

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §297.21, Domestic and Livestock Use; and §297.41, General Approval Criteria.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed rule changes would 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 Legislature, 1999. In addition, this rulemaking would clarify language concerning formal commission enforcement of the requirement of reasonable use as between domestic and livestock users and move 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 would 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 proposed amendments will add a sentence to §297.21(b), which implements HB 2572, delete 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.

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 proposes to add 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 law, staff working in some of the regional offices have found administration of this rule to be nonenforceable.

The commission staff have 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.

The purpose of these proposed amendments is to 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 amend Chapter 304, Watermaster Operations, §304.21(d)(3) to include this requirement. Chapter 304 is an appropriate provision 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 §297.21(c).

Proposed §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.

FISCAL NOTE

Jeff Grymkoski, Director, Strategic Planning and Appropriations, has determined that for the first five-year period that these rules will be in effect, there will be no adverse fiscal implications for the commission and other units of state and local government as a result of administration and enforcement of the proposed amendments. The proposed amendments would implement certain provisions of HB 2572, 76th Legislature, 1999 and SB 658, 76th Legislature, 1999. The proposed amendments would also amend §297.21(c).

HB 2572 prevents a person who purchases land within 5,000 feet of a lake from a municipality with a population of 250,000 or less from constructing a dam or reservoir on that property. SB 658 extends to January 5, 2002, the authority to issue a water right for municipal purposes in a region without an approved regional water plan. The proposed rules would also amend §297.21 to delete the provision that a person who constructs on his property a reservoir exempt from permitting of not more than 200 acre-feet may not reasonably interfere with another's domestic use and must allow sufficient inflows to pass through downstream for the benefit of other domestic and livestock uses.

PUBLIC BENEFIT

Mr. Grymkoski has also determined that for each of the first five years of the proposed rules, the public benefit will be greater protection of public health, safety, and welfare by ensuring adequate municipal water supplies and clarify existing rules for ease of administration and enforcement. These proposed rule amendments are not anticipated to have any adverse economic impact on any persons or industries.

SMALL BUSINESS AND MICRO-BUSINESS ANALYSES

The proposed rules are not anticipated to have an adverse economic impact on any small businesses or micro-businesses as a result of implementing and enforcing the proposed rules.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed 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 proposed 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 proposed 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.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that the proposed rulemaking is subject to the Texas Coastal Management Program (CMP) and has reviewed the proposal 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 proposed 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 proposed rulemaking.

The commission has reviewed the proposed 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.

The commission solicits comments on the consistency of the proposed rulemaking.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All

comments should reference Rule Log Number 1999-078-297-WT. Comments must be received by 5:00 p.m., May 22, 2000. For further information, please contact Bruce Moulton, Policy and Regulations Division, at (512) 239-4809.

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103 and §5.105, which authorize the commission to adopt rules necessary to carry out its responsibilities and duties under the TWC and other laws of Texas. The amendments are also proposed under HB 2572 and SB 658.

No other codes or states will be affected by this proposal.

SUBCHAPTER C : USES OF EXEMPT FROM PERMITTING

§297.21

§297.21. Domestic and Livestock Use.

(a) (No change.)

(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 of 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 [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) (No change.)

SUBCHAPTER E : ISSUANCE AND CONDITIONS OF WATER RIGHTS

§297.41

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103 and §5.105, which authorize the commission to adopt rules necessary to carry out its responsibilities and duties under the TWC and other laws of Texas. The amendments are also proposed under HB 2572 and SB 658.

No other codes or states will be affected by this proposal.

§297.41. General Approval Criteria.

(a) (No change.)

(b) Beginning January 5, 2002 [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.