

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §297.21, Domestic and Livestock Use; and §297.41, General Approval Criteria. These sections are adopted *without changes* to the proposed text as published in the April 21, 2000 issue of the *Texas Register* (25 TexReg 3499).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The rule amendments implement provisions of Senate Bill (SB) 658 (An Act relating to dates by which regional and state water plans must be adopted) and House Bill (HB) 2572 (An Act relating to reservation of riparian rights associated with land sold by certain municipalities), enacted by the 76th Texas Legislature. In addition, this rulemaking clarifies language concerning formal commission enforcement of the requirement of reasonable use as between domestic and livestock users and moves appropriate portions of Chapter 297, pertaining to domestic and livestock use, to Chapter 304 to facilitate enforcement in areas covered by the commission watermaster programs. The rulemaking will also preclude a claim of domestic and livestock exemption for a purchaser of land from a municipality of a certain size, that lies within 5,000 feet of the shoreline of a lake.

SECTION BY SECTION DISCUSSION

The amendments add a sentence to §297.21(b), which implements HB 2572, 76th Legislature, 1999; remove language concerning formal enforcement of the requirement of reasonable use as between domestic and livestock users from §297.21(c); and change the date after which the commission will not issue a water right for municipal purposes in any region that does not have an approved regional water plan, as required by Texas Water Code (TWC), §11.134. These provisions implement SB 658, 76th

Legislature, 1999.

Section 297.21(b) provides that persons may construct on their own property reservoirs to impound 200 acre-feet or less for domestic and livestock purposes without obtaining a permit. The commission adds to that section that this exemption is not available to owners of property sold by a municipality having a population of 250,000 or less; owners of land within 5,000 feet of where the shoreline of a lake would be if the lake were filled to its storage capacity; owners whose property was sold without notice; or in the solicitation of bids to the person leasing the land. This subsection notifies people of the exclusion from the domestic and livestock exemption in Local Government Code, §272.001(h), which was adopted by the legislature in HB 2572.

Section 297.21(c) provides that a person's domestic and livestock use may not unreasonably interfere with another person's domestic and livestock use, and that any domestic and livestock dam exempt from permitting under §297.21(b) must allow sufficient inflows through for the benefit of domestic and livestock users downstream. While this is an accurate statement of the rights of domestic and livestock users under the common law, staff working in some of the regional offices have found administrative enforcement problematic, due to the subjective nature of the finds required.

The commission has traditionally advised domestic and livestock users of the necessity to share with one another during times of shortage. Often this type of intervention has been successful in facilitating agreement between the landowners involved on an equitable sharing arrangement. Institutionalizing this procedure into a rule, however, was a change that added some features that are difficult to manage.

For example, most domestic and livestock users do not meter their flows. Therefore, in order to enforce this provision, staff must decide by visual examination if passage of inflows is sufficient or if the domestic and livestock use is reasonable. This is usually easy to do on an informal basis, but not so easy to determine with the precision necessary for a formal enforcement proceeding. The commission has not received statutory guidance on these issues. Also, there often is not sufficient staff in the region to police these inflow passage requirements in addition to their other duties. For these reasons, the commission proposes to return to the former, informal procedure. When facilitation by the commission is unsuccessful, the appropriate venue for formal action is a private action in court between the disputing domestic and livestock users.

Additionally, while the requirement that a domestic and livestock user must not unreasonably interfere with the use by other domestic and livestock users is established in common law, the TWC does not explicitly require or authorize the commission to enforce this requirement, except where a watermaster has been appointed.

These amendments take the language in §297.21(c) that states a domestic and livestock reservoir shall pass sufficient inflows to downstream domestic and livestock users out of Chapter 297 which contains general substantive water rights requirements and amends Chapter 304, Watermaster Operations, §304.21(d)(3) to include this requirement. Chapter 304 is an appropriate place in which to insert the requirement that domestic and livestock reservoir owners pass inflows when necessary to protect others. Watermasters have statutory authority to enforce this requirement; they are familiar with the water rights in their areas; they have staff that work solely on water rights enforcement; and they have

statutory authority to apportion flows in times of drought. The prohibition against locating a domestic and livestock reservoir on a navigable stream would remain in §297.21(c).

Adopted §297.41(b) provides that, beginning January 5, 2002, the commission will not issue a water right for municipal purposes in a region that does not have an approved regional water plan unless the commission determines that new, changed, or unaccounted for conditions warrant the waiver of this requirement. This amendment implements the change in the date required by SB 658.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

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 the definition of a “major environmental rule” as defined in that statute.

“Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a section of the state. The rule amendments will not adversely affect the economy, productivity, competition, jobs, the environment, or public health and safety because the amendments do not relate to jobs, economy, competition, or productivity. In addition, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal

government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

These amendments do not meet any of these four applicability requirements of a major environmental rule. The changes in §297.21(b) and (c) implement state legislation and the deletion from §297.21(c) clarifies the rules used for enforcement in the agency.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rule amendments pursuant to Texas Government Code, §2007.43. The following is a summary of that assessment. The purposes of these amendments are to take a rule out of Chapter 297 that is difficult to enforce and for which adequate agency staff for enforcement does not exist; provide a situation in which a buyer of land from a municipality of a certain size cannot claim a domestic and livestock exemption; and change a date on which the commission shall deny water rights if the application is from an area that does not have an approved regional plan. Removing the inflow passage provision from Chapter 297 reflects current practice of the region and enforcement staff and does not place a burden on private real property. The other two amendments do not affect private real property. The exception from the domestic and livestock exemption is pursuant to state law, and does not adversely affect private real property because this situation will be very rare and the land buyer may still file an application for a water right for this water.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has determined that the rulemaking is subject to the Texas Coastal Management Program (CMP) and has reviewed the amendments for consistency in accordance with the Coastal Coordination Act Implementation Rules in 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. The rulemaking has the potential to affect 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, relating to Goals, are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; and to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhance 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 18 policies contained in 31 TAC §501.14, relating to Policies for Specific Activities and Coastal Natural Resource Areas, only one, Appropriations of Water, has the potential for being affected by the rulemaking.

The commission has reviewed the rules for consistency with the aforementioned goals and policies of the CMP 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.

HEARINGS AND COMMENTERS

A public hearing was not held on this rulemaking. The commission received three written comments before the public comment period closed on May 22, 2000. Comments were submitted by the Texas Department of Transportation (TxDOT), the Lower Colorado River Authority (LCRA), and an individual attorney.

ANALYSIS OF TESTIMONY

TxDOT stated that the rulemaking had been reviewed and that no comments would be submitted.

LCRA filed comments which urged the commission to reconsider amending §297.21(c) and §304.21(d)(3) for primarily four reasons. LCRA argued that (1) the commission has jurisdiction to require domestic and livestock users to pass inflows to other domestic and livestock users; (2) the commission should consider alternatives to the deletion of the requirement 297.21(c); (3) the proposed changes will not benefit all of the public; and (4) the proposed changes may result in increased costs to the public, units of the state, and the judicial system.

LCRA's first comment was that the commission has authority to require domestic and livestock users to pass inflows under TWC, §11.121, which requires a person who appropriates water to obtain a permit. The commission must determine whether someone claiming the exemption in §11.142 should be required to obtain a permit. If a person is not in compliance with §11.142, the commission should exercise its discretion and proceed with enforcement.

The commission agrees with the comment, but does not agree that the commission's authority to ascertain whether a person should obtain a permit under TWC, §11.121 necessarily provides authority for the commission to enforce against a domestic and livestock user which is not passing inflows to another domestic and livestock user. Riparian rights were established by case law, not the TWC, which the commission enforces. Section 11.142 only allows the commission to determine how much water a domestic and livestock user has impounded in order to determine whether a permit is needed. Under the TWC, if a domestic and livestock user does not pass inflows, this would not result in the user having to obtain a permit unless the domestic and livestock user was impounding more than 200 acre-feet of water.

The TWC creates special responsibilities for the commission in some circumstances. Where a watermaster has been appointed, the watermaster is to "regulate or cause to be regulated the controlling works of reservoirs and diversion works in times of water shortage, as is necessary to prevent the waste of water or its diversion, taking, storage, or use in excess of the quantities to which the holders of water rights are lawfully entitled." Texas Water Code, §11.327 and §11.454 provides the authority and duty of a watermaster to require passage of inflows by domestic and livestock users during water shortages. This action will protect the rights of domestic and livestock users to the equal priority which they share. This function, however, does not interfere with a persons right to impound water under TWC, §11.142 without a permit.

LCRA's second comment was that the commission should consider alternatives to repealing the language of §297.21(c) requiring the passage of inflows to other domestic an livestock users. LCRA

stated that if the commission is going to continue to informally advise domestic and livestock users of the necessity of passing inflows, the public would be better served if the process was clear in the rules. The commission should also consider amending its rules to include mechanisms or methods by which flows can be measured to assist regional personnel. This process would be a more efficient means of enforcing §297.21(c). During times of drought, the commission should maintain a lead role in resolving water disputes that arise under TWC, §11.142.

The commission disagrees that any of the alternatives suggested by LCRA would be more appropriate at this time. Case law provides that domestic and livestock users are limited to reasonable use of the water, which includes a domestic and livestock reservoir owner passing inflows to other domestic and livestock users. However, TWC, §11.142, which the commission enforces, does not require reasonable use of the passage of inflows, but only relates to how much water a person can impound for domestic and livestock use. Also, “reasonable use” and “sufficient inflows” are not easily definable in a rule because they depend on the circumstances of each case. The fact that the relative rights of domestic and livestock users is not governed by statute, are but based only on case-by-case, subjective analyses by courts of equity, makes them inappropriate for administration in the field by agency staff. By contrast, there is a statutory basis and standard for such administration by watermasters during times of shortage, making it both legally appropriate and administratively practical for this provision to be adopted for those districts where a watermaster has been appointed. Those offices have not only the statutory mandate to regulate domestic and livestock impoundments, they are also staffed to perform such tasks.

LCRA's third comment was that the proposed rule amendments do not benefit all of the public because only persons with water rights in two areas of the state have watermasters.

The commission generally agrees with this comment but responds that this is not a change from the current situation. Regions are currently unable to adequately enforce §297.21(c) due to the vagueness of the rule and the shortage of personnel. A watermaster is capable of enforcing provisions of the TWC that the regions cannot, and has broad powers to enforce water rights in times of drought. Watermasters currently have the authority to require this passage of inflows; the change to §304.21(d)(3) is simply to clarify that authority. No changes were made based on this comment.

The LCRA commented that the proposed deletion of language in §297.21(c) relating to the domestic and livestock use may result in increased costs to the public, local governments, state entities, and the state's judicial system.

The commission disagrees with this comment. At the outset, the commission notes that the commenter merely asserts that the proposed rule *may* increase costs. The commenter cites no studies or cost estimates of the effect of the proposed rule. The commission acknowledges that they also do not have exact cost estimates of the effect of the proposed rule. However, the commission does not believe that these amendments will result in any significant cost increases to other state and local government entities.

Under the adopted rules, commission staff could continue to seek informal resolution of disputes among domestic and livestock users and, therefore, lessen the costs associated with dispute resolution either by the administrative process or judicial process. As noted in the preamble to the proposed rule, commission staff have traditionally sought to informally facilitate agreements providing for equitable sharing among domestic and livestock users during times of water shortage. By adopting these rules, commission staff will still be able to attempt such informal agreements.

The vast majority of cases in both the judicial process and the administrative process are settled without the need for a contested case. For those remaining cases that must be resolved by hearing or trial, it is very speculative to assess which might cost more. Both are subject to the same broad discovery process. Both rely on the same rules of evidence. In disputes between domestic and livestock users, most witnesses reside near the points of use. There will be no increased costs to the public because the ultimate decisions of these disputes concerning private property rights will continue to be made where they have always been - in civil court. Because of the administrative and practical difficulties of implementing an administrative system in areas without watermasters, this burden was never even partly transferred to the agency; therefore, it has always been, as it will remain, one of the private property rights that each owner has and enforces through the court system. The voluntary and informal mediation function traditionally offered by the commission will continue.

Under the historic rule and practice, an aggrieved downstream domestic and livestock user could

seek a private remedy in court. The commission is aware of at least one recent case where an aggrieved domestic and livestock user elected to do just that, perhaps because of the difficulties in administrative enforcement the commission has pointed out in its preamble to the proposed rule. Under the circumstances, the adoption of these rules might not result in any real shift in cases of this type from the administrative hearing process to the judicial process.

Nothing in the adopted rule would require other state or local entities to monitor or provide these entities with the jurisdiction to enforce the principles that a persons's domestic and livestock use may not unreasonably interfere with another's domestic and livestock use, and that an exempt dam must allow sufficient inflows to pass through downstream for the benefit of other domestic and livestock users. The adopted rules does not require other state agencies or local entities to do anything. Therefore, the commission has not estimated any cost for such entities in adoption of this rule. No changes to the rules were made based on this comment.

The individual commenter stated that the amendment to §304.21(d)(3) appears to be contrary to TWC, §11.142, which allows a person to impound up to 200 acre-feet normal capacity of water on his own land for domestic and livestock purposes without obtaining a permit. The commenter asserted that the commission is in effect attempting to usurp the authority of the legislature.

The commission disagrees because the purpose of the amendment of §304.21(d)(3) is to clarify a watermaster's authority to regulate water rights during times of drought, not to change the exemption from permitting for impoundments for domestic and livestock purposes. Section

304.21(d)(3) clarifies that in times of shortage, the watermaster may require owners of exempt domestic and livestock reservoirs to pass inflows sufficient for the use of other holders of domestic and livestock rights.

The proposed amendment does not affect the exemption in TWC, §11.142. The TWC creates special responsibilities for the commission in some circumstances. Where a watermaster has been appointed, the watermaster is to “regulate or cause to be regulated the controlling works of reservoirs and diversion works in times of water shortage, as is necessary to prevent the waste of water or its diversion, taking, storage, or use in excess of the quantities to which the holders of water rights are law fully entitled.” Texas Water Code, §11.327 and §11.454, provide the authority and duty of a watermaster to require passage of inflows by domestic and livestock users during water shortages. This action will protect the rights of domestic and livestock users to the equal priority which they share. This function, however, does not interfere with a person’s right to impound water under TWC, §11.142, without a permit.

No changes to the rule were made based on this comment.

STATUTORY AUTHORITY

The amended sections are adopted under TWC, §5.103 and §5.105, which provide the commission the authority to adopt rules necessary to carry out its responsibilities and duties under the TWC and other laws of Texas. The amendments are also adopted under HB 2572 and SB 658, 76th Legislature, 1999.

SUBCHAPTER C: USES EXEMPT FROM PERMITTING

§297.21

§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. This domestic and livestock exemption is not available to owners or property sold by a municipality having a population of 250,000 or less and owning land within 5,000 feet of where the shoreline of a lake would be if the lake were filled to its storage capacity, if the

property was sold without notice or the solicitation of bids to the person leasing the land, in accordance with Local Government Code, §272.001(h).

(c) A dam constructed in accordance with subsection (b) of this section 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.

SUBCHAPTER E: ISSUANCE AND CONDITIONS OF WATER RIGHTS

§297.41

STATUTORY AUTHORITY

The amended sections are adopted under TWC, §5.103 and §5.105, which provide the commission the authority to adopt rules necessary to carry out its responsibilities and duties under the TWC and other laws of Texas. The amendments are also adopted under HB 2572 and SB 658, 76th Legislature, 1999.

§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 January 5, 2002, 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.