

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §304.21, Watermaster Operations. This section is adopted *without changes* to the proposed text as published in the April 21, 2000 issue of the *Texas Register* (25 TexReg 3502).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The rule amendment 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.

SECTION BY SECTION DISCUSSION

Amendments to §297.21(c) provide that a person's domestic and livestock use cannot 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 to pass 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.

Texas Water Commission and 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.

There is an exception to this general statement. In watermaster districts, there are specialized personnel whose role it is to regulate diversions during shortage. For that reason, this amendment moves the requirement that domestic and livestock exempt reservoirs pass inflows to other domestic and livestock users from §297.21(c), which is being amended, to a new §304.21(d)(3). Watermasters have broad authority under Texas Water Code (TWC), Chapter 11 to regulate water usage during drought. Under §297.327, watermasters, in times of water shortage, may regulate the works of reservoirs and regulate the distribution of water among water right holders. Chapter 304 is an appropriate place for requiring domestic and livestock exempt reservoirs to pass inflows because watermasters are familiar with the water rights in their areas, have staff that work solely on water rights enforcement, and have statutory authority to apportion flows in times of drought.

Section 304.21(d) provides what a watermaster may do when sufficient flow is not available to meet water right holder's existing declarations of intent to take water or meet the needs of domestic and livestock users. Section 304.21(d)(2) provides that the watermaster can require water right holders with reservoirs to pass inflows to honor these downstream water rights. New §304.21(d)(3) provides that domestic and livestock reservoir owners exempt from permitting under TWC, §11.142 must allow inflows to pass through when necessary for the protection of downstream domestic and livestock users. The commission does not regard this amendment as a change in the law. Watermasters already have this authority under statute, and §304.21(d)(2) can already be read to include domestic and livestock users as persons who can be required to pass inflows. New §304.21(d)(3) simply makes that authority explicit in the rule.

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. This rule will not adversely affect the economy, productivity, competition, jobs, the environment, or public health and safety. 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.

This rule amendment does not meet any of these four applicability requirements of a major environmental rule. This rule implements state law, not federal, and simply clarifies the watermaster's authority.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule pursuant to Texas Government Code, §2007.43. The following is a summary of that assessment. The rule clarifies that the watermaster can require a domestic and livestock user with exempt reservoirs to pass inflows to another domestic and livestock user when flows are low. This is not a change in interpretation or policy of this agency. The watermaster has always had this authority. This is not a burden on private real property because the fact that domestic and livestock exempt reservoirs may be required to pass inflows is a current rule of law and does not affect the property value of the right.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that the rule amendment is neither identified in Texas Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to actions and rules subject to the Texas Coastal Management Program (CMP), nor will it affect any action or authorization

identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the rule amendment is not subject to the CMP.

HEARINGS AND COMMENTERS

A public hearing was not held for this rulemaking. The public comment period for the rulemaking closed May 22, 2000. Written 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 the rulemaking had been reviewed and that no comments would be submitted.

LCRA expressed concerns that repealing language in §297.21(c) and placing the provision in §304.21, would restrict the benefits of that provision to a limited portion of the state.

The LCRA commented neither in support of or opposition to the rulemaking.

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 amendment is adopted 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.

SUBCHAPTER C: ALLOCATION OF AVAILABLE WATERS

§304.21

§304.21. Allocation of Available Waters.

(a) The allocation of water between water rights holders shall be on the basis of seniority, which may be modified as provided in subsection (b) of this section. The watermaster shall allocate waters in such a way as to maximize the beneficial utilization of state water, to minimize the potential impairment of senior water rights by the diversions of junior water rights holders, and to prevent waste or use in excess of quantities to which the holders of water rights are lawfully entitled.

(b) In administering water rights, the watermaster shall take into account any exceptions to the priority system as directed by the commission relative to the Wagstaff Act, Texas Water Code (TWC), §11.028.

(c) The executive director may request suspension of any or all special streamflow or minimum release requirements. Such a request shall be considered under §297.61 of this title (relating to Amendments by Executive Director).

(d) When available flow is not sufficient to meet the demands of existing declarations of intent for downstream senior rights, demands for domestic and livestock purposes that are not included under any water right, or other minimum streamflow requirements that the commission determines necessary

for purposes other than protection of downstream senior and superior water rights, the watermaster may:

(1) cancel or modify, as needed, any existing declaration of intent made pursuant to §304.15 of this title (relating to Declarations of Intent to Divert, or Release Water);

(2) order that water right holders with reservoir(s) allow inflows to pass through such reservoir(s) to the extent necessary to honor downstream senior water rights, demands for domestic and livestock purposes, minimum streamflow requirements, minimum release requirements, and other conditions;

(3) order that persons with reservoirs exempt from permitting under TWC, §11.142, allow inflows to pass through such reservoirs for the protection of downstream domestic and livestock users. Failure to comply with a watermaster's order under this subsection is a violation of TWC, §11.081.

(4) order that diverters limit or cease diversions to the extent necessary to honor downstream senior water rights, demands for domestic and livestock purposes, minimum streamflow requirements, minimum release requirements, and other conditions; and/or

(5) take any other action necessary to ensure that downstream senior water rights, demands for domestic and livestock purposes, minimum streamflow requirements, minimum release

requirements, and other conditions, are administered in accordance with the laws of Texas.