation or transfer of water.

Amendments to §295.111, Application, change the title as well as the section to clarify that this provision relates to a bed and banks authorization under Texas Water Code §11.042(a) providing for the release of water from a storage reservoir and its conveyance downstream to meet a water supply contract. The rule also adds that a person seeking such bed and banks authorization must also submit information on how the conveyance of the water will be measured. The changes are necessary in order to assure that no more water will be diverted at the delivery point than water being released, less carriage losses.

New §295.112, Application to Convey Groundwater-Based Effluent in Bed and Banks, implements changes made to Texas Water Code §11.042(b) and (d) by Senate Bill 1 by providing the application content requirements for the use of bed and banks for the discharge of groundwater-based effluent into a stream and its subsequent diversion and use. This information is needed to determine what special conditions, if any, may be necessary to protect affected water rights and environmental flow needs as provided by Texas Water Code, §11.042(b). Nothing in this rule shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission prior to September 1, 1997.

New §295.113, Application to Convey Water in Bed and Banks, implements changes made to Texas Water Code §11.042(c) and (d) by providing the application content requirements for a bed and banks authorization for the conveyance of water in a state watercourse other than provided by Texas Water Code §11.042(a) and (b). This information is needed to determine what special conditions, if any, may be necessary to protect affected water rights and environmental flow needs as provided by Texas Water Code, §11.042(c). Nothing in this proposed rule shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission prior to September 1, 1997.

Amendments to §295.133, One-Time Use Fees, and §295.134, Maximum Fees, implement changes made to Texas Water Code §5.235 by Senate Bill 1 providing the statutory language that the one-time use fee to be submitted with an application to use saline tidal water for industrial processes shall be one dollar per acre-foot, not to exceed a total fee of five thousand dollars (\$5,000). Additionally, the rule provides that for an application requesting multiple purposes for the same amount of water, the fee is based on the use with the highest fee.

The title of Subchapter C has been changed to clarify that the subchapter includes all classes of water rights administered by the commission, including certificates of adjudication, claims, and certified filings as well as permits.

Amendments to §295.155, Notice for Interbasin Transfers, implement changes to Texas Water Code §11.085 made by Senate Bill 1 (1997) by providing additional statutory notice requirements for an application for an interbasin transfer.

Amendments to §295.156, Notice for Emergency Water Use, implement changes to Texas Water Code §11.139 made by Senate Bill 1 (1997) by providing additional statutory notice requirements for an application for the emergency use of water.

New §295.161, Notice of Applications to Convey Water in Bed and Banks, implements changes made to Texas Water Code §11.042(b) and (c) by Senate Bill 1 (1997) by providing notice requirements for applications to convey water, including groundwater, discharged into a stream or watercourse for subsequent diversion and use. Specifically, notice is provided to existing water right holders downstream of the discharge point as well as the Public Interest Counsel and the Texas Parks and Wildlife Department for the diversion of historically discharged groundwater and water under Texas Water Code, §11.042(b) and §11.042(c), respectively. Such notice to downstream water right holders needs to be provided since §11.042(b) and (c) provide that existing water rights that were based upon the availability or use of historical return flows may potentially be affected by the diversion of these return flows under a bed and banks authorization. However, in the case of a new or increase of discharge of groundwater, notice is provided to water right holders of record between the points of discharge and diversion to provide consistency with the notice under §295.160 provided for the diversion of stored or conserved water as well as to “affected persons” as may be required under the Texas Administrative Procedures Act. Notice is also provided to the Texas Parks and Wildlife

Department pursuant to Texas Water Code, §11.147(f). The Public Interest Counsel also receives notice in accordance with Texas Water Code, §5.273.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to this provision because it does not meet any of the four applicability requirements listed in the provision because the rule is specifically required by changes made to the Water Code by SB 1 (1997), there is no applicable federal law, it does not otherwise exceed any express requirements of state law, and does not involve any delegation agreements or contracts. This rulemaking only implements state law, and all requirements not specifically stated in the law, are necessary to carry out the express provisions of the law, as stated above.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Statement for these rules pursuant to Texas Government Code §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to adopt criteria and guidelines for the submission of certain water right applications. Promulgation and enforcement of these rules will not burden private real property. Rather, they implement statutory requirements providing procedural requirements for the beneficial use of state water to which persons have been granted a usufructuary interest and over which the state retains supervisory oversight in trust for the public for the protection of the public health, safety, and welfare. None of these requirements would adversely impact private real property.

COASTAL MANAGEMENT PROGRAM

The commission has determined the rulemaking is subject to the Texas Coastal Management Program and has reviewed the rules for consistency in accordance with the Coastal Coordination Act Implementation Rules, 31 TAC §505, relating to Council Procedures for State Consistency with Coastal Management Program Goals and Policies, and in particular, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, and has identified the rule as potentially affecting an action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Applicable goals contained in 31 TAC §501.12 include: 1.) To protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 2.) To ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; and 5.) To balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone. Of the eighteen policies contained in 31 TAC §501.14, relating to Policies for Specific Activities and Coastal Natural Resource Areas, only one: (r) Appropriations of Water, has the potential for being affected by the rule. The commission has reviewed these rules for consistency with the aforementioned goals and policies of the Texas Coastal Management Program and has determined the rules are consistent with the intent of the applicable goals and policies and will not result in any significant adverse effects to CNRAs. The rules implement, in part, provisions under Chapter 11 of the Texas Water Code requiring the assessment of environmental impacts from applications for new and amended water rights to existing instream uses, aquatic and wildlife habitat, water quality, and freshwater inflows to bays and estuaries.

In determining what conditions may be placed on the water right, if granted, the commission is to weigh such impacts with the proposed use of the water to balance such benefits with any potential impacts. The commission may also require that if such impacts cannot be avoided, that they be minimized and mitigated.

PUBLIC HEARING

A public comment hearing on the proposed rules was held in Austin on October 29, 1998. One commenter submitted comments.

GENERAL COMMENTS

Written comments suggesting changes to the proposed rules were provided by: the American Land Foundation (ALF); the Association of Electric Companies of Texas, Inc. (AECT); Bracewell & Patterson, L.L.P., on behalf of the company of Azurix, a subsidiary of the Enron Corporation; Booth, Ahrens & Werkenthin, L.L.P., on behalf of the City of Victoria (Victoria) and Tarrant Regional Water Authority (Tarrant Regional); Bracewell & Patterson, L.L.P., on behalf of Associated General Contractors (AGC); Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll); Brown & Potts, L.L.P. (Brown & Potts); the Brazos River Authority (BRA); the City of Dallas; the Law Offices of Glenn Jarvis on behalf of the Texas Irrigation Council (TIC); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre); the Lake Medina Conservation Society (LAMCOS); the Law Offices of Louis T. Rosenberg, P.C., on behalf of Bexar Metropolitan Water District (Bexar Met); the City of North Richland Hills (North Richland Hills); the Public Interest Council of the Texas Natural Resource Conservation Commission (PIC); the San Antonio Water System (SAWS); Small,

Craig & Werkenthin, P.C., on behalf of the Texas and Southwestern Cattle Raisers' Association (Cattle Raisers); the Texas Water Conservation Association (TWCA); the Texas Water Development Board (TWDB); and Texas Utilities Services (TU).

Henry, Lowerre, Johnson, Hess & Frederick stated that proposed revisions to Chapter 295 were subject to the Texas Coastal Management Program (CMP) and by failing to acknowledge this, the TNRCC failed to comply with the requirements of 31 TAC Section 505.22.

The commission disagrees with the comment. The commission has conducted a consistency review of the adopted rules in accordance with 31 TAC 505.22 and has found the rules to be consistent with the applicable goals and policies of the CMP (see Coastal Management Program section).

SAWs comments that the definition for "municipal use" contained in §297.1(29) also be provided in Chapter 295 and that revisions to the definition substitute the language "reuse of such water" for "use of sewage" and "municipal, industrial and commercial" uses be substituted for "urban uses".

The commission disagrees with the comment because §297.1 expressly provides that those definitions are also applicable to Chapter 295 and that the inclusion of the term "reuse" and uses other than municipal would greatly expand current authorizations for municipal water rights. Changes in purpose of use, diversion point, and location of use that may be associated with reuse and industrial and commercial use require the approval of an amendment to the water right in accordance with Texas Water Code §§11.122, 11.042 and 11.046.

Henry, Lowerre commented that §295.5, Amount and Purpose of Diversion and Use, should be clarified that even when an applicant seeks authorization for multiple uses, the applicant should be required to specify the amount for each separate use so that there is a reasonable basis for assessing the need for the requested amount of water and consistency with the state or applicable regional water management plans.

The commission agrees with the comment and has revised the rule accordingly.

AECT commented that proposed §295.9 should be clarified to indicate that water conservation and drought contingency plans must be submitted with an application for a new water right as well as with an application for an amended water right as provided by subsection (4) of this section.

The commission disagrees with the need for this clarification because the other subsections of the rule expressly provide that water conservation and drought contingency plans must be submitted with an application for a water right.

The AECT also commented that §295.9 (4) should be clarified by expressly referencing the requirements of Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements).

The commission disagrees with the need for this clarification because subsection (4) requires that plans submitted with an application for an amendment must meet the requirements of the section,

which already provides that water conservation and drought contingency plans meeting the requirements of Chapter 288 must be submitted with an application for an amendment to a water right.

An individual commented that proposed §295.13 be revised to require the applicant to develop watershed management plans that address all environmental water needs identified in Chapter 11 of the Water Code. The individual further commented that this requirement apply to all sub-basins or watersheds subject to interbasin transfers in which the cumulative daily diversion rate or monthly diversion amount is greater than the fifth percentile daily discharge or fifth percentile monthly volume, respectively.

The commission disagrees with the need for this modification since the rule clearly provides for the assessment of impacts resulting from an application to transfer water from one basin to another relative to existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries. Pending results of the individual assessments, the commission may impose specific conditions on any transfer to protect and preserve environmental resources.

Brown & Potts, L.L.P, commented that proposed §295.13(b) should be clarified to recognize that if there is no approved regional plan existing at the time of the application for an interbasin transfer is submitted, this information is not required to be submitted with the application.

The commission agrees with the comment and has revised the rule accordingly.

Azurix commented that proposed §295.13(b)(9) be revised to provide that the application contain “information required to be submitted by the applicant”, rather than “any other related information the executive director or commission may require to make recommendation or determination, as applicable, whether (the application) meets all applicable requirements.” The commenter states that the latter language is broader in scope than that authorized by statute.

The commission disagrees that the rule is broader in scope than the statute and simply provides that the executive director or commission may require the applicant to submit clarifying or supporting information that goes toward meeting application requirements.

Bexar Met commented that subparagraph (c)(4) of proposed §295.13, Interbasin Transfers, should be revised to provide that a proposed transfer from a basin to a municipal water district that is partially within the basin for use in that part of the district not within the basin should also be exempt from application content requirements provided in subsection (b) of that section.

The commission disagrees with the comment because such exemption for transfers under Texas Water Code §11.085(v) are only provided to municipalities and counties that straddle a basin line, and not to districts.

Bexar Met commented that proposed §295.21, Aquifer Storage and Retrieval Projects, should allow a phased progression from pilot status to Phase II long-term basis without separate proceedings.

The commission disagrees with this comment because Texas Water Code §11.153 specifically provides for separate proceedings for a Phase I pilot project and Phase II long-term project to allow the commission and Texas Water Development Board to evaluate the feasibility of the pilot project and provide notice and opportunity for hearing on such analysis as well as whether the project should be granted on a long-term basis.

The TWCA, TU and AECT commented that proposed §295.91, Application for Emergency Water Use, should be revised to provide that an application for an emergency transfer or appropriation of water include information on the steps made by the applicant to develop and implement a water conservation and drought contingency plan in order for the commission to be able to assess whether practical alternatives exist to the proposed emergency transfer or appropriation as required by Texas Water Code §11.139 and §297. 17 of this title (relating to Emergency Authorization (Texas Water Code §11.139)).

The commission agrees with the comment and has revised the rule accordingly.

Tarrant Regional comments that proposed §295.111, Authorization to Convey Stored Water in Bed and Banks, improperly narrows the definition of “stored” water in Texas Water Code §11.042(a) to mean water stored in a reservoir and requests that the statutory language “stored” water only be used in the rule.

The commission disagrees with the comment, in part, because the term “stored” means water that has been stored in a reservoir and is being proposed for release and conveyance in the bed

and banks for downstream use. Such definition is consistent with previous commission authorizations under this section and the purpose of the proposed change was not to substantively change the interpretation or use of this rule or Texas Water Code §11.042. Without such clarification, the meaning of “stored” water could be subject to different interpretations that would have unintended consequences and inconsistencies with other subsections of the rule relating to what reuse projects may be authorized under a bed and banks permit. In response to the comment, however, the inclusion of “conserved water” has been made to clarify that this rule seeks to implement Texas Water Code §11.042(a) relating to both stored and conserved water. A definition for “conserved water” is contained in §297.1 of the rules (relating to Definitions) and is consistent with Texas Water Code §11.002(9).

Henry, Lowerre commented that §§295.111, 295.112, and 295.113 relating to bed and banks authorizations, should be clarified to provide that nothing in these sections shall be construed to affect an existing project for which all required water rights and reuse authorizations have been granted by the commission prior to September 1, 1997, as provided under Texas Water Code §11.042(d).

The commission agrees with the comment and has revised the rules accordingly.

Henry, Lowerre commented that, in accordance with Texas Water Code §11.042(b) and (c), §§295.111, 295.112, and 295.113 should be clarified to require that the applicant submit an assessment of the adequacy of the quantity and quality of flows remaining after the proposed diversion to meet instream flow and bay and estuary freshwater inflow needs. The commenter also requests that the rules

provide the executive director with express authorization to require the applicant to submit additional information addressing the criteria for review and approval of the application.

The commission agrees with the comment and has revised the rule accordingly. The statement of adequacy of the flows is necessary to implement the statutory provisions that the commission may include special conditions to maintain instream flows and freshwater inflows to bays and estuaries provided under Texas Water Code, §§11.147, 11.150, and 11.152.

LAMCOS comments that proposed §§295.111, 295.112, and 295.113 should be revised to provide that the calculation of carriage losses include the loss of water through seepage and evaporation of the water before it is released and conveyed downstream, that all water right holders of record be provided notice of an application for a bed and banks permit, and that the rules specifically require that executive director approval is required of the method of measuring carriage losses.

The commission disagrees with the comment . Losses resulting from storage in the reservoir are taken into consideration when calculating the safe yield of the reservoir, therefore carriage losses occurring between the discharge point and diversion point may include such factors as evaporation, seepage, evapotranspiration, and losses to the adjacent alluvial banks and flood plains. Charging reservoir evaporation and seepage to the carriage losses constitutes double accounting. With regard to the comment on notice for an application under §295.111 relating to the conveyance of stored water, §295.160, Notice of Applications to Convey Stored Water, is not the subject of this proposed rulemaking. However, concurrent with this rulemaking, the

commission has provided notice and request for comment on the regulatory review of all of Chapter 295 and shall consider this comment in any subsequent, related rulemaking.

Tarrant Regional comments that it is in support of proposed §295.133(d) providing that for multiple use permits, only one use fee should apply and requests the commission to clarify that this approach is reflective of current policy and practice rather than a change of policy and practice.

The commission agrees with the comment and acknowledges that the rule is reflective of current policy and practice.

AECT commented that proposed §295.155, Notice for Interbasin Transfers, be revised to provide notice to regional water planning groups in both the basin of origin and in the receiving basin to assist the commission in assessing the impacts to both basins and determining consistency with applicable regional water management plans as required by Texas Water Code §§11.085, 11.134 and 11.1501, respectively.

The commission agrees with the comment and has revised the rule accordingly for the reasons provided and pursuant to Texas Water Code §11.132 which provides the commission with the authority to require notice of an application to those persons who, in the judgement of the commission, may be affected by the granting of the application.

The City of Victoria comments that proposed §295.155 (a) should be amended to provide that a change in place or purpose of use for an existing interbasin transfer constitutes a new interbasin transfer for which additional requirements should apply.

The commission disagrees with this comment because the additional requirements for a new transfer seek to address the impacts of the loss of water from the basin of origin, not on a transfer of water that has already been authorized. In the case of a change in purpose or location of use for an already authorized transfer, impacts from the transfer itself have already been assessed and addressed when the original transfer was granted. Changes in purpose of use or place of use for water that has already left the basin of origin would not have any greater impact on the basin of origin than the original transfer. Whether there is a justified need for the change in purpose or place of use are already addressed under Texas Water Code §11.085(j) making applicable Texas Water Code §§11.122, 11.1271, 11,134 and other Code provisions generally applicable to an application for an amended water right. However, in response to the comment, the commission has clarified that where a change in place of use is for use in a basin other than authorized, such transfer shall constitute a new interbasin transfer so that impacts on the previously authorized receiving basin may be assessed, unless the transfer is otherwise exempt under §11.085(v).

SAWS comments that proposed §295.155(d)(4) relating to the exemption for additional requirements for those interbasin transfers to a city or county that straddle basin lines should be clarified to extend such exemption to the use of water in a city and its service area as these areas expand in the future

without having to obtain additional authorization from the commission. SAWS also comments that the descriptions of this exemption in §295.155(d)(4) and §297.18(k)(4) should be consistent.

The commission agrees with the comments and further responds that the intent of the rule is, in part, to prevent the sidestepping of the interbasin transfer requirements by using the exemption to leapfrog into another basin. This could be attempted by transferring the water first to a county or a city that straddles the basin line and then relaying the water further into the receiving basin for use in a city or county that does not straddle the basin line. The commission has revised the rules to allow use of the water in a city or county as the service area expands without further authorization but to clarify its intent to prevent transfers that attempt to leapfrog the additional requirements applicable to an interbasin transfer. Additionally, both §295.155(d)(4) and §297.18(k)(4) have been revised so that they contain the same exact language.

Brown & Potts comments that proposed §295.156, Notice for Emergency Water Use, should be revised to provide that notice of the initial emergency authorization shall be provided to all water right holders of record.

The commission disagrees with the comment because Texas Water Code §11.139 allows limited or no notice of the initial authorization. This is because insufficient time exists to provide such notice and meet an emergency need for water. Providing such notice for the initial authorization would also defeat the utility of acting quickly to address an emergency and, therefore, defeat the purposes of Texas Water Code, §11.139. Additionally, notice is provided to water right holders of

the hearing to affirm, amend or set aside the emergency authorization not later than twenty days from the date of the initial authorization. At the hearing, affected water right holders may assert how they have been impacted, pursuant to Texas Water Code, §11.139.

SAWS comments that proposed §295.161, Notice of an Application to Convey Water in Bed and Banks, should be revised to provide that notice of an application to convey groundwater that has not historically been discharged into stream not be provided to downstream water right holders since they could not be affected by the diversion of water that is new to the stream and that was not used as a basis for granting their water rights.

The commission disagrees, in part, with the comment because downstream water right holders should be made aware that a new diversion is being proposed upstream and the purpose of such diversion. Additionally, the diversion of such new water to a stream may potentially affect existing water rights or instream uses if more water is diverted than actually discharged, less carriage losses. This could occur if the method and calculation of carriage losses as well as the diversion amount, timing and rate to ensure that no more water is being taken out of the stream than is being discharged is done inaccurately. There is a similar potential impact that may occur in the diversion of stored or conserved water under Texas Water Code, §11.042(a). However, notice of a related application provided under §295.160 is given only to water right holders of record between the points of release and diversion. This rule was not the subject of this rulemaking, but the commission received a comment in response to its concurrent notice of the regulatory review of Chapter 295 to revise this rule to provide notice to water rights holders downstream of the

diversion point. In order to reconcile the notice requirements for these two authorizations and allow time to further study this issue, the commission has revised §295.161 to provide a similar notice of a bed and banks permit application to convey new groundwater until such time that the regulatory review process is completed. A reference to required notice under the Texas Administrative Procedures Act is also made to ensure that notice shall not be denied to an affected person.

STATUTORY AUTHORITY

The new and amended sections are adopted under Texas Water Code (TWC), Chapter 5, Subchapter D, §§5.103 and 5.105, which establishes the commission's authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule. Other relevant sections of the TWC under which the commission takes this action include: §5.235, which establishes the commissions authority regarding fees; §11.042, which establishes the commission's jurisdiction over delivering water down the bed and banks of streams; §11.085, which establishes the commission's authority concerning the interbasin transfer of state water; §11.1271, which establishes the commission's authority regarding requirements for water conservation plans; §11.1272, which establishes the commission's authority regarding additional requirements for drought contingency plans for certain applicants and water right holders; §11.134, which establishes the commission's jurisdiction regarding actions on applications to use state water; §11.139, which establishes the commission's authority to issue emergency permits; §11.1501, which establishes the commission's authority regarding permitting and consideration and revision of state and approved regional water plans; §11.153, which establishes the commission's jurisdiction over pilot projects for storage of appropriated water in

aquifers; §11.154, which establishes the commission's authority regarding permits to store appropriated water in aquifers; and §11.155, which establishes the commission's authority aquifer storage pilot project reports.

SUBCHAPTER A : REQUIREMENTS OF WATER RIGHT APPLICATIONS

GENERAL PROVISIONS

§§295.5, 295.9, 295.13, 295.16

§295.5. Amount and Purpose of Diversion and Use.

The total amount of water to be used shall be stated in definite terms, i.e., a definite number of acre-feet annually or, in the case of a seasonal, emergency, or temporary water right application, over the period for which application is made. The purpose or purposes of each use shall be stated in definite terms. If the water is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth. If the application requests authorization to use water for multiple purposes, the application shall expressly state an annual amount of water to be used for the multiple purposes as well as for each purpose of use. If the amount to be consumptively used is less than the amount to be diverted, both the amount to be diverted and the amount to be consumptively used shall be specified.

§295.9. Water Conservation and Drought Contingency Plans.

An application relating to the appropriation or use of state water must include water conservation and drought contingency plans meeting applicable requirements contained in this section. An application not accompanied by such plans is not administratively complete and shall not be considered by the commission, unless expressly exempted by this section. The water conservation plan

must demonstrate that reasonable diligence will be used to avoid waste and achieve water conservation in order that appropriated waters will be beneficially used for the authorized purposes. Conservation means those practices, techniques, and technologies that will reduce the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water so that a water supply is made available for future or alternative uses for the benefit of the public health, safety and welfare, and of the environment.

(1) Applications to appropriate or to use water for municipal use, industrial or mining use, or irrigation use. The water conservation and drought contingency plans submitted with an application to appropriate or to use state water for municipal use, industrial or mining use, or irrigation use must be submitted in accordance with the guidelines set forth in Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements).

(2) Applications to appropriate or to use water by wholesale water suppliers. A water conservation plan submitted with an application to appropriate or to use state water by a wholesale water supplier must be submitted in accordance with the guidelines set forth in Chapter 288 of this title.

(3) Applications to appropriate or to use water for any other purpose or use. A water conservation plan submitted with an application to appropriate or to use state water for any other purpose or use shall include a water conservation plan providing information where applicable about those practices, techniques, and technologies that will be used to reduce the consumption of water,

prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water.

(4) Applications to amend existing water rights. An application to amend an existing water right for any of the following reasons must be accompanied by water conservation and drought contingency plans in accordance with the applicable provisions of this section:

(A) - (D) (No change.)

(5) (No change.)

§295.13. Interbasin Transfers.

(a) An applicant seeking to transfer state water from one basin to another basin shall so state in the application. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code §16.051. The application content requirements contained in this chapter for a new or amended water right, as applicable, shall apply to all applications for an interbasin transfer unless otherwise provided.

(b) In addition to the application requirements for a new or amended water right contained in this chapter, the application must also include the following unless exempted by subsection (c) of this section:

- (1) the contract price of the water to be transferred;
- (2) a statement of each general category of proposed use of the water to be transferred and a detailed description of the proposed uses and users under each category;
- (3) the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users;
- (4) the projected effect on user rates and fees for each class of ratepayers;
- (5) an analysis of whether and to what extent there is the need for the water in the basin of origin and in the proposed receiving basin based upon the period for which the transfer is requested, but not to exceed fifty (50) years;
- (6) factors identified in the applicable approved regional water plans which address the following (Regional water management plans must be submitted to the Texas Water Development Board for review and approval not later than September 1, 2000. If applicable approved regional water management plans do not exist at the time the application is submitted, the following information under this subparagraph is not required to be submitted.):
 - (A) an analysis of the availability of feasible and practicable alternative supplies in the receiving basin for which the water is needed;

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

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

(D) the 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 that must be assessed under Texas Water Code, §§11.147, 11.150, and 11.152 and related commission rules contained in §§297.49-297.52 of this title (relating to Return and Surplus Waters, Consideration of Water Conservation Plans, Time Limitations for Commencement or Completion of Construction, Suppliers of Water for Irrigation) in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on historical uses of the water right for which amendment is sought.

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

(8) 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 being sought; and

(9) any other related information the executive director or commission may require to review the application to make recommendation or determine, as applicable, whether it meets all applicable requirements of the Texas Water Code or other applicable law.

(c) Subsection (b) of this section shall 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 under §297.17 of this title (relating to Emergency Authorizations (Texas Water Code, §11.139));

(3) a proposed transfer from a basin to its adjoining coastal basin; or

(4) a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in that part of the county or municipality and

the municipality's retail service area not within the basin. For purposes of this paragraph, a county, municipality, or municipality's service area refers to a geographic area.

§295.16. Consistency With State And Regional Water Plans.

An application shall contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement.

**DIVISION 2 : ADDITIONAL REQUIREMENTS FOR THE STORAGE OF APPROPRIATED
SURFACE WATER IN AQUIFERS**

§295.21, §295.22

STATUTORY AUTHORITY

The amended sections are adopted under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

§295.21. Aquifer Storage and Retrieval Projects.

(a) Except as provided by subsection (b) of this section, an applicant shall file the appropriate application and obtain the issuance of the following:

(1) a temporary or term permit under Chapter 297 of this title (relating to Water Rights, Substantive) and the necessary authorization under Chapter 331 of this title (relating to Underground Injection Control) prior to commencement of construction of Phase I of an aquifer storage and retrieval project, as defined in §297.1 of this title (relating to Definitions); or

(2) a permit under §297.11 of this title (relating to General Authorization to Divert, Store, or Use State Water, Texas Water Code, §11.121) and the necessary authorization under Chapter

331 of this title (relating to Underground Injection Control) prior to actual storage of state water for underground storage and retrieval for purposes other than a Phase I project.

(A) An application for permit under paragraph (2) of this subsection will not be accepted for processing by the executive director until such time as the applicant has obtained the necessary authorizations and successfully completed a Phase I project.

(B) The commission will only issue a final order granting a water right under §297.11 of this title (relating to General Authorization to Divert, Store, or Use State Water, Texas Water Code §11.121) or an amendment to an existing water right authorizing that storage of state water in an aquifer for subsequent retrieval and beneficial use where completed pilot projects or historically demonstrated projects have been shown to be feasible.

(b) A water right permit is not required for Phase I of an aquifer storage and retrieval project that proposes the temporary storage of appropriated surface water in an aquifer for testing and subsequent retrieval and beneficial use if the diversion and purpose of use (e.g., municipal, industrial, etc.) of the surface water is covered by an existing water right. The water right holder or person holding a valid contract with a water right holder shall notify the executive director, in writing, of the proposed temporary storage and shall submit the information required by §295.22 of this title (relating to Additional Requirements for Storage of Surface Water for Subsequent Retrieval and Beneficial Use) with the written notification not later than 60 days prior to the proposed temporary storage of water in an applicable aquifer. Upon completion of Phase I of the project, an amendment to the existing water

right is required for permanent authorization to store appropriated surface water in an aquifer for subsequent retrieval and beneficial use.

(c) This section does not apply to any existing permit or permit amendment issued by the commission or to any administratively complete application for a permit or permit amendment filed with the commission prior to June 5, 1995.

§295.22. Additional Requirements for the Underground Storage of Surface Water for Subsequent Retrieval and Beneficial Use.

(a) Phase I projects. In addition to the applicable information required by Subchapter A of this chapter (relating to Requirements of Water Right Application), the appropriate application must include:

(1) (No Change.)

(2) a map or plat showing the proposed depth and location of all injection facilities, retrieval wells, and the aquifer in which the water will be stored; and

(3) if applicable, the application for storage of surface water in a groundwater reservoir or a subdivision of a groundwater reservoir, as defined by Chapter 35 of the Texas Water Code, that is under the jurisdiction of a groundwater conservation district, must include:

(A) evidence of service, by certified mail, of a copy of the application or notification submitted in accordance with §295.21 of this title (relating to Aquifer Storage and Retrieval Projects) to the groundwater water conservation district having jurisdiction over the aquifer; and

(B) a copy of an agreement, if any, reached by the applicant with the groundwater water conservation district reflecting the applicant's consent to cooperate in the development of, and abidance with, the rules governing the injection, storage, or retrieval of appropriated surface water in the underground water reservoir or a subdivision thereof.

(b) - (e) (No change.)

DIVISION 9 : REQUIREMENTS FOR APPLICATION FOR EMERGENCY WATER USE

§295.91

STATUTORY AUTHORITY

The amended section is adopted under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

§295.91. Application for Emergency Water Use.

A person requesting an emergency authorization under Texas Water Code, §11.139 and commission rules contained in §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139)) shall submit to the commission a sworn application containing the following information:

(1) a description of the condition of emergency justifying the granting of an emergency authorization, including a statement of the facts which support the finding that such conditions present an imminent threat to the public health and safety which override the necessity to comply with established statutory procedures and there are no feasible practicable alternatives to the emergency authorization;

(2) the proposed location of the diversion point, diversion rate, the amount of water to be diverted, the purpose or purposes of use, and an estimate of the dates on which the proposed authorization should begin and end;

(3) steps made by the applicant to develop and implement water conservation and drought contingency plans, to purchase the needed water including whether the water is available to the applicant to meet the emergency need at a price affordable to the applicant, or to otherwise acquire the needed water other than through an emergency authorization;

(4) for a proposed transfer, a statement of consistency with the applicable approved regional water plan, if available; and

(5) any other statements or information required by the commission or executive director necessary to review and take action on the application.

DIVISION 11 : REQUIREMENTS FOR APPLICATIONS FOR AUTHORIZATION TO USE

BED AND BANKS

§§295.111-295.113

STATUTORY AUTHORITY

The new and amended sections are adopted under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

§295.111. Authorization to Convey Stored and Conserved Water In Bed and Banks.

(a) Any seller or purchaser of conserved water or water stored in a reservoir desiring to use the bed and banks of any natural watercourse to release the water from storage and convey it downstream for subsequent use under a water supply contract pursuant to Texas Water Code, §11.042(a) shall file a copy of the purchase contract with the executive director and a written statement of the intended transit of the water setting forth the following:

(1) - (7) (No Change.)

(8) The number of the permit, certified filing, or certificate of adjudication which authorizes the storage and the use of water proposed to be transported; and

(9) The manner in which the water being conveyed will be measured to ensure that only the water being released is being diverted at the point of delivery, less the amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of release to the point of delivery. The method and calculation of carriage losses shall be subject to the review and approval of the executive director.

(b) An exception to the requirements of subsection (a) of this section may be granted by the commission if an emergency exists and time does not permit following the procedures herein outlined. Further, the requirements of this subsection are not applicable if water is being released from upstream storage under the order of the commission.

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

§295.112. Application to Convey Groundwater-Based Effluent in Bed and Banks.

(a) The purpose of this section is to provide the application content requirements for a bed and banks authorization under Texas Water Code §11.042(b).

(b) A person who has discharged or intends to discharge groundwater-based effluent into a stream or watercourse and wishes to divert and use the discharged water shall submit an application with the commission containing the following information:

- (1) the name, mailing address, and telephone number of the applicant;
- (2) the name of the stream and the locations of the point of the existing or proposed discharge and diversion as identified on a USGS 7.5 minute topographical map(s);
- (3) the source, amount, and rates of the existing or proposed discharge and diversion;
- (4) a description of the water quality of the water discharged or proposed to be discharged and the permit number and name of any related discharge permit;
- (5) the date of initial discharge of the groundwater into the watercourse or stream, if applicable, and any related records of discharge periods, points, amounts and rates;
- (6) the estimated amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion;
- (7) an assessment of the adequacy of the quantity and quality of flows remaining after the proposed diversion to meet instream uses and bay and estuary freshwater inflow needs; and
- (8) any other information the executive director may need to complete an analysis of the application.

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

(d) The method and calculation of carriage losses under this section shall be subject to the review and approval of the executive director.

§295.113. Application to Convey Water In Bed and Banks.

(a) The purpose of this section is to provide the application content requirements for a bed and banks authorization under Texas Water Code §11.042(c).

(b) A person wishing to place water into a stream or watercourse, convey the water in the watercourse or stream, and subsequently divert such water shall file an application with the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the name of the stream and the locations of the point of discharge and diversion as identified on a USGS 7.5 minute topographical map(s);

(3) the source, amount, and rates of discharge and diversion;

(4) a description of the water quality of the water discharged and, if applicable, the permit number and name of any related discharge permit;

(5) if the water to be placed into the stream is from an existing, authorized interwatershed or interbasin transfer, a certified copy of the related water right;

(6) if the water placed into the stream is from a proposed interwatershed or interbasin transfer, the information required by this subsection shall be provided in the application for the interwatershed or interbasin transfer and the bed and banks authorization shall be combined with the authorization for the interbasin transfer;

(7) the estimated amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion;

(8) an assessment of the adequacy of the quantity and quality of flows remaining after the proposed diversion to meet instream uses and bay and estuary freshwater inflow needs; and

(9) any other information the executive director may need to complete an analysis of the application.

(c) An application under this section may be combined with an application for a wastewater discharge for purposes of a consolidated permit proceeding.

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

(e) The method and calculation of carriage losses under this section is subject to the review and approval of the executive director.

SUBCHAPTER B : WATER USE PERMIT FEES

§295.133, §295.134

STATUTORY AUTHORITY

The amended sections are adopted under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

§295.133. One-Time Use Fees.

(a) - (b) (No Change.)

(c) A fee imposed under subsection (a)(4) of this section for the use of saline tidal water for industrial processes shall be one dollar (\$1) per acre-foot of water diverted for the industrial process, not to exceed a total fee of five thousand dollars (\$5,000).

(d) For an application requesting multiple uses of the same amount of water, the fee shall be based on the use with the highest fee.

§295.134. Maximum Fees.

A fee under §295.133 of this title (relating to One-Time Use Fees) for one use of state water under a permit from the commission shall not exceed \$50,000. The fee for each additional use of water under a permit for which the maximum fee is paid shall not exceed \$10,000. Temporary water permit use fees under §295.133 of this title shall not exceed \$500. The fee for any application for extension of time to commence or complete construction under §295.133 of this title shall not exceed \$1,000. The fee under §295.133 of this title for the use of saline tidal water for industrial processes shall not exceed five thousand dollars (\$5,000).

SUBCHAPTER C : NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS

§§295.155, 295.156, 295.161

STATUTORY AUTHORITY

The new and amended sections are adopted under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

§295.155. Notice for Interbasin Transfers.

(a) The notice requirements of this subchapter for an application for a new or amended water right, as applicable, shall apply to an application for an interbasin transfer except as otherwise provided by this section. In addition, notice shall be given to users of record in the receiving basin who are located below the point of introduction except for interbasin transfers described under subsection (d)(2), (3) and (4) of this section. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code §16.051. An increase in the amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin basin transfer for purposes of this section.

(b) In addition to the notice requirements provided by subsection (a) of this section, notice of an application for an interbasin transfer shall also include the following unless exempted by subsection (d) of this section:

(1) notice of the application shall be mailed to:

(A) all holders of water rights located in whole or in part in the basin of origin if not already provided under subsection (a) of this section;

(B) each county judge of a county located in whole or in part in the basin of origin;

(C) each mayor of a city with a population of 1,000 or more based upon the most recent estimate of the U.S. Census Bureau located in whole or in part in the basin or origin; and

(D) all groundwater conservation districts located in whole or in part in the basin of origin;

(E) each state legislator in both basins; and

(F) the presiding officer of each affected regional water planning group in both basins.

(2) the applicant shall cause notice of the application to be published once a week for two consecutive weeks in one or more newspapers having general circulation in each county located in whole or in part in the basin of origin and the receiving basin. The published notice may not be smaller

than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. The notice of application and public meetings shall be combined in the mailed and published notices; and

(3) the notice of the application must state how a person may obtain from the applicant, without cost, information relating to the contract price of the water to be transferred; a statement of each general category of proposed use of the water to be transferred, and a detailed description of the proposed uses and users under each category; the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users; and the projected effect on user rates and fees for each class of ratepayers.

(c) The applicant shall pay the cost of notice required to be provided under this section.

(d) Subsection (b) of this section shall 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 under §297.17 of this title (relating to Emergency Authorizations (Texas Water Code, §11.139));

(3) a proposed transfer from a basin to its adjoining coastal basin; or

(4) a proposed transfer from a 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 that 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.

§295.156. Notice for Emergency Water Use.

(a) An initial emergency authorization for the diversion and use of state water for a period of not more than 120 days under the Texas Water Code, §11.139, may be granted after notice to the governor and without the necessity of issuing the notice required for other water rights issued by the commission.

(b) Notice of the hearing at which the commission determines whether to affirm, modify or set aside the emergency authorization is not subject to the requirements of Texas Water Code §11.132, but such general notice of the hearing shall be given as the commission deems practicable and meets the requirements of Texas Government Code, Chapter 2001. In the case of an emergency transfer, such notice shall be provided, at a minimum, to the water right holders whose right to use water is being temporarily transferred and to the governor.

§295.161. Notice of Application to Convey Water in Bed and Banks.

(a) Except for an application to convey new or future increases of groundwater-based effluent or other groundwater as provided in subsection (b) of this section, notice of an application to convey groundwater-based effluent or other water in the bed and banks of a stream or watercourse pursuant to Texas Water Code §11.042(b) and (c) shall be provided by first class mail, postage prepaid, by the commission to every water right holder of record downstream of the discharge point at least thirty (30) days prior to commission consideration of the application.

(b) If the commission has received a written statement of a proposed conveyance of new or future increases in groundwater-based effluent or other groundwaters in the bed and banks of a stream or watercourse pursuant to Texas Water Code §11.042(b), it shall send notice to each diverter of record on the watercourse between the proposed point of discharge and the proposed point of diversion. The notice shall set forth the approximate time that deliveries of such water will occur, the legal consequences that could result from the unlawful diversion and taking of such water in transit, and other details the commission considers appropriate.

(c) Notice of an application for a bed and banks permit under this section shall also be provided to the Texas Parks and Wildlife Department and the Public Interest Counsel.

(d) No published notice shall be required for an application under this section.

(e) The applicant shall be responsible for the costs of providing notice under this section. (For notice requirements relating to the conveyance of stored water under Texas Water Code, §11.042(a), see §295.160 of this title relating to Notice of Applications to Convey Stored Water.)

(f) Nothing in this section is intended to deny any additional notice to an affected person that may be required under the Texas Administrative Procedures Act.

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§297.1, 297.11, 297.13-297.15, and 297.17-297.19; the repeal of §§297.16, 297.20, 297.21-297.29, 297.41-297.56, 297.71-297.74 and new §§297.16, 297.21-297.27, 297.41-297.56, 297.58-297.59, and 297.71-297.75, relating to Water Rights, Substantive. Sections 297.1, 297.13, 297.16, 297.17, 297.18, 297.19, 297.21, 297.24, 297.42, 297.43, 297.44, 297.45, 297.49, 297.50, 297.53, 297.56, 297.58, 297.59, and 297.71 are adopted with changes. Sections 297.11, 297.14, 297.15, 297.22, 297.23, 297.25, 297.26, 297.27, 297.41, 297.46, 297.47, 297.48, 297.51, 297.52, 297.54, 297.55, 297.72-297.75, and the repeal of §§297.16, 297.20, 297.21-297.29, 297.41-297.56, 297.71-297.74 are adopted without changes to the proposed text as published in the October 9, 1998, *Texas Register* (23 TexReg 10306 et seq.), and will not be republished.

The amendments to §297.1, Definitions, add definitions for the terms “beneficial inflows,” “conserved water,” “drought of record,” “firm yield,” “mitigation,” “unappropriated water,” and “wetlands;” amend the existing definitions for the terms “appropriative right,” “beneficial use,” “dam,” “domestic use,” “industrial use,” “permit,” “priority,” “state water,” “streamflow,” “surplus water,” and “water right;” and repeal the definitions for “commission,” “director or executive director,” and “person.”

The purpose of these changes is to clarify the meaning and use of these terms as they are used in applicable commission rules and the commission's interpretation and application of provisions contained in the Water Code and other state law, including Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010). The changes also number the definitions contained in §297.1 in accordance with *Texas Register* style and format guidelines.

The commission also adopts amendments to §§297.11, 297.13-297.15, and 297.17-297.18, the repeal of §§297.16 and 297.20, and new §297.16 to clarify the meaning and use of these provisions as they are used by the commission in the review and action on water right applications and to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

In addition, the commission adopts the repeal of §§297.21-297.24, new §297.21, and the amendment and renumbering of §297.25-297.30. The purpose of the changes is to consolidate and clarify provisions related to water uses exempt from permitting and special conditions for storage in another's reservoir.

Additionally, the commission adopts the repeal of §§297.41-297.57 and new §§297.41-297.58. The purpose of these changes is to clarify existing commission criteria used for the issuance and the placing of conditions on new and amended water rights and to implement related provisions of Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

In addition, the commission adopts the repeal of §§297.71 -297.74 and new §§297.71 -297. The purpose of these changes is to clarify the meaning and use of these provisions as they are used by the commission in the cancellation and revocation of water rights and to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

EXPLANATION OF ADOPTED RULES.

The definitions contained in §297.1 are made applicable to Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements, as well as to Chapter 295 as currently provided. These definitions are equally applicable to Chapter 288 since the rules address the same subject matter.

The new definition for “conserved water” is in response to changes made to Texas Water Code §11.002 by Senate Bill 1 (1997). A related amendment to “beneficial use” adds as a beneficial use the conservation of water in accordance with changes made to §11.002 of the Texas Water Code by Senate Bill 1 (1997).

Additionally, a definition for “unappropriated water” is adopted for purposes of Texas Water Code §11.134(b)(2). This statute provides that the commission may grant an application for an appropriation of state water only if “unappropriated water is available in the source of supply.” Unappropriated water available for this purpose would be the water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing uncanceled certificates of adjudication, permits, and certified filings valued at their fully recorded amounts and conditions. This definition is based upon the Texas Supreme Court's interpretation of this provision in *Lower Colorado River Authority v. Texas Dept. of Water Resources (Stacy Dam)* , 689 S.W.2d 873 (Tex. 1984). The definition includes unappropriated water available for all beneficial purposes. Water available for new appropriation, however, may be limited for the maintenance and protection of flows necessary for

existing instream uses, water quality, aquatic and wildlife habitat, and bays and estuaries pursuant to §§11.147, 11.150, and 11.152 of the Texas Water Code.

A related definition is being adopted for the term “firm yield” in determining the availability of unappropriated water for storage in a reservoir to supply water for domestic and municipal use. The definitions for “unappropriated water” and “firm yield” also correspond to proposed amendments to §297.41 of this title (relating to Subject to Prior and Superior Water Rights) clarifying the existing criteria used by the commission in determining whether there is sufficient, available unappropriated water for a new or increased appropriation.

A definition for “beneficial inflows” is also adopted for purposes of Texas Water Code §11.147 and §297.51 of this title (relating to Estuarine Considerations). These laws provide that the commission shall consider the impacts of an application for a new or amended water right on bays and estuaries and the commission may place conditions on the water right to provide beneficial inflows to the affected bay and estuary. The definition is based upon the definition of “beneficial inflows” contained in §11.147(a) of the Code.

A definition for “drought of record” is adopted for purposes of determining the firm yield of a project and whether there is sufficient water to grant certain appropriations such as municipal use that are dependent upon a firm water supply in accordance with Texas Water Code §11.134(b)(2). This definition is based on historic practice within the agency and is consistent with accepted principles of climatological and hydrological analysis.

The definition for “mitigation” is adopted for purposes of Texas Water Code, §§11.147, 11.1491, 11.150, and 11.152, and commission rules contained in proposed §§297.53, 297.54, 297.55, and 297.56 of this title. These laws provide that the commission must consider the effects of the issuance of a new or amended permit on water quality, existing instream uses, fish and wildlife habitat, and bays and estuaries, with the goal of implementing reasonable actions to avoid, minimize and/or compensate for unavoidable adverse impacts. This definition is consistent with related commission rules contained in Chapter 279, Water Quality Certification, and with use of the term for identifying mitigation measures under other state and federal statutes.

Additionally, a definition of “wetland” as provided by Texas Water Code §11.502 has been added to §297.1 for purposes of §§11.147 and 11.152 Texas Water Code and §297.53 of this title relating to Habitat Mitigation. These provisions require the commission to assess the impacts of a proposed project on aquatic and wildlife habitat, including wetlands, and to require the mitigation of unavoidable impacts.

The amendment to the definition of “dam” clarifies that such structures may also store as well as impound water. These terms, although similar, may convey different meanings.

The commission adopts a revised definition of “domestic use.” While the revision is intended primarily to make it easier to understand the definition, the revised definition also contains further clarification concerning the commission’s policy and past actions relative to whether or not a water right permit would be required. The revised definition clarifies that such use is limited to the use by the person or

household. Additionally, the definition specifies that “domestic use” may include a recreational use (including aquatic and wildlife enjoyment) so long as the use also meets the other requirements for a “domestic use.” For example, if a person specified a recreational use other than for his personal or household use, such as a hunting and fishing club and charges a fee for its use, the exempt status under “domestic use” would not apply and the person would need to obtain a water right permit for “recreational use.”

The amendment to the term “livestock use” clarifies the types of animals and watering activity which could be considered for permit exemption under §11.142 of the Texas Water Code. For example, the incidental and open-range watering of game and fur-bearing animals would be considered as part of the “livestock use” and, therefore, exempt from permitting under §11.142. Also, a landowner who constructed a reservoir primarily for domestic and livestock purposes and leases his ranch or farm for the hunting of wildlife would be exempt from the permitting requirements under §11.142.

The amendment to the definition of “permit” clarifies that such term also includes new or amended certificates of adjudication, certified filings, or unadjudicated claims.

The amendment to the term “priority” deletes the reference to the Wagstaff Act, Texas Water Code §11.028, which was repealed by Senate Bill 1 (1997), and indicate that exceptions to the priority in time rule are provided by court decisions and state law relating to water rights in the Lower Rio Grande Valley, vested riparian rights, and certain uses exempt from permitting.

The amendment to the term “recreational use” clarifies that the use of water for aquatic and wildlife resource purposes which exceed the personal and household needs of an individual and for which the individual will receive consideration or compensation, does not qualify for exemption under §11.142 of the Texas Water Code. For example, if a person proposes to construct and maintain a reservoir for the purpose of fishing or in-place recreational activities and charges for that activity, a permit must be obtained under §11.121 of the code.

Adopted changes to the definition of “reservoir systems operations” clarify that the coordinated operation of such reservoirs to optimize water supplies may be done across river basins and with reservoirs owned or operated by different entities through cooperative agreements.

The definition for “streamflow” is amended to clarify that it may include any flow in the stream.

The definition for “state water” is also amended to clarify that percolating groundwater and diffuse surface runoff before it reaches a state watercourse is not state water. This includes springwater before it reaches a watercourse, as determined by the court in *A.H. Denis, III et al. v. Kickapoo Land Co., et al.*, 771 S.W.2d 235 (Tex. App. -Austin 1989, writ denied). Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water in accordance with the court ruling in *Texas Rivers Protection Assoc. V. TNRCC*, 910 S.W.2d 147 (Tex. App. -Austin 1995).

In addition, a change to the definition of “surplus water” is adopted to correspond to the change in the definition of this term in §§11.002 and 11.046(d) of the Texas Water Code made by Senate Bill 1 (1997).

Amendments to the definition of “water right” clarify that such rights include amendments made to water rights and that they may also provide for the taking and storing of water.

Finally, the definitions for “commission,” “director or executive director,” and “person” are repealed because they are redundant of the definitions for these terms contained in Chapter 3 of this title that apply to all commission rules.

The title of Subchapter B is changed to clarify that the subchapter includes all classes of water rights administered by the commission, including certificates of adjudication, unadjudicated claims, and filings as well as permits.

Changes to §297.11, Permit Under Texas Water Code §11.121, amends the title and rule to clarify that Texas Water Code §11.121 provides the general authority to the commission for the issuance of a water right, and that these rights may have special terms and conditions as provided by more specific statutory and regulatory provisions addressed in subsequent rules in the subchapter.

Amendments to §297.13, Temporary Permit Under Texas Water Code §§11.138 and 11.153-11.155, incorporate the specific conditions provided by Texas Water Code §11.138 under which a person may

be granted the authority to temporarily use water. The changes also allow the TNRCC regional director or watermaster, as applicable, to issue by registration temporary permits of ten acre-feet or less for no more than one year and for which no notice or hearing is required. This change also implements recommendations made in the agency's Business Plan Review. The change is necessary because these small amounts of water for limited periods need to be issued quickly and locally.

Amendments to §297.14, Contractual Permit, clarify that such permits may be issued by the commission as well as authorized through the administrative review and approval of contracts by the executive director under subchapter J, Chapter 297, (relating to Water Supply Contracts and Amendments) to ensure consistency with the underlying water right.

Amendments to §297.15, Permit Under Texas Water Code, §11.143, change the title of the rule to more specifically describe the nature of this permit by indicating in the title that a permit is required to make additional uses of a domestic and livestock reservoir that would otherwise be exempt from permitting.

Section 297.16, Permit for Storage (Texas Water Code, §11.140), is repealed because it is redundant of other existing rules relating to the review and approval of an application for a new or amended water right, including that for a storage reservoir.

The adoption of new §297.16 implements changes made to Texas Water Code §11.042 by Senate Bill 1 (1997) by providing the statutory criteria and conditions to be used in the commission's authorization

for the conveyance of water in the bed and banks of a stream or watercourse. This rule tracks the statute.

Amendments to §297.17, Emergency Permit (Texas Water Code §11.139), implement changes made to Texas Water Code §11.139 by Senate Bill 1 (1997). Specifically, these changes provide for the emergency transfer of water appropriated to another if the commission finds emergency conditions to exist which present an imminent threat to the public health and safety and which override the necessity to comply with established procedures and there are no practicable alternatives to the emergency authorization.

Amendments to §297.18, Interwatershed Transfers, implement changes made to Texas Water Code §11.085 by providing a balancing test to be performed by the commission between the detriments to the basin of origin and the benefits to the receiving basin. If the benefits outweigh the detriments, the commission may approve the application. Specific factors to be examined in performing this balancing test as provided under §11.085 are also included in the proposed rule as well as corresponding statutory conditions and criteria relating to water right amendments. Additionally, statutory exemptions to the special requirements under §11.085 are also provided. Also, the title of the rule is amended to reference “inter-basin,” rather than “inter-watershed,” as provided by the changes made to §11.085 by Senate Bill 1.

Amendments to §297.19, Term Permit, clarify the criteria and conditions the commission must use in its authorization for someone to use unused appropriated water in accordance with Texas Water Code, §§11.1381, and 11.153-11.155.

Section 297.20, Permit for Diversion from Un-sponsored or Storage-Limited Reservoir, is repealed as redundant of provisions under §§297.31-297.32 of this title (relating to Diversion from Un-sponsored or Storage Limited Reservoirs).

Sections 297.21-297.24 are repealed so that redundant provisions can be deleted and remaining provisions relating to domestic and livestock use may be consolidated in a proposed new §297.21, Domestic and Livestock Use. Additionally, the statutory and common law extent of the exempt domestic and livestock use is clarified by including the distinction from other vested riparian rights, the rights and duties as between exempt uses, the definition for “normal” storage for purposes of determining the size of an exempt domestic and livestock reservoir, and the prohibition of such reservoirs on navigable streams. These provisions are based upon the Texas Supreme Court’s decision in *Mott v. Boyd*, 116 Tex. 82, 104-108, 111, 121-122 and 124 (1926) and the exemption provided to vested riparian rights for domestic and livestock use from having to file a claim under the Texas Water Right Adjudication Act, Texas Water Code, §11.303(a)(1) and (l), as well as Texas Water Code, §11.142 (see also, Hutchins, *The Texas Law of Water Rights*, pp. 293 *et seq.* - 1961).

New §297.22, Storage in Another’s Reservoir, clarifies that the consent from the reservoir owner for the storage of water must be in writing and submitted to the executive director. The amendments also

reflect the change in name of the Soil Conservation Service to the Natural Resources Conservation Service.

Amendments to §297.26, Spreader Dams, Contouring, Terracing, renumber this section as new §297.23.

Amendments to §297.27, Permit Exemption for Mariculture Activities, renumber this section as new §297.24 and clarify that an order requiring the interruption or reduction of the use of water under the section may apply to all water rights for this purpose, not just to appropriations.

Amendments to §297.28, Permit Exemption for Drilling and Producing Petroleum, renumber this section as new §297.25.

Amendments to §297.29, Permit Exemptions to Use State Water for Emergency Use, renumber this section as new §297.26 and clarify that such exemption includes firefighting emergencies.

Amendments to §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, have been renumbered as new §297.27.

Subchapter E, Chapter 297, is repealed so that it may be reorganized to follow generally the corresponding statutory order of the criteria and factors used in the review and approval of a water right

application as set forth in the Texas Water Code as well as to make certain clarifications and to implement changes made to the Texas Water Code by Senate Bill 1 (1997).

The repeal of §297.41, Subject to Prior and Superior Rights, and adoption of new §297.41, General Approval Criteria, provides the general statutory criteria the commission must use in its review and action on a water right application pursuant to Texas Water Code §11.134. The provisions of existing §297.41 are clarified and transferred to new §297.44 as provided below.

The repeal of §297.42, Additional Limitations, and adoption of new §297.42, Water Availability, sets forth the criteria the commission uses to determine whether there is sufficient unappropriated water available to grant a new appropriation pursuant to Texas Water Code §11.134(b)(2). Generally, one hundred percent of the water does not need to be available one hundred percent of the time for the requested appropriation to be granted. Rather, sufficient water will be found available if there is a sufficient amount available a sufficient amount of time to make the proposed project viable and ensure the beneficial use of water without waste. Alternatively, supplemental water supplies available to the applicant and return flow requirements may be considered in making this determination. The existing provisions of §297.42 are consolidated with other special conditions under a new §297.58 as described below. These provisions have long been the policy of the commissions.

The repeal of §297.43, Requiring Storage Facilities, and adoption of new 297.43, Beneficial Uses, sets forth the statutorily authorized purposes for which water may be put to use as provided under Texas Water Code §11.023. The new rule also provides that such preferences of use as provided under Texas

Water Code §11.024 shall be used in the commission's consideration of competing applications for the use of the same water, which has long been commission policy. The provisions of existing §297.43 are transferred and consolidated with other special conditions under new §297.58 described below.

The repeal of §297.44, Acceptance of Permit or Certificate of Adjudication, and adoption of new §297.44, Subject to Prior and Superior Rights, reflect that Texas has generally adopted the prior appropriation doctrine as a basis of allocating state water resources as provided by Texas Water Code §11.027. The amendment further provides that the priority of a water right is determined by the date the application is filed with the commission as provided by Texas Water Code §11.141. The amendment clarifies that an application is deemed to have been filed with the commission for purposes of time priority when it has been declared administratively complete by the executive director and filed with the chief clerk. The provisions of existing §297.44 are transferred and consolidated with other special conditions under new §297.58 described below.

Additionally, new §297.44 provides that there are some exceptions to the first in time, first in right principle. One such exception relates to water rights granted on the main stem of the Rio Grande below the Amistad Reservoir in the Lower Rio Grande Valley (see, generally, Chapter 303 of this title). In the court's adjudication of those rights in *State v. Hidalgo County WCID No. 18*, 443 S.W.2d 728 (Tex. Civ. App. - Corpus Christi 1969, writ ref'd n.r.e.), priority was assigned based upon the classification of use, rather than the date the certified filing, claim, or application was filed, in order to address rights granted under Spanish and Mexican law and recognized by Texas under treaty and equitable rights granted by the courts. *State v. Valmont Plantations*, 355 S.W. 2d 502 (1962). Under

the court's ruling, rights for domestic, municipal, and industrial use have a higher priority and may be curtailed during times of low flow only after rights for irrigation, mining, and other uses have been limited. The other exceptions to the prior appropriation principle relate to certain limited uses exempt from permitting under Texas Water Code §§11.142, 11.1421, 11.1422, and 11.303(l).

The repeal of §297.45, Return and Surplus Water, and adoption of new §297.45, "No Injury" Rule, sets forth the "no injury" rule pursuant to Texas Water Code §11.134(b)(3)(B) providing that an application may not be approved if it would impair an existing water right or vested riparian right such as domestic and livestock use exempt from permitting. Additionally, the amendment provides that the scope of review under the "no injury" rule when considering an application for a water right amendment is limited by the "four corners" analysis provided under Texas Water Code §11.122, as amended by Senate Bill 1 (1997). Under this provision, the commission is to compare the effect of the proposed amendment on other existing water rights with such effects from the full, lawful exercise of the water right prior to its amendment to determine whether the proposed change would impair another existing water right. If the existing water right can be fully exercised in accordance with all terms and conditions within the "four corners" of the existing water right so as to have the same impacts on stream flows as the proposed amended water right, then the proposed change could not, as a matter of law, impair other water rights. If the proposed change would create such impacts, however, the commission will consider what types of restrictions to place on the amendment to prevent such impacts. This is commission practice and consistent with case law. The provisions of existing §297.45 are clarified and transferred to new §297.49 as described below.

The repeal of §297.46, Suppliers of Water for Irrigation, and adoption of new §297.46, Consideration of Public Welfare, implements Texas Water Code §11.134(b)(3)(C) by providing that the commission may not grant an application for a new or amended water right if it would be detrimental to the public welfare. The rule sets out the factors and criteria, already in another rule, to be used by the commission in making this determination. The provisions of existing §297.46 are transferred to new §297.52.

The repeal of §297.47, Time Limitations for Commencement or Completion of Construction, and adoption of new §297.47, Impacts on Groundwater, implements changes made by Senate Bill 1 (1997) to Texas Water Code §11.134(b)(3)(D) and new Texas Water Code §11.151 requiring the commission to assess the impacts to groundwater in its review and action on an application for a new or amended water right. The provisions of existing §297.47 are transferred to new §297.51 as described below.

The repeal of §297.48, Low-Flow Outlets for Dams, and adoption of new §297.48, Waste Prevention, provides for the transfer of provisions in existing §297.54 to new §297.48. The provisions of existing §298.48 are consolidated with other special conditions and transferred to new §297.58.

The repeal of §297.49, Habitat Mitigation, and adoption of new §297.49, Return and Surplus Water, implements changes made by Senate Bill 1 (1997) to Texas Water Code §11.046. Such changes clarify that, unless provided otherwise in the water right, the water right holder may use and reuse the water as authorized under the water right prior to its return to the stream. However, once the water is returned to the stream, it is generally considered to be surplus water, subject to appropriation by others and

meeting environmental water needs. The amendments also make clear that return flows must also meet applicable water quality standards for the stream contained in Chapter 307 of this title. The provisions of existing §297.49 are clarified and transferred to new §297.53 as described below.

The repeal of §297.50, Water Quality Effects, and adoption of new §297.50, Consideration of Water Conservation Plans, provides for the clarification and transfer of the provisions of §297.50 to new §297.54 and the transfer of the provisions of §297.55 to proposed new §297.50.

The repeal of §297.51, Estuarine Considerations, and adoption of new §297.51, Time Limitations for Commencement or Completion of Construction, provides for the clarification and transfer of the existing provisions of §297.51 to proposed new §297.55 as described below and the transfer of existing provisions of §297.47 to new §297.51.

The repeal of §297.52, Instream Uses, and adoption of new §297.52, Suppliers of Water for Irrigation, allows for the transfer of the existing provisions of §297.46 to proposed new §297.52 and the clarification and transfer of the existing provisions of §297.52 to proposed new §297.56 as described below.

The repeal of §297.53, Conservation and Beneficial Use, and adoption of new §297.53, Habitat Mitigation, allows for the clarification and transfer of the existing provisions of §297.53 to new §297.50 and for the clarification and transfer of existing provisions of §297.49 to new §297.53. New §297.53, Habitat Mitigation, reorganizes the existing provisions under §297.49 to make it more

readable. Additionally, the change clarifies existing criteria used to determine the manner and extent of mitigation required for aquatic and wildlife habitat lost as a result of the approval of the application pursuant to Texas Water Code §11.152. Specifically, the commission is to consider any environmental net benefit to the habitat produced by the project in determining overall mitigation requirements. These rules are consistent with current 279 rules and policy.

The repeal of §297.54, Waste, and adoption of new §297.54, Water Quality Effects, provides for the transfer of the existing provisions of §297.54 to new §297.48 and the clarification and transfer of the provisions of existing §297.50 to new §297.54. New §297.54, Water Quality Effects, clarifies that the commission is also to assess the impacts to water quality resulting from a proposed new or amended water right pursuant to Texas Water Code §11.147 and 11.150. The commission may also impose conditions on new or amended water rights to protect water quality standards established by commission rules contained in Chapter 307 of this title.

The repeal of §297.55, Consideration of Water Conservation Plans, and adoption of new §297.55, Estuarine Considerations, allows for the transfer of the provisions of existing §297.55 to new §297.50 and the clarification and transfer of the provisions of existing §297.51 to new §297.55. New §297.55, Estuarine Considerations, includes all factors and information provided under Texas Water Code §11.147 relevant to determine water right conditions for the maintenance of beneficial inflows to bays and estuaries. Amendments to this section also include the appropriation to Texas Parks and Wildlife Department for bay and estuary purposes of at least five percent of the storage of a reservoir built after September 1, 1985, with state financial aid as well as the emergency release of unappropriated or

unallocated water in certain state-owned and controlled reservoirs for the protection of environmental water needs as provided by Texas Water Code §16.1331 and 16.195, respectively.

The repeal of §297.56, Conserved Water, and adoption of new §297.56, Instream Uses, implements the changes to Texas Water Code §11.002 enacted by Senate Bill 1 (1997) which provides that conserved water constitutes a beneficial use of water and allows the clarification and transfer of the provisions under existing §297.52 to new §297.56. New §297.56, Instream Uses, clarifies that the commission also assesses the impacts to existing instream uses resulting from proposed water right amendments as well as new water rights. The commission shall impose limitations in a new or amended water right necessary to maintain applicable water quality standards for the affected stream or as necessary to protect federally listed species or species of “high interest” as defined under the section or recreational uses.

Adoption of new §297.58, Accounting; Multiple Uses of the Same Amount, prevents the redundancy with proposed new §35.101 of this title (relating to Emergency Suspension of Permit Conditions) and implements new Texas Water Code §11.135(b)(5) enacted by SB 1 (1997) providing that if the use of the appropriated water is authorized for multiple purposes, the permit shall contain a special condition limiting the total amount of water that may actually be diverted for all the purposes to the amount of water appropriated. The rule also provides that if a water right has appropriations with different priority dates, the oldest priority water shall be credited against the water right first unless the water right expressly provides otherwise.

The adoption of new §297.59, Additional Limitations, incorporates special permit conditions currently provided under §§297.43, 297.44 and 297.48. These latter rules are repealed so that they may be consolidated under the one general, miscellaneous provision.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rules, as adopted, and in light of the regulatory analysis requirements of Texas Government Code §2001.0225, has determined that the rulemaking is not subject to this provision because it does not meet any of the four applicability requirements listed in the provision because the rule is specifically required by changes made to the Water Code by Senate Bill 1 (1997), and it does not otherwise exceed any express requirements of state law, and does not involve any delegation agreements or contracts. Some of these rules implement S.B. 1, and other rules implement existing commission policy which has been necessary to implement existing law.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Statement for these rules pursuant to Texas Government Code §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to implement the substantive requirements of Senate Bill 1 from the 1997 legislative session. Promulgation and enforcement of these rules will not burden private real property. Rather, they implement statutory requirements providing for the beneficial use of state water to which persons have been granted a usufructuary interest and over which the state retains supervisory oversight in trust for the public for the protection of the public health, safety, and welfare. And, since these

requirements are in the legislation of S.B. 1, any takings argument would be that the statute violates Chapter 2007 of the Government Code.

Any burden to real property, if it exists, would be exempt from takings claims because the rules are adopted pursuant to a real and substantial threat to human health and safety, significantly advance that human health and safety purpose and go no further than is necessary to achieve that purpose.

Specifically, these requirements protect property right holders, other water right holders, and protect environmental uses of state water.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission has determined the rulemaking is subject to the Texas Coastal Management Program and has reviewed the rules for consistency in accordance with the Coastal Coordination Act Implementation Rules 31 TAC §505, relating to Council Procedures for State Consistency with Coastal Management Program Goals and Policies, and in particular, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, and has identified the rules as potentially affecting an action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Applicable goals contained in 31 TAC §505.12 include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions and values of coastal natural resource areas (CNRAs); 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; and 5) to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and

the benefits from public access to and enjoyment of the coastal zone. Of the eighteen policies contained in 31 TAC §501.14, relating to Policies for Specific Activities and Coastal Natural Resource Areas, only one: (r) Appropriation of Water, has the potential for being affected by the rule.

The commission has reviewed these rules for consistency with the aforementioned goals and policies of the Texas Coastal Management Program and has determined the rules are consistent with the intent of the applicable goals and policies and will not result in any significant adverse effects to CNRAs. The rules implement, in part, provisions under Chapter 11 of the Texas Water Code requiring the assessment of environmental impacts from applications for new and amended water rights to existing instream uses, aquatic and wildlife habitat, water quality, and freshwater inflows to bays and estuaries. In determining what conditions may be placed on the water right, if granted, the commission is to weigh such impacts with the proposed use of the water to balance such benefits with any potential impacts. The commission may also require that if such impacts cannot be avoided, that they be minimized and mitigated.

PUBLIC HEARING

A public comment hearing on this proposal and rules was held in Austin on October 29, 1998, beginning at 10:00 a.m. in the Texas Natural Resource Conservation Commission Office Complex, Building E, Room 201S, located at 12100 Park 35 Circle. The hearing was structured to receive oral or written comments by interested persons. One individual, Dr. Richard Kiesling provided oral comment. Dr. Kiesling also filed written comments prior to close of the public comment period established through publication of the rules in the October 9, 1998 Texas Register (23 TexReg 10298 et. seq.).

GENERAL COMMENTS

In reviewing the proposed rule following the public comment period commission staff identified a small number of grammatical and typographical errors which were not caught by respondents. Since the corrections do not constitute substantive changes to the rules, staff have made corrections in conjunction with the revisions made to address comments received during the public comment period.

Written comments suggesting changes to the proposed rules were provided by: the American Land Foundation (ALF); the Association of Electric Companies of Texas, Inc. (AECT); Bracewell & Patterson, L.L.P., on behalf of the company of Azurix, a subsidiary of the Enron Corporation; Booth, Ahrens & Werkenthin, L.L.P., on behalf of the City of Victoria (Victoria) and Tarrant Regional Water Authority (Tarrant Regional); Bracewell & Patterson, L.L.P., on behalf of Associated General Contractors (AGC); Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll); Brown & Potts, L.L.P. (Brown & Potts); the Brazos River Authority (BRA); the City of Dallas; the Law Offices of Glenn Jarvis on behalf of the Texas Irrigation Council (TIC); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre); the Lake Medina Conservation Society (LAMCOS); the Law Offices of Louis T. Rosenberg, P.C., on behalf of Bexar Metropolitan Water District (Bexar Met); the City of North Richland Hills (North Richland Hills); the Public Interest Council of the Texas Natural Resource Conservation Commission (PIC); the San Antonio Water System (SAWS); Small, Craig & Werkenthin, P.C., on behalf of the Texas and Southwestern Cattle Raisers' Association (Cattle Raisers); the Texas Water Conservation Association (TWCA); the Texas Water Development Board (TWDB); Texas Parks and Wildlife, Texas Utilities Services (TU) and an individual.

Henry, Lowerre, Johnson, Hess & Frederick stated that proposed revisions to Chapter 297 were subject to the Texas Coastal Management Program (CM) and by failing to acknowledge this, the TNRCC failed to comply with the requirements of 31 TAC Section 505.22.

The commission has conducted a consistency review of the adopted rules and has found the rules to be consistent with the applicable goals and policies of the CMP (see Coastal Management Program discussion above).

Brown & Potts, L.L.P., commented that the definition of “conserved water” contained in §297.1(12) providing that conserved water does not include water made available simply through its non-use without the use of conservation practices, techniques or technologies is confusing and exceeds statutory authority.

The commission disagrees with the comment because the definition makes a necessary distinction between the simple non-use of water subject to cancellation of a water right under Subchapter E, Chapter 11 of the Texas Water Code, and water saved by the active employment of conservation measures and, thus, the beneficial use of the water.

SAWS comments that the definition for “municipal use” contained in §297.1(29) also be provided in Chapter 295 and that revisions to the definition substitute the language “reuse of such water“ for “use of sewage” and “municipal, industrial and commercial” uses be substituted for “urban uses”.

The commission disagrees with the comment because §297.1 expressly provides that these definitions are also applicable to Chapter 295 and that the inclusion of the term “reuse” and uses other than municipal would greatly expand current authorizations for municipal water rights. Changes in purpose of use, diversion point, and location of use that may be associated with reuse and industrial and commercial use require the approval of an amendment to the water right in accordance with Texas Water Code §§11.122, 11.042 and 11.046.

The ALF and the Cattle Raisers comment that the definition for “domestic use” contained in §297.1, Definitions, should not limit the amount of acreage that may be used for domestic purposes exempt from permitting pursuant to Texas Water Code §11.142 to one acre or any other fixed amount. Rather when questions arise of whether the amount of irrigated acreage exceeds that necessary for the domestic use of an individual of an individual or household, that this be reviewed on a case-by-case basis considering the particular needs and size of the household.

The commission agrees with this comment. The commission further responds that the greatest number of water right complaints to the commission’s central office and field staff relate to whether a use is exempt from permitting under Texas Water Code §11.142. Because of limited staff resources and the inability to investigate and evaluate every complaint, a fixed amount of irrigated acreage below which there would be no question as to whether the use qualified as exempt would have greatly helped alleviate this work load on the agency. Additionally, it would have provided clear and consistent guidance on this issue. A similar practice is followed by other western states for these reasons. It is generally believed that a one acre/orchard may be sufficient

to meet any household's domestic needs. However, the commission recognizes that what amount of irrigated acreage falls within an exempt use is subject to the particular domestic needs and size of a household. Accordingly, the amendment to the definition of "domestic use" at this time simply clarifies that such use is limited to the use by the person or household. The commission will include factors that may be considered in this evaluation in the commission's regulatory guidance document for water rights.

The Cattle Raisers commented that the proposed changes to the definition of "domestic use" has changed the definition to exclude uses for which payment or compensation is received, without any qualification to recognize legitimate incidental situations where "consideration" may be given or received. For example, the Cattle Raisers state that such incidental uses could include persons trading products from a family garden or orchard with a neighbor or using such products in bake sales, potluck suppers or similar circumstances. Therefore, the Cattle Raisers recommend that the definition include a qualification for such incidental activities.

The commission responds that the definition of domestic use as it relates to uses exempt from permitting under Texas Water Code §11.142 previously included that compensation for such use may not be given or received. However, the intent of the provision is to not require a permit for the use of water that may result in such incidental exchanges between neighbors or other similar activities such as bake sales or potluck suppers. The commission has amended §297.21, relating to (Domestic and Livestock Use) to further clarify the intent to not require a permit for the use of water that goes toward such exchanges and donations.

The AECT, commented that the proposed definition for “drought of record” contained in §297.1(17), Definitions, should be amended by deleting language providing that such flows are calculated by using naturalized streamflow.

The commission disagrees with the comment because the definition relates to the lowest anticipated flow in the stream as a result of drought based upon historical records, and not the lowest flow based on artificial diversions and impoundments.

TWDB commented that the proposed definition for “drought of record” in §297.1(17) specify an appropriate period for determining the drought of record and that a separate period should be provided for direct diversion rights and for projects with reservoir storage. TWDB suggests a single year for the former and the period between consecutive flood spills for the latter.

The commission has made no changes in response to this comment. The phrase “drought of record” is only used in the Chapter in the definition of firm yield. Firm yield is a concept related to the effective amount of water to be produced from a reservoir. Since the phrase “drought of record” is not used in this Chapter in relation to direct diversions, a definition for this purpose would be superfluous. The appropriate period for determining the drought of record is specified in the adopted rules as the historic period of record in order to ensure that the full range of available historical data is examined in order to find the period of lowest flows, to obtain a worst case scenario on which to base the proposed yield of the reservoir.

Brown & Potts, L.L.P. commented that the proposed definition for “drought of record” contained in §297.1(17) is inconsistent with the use of this term by the TWDB for regional planning purposes and that the two agencies should use consistent definitions. Specifically, the rule defines “drought of record” as “(t)he historic period of record for a watershed in which the lowest flows were known to have occurred on naturalized streamflow” whereas the TWDB definition defines the term to mean “(t)he period of time when natural hydrological conditions provided the least amount of water supply”.

The commission disagrees with the comment because the commission’s term relates only to surface water while the TWDB’s term must relate to all sources of water supply, including surface and groundwater. In addition, there is no conflict in meaning between the two terms when applied to surface water.

TWDB commented that the proposed definition for “firm yield” in §297.1(18) be revised so that the term “annually” be replaced with “each year” because the term “annually” could imply any one year. TWDB also commented that a comma should go in between the words “flows” and “that” and the word “naturalized” be substituted for “historic available”. Finally, the TWDB commented that “naturalized” stream flows could be defined as historic stream flows adjusted to remove human impacts, including those associated with diversions, storage and discharges.

The commission agrees in part with the comments. The change from “annually” to “each year” is unnecessary and does not provide greater clarity. However, the commission agrees with the remaining comments and has revised the rule accordingly.

Henry, Lowerre commented that the proposed definition in §297.1(18), Definitions, for “firm yield” should acknowledge that the calculation would also assume the passage of flows needed to meet all applicable instream and inflow requirements.

The commission agrees with the comment and has revised the rule accordingly.

BRA commented that the proposed definition for “firm yield” contained in §297.1(18), Definitions, should be clarified to indicate that firm yield is based upon naturalized flows for which the full impact of all pre-existing water rights exercised at their full legal amount is accorded.

The commission agrees with the comment and has amended the rule accordingly.

Brown & Potts, L.L.P., commented that the proposed definition for “mitigation” is incomplete as it may also relate to mitigating economic impacts of an interbasin transfer to the basin of origin.

The commission responds that the definition is intended to relate only to habitat mitigation provided by §297.53, Habitat Mitigation, and has revised the term accordingly by placing the word “habitat” before “mitigation” and renumbering the definitions according to alphabetical order.

The AECT, commented that all proposed new language for the definition of “mitigation” contained in §297.1(28) setting out the sequence of mitigation steps be deleted because mitigation is addressed in

Senate Bill 1 (1997) only in regards to interbasin transfers and is listed there as “compensation and mitigation.”

The commission disagrees with the comment because the definition is applicable to mitigation required for impacted aquatic and wildlife habitat in the assessment of water right applications as provided under §297.53 of this title (relating to Habitat Mitigation) and pursuant to Texas Water Code, §11.152. The changes are also consistent with the TNRCC’s regulatory guidance contained in “A Regulatory Guidance Document for Applications to Divert, Store or Use State Water” (June 1995). An expressly-stated purpose of this rulemaking was not only to implement Senate Bill 1 but to also provide in rule where necessary and appropriate the agency’s policies and guidance contained in this document as required by Texas Water Code §5.103.

The City of Dallas commented that in the proposed definition of “mitigation” that “balance”, “compensate”, or “counteract” be used instead of the term “offset”.

The commission disagrees with the comment because the term “offset” is appropriate when considering actions to mitigate loss of wildlife habitat affected by a project. It is also consistent with the state’s “no net loss” policy of wetland functions and values contained in Texas Parks and Wildlife Code §14.002 and the goals and policies of the Texas Coastal Management Program contained in 31 TAC §501.14. The term is also used in the underlying statute, Texas Water Code §11.152.

Tarrant Regional commented that the proposed definition of “priority” contained in §297.1(35) is inappropriate because it is a generic term that may be applicable to many things, not just to the prior appropriation principle of “first in time, first in right.”

The commission disagrees with the comment because the definition is needed to clarify how that term is used for the specific purposes of the rule.

Henry, Lowerre commented that the proposed definition in §297.1(37), Definitions, for “recreational use” invites confusion in its reference to “non-domestic use of aquatic and wildlife resources” and is unclear how it relates to the additions to the definition of “livestock use” regarding game animals and fur-bearing animals. Similarly, the commenter stated that the definition of “recreational use” and “industrial use” seem to overlap with respect to aquatic resources. The commenter presumes that “recreational use” is intended to have a more limited context than the livestock or industrial use categories with respect to aquatic and wildlife resources, but the distinction seems unclear.

The commission agrees that the definitions and their applicability could be made more clear. The intent of the proposed changes was to make clear that aquatic and wildlife enjoyment is included within the domestic use associated with domestic and livestock reservoirs exempt from permitting under Texas Water Code §11.142. However, for such use to be exempt, compensation cannot be given or received for aquatic and wildlife enjoyment. If so, a permit must be obtained. For example, a business where people are allowed to fish in a pond for a fee would be a recreational use for which a permit is required. If the reservoir is used to raise fish to be harvested and sold

commercially, then a permit would be required for this industrial use of water. In addition, the changes were to make clear that the incidental use of reservoirs by free-ranging wild game and fur-bearing animals that may be harvested by hunters and trappers who pay a fee to hunt or trap on the property does not constitute a recreational use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir. Accordingly, the commission has revised the definitions for “recreational use” and §297.21, Domestic and Livestock Use, to make this intent more clear.

The City of Dallas commented that the proposed definition of “reservoir system operations” contained in §297.1(39) be amended by adding the words “or a reservoir and river stream segment” after the words “more than one reservoir.”

The commission has interpreted the comment to refer to a reservoir in combination with a direct diversion facility and has changed the rule accordingly.

Henry, Lowerre commented that the definition of “state water,” specifically the reference to a “state watercourse,” invites confusion since no definition is provided for a “state watercourse.” The commenter also states that the last sentence does not appear to advance the clarity of the definition.

The commission responds that what constitutes a state watercourse is derived from the definition of “state water” and “watercourse”; i.e., state water in a watercourse. It is not limited by state ownership of the bed and banks. In order to make this more clear, the word “state” preceding

watercourse has been deleted. With regard to the last sentence, the purpose of the change is to make clear that state water does not lose its characteristic as state water simply because it has been injected into the ground for an aquifer storage and recovery project. It is to also make clear that the state retains the ability to ensure that the water is put to beneficial use in accordance with the water right after it has been retrieved and used by the permittee.

Additionally, diffuse surface runoff from rainfall, percolating groundwater seepage, and percolating groundwater before it erupts from a spring and before it enters a watercourse is not state water. The commission has revised the definition of “state water” to clarify its intent.

Henry, Lowerre commented that the definition of “unappropriated water” contained in proposed §297.1 also includes a requirement for the passage of flows needed to meet all applicable instream and inflow requirements.

The commission disagrees with the comment because the definition describes the total remaining unappropriated water to meet both consumptive as well as instream use and freshwater inflow needs. Additionally, the comment presumes the result of the balancing test between these needs to be performed under Texas Water Code, §11.147. Finally, the commission’s ability to assess environmental impacts when evaluating applications for new and amended water rights and to impose related conditions on such rights, if appropriate, is clearly set forth under §297.42(b), Water Availability.

Brown & Potts, L.L.P., commented that the proposed definition for “surplus water” in §297.1(49) refers to water taken from “any source” and, therefore, may relate to groundwater for which the commission does not have authority to regulate its use.

The commission disagrees with the comment because the definition includes water taken by an appropriator, and appropriator relates to a person authorized to appropriate state water. In addition, the applicability of the chapter and the commission’s authority over state water is stated numerous times throughout the chapter.

TWDB commented that the proposed definition for “unappropriated” water contained in §297.1(50) be revised so that the word “state” precedes “water”.

The commission agrees with the comment because an appropriation for purposes of Chapters 295 and 297 relates to state water.

Bexar Met commented that groundwater based sources should be addressed with respect to granting a water right for storage under §297.11, General Authorization to Divert, Store, or Use State Water, Texas Water Code, §11.121, and include water quality criteria with respect to water proposed for underground injection.

The commission disagrees with this comment because §297.11 relates to the diversion, storage, or use of state-owned surface water, rather than groundwater, and water quality criteria for

underground injection is provided in Chapter 331 of this title (relating to Underground Injection Control).

AGC comments that proposed §297.13 should be clarified by providing that a temporary permit may be suspended only in accordance with the terms of the permit.

The commission disagrees with the comment because the commission continues to have oversight authority after the issuance of the water right to ensure compliance with the law. Actions the commission may take to administer and enforce water rights are not limited by the express provisions in the permit but are also provided by statute including, but not limited to, Texas Water Code §5.013(a)(1) and 11.327(b).

AGC commented that proposed §297.13 should be amended to provide that the commission may issue a temporary permit without notice and hearing, rather than notice or hearing.

The commission agrees and has revised the rule accordingly.

Henry, Lowerre and Brown McCarroll commented that §297.13, Temporary Permit Under the Texas Water Code, §§11.138 and 11.153-11.155, appeared to have a typographical error in referring to a “commissioner” who may issue a temporary permit, rather than commission. Additionally, TPWD commented that all three commissioners should be involved in a decision that may affect senior water right holders.

The commission disagrees with the comment. Texas Water Code, §11.138, provides that the commission may, by appropriate order, authorize any member of the commission to approve and issue temporary permits without notice and hearing if it appears that sufficient water is available and authorizes not more than 10 acre-feet of water for not more than one year. The order adopting these rules is also the order authorizing any one commissioner to issue such permits.

AGC commented that proposed §297.13(d) should be amended to provide that a registration for a temporary permit may be denied for failure to meet the requirements of Texas Water Code §11.138, rather than the requirements of the rule.

The commission disagrees with the comment because the rule also contains the definitions and implementation procedures for the statute.

TPWD commented that §297.13 should provide that the commission may place conditions in a temporary permit as appropriate to protect environmental flow needs.

The commission agrees and has revised the rule accordingly.

Tarrant Regional commented that the intent of reinstating the contractual permit in proposed §297.14 is unclear.

The commission responds that the intent of reinstating language regarding contractual permits is to allow for the streamlined review and approval of such actions if the underlying water right already authorizes such contracts. Under the rule, the commission staff would simply review the contract to ensure it was consistent with the underlying water right . No formal commission review and approval would be required. However, if the contract provided for a different location of use or diversion point, for example, either the underlying water right would have to be amended or a contractual permit obtained by the buyer.

Bexar Met commented that proposed §297.16, Conveyance of Water Down Bed and Banks, should include groundwater other than of effluent quality.

The commission responds that such conveyance of groundwater other than effluent is covered under subsection (b) of §297.16, relating to the conveyance of water in general.

North Richland Hills commented that proposed §297.16, Conveyance of Water Down Bed and Banks, should be amended to provide that the reuse of wastewater plant discharges should be the right of the parties who have the NPDES permit and should not be restricted.

The commission disagrees with the comment because such reuse may be expressly limited by the underlying water right or by conditions necessary to protect existing water right holders and environmental flow needs as provided by Texas Water Code §§11.042 and 11.046.

Henry, Lowerre commented that proposed §297.16(a) should be clarified by stating that special conditions to help maintain instream uses and freshwater may be included in a water right as provided by Texas Water Code §§11.147, 11.150, and 11.152.

The commission agrees with the comment and has revised the rule accordingly.

Henry, Lowerre commented that proposed §297.16(c) should be clarified by making it consistent with the water quality antidegradation policy contained in §307.5 of this title (relating to Texas Surface Water Quality Standards). The policy provides that existing uses be protected and that no activities subject to regulatory action which would cause degradation of waters which exceed fishable/swimmable quality will be allowed unless it can be shown that the lowering of water quality is necessary for important economic or social development. Degradation is defined as a lowering of water quality to more than a *de minimus* extent, but not to the extent that an existing use is impaired. Finally, the policy provides that the quality of outstanding national resource waters will be maintained and protected.

The commission agrees with the comment and has revised the rule to provide that it will be implemented consistent with the state antidegradation policy contained in §307.5.

Henry, Lowerre also commented that the last sentence in proposed §297.16(c) should be clarified to provide that nothing in the chapter affects the obligation to obtain the appropriate water quality permit.

The commission agrees with the comment and has revised the rule accordingly.

Tarrant Regional and an individual commented that proposed §297.16 generally tracks the statutory language and that the commission should elaborate on the circumstances that it would authorize indirect reuse under a bed and banks permit and placing conditions on such bed and banks permits. Tarrant Regional further provides specific rule language providing recommended factors.

The commission responds that the underlying statutes, Texas Water Code §§11.042 and 11.046, and the applicable rules of this chapter taken together, adequately provide the factors the commission is to consider when determining bed and banks permitting decisions. Therefore, the inclusion in the rule of additional factors recommended by the commenter would be unnecessary and confusing. If necessary, the commission may revise the regulatory guidance document to provide further description of the technical assessment that will need to be done based upon the statutory considerations.

Tarrant Regional commented that it is unclear why previous language in §297.16 relating to optimum development projects under Texas Water Code, §11.140, was proposed for deletion because it was redundant of other rules.

The commission responds that Texas Water Code, §11.140, simply provides that the commission may issue permits for storage solely for the purpose of optimum development of projects. The statute further provides that the commission may convert these permits to permits for beneficial use if application to have them converted is made to the commission. The criteria and procedures

for the review and approval of these projects and subsequent amendments would be the same as the general criteria and procedures provided under Chapters 295 and 297 of this title.

Brown & Potts, L.L.P., commented that it is unclear in proposed §297.17 whether the terms “affected person,” “affected water right holder,” and “water right holders for whom the water is being transferred” are synonymous and, if so, they should all be referred to by using a consistent term.

The commission responds that the terms may be synonymous in many instances but not exclusive since there may be other affected persons as that term is defined under Texas Water Code §5.115 besides water right holders or water right holders from whom the water is being transferred.

Brown & Potts, L.L.P., comments that proposed §297.17 contains inconsistent references to the executive director and the commission.

The commission disagrees with the comment. The use of the two separate terms is to identify emergency authorizations for which the executive director is authorized to make under Texas Water Code §11.139(f).

The City of Dallas commented that proposed §297.17(a) relating to Emergency Authorization (Texas Water Code §11.139) be clarified to read that the authorization may relate to the emergency use of water appropriated “by someone other than the applicant” rather than simply by “another”.

The commission agrees with the comment and has revised the rule accordingly.

AECT and TU commented that proposed §297.17(b), Emergency Authorization, should be revised by deleting whether the purchase of water or a water right at a “reasonable price” should constitute a practical alternative to the emergency transfer of water. The commenter explained that the emergency authorization process should be a path of last resort and not triggered if one party in need of additional water makes a determination that the cost of alternative water is “too high.” Rather, the party in need should provide the quoted water cost to the commissioners as the basis that no additional water is available.

The commission agrees that the rule needs clarification as to whether the purchase of water or a water right is a practical alternative to an emergency transfer of water. Therefore, the rule is amended to require the applicant to provide information on whether such purchase was available at a reasonable as well as affordable price to the applicant.

Brown & Potts, L.L.P., commented that proposed 297.17(e) providing that the commission shall issue an order directing water right holders from whom water is being transferred to curtail their use of water should only be issued after notice and opportunity for hearing has been provided to affected water right holders.

The commission responds that such notice and opportunity for hearing is already provided under subsection (e) of the rule providing that such notice and hearing shall be provided in accordance

with Chapter 2001 of the Texas Government Code, pursuant to Texas Water Code §11.139. This provides that affected persons be provided notice and opportunity for a hearing on whether to affirm, modify or set aside the initial emergency authorization. At that hearing, the order directing affected water right holders to curtail their use would also be considered, and notice of this would be included in the notice of the hearing provided to the affected water right holders. Such affected persons would include water right holders from whom the water is being transferred.

The City of Dallas commented that proposed §297.17(h) be clarified to provide that the order requiring the applicant to timely pay the amounts for which the applicant may be liable to be couched in terms using the current rather than future tense.

The commission agrees with the comment and has revised the rule accordingly.

AECT, and TU comments that proposed §297.17(k) should be amended by providing that if the emergency transfer of water is to be made, the allocation to be made among two or more water right holders should not exclude domestic or municipal water right holders.

The commission disagrees with the comment because Texas Water Code §11.139 expressly excludes domestic and municipal water right holders from those among whom the burden of the transfer may fall.

Brown McCarroll and Brown & Potts, L.L.P., commented that proposed §297.17(l), Emergency Authorization (Texas Water Code, §11.139) should be amended to provide that the person receiving an emergency transfer of water is liable to the water right holder from whom the water is being transferred for the fair market value of the water and related damages regardless of whether the water was being used by the water right holder or whether financial commitments by the water right holder would be jeopardized. Similarly, Tarrant Regional commented that it is bad policy to look first to having water transferred from unused water rights and not provide them compensation because there is an assumption that the rights are not being used because of low flow drought conditions. Tarrant Regional recommends that these holders of unused water rights be provided an opportunity to demonstrate the circumstances of their non-use and whether they are entitled to compensation under Texas Water Code, §11.139.

The commission disagrees with the comment by Tarrant Regional that it is bad policy to first examine whether unused appropriated water is available to meet the transfer request because the comment does not take into account the ability to issue term permits pursuant to Texas Water Code, §11.1381. Section 11.1381 provides that the commission may issue a term permit to the extent that it would not interfere with the use of an existing water right holder or jeopardize existing financial commitments. Generally, if there is unused water available, the applicant could obtain a term permit, thus avoiding the consequences to water right holders discussed by Tarrant Regional. If a request for water is submitted, the commission would determine first whether appropriated but unused water is available to meet the emergency need. If such water is available, the option of obtaining a term permit would be made known to the applicant and, if

pursued, would follow the procedures applicable to the issuance of a term permit. However, if the applicant indicates that the water is needed on a more immediate timeframe, then procedures for the issuance of an emergency transfer would be followed, including the applicant being liable for the fair market value of the water whether it was being used or had related financial commitments. Not to provide this option to the applicant and to automatically require the payment of fair market value and damages to a water right holder when conditions exist to grant a term permit would nullify the existence of §11.1381, provide unwarranted windfall profits to the water right holder, improperly reward the nonuse of available water by a water right holder, and unreasonably penalize a person facing an emergency need for water. The commission agrees with the other comments recommending that if an emergency transfer is granted, the transferee is liable for the fair market value of the water and damages, if any, under Texas Water Code §11.139 and has clarified this in the rules.

Brown McCarroll commented that §297.17, Emergency Authorization (Texas Water Code, §11.139), should be clarified that a person receiving an emergency transfer of water under Texas Water Code, §11.139 is liable to the water right holder from whom the water is being transferred for the fair market value of the water as well as any damages caused to the water right holder by the transfer, such as loss of production due to inadequate water for manufacturing or jeopardy to some existing financial commitment of the water right holder. The commenter also stated that additional guidance was needed in determining what constituted fair market value for this purpose.

The commission agrees with the comment and has revised the rule to expressly include a statement that the transferee is liable for the fair market value of the water transferred as well as any damages and that fair market value will be determined in accordance with Texas Water Code, §11.0275.

The City of Dallas commented that proposed §297.17(m) be clarified to state that the commission's designation of affected water right holders under this section does not preclude other water right holders from "establishing," rather than "demonstrating," the impact of the transfer.

The commission agrees with the comment and has revised the rule accordingly.

AECT and City of Dallas comments that the correct citation of exhaustion of administrative remedies in proposed §297.17(n) should be subsections (l) and (m).

The commission agrees with this comment and has revised the rule accordingly.

The City of Dallas recommended adding two sentences to §297.17(o) which would clarify that: 1) emergency authorizations could be suspended in order to protect senior water rights; and 2) the commission could include provisions for the protection of instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries.

The commission has modified the rule to clarify that emergency authorizations may be suspended to protect senior water rights. The commission agrees that emergency authorizations may include provisions for environmental flows for the protection of instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to the bays and estuaries. However, some of these needs may be secondary to the emergency use because public health and safety take precedent over all other discretionary uses of water. The commission would also consider the time it would take to assess and identify environmental flow needs which could preclude the conditioning of an emergency authorization if it would result in a significant delay in the delivery of the water for the identified emergency situation. Accordingly, the emergency use of water shall be consistent with any environmental conditions placed on the water right from which the water is being transferred. Any conditions placed on an emergency authorization to protect instream uses related to public health and safety (including, but not limited to water quality) would require the commission to weigh all relevant factors. The rule has been amended to clarify this intent.

Azurix commented that §297.18 should be amended to “grandfather” transfers that were between river basins under previous TWDB definitions or delineations prior to the passage of Senate Bill 1.

The commission responds that this is unnecessary since, by law, rules and law that were in effect at the time the application was submitted were applied in the review and action on the application. Interbasin transfer permittees who received authorization prior to the effective date of Senate Bill 1 changes to Texas Water Code §11.085 and who do not request an amendment will not be subject to any new application requirements.

The City of Dallas commented that the word “for” should be inserted between the words “applying” and “and” in the first sentence of proposed §297.18(a) for grammatical purposes.

The commission agrees with this comment and has revised the rule accordingly.

The City of Victoria commented that proposed §297.18(b), Interbasin Transfers, should be amended to provide that a change in place or purpose of use for an existing interbasin transfer constitutes a new interbasin transfer for which additional requirements should apply.

The commission disagrees with this comment because the additional requirements for a new transfer seek to address the impacts of a new loss of water from the basin of origin, not on a transfer of water that has already been authorized. In the case of a change in purpose or location of use for an already authorized transfer, impacts from the transfer itself have already been assessed and addressed when the original transfer was granted. Changes in purpose of use or place of use for water that has already left the basin of origin would not have any greater impact on the basin of origin than the original transfer. Whether there is a justified need for the change in purpose or place of use are already addressed under Texas Water Code §11.085(j) making applicable Texas Water Code §§11.122, 11.1271, 11.134 and other Code provisions generally applicable to an application for an amended water right. However, in response to the comment, the commission has clarified that a change in place of use to a third basin not currently

authorized, constitutes a new interbasin transfer so that impacts of the transfer to the third basin on the previously authorized receiving basin may be assessed, unless otherwise exempt.

Azurix commented that proposed §297.18(c) should include the provisions that the comments by county judges be considered by the commission in its review and action on an interbasin transfer as required by Texas Water Code §11.085(j).

The commission responds that this provision is already contained in §297.18(c)(5).

Brown & Potts, L.L.P., commented that proposed §297.18(c)(5) providing that the commission will give consideration to the comments of county judges as well as weigh the effects of the scientific and technical issues is contrary to Senate Bill 1 because the comments by county judges will be hearsay opinions, not based on fact or technical expertise, and not subject to cross-examination.

The commission disagrees with the comment. Section 11.085 of the Water Code not only requires the commission to weigh the technical aspects of the application but also the social and economic impacts. Section 11.085(j)(2) expressly requires the commission to give consideration to the comments of each county judge of a country located in whole or in part in either the basin of origin or destination. As elected representatives, county judges may provide useful information on the less technical aspects of the balancing test between the detriments and benefits to the two basins. Finally, nothing in the rule or underlying statute prescribes what weight to give such

comments vis a vis other factors. In evidentiary hearings, such comments will be provided appropriate weight under applicable rules of evidence.

AECT comments it is in strong support of the term language in §297.18(h), Interbasin Transfers, and the return of the interbasin transfer water to its original priority date in the basin of origin upon expiration of the term period.

The commission acknowledges the comment.

Henry, Lowerre commented that proposed §297.18(j), Interbasin Transfers, Texas Water Code, §11.085, providing that a municipal water right holder may be a party in a hearing on the application, should not be construed as adversely affecting the ability of any other potentially affected person to obtain party status.

The commission agrees with this comment and has revised the rule accordingly.

Henry, Lowerre commented that proposed §297.19(b), Term Permit under Texas Water Code, §§11.1381 and 11.153-11.155, would be more clear if it stated that the commission may deny or condition an application for reasons applicable to any water right application.

The commission agrees with the comment and has revised the rule accordingly.

AECT comments that proposed §297.19(b)(2) should be amended to provide that an application for a term permit be denied if it would interfere with a water right holder's authorized use of water for electric generation needs.

The commission agrees with the comment because interference with the exercise of a water right for any authorized purpose, including electrical general needs, would be grounds to deny a term permit under Texas Water Code, §11.139 and, therefore, the rule has been revised accordingly.

TPWD commented that proposed §297.19(b) be clarified by providing that a term permit may be denied if it will interfere or adversely affect environmental flow needs.

The commission responds that conditions in the permit may be provided in the permit for this purpose pursuant to Texas Water Code §§11.134(b)(3)(C), 11.147, 11.150 and 11.152 and has revised the rule to clarify this.

An individual commented that proposed §297.21 should delete the authority for someone to build an off-channel domestic and livestock reservoir exempt from permitting.

The commission disagrees with the comment because the underlying statute for the rule, Texas Water Code §11.142, provides that such a reservoir must be on the person's land but does not limit it to being on-channel. Additionally, such reservoir may not be built on navigable streams.

Brown & Potts, L.L.P., commented that the use of the term “riparian” in proposed §297.21 is confusing and needs further clarification.

The commission agrees with the comment and has revised the rule accordingly.

An individual commented that proposed §297.21 should be revised by adding a definition for “riparian”.

The commission responds that the rule has been revised to more clearly describe how the term is used in the rule.

AECT comments that proposed §297.21(a), Domestic and Livestock Use, should be amended by providing that releases of water stored in reservoirs to meet downstream water supply contracts are not subject to diversion or use for vested riparian domestic and livestock purposes.

The commission agrees with the comment because a riparian water right holder is entitled only to the reasonable use of the normal flow of the stream, and has revised the rule accordingly.

However, because such vested riparian rights are not required to register with or report their use to the commission, enforcement of such a provision is problematic.

The Cattle Raisers commented that proposed §297.21(b) should be clarified that the permit and permit exemption provisions relating to domestic and livestock reservoirs relate only to the storage of state water, and are not privately-owned water such as diffuse surface runoff collected in a stock pond.

The commission agrees with this comment and has revised the rule accordingly.

Henry, Lowerre commented that proposed §297.24, Permit Exemption for Mariculture Activities, should be amended to require that the notice include a justification for determining that the amount to be diverted is an “appropriate amount” as provided under Texas Water Code, §11.1421. Additionally, TPWD comments that proposed §297.24, Permit Exemptions for Mariculture Activities, be clarified to provide that after notice and hearing, if the commission determines that low freshwater inflows are interfering with estuarine productivity, the commission shall issue an order requiring the interruption or reduction of the use of water.

The commission agrees with the comments and has revised the rule accordingly.

Brown & Potts, L.L.P., commented that the commission does not have the authority to deny a water right application or reserve water from appropriation in order to maintain or protect environmental flow needs. In addition, Brown & Potts, L.L.P., commented that the commission does not have authority to assess estuary impacts beyond 200 stream miles for the coast.

The commission disagrees with this comment. Texas Water Code §§11.122, 11.134, 11.147, 11.150 and 11.152 expressly provide that the commission may assess such impacts when reviewing and taking action on an application. In performing this assessment, the commission is to weigh the request with such impacts. If the environmental impacts outweigh the request, the commission may find the application detrimental to the public welfare and deny the application or

place conditions on the permit to avoid or mitigate such impacts. The effect of either option is to reserve water from appropriation. In addition, Texas Water Code §11.147 mandates that commission to assess bay and estuary impacts on applications within 200 stream miles of the coast, but does not preclude such consideration of other applications. To assess such applications for aquatic and wildlife habitat would also be consistent with other provisions §11.147 as well as §§11.134(b)(3)(C) and 11.152.

BRA comments that proposed §297.21(b), Domestic and Livestock Use, should be amended by deleting the reference to “normal” storage and replacing it with “conservation” storage.

The commission disagrees with the comment because the term “normal” storage is used in the underlying statute, Texas Water Code, §11.142. However, the commission has included a definition for what constitutes “normal” storage by providing that it is the conservation storage of the reservoir and further defines this term.

TWCA and Tarrant Regional commented that proposed §297.42(b) should be clarified to read that a water right may be conditioned as appropriate to protect instream uses, after considering all factors provided under Texas Water Code, §11.134(b)(3)(C), §11.147, and §11.150.

The commission agrees with the comment and has amended the rule accordingly.

TPWD commented that it is concerned that allowing an appropriation where less than 75% of the water is available less than 75% of the time will lead to the over-appropriation of streams.

The commission disagrees with the comment because the commission places limits on new appropriations to prevent over-appropriation and resulting impacts to senior water rights or environmental flow needs. In addition, the 75% rule of thumb is intended to be flexible because it is based upon an average percentage of amount and time of water availability needed for a viable irrigation use based upon cases determined during the adjudication of water right claims.

However, it does not take into account other purposes by use that may be viable at lesser or greater percentages and/or that also rely on alternative sources of water supply.

AECT comments that it strongly supports limiting the applicability of §297.42(b), Water Availability, to new water rights as provided in the rule.

The commission acknowledges the comment.

TWDB commented that proposed §297.42(c) should be revised to provide that the 75% rule of thumb for direct diversion projects should also apply to those with on-channel storage capability as well as off-channel storage capability.

The commission agrees with this comment and has revised the rule accordingly.

The City of Dallas commented that proposed §297.42(d) be amended by adding that a system operation in conjunction with other water rights may also be a project that does not require the continuous availability of historic, normal stream flow.

The commission agrees with this comment and has revised the rule accordingly.

BRA comments that proposed §297.42(e), Water Availability, should be revised by providing that for an application for a municipal or domestic water right to be approved, the diversion right, rather than the yield, must be equal to its firm yield.

The commission agrees with this comment and has revised the rule accordingly.

Tarrant Regional commented that proposed §297.42(g) should be revised to delete the reference to “direct” reuse and simply refer to the cessation of flow for any lawful reason.

The commission disagrees with the comment because the reference to direct reuse is to provide one of many examples under which flows may be diminished. Such examples also assist in the reader’s understanding of the rule. The rule also makes clear that this example is not exclusive by also providing that flows may be diminished for other lawful reasons.

Tarrant Regional also commented that it is unclear how the commission staff will decide if return flows may cease in the future under proposed §297.42(g) in order to provide the permittee the caveat that the permit has been granted based upon an interruptible water supply.

The commission responds that for the water availability analysis for a new water right application, it will be assumed that existing water rights without specific return flow requirements or other limits on direct reuse will be able to directly reuse and consume the entire appropriate amount as authorized by the water right, resulting in no return flows. In cases where no water is available for a new water right except for these potentially, interruptible return flows, the permit will contain a condition providing that this was the basis for granting the water right on an interruptible basis.

TPWD comments that proposed §297.43, Beneficial Uses, be revised to specifically include instream uses as a beneficial use.

The commission responds that the existing list includes specific instream uses such as navigation, recreation and pleasure, aesthetics, public parks, game preserves, and hydro-electric generation. In addition, these uses would include water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries necessary for the listed instream uses other than navigation and hydro-electric generation. However, the commission has further clarified the provision referencing beneficial uses recognized by other law by including instream uses also recognized under Texas Water Code §§11.147 and 15.7031. This is also consistent with the existing definition

of instream use contained in §297.1 of this title (relating to Definitions) specifically providing that an instream use is a beneficial use of water.

Tarrant Regional commented that administrative completeness of an application for purposes of time priority contained in proposed §297.44(c) should be further clarified to provide that clear and objective criteria for such a determination will be used by commission staff.

The commission disagrees with the comment because such criteria already exist in other commission rules. The proposed rule is based on existing §295.201(b) and §281.17 of this title relating to Filing and Instruments and Notice of Receipt of Application and Declaration of Administrative Completeness, respectively. The latter provides a detailed list of what constitutes an administratively complete application and the former provides that the commission will not formally accept an application until it has met the administrative completeness requirements provided under §281.17.

Henry, Lowerre commented that subsection (a) of proposed §297.45, “No Injury” Rule, would be more clear if it acknowledged that the limitations on approval of a new or amended water right are in addition to the other limitations that also apply to such applications; for example, protection of water quality and fish and wildlife resources.

The commission agrees and has revised the rule accordingly to make clear that the section relates only to impacts to existing water rights and is not exclusive of other requirements that may apply, including the assessment of environmental impacts.

BRA comments that proposed §297.45(a), “No Injury” Rule, should be clarified to provide that changes in stream conditions necessary to constitute an adverse impact to other water right holders would be those changes in addition to those that would have occurred with the full exercise of senior water rights.

The commission disagrees with the comment because the conditions under which the “four corners” analysis shall be applied to proposed water right amendments are provided under §297.45.

TPWD commented that proposed §297.45(a) should be amended to include impacts to aquatic and wildlife habitat.

The commission disagrees with the comments because the provision relates only to the assessment of impacts to other water right holders. The assessment of environmental impacts are addressed by subsequent sections in the chapter including §§297.46, 297.47, 297.53, 297.54, 297.55 and 297.56.

The City of Dallas commented that proposed §297.45, “No Injury” rule, be amended to provide that nothing in this section is intended to limit changes in return flow discharge points where the change is needed to improve water quality or public health risk, or where the return flow did not exist when the affected water right was granted.

The commission disagrees with the comment because it is inconsistent with Texas Water Code §11.046(b) providing that the commission may include conditions in a water right providing for the return of surplus water, in a specific amount or percentage of water diverted, and the return point on a watercourse or stream as necessary to protect senior downstream water rights or to provide flows for instream uses or bays and estuaries. In addition, the commission may require flows to be returned in order to protect senior water rights pursuant to Texas Water Code §11.1351. The commission has revised the rule to incorporate these provisions.

The City of Dallas commented that §297.45(b) should be amended by adding the following sentence at the end of that subsection: “However, if the water right was not limited according to §297.42(e), then the adverse impact should consider the firm yield of the water right.”

The commission has made no changes in response to this comment. In the commission’s analysis of potential adverse impacts to existing water rights as provided in the adopted §297.45, the commission will look to the “four corners” of existing water rights. What water the commission finds available for permitting will depend on the specific fact situation of the application and will,

therefore, be decided on a cases by case basis. The proposed language by the City of Dallas does not further clarify the subsection. Accordingly, no changes have been made to the rule.

The Cattle Raisers commented that the commission has no specific statutory authority to require a public welfare evaluation or social, economic, or environmental impact statements for purposes of water rights applications as provided under proposed §297.46.

The commission disagrees with the comment. Section 11.134(b)(3)(c) of the Texas Water Code expressly provides that the commission shall grant a water right application only if it is not detrimental to the public welfare. Since the burden is on the applicant to meet all application requirements, it is reasonable and necessary to require the applicant to submit supporting information.

TIC commented that proposed §297.46, consideration of Public Welfare, and §297.47, Impact on Groundwater, should be revised by providing that an amendment to a water right that does not have a greater impact on the public welfare or groundwater than the full, legal exercise of the water right prior to the amendment, must be granted pursuant to Texas Water Code §11.122(b). By not doing so, the commenter states, the rules could hinder the marketing of water rights.

The commission disagrees with the comment. Section 11.122(b) of the Water Code provides that with respect to impacts to existing water rights or instream uses and freshwater inflows, an amendment other than an increase in the appropriative amount or diversion rate shall be

authorized if the requested change will not result in a greater impact on existing water right rights or the environment than the full, legal exercise of the water right prior to its amendment.

However, with respect to criteria other than water right and environmental impacts, the statute states that the application is subject to meeting all other applicable requirements of Chapter 11 of the Water Code including, but not limited to, the assessment of groundwater impacts, conservation and the avoidance of waste, and public welfare considerations provided under Texas Water Code §11.134.

TPWD commented that it supports the adoption of §297.47(c) relating to Impacts of Groundwater.

The commission acknowledges the comment.

AECT comments that the applicability of proposed §297.47, Impacts on Groundwater, be limited to applications for new water rights and an amendment to an existing water right that would increase the appropriative amount.

The commission disagrees with the comment because the applicability of Texas Water Code §§11.134 and 11.1501 are not limited as suggested and changes in purpose of use to a more consumptive use or changes in the points of diversion also have the potential to significantly impact groundwater by reducing recharge amounts and location.

Brown & Potts, L.L.P., comments that there is no Senate Bill 1 provision requiring or statutory authority for proposed §297.48.

The commission responds that the notice and scope of rulemaking is not limited to only implementing Senate Bill 1 but to also implement by rule all provisions of Chapter 11 of the Water Code, where appropriate, and to provide in rule form all related policies and guidance as required by Texas Water Code §5.103. The waste of water not contributing a beneficial use of water is based upon the definition of “beneficial use” contained in Texas Water Code §11.002.

Brown & Potts, L.L.P., commented that proposed §297.49 be amended to provide that return flows of surplus water may not be used for environmental flows without an express reservation or other act by the commission.

The commission disagrees with the comment because return flows in a stream will have environmental benefits whether the commission takes an official act recognizing this or not.

TPWD commented that it supports the adoption of proposed §297.49, Return of Surplus Waters.

The commission acknowledges the comment.

AECT and TU comment that proposed §297.49, Return and Surplus Waters, be amended to provide that water recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

The commission agrees with the comment because it is consistent with Texas Water Code §11.046(d) and has revised the rule accordingly.

TWDB and Brown & Potts, L.L.P., commented that the requirement in proposed §297.49(c) that the discharge of return waters shall not impair an existing or potential beneficial use of groundwater as to its water quality significantly expands the provision of Senate Bill 1 and is particularly onerous.

The commission disagrees with the comment. The protection of existing and beneficial uses of groundwater is consistent with §26.401(c) of the Water Code providing that discharges subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard.

TPWD commented that it supports the adoption of proposed §297.50, Water Use Measurement.

The commission acknowledges the comment.

The City of Dallas commented that proposed §297.50(b) be clarified to provide that the use of a water source which in itself is not a dependable water supply is a conservation practice because using this water where it is available reduces and thus, conserves the use of the dependable supply.

The commission disagrees with the comment because the use first of an available, non-dependable water supply is a drought management measure, rather than a conservation measure that provides the overall reduction in the use of water by reducing waste and using water more efficiently as defined by Texas Water Code §11.002(8).

TWDB and Brown & Potts, L.L.P., commented that the requirement under proposed §297.50(b)(3) that an applicant must prove that no feasible alternative exists to the requested appropriation is too burdensome because it exceeds commission authority and such alternatives may be too costly from either a financial or environmental viewpoint. Specifically, SAWS commented that it found no legislative support for a burden of proof that an applicant show that “no feasible alternative” to the proposed appropriation existed in order to have the appropriation authorized. SAWS stated that it agrees that applicants for appropriations bear the burden of proof to show that they have evaluated all feasible alternatives and that the alternative selected is reasonable and necessary. However, SAWS expressed concern that the language in the proposed rule may allow a protestant to argue that there was some other feasible alternative, which the applicant may have chosen not to pursue for any variety of legitimate reasons and, therefore, the application should be denied under the concept embodied in the proposed rule is untenable. TWDB further comments that the imposition of this standard would create

a situation where no permits would be granted, as there almost always are other options even though they are not acceptable to the applicant.

The commission disagrees, in part, with these comments. In its review and action on a water right application, the commission must determine whether the application is intended for a beneficial use and whether the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation. “Beneficial use” is defined by Texas Water Code §11.002(4) to mean the use of that amount of water which is economically necessary for a purpose authorized by law when reasonable intelligence and diligence are used in applying the water to that purpose. “Conservation” is defined in Texas Water Code §11.002(8) to include those practices, techniques and technologies that will reduce the consumption and loss of water and improve efficiency in the use of water. These standards have been in place prior to this rule adoption and the current rule adoption does not impose this as a new requirement, but simply rennumbers an existing requirement. Under this standard, numerous water right applications have been approved. The term “feasible” allows the applicant to provide information as to financial and environmental costs associated with options and whether the requested appropriation is the most cost-effective and environmentally sensitive option to meet applicant’s water needs. Information submitted under the beneficial use and conservation standard will also help the commission determine whether the amount requested is reasonable and necessary for the proposed purpose. The burden is appropriately on the applicant as the petitioner for a favorable action on the application as well as the party with the best and most complete access to this information to support the application. However, to avoid confusion and to distinguish the broader practical

alternatives test that may be applied under the public welfare criteria contained under §297.46, and pursuant to Texas Water Code, §11.134(b)(3)(c), §297.50(b)(3) has been revised to delete the reference to this broader test and to just provide how the conservation plan is used to determine whether the need for the water and the requested amount are reasonable and necessary considering the efforts made by the applicant to conserve water and avoid waste. This deletion is not intended to remove an existing requirement that the applicant bears the burden to demonstrate that the applicant has examined practical alternatives to the proposed project to determine whether there exists practical alternatives that are less impacting to the available supply of water and the environment and that are also cost effective to the applicant.

AECT comments that it is in support of proposed §297.50(c). Consideration of Water Conservation Plan, allowing the executive director or watermaster to waive the 5% measurement accuracy requirement because many existing water rights have historically measured diversions using alternative measuring methods such as pump curves and water balances and hopes the approval process for such waivers does not unduly burden the water right holder.

The commission acknowledges the comment and responds that this provision is similar to that contained in Chapter 303 and 304 of this title (relating to Watermaster Operations). Past experience and implementation of this provision has shown the approval process to be relatively short and simple because such acceptable alternative measuring methods such as the one mentioned in the comment are widely known and have been previously approved.

Brown McCarroll and TWCA commented that proposed §297.53, Habitat Mitigation, be amended to remove language providing the steps and criteria used for the habitat mitigation assessment of a water right application pursuant to Texas Water Code §11.152. Brown McCarroll commented that the statute does not provide the authority for such an “exhaustive” analysis and mitigation as provided in the proposed rule and is essentially duplicative of requirements of the U.S. Corps of Engineers, under §404 the Clean Water Act. Additionally, both commenters stated that the commission should wait until negotiations with the U.S. Corps of Engineers on a memorandum of agreement relating to §401 certification of Corps permits be finalized before going forward with any guidance on rulemaking on habitat mitigation. For similar reasons, Brown McCarroll requests the definition of “mitigation” in 297.1, Definitions, also be deleted.

The commission disagrees with the comment because the proposed rule is authorized under Texas Water Code §§11.147 and 11.152 and is consistent with related regulatory guidance previously adopted by the commission and published in “A Regulatory Guidance Document For Applications To Divert , Store Or Use State Water” (June 1995). This document was developed in 1994-1995 with the assistance of an earlier ad hoc advisory group. This guidance and rule are based upon Texas Water Code §11.147 and §11.152 providing that the commission may require the applicant to take reasonable actions to mitigate adverse impacts on fish and wildlife habitat. In determining whether to require an applicant to mitigate adverse impacts on a habitat, the statutes provide that the commission may consider any net benefit to the habitat produced by the project and shall offset against any mitigation required by the U.S. Fish & Wildlife Service pursuant to 33 CFR §§320-330. The rule sets forth the specific criteria the commission uses to determine such

reasonable actions that would be required to mitigate such impacts, including the consideration of net benefits and mitigation required by the USFWS. The rule is also consistent with the state wetlands policy of “no net loss” of wetlands functions and values provided by Texas Parks and Wildlife Code §14.002(b)(2) and the goals and policies of the Coastal Management Program contained in 31 TAC §501.14. Additionally, the rule seeks to avoid unnecessary conflict with Corps requirements by expressly providing that the commission shall offset against any mitigation required by the U.S. Fish and Wildlife Service pursuant to 33 CFR §§320-330. Although the rules are consistent with a similar analysis conducted under the §401 state water quality standards certification program provided in Chapter 279 of this title (relating to Water Quality Certification), this rule implements state authority provided under Chapter 11 of the Water Code that is independent of §401 as well as broader in scope than determining whether a federal permit may be in violation of State water quality standards. In addition, to defer action on water right applications until finalization of a MOA relating to a different program when there already exists policy and guidance approved by the commission to make such assessments is unwarranted, would cause unnecessary delays, and be inconsistent with Texas Water Code §5.312 providing a time limit for which action must be taken on an application. In addition, Texas Water Code §5.103 requires that the commission adopt rules when adopting or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency.

AECT, Brown McCarroll and Brown & Potts, L.L.P., commented that proposed §297.53, Habitat Mitigation, should be limited to only those applications requesting a new or increased annual appropriation of 5,000 acre-feet or more.

The commission disagrees with this comment. Texas Water Code §11.152 requires the commission to assess the affects of applications in excess of 5,000 acre feet per year on fish and wildlife habitats but does not preclude the commission from performing such assessments on applications for less than that amount. Texas Water Code §11.147 requires the commission in its review of an application to assess similar impacts on instream uses and freshwater inflows to bays and estuaries, including aquatic and wildlife habitat. There is no numeric qualification contained in §11.147. In reading the two statutes together, the commission has construed §11.152 to be a non-discretionary requirement to assess all applications for 5,000 acre-feet per year or more, rather than an exclusion of projects less than 5,000 acre-feet per year. To conclude the latter would be to create an irreconcilable conflict between the two statutes. Because Texas Water Code §11.152 requires the commission to perform such assessments for applications in excess of 5,000 acre feet per year but allows the commission the discretion to make such assessments for application of lesser amounts, the commission shall also assess the latter because they may also have significant impacts to fish and wildlife habitat, and such assessment would also be consistent with Texas Water Code §11.147.

AECT and the TWDB comments that the reference contained in proposed §297.53(a), Habitat Mitigation, be clarified that it relates to commission consideration of areas of unique ecological value

identified by the applicable approved regional water plan and designated as such by the legislature pursuant to Texas Water Code §16.051(e).

The commission agrees with this comment and has revised the rule accordingly to track the statutory language.

TPWD commented that it supports the adoption of proposed §297.55, Estuarine Considerations.

The commission acknowledges the comment.

AECT and the TWDB comments that §297.55(e), Estuarine Consideration, should track the exact statutory language in Texas Water Code §16.1331 and 15.3041 as it relates to the appropriation of five percent (5%) of the annual for yield to Texas Parks & Wildlife Department of reservoir built with state funds after September 1, 1985.

The commission responds that the intent of the proposed rule is to implement Texas Water Code §§16.1331 and 15.3047 as well as §§11.147, 11.150 and 11.152. The former two statutes grant an appropriation to the Texas Parks and Wildlife Department of 5% of the annual firm yield of the reservoir and the latter statutes provide the commission with authority to place environmental conditions on water rights to protect instream uses and freshwater inflows to bays and estuaries. The combined implementation of these provisions may result in more than 5% of the yield being used to meet these environmental needs. However, to avoid confusion between the amount

statutorily appropriated to TPWD and the total amount that may be provided to meet environmental needs, the commission has deleted “at least” from the beginning of subsection (c).

An individual commented that proposed §297.56 should include the description of the instream use impact assessment contained in the agency’s regulatory guidance document.

The commission disagrees with the comment because the guidance is intended to provide the applicant as well as the public at large the various acceptable methodologies when conducting a project evaluation, rather than to require only one specific methodology in every case.

TPWD commented that it supports the adoption of proposed §297.56, Instream Uses.

The commission acknowledges the comment.

AECT, the Cattle Raisers, and Brown & Potts, L.L.P., commented that proposed §297.56(a), Instream Uses, should be amended by deleting the reference to species other than federally listed species for which the commission may consider requiring conditions in a water right to provide sufficient instream flows.

The commission disagrees with the comment because it does not take into account the overall ecological health and diversity of the stream as contemplated by Texas Water Code, §11.147.

AECT commented that the title to proposed §297.58, Accounting of Water Use: Multiple Uses for the Same Amount, be more general and reflect other provisions in the section besides accounting for multiple uses for the same amount.

The commission agrees with this comment and has revised the rules accordingly by deleting the references to multiple uses and simply providing that the rule relates to water use accounting.

The AECT, BRA, Tarrant Regional and Brown & Potts, L.L.P., commented that proposed §297.58 be amended to remove the provision that water from a water right with multiple appropriation dates be deducted from the oldest priority date first. The commenter states that if water became scarce later in the year, the water right holder would not be able to rely on his senior water right because it may have already been fully used. The commenter also states that this accounting practice appears to defeat the priority system recognized by statute and case law. AECT also suggests that if the provision is kept, that it apply only to appropriations with priority dates after December 31, 1998.

Additionally, BRA and Tarrant Regional commented that §297.58(b) should be revised to provide that the most recent priority water shall be credited against water first used unless the water right expressly provides otherwise, or unless the appropriator expresses the desire to assert the senior water right at some other time.

The commission disagrees, in part, with the comments and responds that the purpose of the proposed rule was to account for water use under a water right with varying priority dates in

accordance with the prior appropriation system where the older rights are honored first. If a water right holder wishes to exercise the junior portion of the right first, the water right holder must affirmatively seek this by amendment to the right or, in a watermaster area, make this request to the watermaster. However, for purposes of water availability modeling, water use shall still be counted against the older rights first. The rule has been clarified to better reflect the intent of the rule.

TPWD commented that proposed §297.59(b), Additional Limitation, be amended to include that permits authorizing dams may also require low-flow outlets for the protection of water quality, as appropriate.

The commission agrees with the comment and has revised the rule accordingly as consistent with Texas Water Code §§11.147 and 11.150.

TWDB comments that proposed §297.71(b) should be rewritten to more closely follow the language of the underlying statutes and to combine the provisions relating to the Water Bank and Water Trust since the latter is an account in the former.

The commission disagrees with the comment because the rule consolidates the provisions relating to several statutes into one rule and a close paraphrase of the statutory language without substantive change was necessary to more clearly and succinctly state the requirements. The

Water Bank and Water Trust are referenced separately because of the different criteria and procedural requirements for a deposit of a water right into the Water Trust.

TWDB comments that proposed §297.73(c) be revised to provide that no water right, held by a city, town, village or municipal water district authorizing the use of water for municipal purposes shall be canceled if “any portion” of the water right has been put to beneficial use during the last ten years.

The commission disagrees with the comment because is inconsistent with the underlying statute, Texas Water Code §11.184. This sections provides that no portion of the water right held by a municipality may be canceled if the water has been beneficially used in accordance with the water right. The rule tracks the statutory language to ensure that there is no confusion as to the grounds for which a water right may be canceled. The rule has been revised to clarify that a water right obtained to meet demonstrated long term water supply needs as evidenced in the applicable regional water plan is not subject to cancellation pursuant to Texas Water Code §11.177(b)(3).

STATUTORY AUTHORITY

The amended section is adopted under Texas Water Code (TWC), Chapter 5, Subchapter D, §§5.103, 5.105 and 5.120 which establishes the commission's authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule. Other relevant sections of the TWC under which the commission takes this action include: §11.002, which contains definitions necessary for the commission's water rights permitting program; §11.023, which establishes

the purposes for which state water may be appropriated; 11.024, which establishes the commission's public policy regarding the preference among recognized beneficial uses of state water; §11.027, which establishes the commission's policy regarding rights between appropriators; §11.042, which established the commission's jurisdiction over delivering water down stream bed and banks; §11.046, which establishes the commission's authority concerning the return of unused water; §11.085, which establishes the commission's authority concerning the interbasin transfer of state water; §11.121, which establishes the commission's jurisdiction regarding the permitting of state water; §11.122, which establishes the commission's authority over the amendment of water rights; §11.1271, which establishes the commission's authority regarding additional requirements for water conservation plans; §11.1272, which establishes the commission's authority regarding additional requirements for drought contingency plans for certain applicants and water right holders; §11.134, which establishes the commission's jurisdiction regarding actions on applications to use state water; §11.135, which establishes the commission's authority to issue permits for the use of state water; §11.138, which establishes the commission's authority to issue temporary permits; §11.1381, which establishes the commission's authority to issue term permits; §11.139, which establishes the commission's authority to issue emergency permits; §11.140, which establishes the commission's authority to issue permits for storage for project development; §11.141, which establishes the commission's authority to set priority dates for appropriations of water; §11.142, which establishes the commission's jurisdiction over permit exemptions for the use of state water; §11.1421, which establishes the commission's jurisdiction regarding permit exemption for mariculture activities; §11.1422, which establishes the commission's jurisdiction regarding permit exemptions for historic cemeteries; §11.143, which establishes the commission's jurisdiction over domestic and livestock reservoirs and uses for other purposes; §11.145,

which establishes the commission's jurisdiction over when construction must begin for a permit to appropriate water by direct diversion; §11.146, which establishes the commission's jurisdiction over forfeitures and cancellation of permits for inaction; §11.147, which establishes the commission's authority regarding effects of permits on bays and estuaries and instream uses; §11.1491, which establishes the commission's authority regarding the evaluation of bays and estuaries data prepared under TWC, §16.058; §11.150, which establishes the commission's jurisdiction over permit effects on water quality; §11.151, which establishes the commission's jurisdiction over permit effects on groundwater; §11.152, which establishes the commission's jurisdiction over permit effects on fish and wildlife habitats; §11.153, which establishes the commission's jurisdiction over pilot projects for storage of appropriated water in aquifers; §11.154, which establishes the commission's authority regarding permits to store appropriated water in aquifers; §11.155, which establishes the commission's authority regarding aquifer storage pilot project reports; §11.173, which establishes the commission's authority regarding the cancellation of permits in whole; §11.175, which establishes the commission's authority regarding notice requirements for permits being considered for cancellation; §11.176, which establishes the commission's authority regarding hearings for permits being considered for cancellation; §11.177, which establishes the commission's regarding commission findings and action on a permit being considered for cancellation; §11.303, which establishes the commission's jurisdiction over recordation and limitation of certain water rights claims; §11.502, which establishes the commission's definition for wetlands within the State of Texas; §16.1331, which establishes the commission's jurisdiction over the reservation and appropriation of water for bays and estuaries and instream uses; and §16.195, which establishes the commission's authority regarding the emergency release of water.

CHAPTER 297

WATER RIGHTS SUBSTANTIVE

SUBCHAPTER A : DEFINITIONS

§297.1

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapters 288 and 295 of this title (relating to Water Conservation and Drought Contingency Plans and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise:

(1) **Appropriations** - The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(2) **Appropriative right** - The right to impound, divert, store, take or use a specific quantity of state water acquired by law.

(3) **Aquifer Storage and Retrieval Project** - A project with two phases that anticipates the use of a Class V aquifer storage well, as defined in §331.2 of this title (relating to Definitions), for injection into a geologic formation, group of formations, or part of a formation that is capable of underground storage of appropriated surface water for subsequent retrieval and beneficial

use. Phase I of the project requires commission authorization by a temporary or term permit to determine feasibility for ultimate storage and retrieval for beneficial use. Phase II of the project requires commission authorization by permit or permit amendment after the commission has determined that Phase I of the project has been successful.

(4) **Baseflow or normal flow** - The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, irrigation, or other uses of ground or surface waters may be included at times.)

(5) **Beneficial inflows** - Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(6) **Beneficial use** - Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(7) **Certificate of adjudication** - An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of the Texas Water Code, §11.323, or the final judgment and decree in State of Texas v. Hidalgo County Water Control and Improvement District No. 18, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(8) **Certified filing** - A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(9) **Claim** - A sworn statement filed pursuant to Texas Water Code, §11.303.

(10) **Commencement of construction** - An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

(11) **Conservation** - Those practices, techniques, and technologies that will 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.

(12) **Conserved water** - That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques or technologies.

(13) **Dam** - Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(14) **Diffused surface water** - Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

(15) **District** - Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(16) **Domestic use** - Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation

including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(17) **Drought of record** - The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(18) **Firm yield** - That amount of water, that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, naturalized streamflows will be modified as appropriate to account for the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions as well as the passage of flows needed to meet all applicable permit conditions relating to instream and freshwater inflow requirements.

(19) **Groundwater** - Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(20) **Habitat Mitigation** - Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(21) **Hydropower use** - The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(22) **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, including commercial feedlot operations, commercial fish and shellfish production and the development of power by means other than hydroelectric.

(23) **Instream use** - The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park

purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

(24) **Irrigation use** - The use of water for the irrigation of crops, trees, and pasture land, including but not limited to golf courses and parks which do not receive water through a municipal distribution system.

(25) **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 and salinity management and leaching requirements associated with irrigation.

(26) **Livestock use** - The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in §142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in §63.001 and 71.001, respectively, of the Parks and Wildlife Code.

(27) **Mariculture** - The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

(28) **Mining use** - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(29) **Municipal per capita water use** - The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(30) **Municipal use** - The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, or the use of reclaimed water in lieu of potable water for the preceding purposes or the application of municipal sewage effluent on land, pursuant to a Texas Water Code, Chapter 26, permit where:

(A) the application site is land owned or leased by the Chapter 26 permit holder; or

(B) the application site is within an area for which the commission has adopted a no-discharge rule.

(31) **Navigable stream** - By law, Natural Resources Code §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(32) **One-hundred-year flood** - The flood peak discharge of a stream, based upon statistical data, which would have a 1% chance of occurring in any given year.

(33) **Permit** - The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

(34) **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 or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(35) **Priority** - As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.

(36) **Reclaimed water** - Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or irrigation tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(37) **Recreational use** - The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aquatic and wildlife enjoyment, and aesthetic land enhancement of a subdivision, golf course or similar development.

(38) **Register** - The Texas Register.

(39) **Reservoir system operations** - The coordinated operation of more than one reservoir or a reservoir in combination with a direct diversion facility in order to optimize available water supplies.

(40) **Return water or return flow** - That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(41) **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.

(42) **Runoff** - That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(43) **Secondary use** - The reuse of state water for a purpose after the original, authorized use.

(44) **Sewage or sewage effluent** - Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(45) **Spreader dam** - A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(46) **State water** - The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within

the state or by utilizing any facilities owned or operated by the state. Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water. State water does not include percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or springwater before it reaches a watercourse.

(47) **Stormwater or floodwater** - Water flowing in a watercourse as the result of recent rainfall.

(48) **Streamflow** - The water flowing within a watercourse.

(49) **Surplus water** - Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(50) **Unappropriated water** - The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(51) **Underflow of a stream** - Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter

flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(52) **Waste** - The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used.

(53) **Water conservation plan** - a strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or 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 planning document or may be contained within another water management document(s).

(54) **Water in the state** - Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of

Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(55) **Watercourse** - A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter, with some degree of regularity, depending on the characteristics of the sources.)

(56) **Water right** - A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take or use state water.

(57) **Watershed** - A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(58) **Water supply** - Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(59) **Wetland** - An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances

supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including but not limited to impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts. This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

SUBCHAPTER B : CLASSES OF WATER RIGHTS

§§297.11, 297.13-297.19

STATUTORY AUTHORITY

The amended and new sections are adopted under Texas Water Code, §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code, §5.103.

§297.11. General Authorization to Divert, Store or Use State Water, Texas Water Code, §11.121.

Except as provided under Texas Water Code §§11.142, 11.1421 and 11.1422 , no person may divert, store, impound, take or use water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a water right. Such authorization may be with or without a term, on an annual or seasonal basis, or on a temporary or emergency basis as provided by this chapter.

§297.13. Temporary Permit Under the Texas Water Code, §§11.138 and 11.153-11.155.

(a) A commissioner may authorize temporary permits under this section for beneficial purposes to the extent that they do not interfere with or adversely affect prior appropriations or vested rights on a stream from which water is to be diverted under such temporary water rights or environmental flow needs. A temporary permit is primarily designed for those persons who require

state water for highway construction, oil or gas well drilling projects, evaluation of Phase I of an aquifer storage and retrieval project, hydro-static tests for pipelines, and other types of short duration projects.

(b) A temporary permit may not be granted for a period of time exceeding three years and shall be junior to all affected prior appropriations and vested rights on a stream. This permit does not vest in the holder any permanent right to the use of state water and expires in accordance with its terms and may be suspended upon notice by the executive director or watermaster, as applicable, in order to protect senior water rights. The permit may also have conditions for the protection of instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries.

(c) The period of time to use water authorized by a temporary permit which was initially granted for a period of less than three years may be extended by the commission upon written request by the permittee, but in no event shall the entire period including the initial period as well as any extension exceed three years nor shall an extension of time seek a change of diversion rate, diversion point, or additional water.

(d) A temporary permit for the use of ten acre-feet or less for a period of one calendar year or less may be authorized without notice and hearing upon the thirtieth day after a registration and fee as provided by §295.132 of this title (relating to Filing, Recording, and Notice Fees) is filed with the TNRCC regional director or the watermaster, as applicable, unless the applicant is notified by the regional director or watermaster within the thirty day period that the registration is denied for failure to

meet the requirements of this section. The registration must contain a sworn statement by the applicant containing the following minimum information:

- (1) the name, mailing address and telephone number of the applicant;
- (2) the diversion point and location of use as indicated on a USGS 7.5 minute map(s);
- (3) the purpose of use, as authorized under Texas Water Code, §11.023;
- (4) the proposed maximum diversion rate;
- (5) amount of water to be diverted not to exceed ten acre-feet per year; and
- (6) the period for which the water is to be used, not to exceed one year from the thirtieth (30th) day from the date the registration is filed with the regional director or watermaster, as applicable.

§297.14. Contractual Permit.

A contractual permit authorizes the use of state water where the source of supply is water lawfully authorized for the use of another person and a written agreement has been entered into with said person. The permit is for a period of time limited by the contract, and no permanent right is

acquired by the holder. See Subchapter J of this chapter (relating to Water Supply Contracts and Amendments).

§297.15. Permit For Additional Uses from a Domestic and Livestock Reservoir, Texas Water Code, §11.143.

A Texas Water Code, §11.143, permit authorizes anyone owning a dam or reservoir on his or her own property which impounds or contains not more than 200 acre-feet of water for domestic and livestock purposes, to take state water therefrom for any lawful purpose authorized in the permit. (A permit is not required to use water from such a reservoir for domestic and livestock use.) Reservoirs on navigable streams are not exempt under the Texas Water Code, §11.142. Application requirements and procedures are less detailed than those required for the Texas Water Code, §11.121, permits. It may be permanent in nature, seasonal, or granted for a term of years. The owner of an exempt impoundment under the Texas Water Code, §11.142, who subsequently desires to use state water therefrom for other than domestic and livestock purposes may elect to apply for a permit under the Texas Water Code, §11.143, or proceed under the provisions of the Texas Water Code, §11.124, et seq.

§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 for the conveyance of stored or conserved water (relating to Conveying Stored 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 Chapter 26 of the Texas Water Code or other applicable law.

(d) 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.

§297.17. Emergency Authorization (Texas Water Code, §11.139).

(a) An authorization under this section may be for an emergency appropriation of water or the emergency use of water appropriated by someone other than the applicant .

(b) An emergency authorization provides for the use of state water for an initial period of not more than 120 days if the commission finds emergency conditions to exist which present an imminent threat to the public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible, practicable alternatives to the emergency authorization. Such emergency action may be renewed once for not longer than sixty (60) days. Feasible, practicable alternatives include, but are not limited to, the implementation of water conservation and drought contingency measures or the purchase of water or water rights at a reasonable and affordable price to the applicant.

(c) If the commission finds the applicant's statements required under §295.91 of this title (relating to Application for Emergency Authorization) to be correct, the commission may grant the emergency authorization after notice has been provided in accordance with §295.156 of this title (relating to Notice for Emergency Water Use).

(d) If the commission grants an emergency authorization under this section without a hearing, the authorization shall fix a time and place for a hearing to be held before the commission. The hearing shall be held as soon after the emergency authorization is granted as practicable but not later than twenty (20) days after the emergency authorization is granted.

(e) At the hearing, the commission shall affirm, modify, or set aside the emergency authorization. Any hearing on an emergency authorization shall be conducted in accordance with Chapter 2001, Government Code, and rules of the commission. Additionally, in the case of an emergency transfer of water, the commission shall also issue an order notifying water right holders from which the water is being transferred of the emergency transfer and directing them to limit the exercise of their water rights to the extent necessary to provide for the emergency transfer of water.

(f) If an imminent threat to the public health and safety exists which requires emergency action before the commission can take action as provided by subsections (c) - (e) of this section and there are no feasible alternatives, the executive director may grant an emergency authorization after notice to the governor. If the executive director issues an emergency authorization under this subsection, the commission shall hold a hearing as provided by subsections (d) and (e) of this section. The application requirements of §295.91 of this title (relating to Application for Emergency Authorization) must be satisfied before action is taken by the executive director on the request for emergency authorization.

(g) The commission or executive director may grant an emergency authorization under this section for the temporary transfer of all or part of a water right for other than domestic or municipal use to a retail or wholesale water supplier for public health and safety purposes.

(h) The commission or executive director may direct the applicant to timely pay the amounts for which the applicant may be potentially liable under subsections (k) and (l) of this section and to the extent authorized by law will fully indemnify and hold harmless the state, the executive director, and the commission from any and all liability for the authorization sought. The commission or the executive director may also order bond or other surety in a form acceptable to the commission or the executive director as a condition for such emergency authorization.

(i) It shall be a condition of granting an emergency authorization under this section that the applicant develop and implement water conservation and drought contingency plans meeting applicable requirements of Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, and Guidelines and Requirements), unless the applicant has already done so.

(j) The commission or executive director will not grant an emergency authorization under this section which would cause a violation of a federal regulation.

(k) Before considering an emergency transfer of water, the commission or executive director shall first determine whether there is sufficient available unappropriated water to meet the emergency needs of the applicant as provided under Texas Water Code §11.1381 and, if so, make the applicant

aware of this option. In transferring the amount of the water requested by the applicant, the executive director or the commission shall allocate the requested amount among two or more water rights for other than domestic or municipal use. In determining the water rights from which the water will be transferred, the commission shall be guided by the applicable approved regional water plan and statutory preferences of use provided by Texas Water Code, §11.024, and shall also look first to water rights that are unperfected or are not otherwise being used and for which the transfer would not jeopardize existing financial commitments made for the water to be transferred. Nothing in this section is intended to limit a person from demonstrating that the person is an affected person for the purposes of this section.

(l) The person granted an emergency transfer authorization under this section is liable to the affected water right holder and the holder's agent or lessee from whom the use is transferred for the fair market value of the water transferred as well as for any damages caused by the transfer of use. If within sixty (60) days of the termination of the authorization, the parties do not agree on the amount due, or if full payment is not made, either party may file a complaint with the commission to determine the amount due. The commission shall use dispute resolution procedures provided under Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure) for a complaint filed under this subsection. Fair market value shall be determined by the amount of money that a willing buyer would pay a willing seller, neither of which is under any compulsion to buy or sell, for the water in an arms-length transaction and shall not be limited to the amount of money that the owner of the water right has paid or is paying for the water.

(m) The commission designation of affected water right holders under this section does not preclude other water right holders from establishing the impact by the transfer to them through commission proceedings or other appropriate legal means.

(n) After exhausting all administrative remedies under subsections (l) and (m) of this section, a water right holder from which the use is transferred may file suit to recover or determine the amount due in state district court in the county where the owner resides or has its headquarters. The prevailing party in a suit filed under this subsection is entitled to recover court costs and reasonable attorneys fees.

(o) An emergency authorization does not vest in the grantee any continuing right to the diversion, impoundment or use of water and shall expire and be canceled in accordance with its terms. An emergency transfer authorization may be suspended upon notice, as applicable, in order to protect senior water rights. An emergency transfer authorization shall comply with the conditions contained in the water right or rights for which the water is being transferred, including any conditions to protect environmental flow needs.

§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. For purposes of this section, a river basin is defined and designated by

the Texas Water Development Board by rule pursuant to Texas Water Code, §16.051. See Texas Water Code, §11.085.

(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 §295.17 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, and 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 (relating to Emergency Authorizations; Texas Water Code, §11.139);

(3) a proposed transfer from a basin to its adjoining coastal basin; or

(4) 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.

§297.19. Term Permit under Texas Water Code, §§11.1381 and 11.153-11.155.

(a) The commission may issue a permit for a term of years for the use of unused appropriated water when there is insufficient unappropriated water in the source of supply to satisfy the application.

(b) An application for a term permit under this section shall be denied if:

(1) the commission finds there is a substantial likelihood that the issuance of the term permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources in the area;

(2) if the holder of an affected unused appropriation can demonstrate that the issuance of the permit would prohibit the holder from beneficially using the water right during the term of the permit. Such demonstration may be made by using water use projections contained in the state or

regional water plans, economic indicators, population growth projections, electrical generation needs, or other reasonable projections based on accepted methods;

(3) the proposed permit is not intended for a beneficial use; or

(4) the proposed permit would be detrimental to the public welfare.

(c) A term permit is subordinate to any vested or senior appropriative water right.

Additionally, conditions may be placed in the permit as necessary to protect instream uses and freshwater inflows to bays and estuaries.

(d) The commission may grant a permit under this section for an aquifer storage and retrieval project as defined in §297.1 of this title (relating to Definitions).

SUBCHAPTER B : CLASSES OF PERMITS

§297.16, §297.20

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code, §5.103.

§297.16. Conveyance of Water Down Bed and Banks.

§297.20. Permit for Diversion from Un-sponsored or Storage-Limited Reservoirs.

SUBCHAPTER C : TYPES OF USES

§§297.21-297.29

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code, §5.103.

§297.21. Direct Diversion.

§297.22. Diversion from a Reservoir.

§297.23. On-Channel Reservoir.

§297.24. Off-Channel Reservoir.

§297.25. Storage in Another's Reservoir

§297.26. Spreader Dams, Contouring, Terracing

§297.27. Permit Exemption for Mariculture Activities

§297.28. Permit Exemption for Drilling and Producing of Petroleum

§297.29. Permit Exemption To Use State Water for Emergency Use

SUBCHAPTER C : USES EXEMPT FROM PERMITTING

§§297.21-297.27

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code, §5.103.

§297.21. Domestic and Livestock Use.

(a) In accordance with Texas Water Code §11.303(l), a person may directly divert and use water from a stream or watercourse for domestic and livestock purposes on land owned by the person and that is adjacent to the stream without obtaining a permit. Manner of diversion may be by pumping or by gravity flow. Such riparian domestic and livestock use is a vested right that predates the prior appropriation system in Texas and is superior to appropriative rights. A vested riparian right is only to the normal flow in the stream, not to the storm water, floodwater, or authorized releases from storage for downstream use.

(b) In accordance with Texas Water Code §11.142, a person may construct on his own property a dam or reservoir with a normal storage of not more than 200 acre-feet of state water for domestic and livestock purposes without obtaining a permit. The reservoir may be on-channel, adjacent to the stream, or on a contiguous piece of property through which flows the stream from which the

water is diverted. For purposes of this subsection, normal storage means the conservation storage of the reservoir, i.e., the amount of water the reservoir may hold before water is released uncontrolled through a spillway or into a standpipe.

(c) A person's domestic and livestock use may not unreasonably interfere with another's domestic and livestock use. A dam and impoundment under subsection (b) of this section must allow sufficient inflows to pass-through downstream for the benefit of other domestic and livestock uses. Such dam may not be located on a navigable stream.

(d) The incidental use of a reservoir by free-ranging wild game and fur-bearing animals that may be harvested by hunters and trappers who pay a fee or other compensation to hunt or trap on the property does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir. Additionally, the use of water that is used in making products from a family garden or orchard that are traded with a neighbor or used in a local bake sale or potluck dinner does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir.

§297.22. Storage in Another's Reservoir.

A permit is required to appropriate state water for storage in another's lawful reservoir and to divert and use water therefrom. Consent of the reservoir owner must be obtained in writing and provided to the executive director. If the reservoir is a project of the Natural Resources Conservation

Service, U. S. Department of Agriculture, consent must be obtained from the local, sponsoring Soil and Water Conservation District or any others having ownership or control over the reservoir before a permit can be acquired.

§297.23. Spreader Dams, Contouring, Terracing.

No permit shall be required to construct or maintain any system of contouring, terracing, spreader dams or other such practices designed to make maximum beneficial use of diffused surface water and overbank flooding and to implement any generally accepted conservation practices necessary to prevent or reduce erosion on one's own property.

§297.24. Permit Exemption for Mariculture Activities.

(a) Without obtaining a permit from the commission, a person engaged in mariculture activities on land may take an appropriate amount of water from the Gulf of Mexico or adjacent bays and arms of the Gulf of Mexico for that purpose if:

(1) prior to the first taking of water, the person gives notice to the commission of the proposed appropriation including:

(A) the name and address of the person(s);

(B) the location of the project;

(C) the name of the water source;

(D) the maximum annual amount of water to be appropriated and the basis for calculating the amount needed; and

(E) the month and year of the first appropriation.

(2) the person submits annual water use reports as required by §295.202 of this title (relating to Reports).

(b) After notice and hearing, if the commission determines that low freshwater inflows resulting from an appropriation authorized under subsection (a) of this section are interfering with natural productivity of bays and estuaries, the commission shall issue an order requiring interruption or reduction of the use of water under this section.

§297.25. Permit Exemption for Drilling and Producing of Petroleum.

Without obtaining a water use permit from the commission, a person engaged in drilling for petroleum, or producing petroleum, may take for those purposes not to exceed one acre-foot of water

per 24-hour period from the Gulf of Mexico or from the adjacent bays and arms of the Gulf of Mexico.

A person using water for such purposes is not required to file water use reports.

§297.26. Permit Exemption to Use State Water for Fire and Emergency Use.

Without obtaining a permit from the commission, county and rural community fire departments and other emergency service providers may divert and use state water from streams and reservoirs, including exempt domestic and livestock reservoirs for fire and emergency purposes. Emergency purposes under this rule include use of water to fight fires, manage chemical spills, and as needed to deal with emergency public welfare concerns. Emergency purposes does not include domestic, livestock or other purposes defined by §297.1 of this title (relating to Definitions). Rural emergency service providers (entities) may also establish "Dry Hydrant" installations in streams and reservoirs, including exempt reservoirs. Dry hydrant installations shall be exempt from permitting requirements provided that:

(1) Hydrant locations are identified and documented by the installing entities and the entities file the identification codes and location descriptions with the executive director within 120 days after completion of an installation;

(2) Facilities installed before the adoption of this rule are documented within six months after the rule is adopted;

(3) Ingress and egress authorizations are obtained from private property owners and/or public entities on whose property the installations are located;

(4) Installations conform to design and installation requirements and guidelines recommended by the USDA, Natural Resources Conservation Service; and

(5) Diversions from dry hydrant installations are reported to the executive director by the using entities within sixty (60) days of use. Pump testing of facilities is not required to be reported.

(A) Local offices of the USDA, Natural Resources Conservation Service can provide technical assistance and recommendations for installation of dry hydrant facilities.

(B) Hydrant facilities which do not meet the above minimum requirements must be authorized by Water Code, §11.121 permits granted by the commission.

§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 Sedimentation Control Purposes within a Surface Coal Mining Operation. Without obtaining a permit from the commission, a person may construct or maintain a reservoir for the sole purpose of sedimentation control as part of a surface coal mining operation under the Texas Surface Coal Mining and Reclamation Act (Art. 5920-11, Vernon's Texas Civil Statutes).

**SUBCHAPTER E : ISSUANCE AND CONDITIONS OF WATER PERMIT OR CERTIFICATE
OF ADJUDICATION**

§§297.41-297.56

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code, §5.103.

§297.41. Subject to Prior and Superior Water Rights.

§297.42. Additional Limitations.

§297.43. Requiring Storage Facilities.

§297.44. Acceptance of Permit or Certificate of Adjudication.

§297.45. Return and Surplus Waters.

§297.46. Suppliers of Water for Irrigation.

§297.47. Time Limitations for Commencement or Completion of Construction.

§297.48. Low-Flow Outlets for Dams.

§297.49. Habitat Mitigation.

§297.50. Water Quality Effects.

§297.51. Estuarine Considerations.

§297.52. Instream Uses.

§297.53. Conservation and Beneficial Use.

§297.54. Waste.

§297.55. Consideration of Water Conservation Plans.

§297.56. Conserved Water.

SUBCHAPTER E : ISSUANCE AND CONDITIONS OF WATER RIGHTS

§§297.41-297.56, 297.58, 297.59

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code, §5.103.

§297.41. General Approval Criteria.

(a) Except as otherwise provided by this chapter, the commission shall grant an application for a water right only if:

(1) the application conforms to the requirements prescribed by Chapter 295 of this title (relating to Water Rights, Procedural) and is accompanied by the prescribed fee;

(2) unappropriated water is available in the source of supply;

(3) the proposed appropriation:

(A) is intended for a beneficial use;

(B) does not impair existing water rights or vested riparian rights;

(C) is not detrimental to the public welfare;

(D) considers the effects of any hydrological connection between surface water and groundwater; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and an approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that new, changed, or unaccounted for conditions warrant waiver of this requirement; and

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 of this title (relating to Definitions).

(b) Beginning September 1, 2001, the commission will not issue a water right for municipal purposes in a region that does not have an approved regional water plan in accordance with Texas Water Code §16.053(i) unless the commission determines that new, changed, or unaccounted for conditions warrant the waiver of this requirement.

§297.42. Water Availability.

(a) Except as provided by Texas Water Code, §11.1381, and §297.19 of this title (relating to Term Permit Under Texas Water Code §§11.1381 and 11.153, 11.155), an application for a new or increased appropriation will be denied unless there is a sufficient amount of unappropriated water available for a sufficient amount of the time to make the proposed project viable and ensure the beneficial use of water without waste.

(b) A new water right may be conditioned as appropriate to protect instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries as provided by Texas Water Code §§11.147, 11.150, and 11.152.

(c) For the approval of an application for a direct diversion from a stream without sufficient on or off channel water storage facilities for irrigation use, approximately seventy-five percent (75%) of the water requested must be available approximately seventy-five percent (75%) of the time when distributed on a monthly basis and based upon the available historic stream flow record. Lower availability percentages may be acceptable if the applicant can demonstrate that a long-term, reliable, alternative source or sources of water of sufficient quantity and quality are economically available to the applicant to make the proposed project viable and ensure the beneficial use of state water without waste.

(d) Projects that are not required to be based upon the continuous availability of historic, normal stream flow include, but are not limited to: the artificial recharge of the Edwards Aquifer pursuant to Texas Water Code §11.023(c); conjunctive ground and surface water management projects such as aquifer storage and recovery projects; diversions or impoundments at times of above-normal stream flow (e.g., “scalping” operations) for seasonal or supplemental use; a system operation in conjunction with other water rights; non-consumptive instream uses; or other similar type projects. The required availability of unappropriated water for these special type projects shall be determined on a case-by-case basis based upon whether the proposed project can be viable for the intended purposes and the water will be beneficially used without waste.

(e) For an application for an on-channel storage facility to be authorized for domestic or municipal water use, the proposed diversion right of the reservoir must be equal to its firm yield. The purpose of this limitation is to ensure a secure and dependable source of water supply for uses necessary to protect the public health, safety, and welfare (see also 30 TAC §290.41(b) requiring public water systems to have a “safe” yield capable of supplying the maximum daily demands during extended periods of peak usage and “critical hydrologic conditions”). Such reservoir may be authorized in excess of its firm yield when the implementation of a drought management plan or alternative sources of water supply such as groundwater, other reservoir systems, or other means are available to satisfy water needs during drought periods when the reservoir’s normal supply capabilities would be exceeded.

(f) Except for an application for an emergency, temporary, seasonal, or term permit, or as provided by this section, the commission may require an applicant to provide storage sufficient to yield the requested annual diversion.

(g) In order to make the optimum beneficial use of available water, a water right may be granted based upon the availability of return flows or discharges. However, a water right granted upon return flows or discharges that may cease in the future because of new or increased direct reuse (i.e., the lawful reuse of water before it is returned or discharged into the stream) or that may cease for other lawful reasons will be granted with the express provision that the water available for the water right is dependent upon potentially interruptible return flows or discharges.

§297.43. Beneficial Uses.

(a) State water may be appropriated, stored, or diverted for the following purposes of use:

- (1) domestic and municipal;
- (2) industrial;
- (3) irrigation;
- (4) mining and the recovery of minerals;

(5) hydroelectric power;

(6) navigation;

(7) recreation and pleasure;

(8) stock raising;

(9) public parks;

(10) games preserves;

(11) instream uses, water quality, aquatic and wildlife habitat or freshwater inflows to bays and estuaries; and

(12) other beneficial purposes of use recognized by law.

(b) Unappropriated storm water and floodwater may be appropriated to recharge freshwater bearing sands and aquifers in the portion of the Edwards Aquifer located within Kinney, Uvalde, Medina, Bexar, Comal, and Hays counties if it can be established by expert testimony that an unreasonable loss of state water will not occur and that the water can be withdrawn at a later time for

application to a beneficial use. The normal or ordinary flow of a stream or watercourse may never be appropriated, diverted, or used by a water right holder for this recharge purpose.

(c) The amount of water appropriated for each purpose listed under this section shall be specifically appropriated for that purpose. The commission may authorize the appropriation of a single amount or volume of water for more than one purpose of use. In the event that a single amount or volume of water is appropriated for more than one purpose of use, the total amount of water actually diverted for all of the authorized purposes may not exceed the total amount of water appropriated.

(d) State policy regarding preferences for certain type uses provided by Texas Water Code §11.024 does not alter the basic principle of priority based upon first in time established under Texas Water Code §11.027. Rather, such preferences will be used, in part, by the commission in determining which competing new uses will be granted water rights as provided by Texas Water Code §11.123.

(e) The water of any arm, inlet, or bay of the Gulf of Mexico may be changed from salt water to sweet or fresh water and held or stored by dams, dikes, or other structures and may be taken or diverted for any purpose authorized by this chapter.

§297.44. Subject to Prior and Superior Water Rights.

(a) Except as provided by subsection (b) of this section, a certificate of adjudication, permit, certified filing or unadjudicated claim to appropriate state water is subject to all prior and vested riparian rights of others using water on the stream or other source of supply.

(b) Except for water rights granted on the mainstem of the Rio Grande below the Amistad Reservoir (see, generally, Chapter 303 of this title relating to Operation of the Rio Grande) and certain uses exempt from permitting under Texas Water Code §§11.142, 11.1421 and 11.1422 (see, generally, Subchapter C of this Chapter), as between appropriators, first in time is first in right.

(c) The time priority of an appropriation of water dates from the filing of the related application with the commission or as determined with a final decree in accordance with Texas Water Code §11.323. The application is considered filed after the application has been declared administratively complete in accordance with §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness) and filed with the chief clerk.

§297.45. “No Injury” Rule.

(a) The granting of an application for a new water right or an amended water right shall not cause an adverse impact to an existing water right as provided by this section. An application for an amendment to a water right requesting an increase in the appropriative amount, a change in the point of

diversion or return flow, an increase in the consumptive use of the water based upon a comparison between the full, legal exercise of the existing water right with the proposed amended right, an increase in the rate of diversion, or a change from the direct diversion of water to on-channel storage shall not be granted unless the commission determines that such amended water right shall not cause adverse impact to the uses of other appropriators. For the purposes of this section, adverse impact to another appropriator includes: the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change; increasing an appropriator's legal obligation to a senior water right holder; or otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time of the appropriator's water right was granted .

(b) Subject to meeting all other applicable requirements for an application to amend an existing water right, an amendment to a water right, except for the increase in the appropriative amount or diversion rate, shall be approved as provided by Texas Water Code §11.122(b) if the requested change will not cause such adverse impact on other water right holders or the environment of the stream of greater magnitude than under circumstances in which the water right being sought for amendment was fully exercised according to its terms and conditions as they existed prior to the amendment.

(c) If it is determined that a proposed amendment for a change in the diversion point may adversely affect existing water rights, the amendment, if approved, shall be subordinate only to such affected water rights and the amended water right shall otherwise retain its priority date.

(d) The burden of proving that no adverse impact to other water right holders or the environment will result from the approval of the application is on the applicant.

(e) In granting an application, the commission may direct that stream flow restrictions, return flows, and other conditions and restrictions be placed in the permit being issued to protect senior water rights.

§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).

§297.47. Impacts on Groundwater.

(a) In its review and action on an application for a new or amended water right, the commission shall consider the hydrological connection between surface and groundwater and the effects, if any, from the granting of the application on groundwater use, quality, or recharge. In its assessment, the commission shall consider whether the proposed diversion is from a stream that provides significant recharge to a “sole source” aquifer as designated under the federal Safe Drinking

Water Act, an aquifer for which there is a certified groundwater management plan under Texas Water Code Chapter 36, or an aquifer that is located within all or part of a priority groundwater management area designated under Texas Water Code Chapter 35.

(b) If the commission determines that the granting of an application for a new or amended water right would significantly impair existing uses of groundwater, groundwater quality, or springflow upon which existing surface rights, water quality, aquatic and wildlife habitat, or bays and estuaries depend, the commission may deny the application or place restrictions and limitations in the water right necessary to prevent or mitigate such impacts.

(c) In determining the extent of the protection to be provided in a proposed new or amended water right to existing downstream water rights or environmental water needs, the commission may take into consideration instream losses because of recharge occurring in the bed of the stream downstream of the proposed diversion.

§297.48. Waste Prevention.

(a) The waste of water is prohibited and is an unlawful use of state water. A water right holder using state water shall use those measures necessary to ensure the beneficial use of water without waste in accordance with these rules and the terms and conditions of the water right and applicable law.

(b) The use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose constitutes waste. Waste also includes the diversion or use of water in any manner that causes or threatens to cause pollution of water in violation of applicable rules and standards.

(c) A person who permits an unreasonable loss of water through faulty design or negligent operation of any waterworks commits waste, and the commission may declare the waste to be a public nuisance. Faulty design or negligent operation shall include, but not be limited to, the design or operation of waterworks not in accordance with applicable state or federal law, commission rules, plumbing fixture codes or ordinances, or other applicable law or, in the absence of such law, not in accordance with commonly accepted industry standards, engineering principles, and best management practices.

(d) The commission or a person injured by the waste of water as provided by subsection (c) of this section may seek civil action in the appropriate state district court to have the nuisance abated and the commission may direct the person supplying the water to close the gates of the person wasting the water and keep them closed until the commission determines that the unlawful use of water is corrected.

(e) The right to appropriate that amount of water not beneficially used cannot be perfected and is subject to limitation, cancellation, or forfeiture as provided by law.

§297.49. Return and Surplus Waters.

(a) A right to take and use water is limited to the extent and purposes authorized in the water right. Except as specifically provided otherwise in the water right, state water appropriated under a water right may be beneficially used and reused by the water right holder in accordance with the water right prior to its release into a watercourse or stream. Once water has been diverted under a water right and then returned to a watercourse or stream, however, it is considered surplus water and, therefore, subject to maintaining instream uses, beneficial inflows to bays and estuaries, or appropriation by others unless expressly provided otherwise in the water right.

(b) A person who takes or diverts water from a watercourse or stream shall conduct surplus water back to the watercourse or stream from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so. In addition, the commission may include in the water right a specific amount or percentage of water diverted to be returned and the return point on the stream or watercourse, if necessary to protect senior downstream water rights or to provide flows for instream uses and bays and estuaries.

(c) Return waters must meet water quality standards provided by Chapter 307 of this title (relating to Texas Surface Water Quality Standards) prior to their discharge into water in the state. Additionally, such discharge shall not impair an existing or potential beneficial use of groundwater as to its water quality. Nothing in this chapter affects the obligation to obtain a permit under Texas Water Code Chapter 26, if required.

(d) Water appropriated under a water right that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus for purposes of this section.

§297.50. Consideration of Water Conservation Plans.

(a) Information in the water conservation plan provided by a water right applicant shall be considered by the commission in determining whether any practicable alternative to the requested appropriation exists, whether the requested amount of appropriation as measured at the point of diversion is reasonable and necessary for the proposed use, the term and other conditions of the water right, and to ensure that reasonable diligence will be used to avoid waste and achieve water conservation. Based upon its review, the commission shall determine whether to deny or grant, in whole or in part, the requested appropriation.

(b) A water conservation plan submitted with an application requesting an appropriation for new or additional state water must include data and information which:

(1) supports the applicant's proposed use of water with consideration of the water conservation goals of the water conservation plan;

(2) evaluates conservation as an alternative to the proposed appropriation; and

(3) evaluates other feasible alternatives to new water development, including but not limited to, waste prevention, recycling and reuse, water transfer and marketing, reservoir system operations, and optimum water management practices and procedures. It shall be the burden of proof of the applicant to demonstrate that the requested amount of appropriation is necessary and reasonable for the proposed use.

(c) Any water conservation measures prescribed by the commission shall be implemented as required by the terms and conditions of a commission order or water right, or by rule. The holder of a water right for which a conservation or drought contingency plan is required to be submitted in accordance with §288.30 or §295.95 of this title (relating to Required Plans and Water Conservation and Drought Contingency Plans, respectively) shall install and maintain a measuring device at such point or points as may be determined by the executive director or water master, as applicable, to be necessary for the proper and efficient administration of water rights. All such measuring devices shall be subject to approval of the executive director or watermaster, as applicable. The measuring devices shall measure within 5.0% accuracy unless otherwise approved by the executive director or watermaster. The diverter shall provide reasonable access to such measuring device.

§297.51. Time Limitations for Commencement or Completion of Construction.

When a water right is issued for appropriation by direct diversion or construction, modification or repair of a storage reservoir, or any work in which a time limitation is set by the water right for commencement or completion of construction, a water right holder shall commence and complete

actual construction of the proposed facilities within the time fixed by the commission. Failure to commence or complete construction within the time specified in the permit or extension granted by the commission shall cause the water right holder to forfeit all rights to the permit, subject to notice and hearing. See §295.72 of this title (relating to Applications for Extension of Time) and §295.202 of this title (relating to Reports).

§297.52. Suppliers of Water for Irrigation.

Persons supplying state water for irrigation purposes shall charge the purchaser on a volumetric basis. The commission may direct suppliers of state water to implement appropriate procedures for determining the volume of water delivered.

§297.53. Habitat Mitigation.

(a) In its consideration of an application for a new or amended water right to store, take, or divert state water in excess of 5,000 acre-feet per year, the commission shall assess the effects, if any, of the granting of the application on fish and wildlife habitats. The commission shall also consider whether the proposed project would affect river or stream segments of unique ecological value as identified by the applicable approved regional water plan and designated as such by the Texas Legislature in accordance with Texas Water Code §16.051(e).

(b) For an application for a new or amended water right to store, take, or divert state water, the commission may require the applicant to take reasonable actions to mitigate adverse impacts, if any, on fish and wildlife habitat.

(c) An assessment under this section shall include the project site as well as potentially impacted habitat upstream, adjoining, and downstream of the project site.

(d) In determining whether to require an applicant to mitigate adverse impacts on a habitat, the commission may consider any net environmental benefit to the habitat produced by the project. The commission shall offset any mitigation it requires by any mitigation required by the United States Fish and Wildlife Service pursuant to 33 Code of Federal Regulations §§320-330.

(e) The goal of the mitigation of wetlands is to achieve “no net loss” of wetland functions and values. In addition to aquatic and wildlife habitat, wetland functions also include, but are not limited to, water quality protection through sediment catchment and filtration, storage plans for flood control, erosion control, groundwater recharge, and other uses.

(f) In case of unavoidable wetlands loss, impacts to wetland habitat are mitigated in accordance with the following guidelines:

(1) Wetlands shall be classified using the USFWS’s “Classification of Wetlands and Deepwater Habitats of the United States” (USFWS 1979). Specific functions and values for wetlands

habitats shall be determined on an individual case basis using the most technically appropriate habitat evaluation methodology (e.g., USFWS's Habitat Evaluation Procedures and Wetlands Evaluation Techniques; TPWD's Wildlife Habitat Appraisal Procedure).

(2) Mitigation for wetland habitat loss shall seek first to be an on-site and in-kind replacement of lost wetland function and value whenever possible. Habitat mitigation shall be considered only after the complete sequencing (avoidance, minimization or modification, and compensation/replacement) process has been performed in accordance with 40 CFR §230.10 et seq.

(3) Habitats shall be evaluated using the most appropriate methodology (e.g., USFWS's Habitat Evaluation Procedures and Wetlands Evaluation Techniques; TPWD's Wildlife Habitat Appraisal Procedure). Total habitat value for each habitat type shall be determined on an individual case basis for the area impacted by a project.

(4) Mitigation for terrestrial and riparian habitat loss shall be based upon on-site and in-kind replacement of lost habitat whenever possible. Habitat mitigation shall be considered only after it has been established that habitat impacts are unavoidable and there is suitable mitigation habitat available for complete compensation for the lost habitat. Where on-site, in-kind replacement of habitat is not possible, mitigation shall be limited to the same watershed and ecoregion.

(5) Replacement of affected terrestrial and riparian habitats shall be of equal or greater value with respect to affected habitat. Mitigation will not be limited to a total habitat replacement, but

will consider the threatened or endangered nature of the habitat(s) being lost or degraded and the limiting effects of surrounding land use on success compensation. Buffer zones around the mitigation area may be required to fully compensate for the total habitat loss.

(6) Water right permit reviews shall examine both direct and indirect impacts to terrestrial and riparian habitats, as well as long and short-term effects to the watershed or ecoregion that may result from the permitted activity.

(7) Habitat mitigation plans and agreements shall be ensured through binding legal contracts, permit provisions, and detailed management plans and shall include goals and schedules of completion of those goals. The mitigation habitat shall be managed in perpetuity by a party approved by the commission to maintain the habitat value lost because of project impacts.

(g) The assessment of and conditions upon a proposed amendment to a water right under this section shall be limited by §297.45(b) of this title (relating to “No Injury” Rule) as provided by Texas Water Code §11.122(b).

§297.54. Water Quality Effects.

(a) In its consideration of an application for a new or amended water right to store, take or divert water, the commission shall assess the effects, if any, of the granting of the application on water quality of the stream or river to which the application applies, as well as associated bays and estuaries.

Assessment of water quality impacts shall consider the maintenance of State of Texas Surface Water Quality Standards provided by Chapter 307 of this title (relating to Texas Surface Water Quality Standards) and the need for all existing instream flows to be passed up to that amount necessary to maintain the water quality standards for the affected stream. Such flows may also be used to protect uses of existing, downstream water rights by providing water of a usable quality and to provide, in part, for the protection of vested riparian water rights and domestic and livestock uses.

(b) The assessment of any conditions upon a proposed amendment to a water right under this section shall be limited by §297.45(b) of this title (relating to “No Injury” Rule) as provided by Texas Water Code §11.122(b).

§297.55. Estuarine Considerations.

(a) In its consideration of an application for a new or amended water right to store, take, or divert water, the commission shall assess the effects, if any, of the granting of the application on the bays and estuaries of Texas. For permits issued within an area that is 200 river miles of the coast, to commence from the mouth of the river thence inland, the commission shall include in the water right, to the extent practicable when considering all public interests, those conditions considered necessary to maintain beneficial inflows to any affected bay and estuary system.

(b) For purposes of making a determination under this section, the commission shall consider:

(1) the need for periodic freshwater inflows to supply nutrients, sediments, and modify salinity to preserve the sound environment of the bay and estuary, using any available information, including studies and plans specified in Texas Water Code §11.1491 and other studies considered by the commission to be reliable; together with existing circumstances, natural or otherwise, that may prevent the conditions imposed from producing benefits;

(2) the ecology and productivity of the affected bay and estuary system;

(3) the expected effects on the public welfare of not including in the water right some or all of the conditions considered necessary to maintain the beneficial inflows to the affected bay or estuary system;

(4) the quantity of water requested and the proposed use of the water by the applicant, as well as the needs of those who would be served by the applicant;

(5) the expected effects on the public welfare of the failure to issue all or part of the water right being considered; and

(6) the declarations as to preferences for competing uses of water as found in Texas Water Code §§11.023 and 11.024 as well as the policy statement in Texas Water Code §11.003.

(c) Five percent (5%) of the annual firm yield of water in any reservoir or associated works on which construction began on or after September 1, 1985, and which is constructed with state financial participation and is located within 200 river miles from the coast, to commence from the mouth of the river thence inland, is appropriated to the Texas Parks and Wildlife Department for use to make releases to bays and estuaries and instream uses. This five percent figure may not be indicative of the full instream needs or the freshwater inflow needs of the affected bay or estuary system and the commission may impose additional water right conditions to provide a greater amount of water for this purpose, if necessary and appropriate after considering all the factors provided by subsection (b) of this section.

(d) Pursuant to Texas Water Code, §16.195, unallocated water and other water of the state permitted to the Texas Water Development Board and stored in any facility acquired by and under the control of the Texas Water Development Board may be released without charge to relieve any emergency condition arising from drought, severe water shortage, or other calamity including, but not limited to, insufficient flows for existing instream uses and beneficial inflows for the maintenance of bays and estuaries, if the commission first determines the existence of the emergency and requests the Texas Water Development Board to release the water. Such release may not impair a contractual obligation of the Texas Water Development Board. The Texas Parks and Wildlife Department may also petition the commission to request such release for the maintenance of existing instream uses and beneficial inflows to bays and estuaries.

(e) The assessment of and conditions upon a proposed amendment to a water right under subsections (a) and (b) of this section shall be limited by §297.45(b) of this title (relating to “No Injury” Rule) as provided by Texas Water Code §11.122(b).

§297.56. Instream Uses.

(a) In its consideration of an application for a new or amended water right to store, take, or divert water, the commission shall consider the effects, if any, of the granting of the application on existing instream uses of the stream or river to which the application applies. In its determination of flows necessary to maintain recreational and navigational flows, the commission shall consider, but not be limited to, the designation of major waterways by the Texas Parks and Wildlife Department in its publication entitled “An Analysis of Texas Waterways” (1979), and as revised, and the definition of “navigable” stream provided by Texas Natural Resources Code §21.001(3). Additionally, flows necessary to protect a federally listed species under the Endangered Species Act or other species that are considered to be of “high interest” (such as state listed endangered and threatened species, self-sustaining wild populations that are endemic to the affected stream or have significant scientific or commercial value) shall also be protected.

(b) The assessment of and conditions upon a proposed amendment to a water right under this section shall be limited by §297.45(b) of this title (relating to “No Injury” Rule) as provided by Texas Water Code §11.122(b).

§297.58. Accounting Water Use .

(a) If the use of the appropriated water is authorized for multiple purposes, the water right shall contain a special condition limiting the total amount of water that may be actually diverted for all the purposes to the amount of the water appropriated.

(b) If a water right has appropriations with different priority dates, the oldest priority water shall be credited against the water first used unless the water right expressly provides otherwise or the water right holder requested the watermaster to count the water use against the junior portion of the right.

§297.59. Additional Limitations.

(a) The commission will incorporate into every permit or certificate of adjudication any condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.

(b) All dams proposed for authorization by the commission shall provide for outlets of size and location sufficient to pass such flows of water as the commission finds necessary to satisfy the rights of downstream domestic and livestock users, the senior and superior rights of other authorized users, instream flow requirements, water quality, and estuarine inflow requirements.

(c) Acceptance of the water right by the water rights holder will be an acknowledgment and agreement that the holder will comply with all the terms, provisions, conditions, limitations and restrictions embodied in such water right. The exercise of rights under a permit authorizing the inundation or installation of a structure upon the land of another will be conditioned upon the continued effectiveness of an easement or agreement between the parties.

SUBCHAPTER G : CANCELLATION AND REVOCATION OF WATER RIGHTS

§§297.71-297.74

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code, §5.103.

§297.71. Cancellation With Consent.

§297.72. Cancellation Under Texas Water Code, §11.146.

§297.73. Cancellation Under Texas Water Code, §§11.171-11.186.

§297.74. Revocation of Authorization To Divert from a Locally Un-sponsored or Storage-Limited Reservoir.

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

§§297.71-297.75

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code, §5.103.

§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 the Food Security Act, Pub. L. No. 99-198, Secs. 1231-1236, 99 Stat. 1354, 1509-1514 (1985) or a similar governmental program;

(2) the water right being held to meet longterm water supply needs as demonstrated by the water right holder or as reflected in regional water planning in accordance with the applicable regional water plan approved pursuant to Texas Water Code §16.053;

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

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

§297.72. Notice and Hearing.

(a) When commission records show that all or part of a water right has not been used during the past ten years, the executive director may file a petition with the commission for a hearing before the commission to show cause why the water right should not be canceled. Except as specifically provided otherwise by this Subchapter, such proceedings shall be held in accordance with the general hearing provisions of Chapter 50 of this title (relating to Action on Applications) of the commission rules.

(b) At least 45 days before the date of the hearing, the commission shall send notice of the petition and hearing to the affected water right holder. Notice shall be sent by registered mail, return

receipt requested, to the last address shown by the records of the commission. The commission shall also send notice by regular mail to all water right holders in the same watershed.

(c) The commission shall also have the notice of the hearing published once a week for two consecutive weeks, at least thirty (30) days before the date of the hearing, in a newspaper published in each county in which the diversion of water from the source of supply was authorized or proposed to be used, as shown by the records of the commission. If in any such county no newspaper is published, then the notice may be published in a newspaper having general circulation in the county.

(d) Except as provided by subsection (e) of this section, the commission shall hold a hearing and shall give the affected water right holder and other interested persons an opportunity to be heard and to present evidence on any matter pertinent to the questions at issue.

(e) A hearing on the cancellation of the water right is unnecessary if the right to such hearing is expressly waived by the affected water right holder.

(f) A water right for a term does not vest in the water right holder any right to the diversion, impoundment, storage, taking or use of water for longer than the term of the water right and shall expire and be canceled in accordance with its terms without further need for notice or hearing.

§297.73. Commission Finding; Action.

(a) At the conclusion of the hearing, the commission shall cancel the water right in whole or in part to the extent that it finds that:

(1) the water or any portion of the water under the water right has not been put to an authorized beneficial use during the ten-year period; and

(2) the water right holder has not used reasonable diligence in applying the water or the unused portion of the water to an authorized beneficial use or is otherwise unjustified in the nonuse as provided by subsection (b) of this section.

(b) In determining what constitutes due diligence or a justified nonuse as provided in subsection (a)(2) of this section, the commission shall give consideration to:

(1) whether sufficient water is available in the source of supply to meet all or part of the appropriation during the ten-year period of nonuse;

(2) whether the nonuse is justified by the water right holder's participation in the federal Conservation Reserve Program or a similar governmental program as provided by §297.71 of this title (relating to Cancellation in Whole or In Part);

(3) whether 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 in accordance with Chapter 288, Subchapter B of this title (relating to Drought Contingency Plans), and consistent with projections of future water needs contained in the state water plan;

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

(5) whether the existing or proposed authorized purpose and place of use are consistent with an approved regional water plan as provided by Texas Water Code §16.053;

(6) whether the water right has been deposited into the Texas Water Bank or Water Trust as provided by Texas Water Code §§15.7031 and 15.704 or whether it can be shown by the water right holder that the water right or water is currently being made available for purchase through private marketing efforts at fair market value and under reasonable terms and conditions; or

(7) whether the water right has been reserved for instream uses or beneficial inflows for bays and estuaries.

(c) Regardless of the other provisions of this subchapter, no portion of a water right held by a city, town, village, or municipal water district authorizing the use of water for municipal purposes shall be canceled if the water has been put to beneficial use under the water right at any time during the ten-year period immediately preceding the initiation of cancellation proceedings.

(d) Failure to initiate cancellation proceedings under this subchapter does not validate or improve the status of any water right in whole or in part.

(e) Once cancellation proceedings have been initiated against a particular water right and a hearing has been held, further cancellation proceedings shall not be initiated against the same water right within the five-year period immediately following the date of the hearing.

§297.74. Forfeiture and Revocation of Water Right.

(a) A water right may be forfeited for failure to timely commence or complete construction of the diversion facilities as provided by §295.72 of this title (relating to Applications for Extension of Time).

(b) A temporary or term permit may be revoked or suspended upon written or verbal notice by the executive director or watermaster, as applicable, without hearing if necessary to protect senior and vested water rights or instream uses and freshwater inflow needs for bays and estuaries. Notice of

such revocation shall also be provided to the affected water right holder by registered mail, return receipt requested.

(c) Authorization to divert water from a reservoir constructed by the federal government for which no local sponsor has been designated nor permit issued or a reservoir permitted for storage solely for the purpose of optimum development of the project may be revoked when compliance with the conditions contained in the letter authorizing the diversion of water is not occurring or, in the case of authorized diversions for domestic use, water becomes reasonably available through a water supply system. Revocation shall be made by a letter setting forth the basis of the revocation signed by a commissioner. Upon receipt of the letter, the user shall cease diverting water and remove diversion facilities.

§297.75. Abandonment of Water Right.

(a) A water right shall be determined to have been abandoned if the water right holder:

(1) has the intent to knowingly relinquish the water right; and

(2) the water right has not been used for a consecutive three-year period or more.

(b) The requisite intent for abandonment can be shown by express statements of the water right holder.

(c) Petition, notice and hearing under this section shall be provided in the same manner as the cancellation of a water right provided by §297.72 of this title (relating to Notice and Hearing).

(d) If the commission's records reflect that the amount of water authorized to be appropriated under a water right is not being used, either in whole or in part, the executive director may send an appropriate form to the holder of the water right by which the holder or the holder's authorized agent may request cancellation of the unused portion of the right or the entire right.