The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §297.1 and §§297.41 - 297.43.

**Background and Summary of the Factual Basis for the Proposed Rules**

In 2019, the 86th Texas Legislature passed HB 720, which removes permitting barriers for aquifer storage and recovery (ASR) and aquifer recharge (AR) projects for both new water rights and existing water rights. HB 720 adds recharge as a beneficial use of water and sets out a process for new appropriations for ASR and AR projects. These new appropriations are subject to notice and contested case hearings and TCEQ has 180 days to complete technical review of the application. HB 720 also requires TCEQ to adopt rules providing for the considerations for determining water availability for new appropriations for ASR and AR.

HB 720 also addresses amendments to existing water rights for reservoirs that have not been constructed or existing reservoirs that have lost storage capacity because of sedimentation. A water right holder with a water right authorizing storage in a reservoir that has not been constructed can remove the storage authorization without notice and hearing if other water rights and the environment are not affected by the amendment.

A water right holder can also request to remove the storage authorization and increase the amount of water to be diverted or the diversion rate, based on an evaporation credit, to increase the amount of water available for ASR or AR project. A water right holder can also amend their water right to replace storage capacity lost to sedimentation with an ASR project.
These two types of amendments are subject to notice and contested case hearing.

This rulemaking implements changes to Chapter 297 required by HB 720.

As part of this rulemaking, the commission is proposing amendments to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing, Chapter 295, Water Rights, Procedural; and Chapter 331, Underground Injection Control, to implement HB 720.

Section by Section Discussion

§297.1, Definitions

The commission proposes §297.1(5) to provide a definition of an AR project consistent with the definition in Texas Water Code (TWC), §27.201. The commission proposes this change to implement TWC, §11.157(a) which allows water to be appropriated for AR. The subsequent paragraphs will be renumbered.

The commission proposes to remove the sentence in renumbered §297.1(52) stating that water injected into the ground for an ASR project remains state water. This change is to implement TWC, §11.023(d).

§297.41, General Approval Criteria

The commission proposes to amend §297.41(a)(3)(D) to implement TWC, §11.157(b)(1) and (c)(1), and §11.158(g)(2). These provisions require the commission to consider the

§297.42, Water Availability

The commission proposes to amend §297.42(b). The proposed changes to §297.42(b) implement TWC, §11.157(b)(1) and 11.157(c)(1) and (2), and §11.158(g)(2), which require the commission to consider the requirements in TWC, §§11.134, 11.147, and 11.1471 in granting an application for a water right. This change is to clarify that the commission can condition new and amended water rights for AR and ASR to protect the adopted environmental flow standards in 30 TAC Chapter 298 (Environmental Flow Standards for Surface Water).

The commission proposes to amend §297.42(d) to remove references to water availability for AR and ASR because water availability for these types of projects is specifically addressed in proposed §297.42(e). The commission also proposes to amend §297.42(d) to clarify the non-consumptive instream uses for which water may be appropriated to ensure consistency with TWC, §11.0235(d).

The commission proposes to add §297.42(e) to specify the water availability criteria for new appropriations for ASR and AR as required by TWC, §11.157(g). Proposed §297.42(e) states that new appropriations of water for these types of projects need not be continuously available as set out in TWC, §11.157(c)(3). The commission proposes that the minimum water availability criteria for these types of projects is that the full amount of the request be
available at least one year in the period of record of the commission’s water availability model for the applicable river basin. This availability criteria is consistent with the commission’s current practice in reviewing applications that are not required to be based on historic normal streamflow. The commission further proposes that this availability criteria would apply provided the project is viable for the intended purpose and the water can be beneficially used without waste.

The commission proposes to add §297.42(f) to specify water availability criteria for new appropriations of water based on an evaporation credit, as described by TWC, §11.158(c). The commission proposes that evaporation credits would apply to on-channel storage that has not been constructed. The volume of water diverted for an off-channel project likely already includes the amount of water that would be lost to evaporation and the commission does not anticipate changes to the volume of water diverted from the stream if a water right holder removes the authorization for an off-channel reservoir from its water right. Further, substituting an ASR project for off-channel storage would not require an amendment to the underlying water right under TWC, §11.153, provided the terms of the water right are not changed and the water right holder obtains the required authorizations specified in that section. The commission proposes that water for these types of projects need not be continuously available. The commission further proposes that the evaporation credit be determined based on the evaporation calculations used in developing the terms of the original water right and cannot exceed the maximum annual modeled evaporation as determined in the commission's water availability model for the applicable river basin. The
commission proposes these criteria for the protection of other water right holders. If an applicant for an amendment to a water right requests more water than would be available as an evaporation credit, TWC, §11.157, and the availability criteria under proposed §297.42(e) would apply to the additional volume of water requested in the application.

The commission proposes to add §297.42(g) to set out criteria for determining the volume of water available for conversion to an ASR project for water right holders with reservoirs which have lost storage capacity because of sedimentation under TWC, §11.158(d). The commission proposes that the volume of water be limited to the lesser of the calculated volume that has been lost to sedimentation and the volume of storage in an ASR project that is necessary to restore the yield of the reservoir that has been lost to sedimentation. The commission proposes these criteria for the protection of other water right holders. If an applicant for an amendment to a water right requests more water than would be needed to restore the yield lost to sedimentation, then TWC, §11.157, and the availability criteria under proposed §297.42(e) would apply to the additional volume of water requested in the application. The subsequent subsections will be re-lettered.

§297.43, Beneficial Uses

The commission proposes to amend §297.43 to ensure consistency with TWC, §11.023. The commission proposes amending subsection (a) to insert the language in TWC, §11.023(a), and amending paragraph (10) by removing the existing language relating to instream uses, water quality, aquatic and wildlife habitat, or freshwater inflows to bays and estuaries because
these uses are not specified in TWC, §11.023. To the extent the commission has the authority to appropriate water for any of those uses, they would be covered in §297.43(a)(11). Finally, the commission incorporates the language in TWC, §11.023(9) into §297.43(10) to clarify that water appropriated for AR or ASR is a beneficial use of water, as set out in TWC, §11.023.

**Fiscal Note: Costs to State and Local Government**

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

This rulemaking addresses necessary changes in order to comply with state law, specifically HB 720, which relates to appropriations of water for AR and use in ASR projects.

**Public Benefits and Costs**

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with state law. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

**Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rules do not adversely
affect a local economy in a material way for the first five years that the proposed rules are in effect.

**Rural Communities Impact Assessment**

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

**Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rulemaking is in effect.

**Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed rulemaking is in effect.

**Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this
The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rulemaking should not impact positively or negatively the state's economy.

**Draft Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225. A "Major environmental rule" means a rule with a specific intent 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 sector of the state.

First, the rulemaking does not meet the statutory definition of a "Major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the rulemaking is to implement HB 720 which enacted requirements in TWC, Chapters 11 and 27, for ASR and AR projects.
Second, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. It is not anticipated that there will be a significant cost to comply with the proposed rules because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendments will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The proposed rules establish program requirements consistent with the requirements of HB 720, therefore, will not adversely impact in a material way the public health and safety of the state or a sector of the state.

Finally, the rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §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 rulemaking does not meet any of the preceding four applicability
requirements for the following reasons: this rulemaking does not exceed any standard set by federal law because there are no federal standards governing water rights; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because there are no delegation agreements or contracts between the commission and the federal government for the commission’s water rights program; and is not based solely under the general powers of the agency, but is based specifically under HB 720, Section 4, as well as, under the other authority of the commission cited in the statutory authority section of this preamble.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

**Takings Impact Assessment**

The commission evaluated this rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed action implements legislative requirements in HB 720 for ASR or AR projects.

The commission determined that the proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules establish program requirements for aquifer storage or AR project applications consistent with the requirements
of HB 720. It is not anticipated that there will be many ASR or AR project applications and the
cost of complying with the regulations is not expected to be substantial because no new fees
are proposed. The proposed rules do not affect a landowner's rights in private real property
because this rulemaking does not burden (constitutionally), nor restrict or limit, the owner's
right to property and reduce its value by 25% or more beyond which would otherwise exist in
the absence of the regulations.

Therefore, the proposed rules would not constitute a taking under Texas Government Code,
Chapter 2007.

**Consistency with the Coastal Management Program**

The commission reviewed the proposed rulemaking and found that the proposal is subject to
the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination
Act, Texas Natural Resources Code, §§33.201 et. seq., and, therefore, must be consistent with
all applicable CMP goals and policies. The commission conducted a consistency determination
for the proposed rules in accordance with Coastal Coordination Act implementation rules, 31
TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals
and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and
enhance the diversity, quality, quantity, functions, and values of coastal natural resource
areas; and 2) to ensure sound management of all coastal resources by allowing for compatible
economic development and multiple human uses of the coastal zone. CMP policies applicable
to the proposed rules include those contained in 31 TAC §501.33. The proposed rules require
that the commission consider the adopted environmental flow standards in Chapter 298 in
determining whether to grant an application and provide that the new water rights can be
conditioned as appropriate to protect the adopted standards. The adopted standards provide
adequate protection of the state’s streams, rivers, bays, and estuaries. Since one of the
purposes of the proposed rules is to ensure that the commission consider protection of
coastal natural resources in considering applications for new or amended water rights that
request additional water and can condition these water rights to ensure that coastal natural
resources are protected, the rules are consistent with CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards
identified in the applicable CMP goals and policies, because the proposed rules are consistent
with these CMP goals and policies; do not create or have a direct or significant adverse effect
on any coastal natural resource areas; and one of the purposes of the proposed rules is to
ensure protection of coastal natural resources as the commission issues new or amended
water rights that request additional water.

Written comments on the consistency of this rulemaking may be submitted to the contact
person at the address listed under the Submittal of Comments section of this preamble.
**Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on January 7, 2020, at 10:00 a.m. in Building E, Room 201S, at the commission’s central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

**Submittal of Comments**

Written comments may be submitted to Andreea Vasile, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: https://www6.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2019-116-297-OW. The comment period closes on January 21, 2020. Copies of the proposed rulemaking can be obtained from the commission’s website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757.
SUBCHAPTER A: DEFINITIONS AND APPLICABILITY

§297.1

Statutory Authority

This amendment is proposed under the authority of Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission’s general authority to adopt rules; TWC, §5.105, which establishes the commission’s authority to set policy by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The proposed amendment implements HB 720.

§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 Plans, Drought Contingency Plans, Guidelines and Requirements; and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agriculture or agricultural--Any of the following activities:
(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

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

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

(D) raising or keeping equine animals;

(E) wildlife management;

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

(G) aquaculture as defined in Texas Agriculture Code, §134.001, which reads "'aquaculture' or 'fish farming' means the business of producing and selling cultured species raised in private facilities. Aquaculture or fish farming is an agricultural activity."
(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) 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.

(4) Appropriative right--The right to impound, divert, store, take, or use a specific quantity of state water acquired by law.

(5) Aquifer recharge project--A project involving the intentional recharge of an aquifer by means of an injection well or other means of infiltration, as described in Texas Water Code, §27.201(1).

(6) [5] Aquifer Storage and Recovery Project--A project involving the injection of water into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator.

(7) [6] 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, agricultural, or other uses of ground or surface waters may be included at times.)

(8) [(7)] 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.

(9) [(8)] 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.

(10) [(9)] Certificate of adjudication--An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of 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.).
(11) [(10)] 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.

(12) [(11)] Claim--A sworn statement filed under Texas Water Code, §11.303.

(13) [(12)] 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.

(14) [(13)] 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.

(15) [(14)] 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.
(16) [(15)] 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.

(17) [(16)] 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.)

(18) [(17)] District--Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(19) [(18)] 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.
(20) [(19)] 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.

(21) [(20)] 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.

(22) [(21)] 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.

(23) [(22)] 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.

(24) [(23)] Hydropower use--The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(25) [(24)] 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 the development of power by means other than hydroelectric, but does not include agricultural use.

(26) [(25)] 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.

(27) [(26)] Irrigation--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.

(28) [(27)] Irrigation water 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.

(29) [(28)] 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 Texas Agriculture Code, §142.001, and the terms game animals and fur-bearing animals are to be used as defined in Texas Parks and Wildlife Code, §63.001 and §71.001, respectively.
(30) [(29)] 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.

(31) [(30)] Marine seawater--Water that is derived from the Gulf of Mexico.

(32) [(31)] Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(33) [(32)] 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.

(34) [(33)] Municipal use--

(A) 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, other public or recreational spaces; or

(B) the use of reclaimed water in lieu of potable water for the preceding purposes; or
(C) the use of return flows authorized pursuant to Texas Water Code, §11.042, in lieu of potable water for the preceding purposes. Return flows used for human consumption as defined in §290.38(34) of this title (relating to Definitions) must be of a quality suitable for the authorized beneficial use as may be required by applicable commission rules; or

(D) the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

   (i) the application site is land owned or leased by the Chapter 26 permit holder; or

   (ii) the application site is within an area for which the commission has adopted a no-discharge rule.

(35) [(34)] Navigable stream--By law, Texas 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.

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

(37) [(36)] One-hundred-year flood--The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year.

(38) [(37)] 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.

(39) [(38)] 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.
(40) [(39)] 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.

(41) [(40)] Reclaimed water--Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or agricultural tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(42) [(41)] 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.

(43) [(42)] Register--The Texas Register.

(44) [(43)] 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.
(45) [(44)] 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.

(46) [(45)] 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.

(47) [(46)] River basin--A river or coastal basin designated by the Texas Water Development Board as a river basin under Texas Water Code, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

(48) [(47)] Runoff--That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(49) [(48)] Secondary use--The reuse of state water for a purpose after the original, authorized use.

(50) [(49)] 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.
(51) [(50)] 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.

(52) [(51)] 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.

(53) [(52)] Stormwater or floodwater--Water flowing in a watercourse as the result of recent rainfall.

(54) [(53)] Streamflow--The water flowing within a watercourse.
(55) [(54)] 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.

(56) [(55)] 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.

(57) [(56)] 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.

(58) [(57)] 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.

(59) [(58)] 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).

(60) [(59)] 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.

(61) [(60)] 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.)

(62) [(61)] 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.

(63) [(62)] 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.

(64) [(63)] 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.

(65) [(64)] 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 E: ISSUANCE AND CONDITIONS OF WATER RIGHTS

§§297.41 - 297.43

Statutory Authority

These amendments are proposed under the authority of Texas Water Code (TWC), §5.102, which establishes the commission’s general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and 11.158 and TWC, Chapter 27, Subchapter H.

The proposed amendments implement HB 720.

§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 any applicable environmental flow standards established under Texas Water Code (TWC), §11.1471 and, if applicable, the assessments performed under TWC [Texas Water Code (TWC)], §§11.147(d) and (e), and 11.150 - 11.152; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant 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;
(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); and

(5) the applicant has completed and returned all Texas Water Development Board surveys of groundwater and surface water use required since September 1, 2001 under TWC, §16.012.

(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 TWC, §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 (TWC), §11.1381, and §297.19 of this title (relating to Term Permit under [Under] Texas Water Code, §11.1381 [§§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 any applicable environmental flow standards as described in Chapter 298 of this title (relating to Environmental Flow Standards for Surface Water), and, if applicable, instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries as provided by TWC, §§11.147, 11.150, 11.152, and 16.059.

(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, approximately 75% of the water requested must be available approximately 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 under TWC, §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 except for instream flows dedicated to environmental needs or inflows to the state's bay
and estuary systems or other similar beneficial 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) New appropriations of water for recharge into an aquifer underlying this state, including aquifer recharge projects as defined by TWC, §27.201 may be for water that is not continuously available. Water availability for the full amount of water requested for these types of projects must, at a minimum, be available at least one year in the period of record based on the commission’s water availability model for the applicable river basin, and the proposed project must be viable for the intended purposes and the water must be beneficially used without waste.

(f) New appropriations of water based on an increase in the amount of water diverted or the rate of diversion resulting from an evaporation credit under TWC, §11.158(c) may be for water that is not continuously available. Water availability for projects under this subsection that request an increase in the amount of water diverted or the rate of diversion from an on-channel reservoir that has not been constructed shall be based on the evaporation calculations that were used in developing the terms of the water right for which the amendment is sought and cannot exceed the maximum annual modeled evaporation as determined in the commission’s water availability model for the applicable river basin.
(g) The volume of water available for conversion of a water right that authorizes storage in a reservoir that has lost storage capacity because of sedimentation to storage as part of an aquifer storage and recovery project, as described in TWC, §11.158(d), does not have to be continuously available. The volume of water that can be converted to storage in an aquifer storage and recovery project under this subsection is limited to the lesser of:

1. the storage volume that is demonstrated to have been lost to sedimentation, as determined by a survey performed by the Texas Water Development Board; or

2. the volume of storage in the aquifer storage and recovery project that would restore the amount of previously authorized yield lost to sedimentation.

(h) 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) of this title (relating to Water Sources) 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.

(i) [(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.

(j) [(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) To the extent that State water has not been set aside by the commission under Texas Water Code (TWC), §11.1471(a)(2), to meet downstream instream flow needs or freshwater inflow needs, State water may be appropriated, stored, or diverted for the following purposes of use:

(1) domestic and municipal;
(2) industrial;

(3) agriculture;

(4) mining and the recovery of minerals;

(5) hydroelectric power;

(6) navigation;

(7) recreation and pleasure;

(8) public parks;

(9) game preserves;

(10) recharge into an aquifer underlying this state other than an aquifer described under subsection (b) of this section through surface infiltration or an aquifer recharge project as defined by TWC, §27.201 [instream uses, water quality, aquatic and wildlife habitat, or freshwater inflows to bays and estuaries]; and
(11) 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 (TWC), §11.024, does not alter the basic principle of priority based upon first in time established under TWC, §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 TWC, §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.