

SUBCHAPTER A: GENERAL PROVISIONS
§§298.1, 298.5, 298.10, 298.15, 298.20, 298.25
Effective May 15, 2011

§298.1. Definitions.

The following words or phrases, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise, or unless a subchapter has a different definition that only applies to that subchapter:

(1) **Affected person**—a person who meets the requirements of §55.256 of this title (relating to Determination of Affected Person) for the specific environmental condition proposed to be adjusted.

(2) **Base flow**--the range of average flow conditions, in the absence of significant rainfall events, that may vary depending on current weather patterns.

(3) **Environmental flow regime**--a schedule of flow quantities that reflects seasonal and yearly fluctuations that typically would vary geographically, by specific location in a watershed, and that are shown to be adequate to support a sound ecological environment and to maintain the productivity, extent, and persistence of key aquatic habitats in and along the affected water bodies.

(4) **Environmental flow standards**--those requirements contained in this chapter, adopted by the commission under Texas Water Code, §11.1471.

(5) **Lower Rio Grande**--the main stem of the Rio Grande, and its tributaries in Texas, from just above Falcon Reservoir to the mouth of the Rio Grande.

(6) **Measurement point**--a specific geographical location on a watercourse where environmental flow standards are established.

(7) **Middle Rio Grande**--the main stem of the Rio Grande, and its tributaries in Texas, from just above Amistad Reservoir to just above Falcon Reservoir.

(8) **Pulse or high flow pulse**--relatively short-duration, high flows within the stream channel that occur during or immediately following a storm event.

(9) **Set-aside**--an amount of unappropriated water, if available, to be set aside to satisfy the environmental flow standards to the maximum extent reasonable when considering human water needs.

(10) **Subsistence flow**--the minimum streamflow needed during critical drought periods to maintain tolerable water quality conditions and to provide minimal aquatic habitat space for the survival and recolonization of aquatic organisms.

(11) **USGS**--United States Geological Survey.

(12) **Water right holder**--a person or entity that owns a valid certificate of adjudication, certified filing, or water right permit.

(13) **Water right permit**--a valid certificate of adjudication, certified filing, or water right permit. The term does not include exempt water uses , such as domestic and livestock water uses.

Adopted April 20, 2011

Effective May 15, 2011

§298.5. General.

This chapter contains the environmental flow standards and set-asides required by Texas Water Code (TWC), §11.1471. The commission adopts these environmental flow standards for each river basin and bay system in this state as the commission receives recommendations from basin and bay area stakeholders in accordance with TWC, §11.02362. The commission finds that the environmental flow standards adopted herein are adequate to support a sound ecological environment, to the maximum extent reasonable, considering other public interests and other relevant factors as described in TWC, §11.1471(b). The environmental flow standards adopted herein are schedules of flow quantities, reflecting seasonal and yearly fluctuations that vary geographically by specific location in a river basin and bay system.

Adopted April 20, 2011

Effective May 15, 2011

§298.10. Applicability.

(a) This chapter only relates to a permit for a new appropriation of water or to an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted, and the chapter applies only when there is an applicable adopted environmental flow standard and only to:

(1) Water appropriated under a permit for a new appropriation of water, the application for which was pending with the commission on September 1, 2007, or is filed with the commission on or after that date; or

(2) The increase in the amount of water authorized to be stored, taken, or diverted under an amendment to an existing water right that increases the amount of

water authorized to be stored, taken, or diverted, and the application for which was pending with the commission on September 1, 2007, or was filed with the commission on or after that date.

(b) This chapter does not otherwise amend or restrict the commission's authority to impose special conditions on water right permits, including special conditions to protect environmental flows. The commission retains any and all authority to place special conditions on interbasin transfers; on amendments, such as an amendment to move a diversion point upstream; and on authorizations under Texas Water Code (TWC), §11.042 and §11.046, to protect environmental flows or senior water rights. This chapter also does not expand the commission's authority to impose special conditions on water right permits beyond the authority granted to the commission in TWC, Chapter 11, or expressed by the commission in Chapter 297 of this title (relating to Water Rights, Substantive).

Adopted April 20, 2011

Effective May 15, 2011

§298.15. Special Conditions to Protect Environmental Flow Standards and Set-Asides .

(a) The commission may not grant an appropriation for state water that has been set aside by the commission under this chapter to meet downstream instream flow needs or freshwater inflow needs. The commission may not issue a permit for a new appropriation or an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted, after the adoption of an environmental flow set-aside, if the issuance of the permit or amendment would impair an environmental flow set-aside established by this chapter.

(b) For purposes of determining any environmental flow conditions in any water right permit application to which this chapter applies that are necessary to maintain: freshwater inflows to an affected bay and estuary system; existing instream uses and water quality of a stream or river; or fish and wildlife habitats; the commission shall apply any applicable environmental flow standard, including any environmental flow set-aside, adopted in this chapter, instead of considering the factors specified in Texas Water Code, §11.147(b) - (e) and §§297.53 - 297.56 of this title (relating to Habitat Mitigation; Water Quality Effects; Estuarine Considerations; and Instream Uses, respectively).

(c) The commission will incorporate into every water right permit any condition, restriction, limitation, or provision, as provided in Chapter 297 of this title (relating to Water Rights, Substantive) that is reasonably necessary to protect environmental flow standards.

Adopted April 20, 2011

Effective May 15, 2011

§298.20. Priority Date for Set-Asides.

An environmental flow standard or set-aside established under this chapter for a river basin and bay system other than the middle and lower Rio Grande shall be assigned a priority date corresponding to the date the commission receives environmental flow regime recommendations from the applicable basin and bay expert science team as set forth in these rules. This priority date shall be included in the appropriate water availability models maintained by the commission in connection with an application for a permit for a new appropriation or for an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted. The priority date for the environmental flow standards will be used in the water availability determination for a new appropriation or for an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted and has no other purpose.

Adopted April 20, 2011

Effective May 15, 2011

§298.25. Process for Adjusting Environmental Flow Conditions in Certain Permits.

(a) On the petition of the executive director, the commission may amend a water right permit for a new appropriation or an amendment for an increase in the amount of water authorized to be stored, taken, or diverted issued after September 1, 2007, in order to adjust environmental flow special conditions, if the commission determines, through the process set forth herein, that such an adjustment is appropriate to achieve compliance with applicable environmental flow standards adopted in this chapter.

(b) A petition to adjust an environmental flow special condition shall be prepared by the executive director in the manner of an original application for a permit and have a title that indicates that it is to adjust environmental flow special conditions. The petition shall be filed with the Chief Clerk in the same manner as a water right permit application.

(c) Notice of the petition, with an opportunity for public comment, shall be mailed by the executive director by first-class mail, postage prepaid, to each water right holder of record within the basin, to the Texas Parks and Wildlife Department, and to all navigation districts within the river basin concerned not less than 30 days before the date of action on the petition by the commission. The executive director will also cause a copy of the notice to be posted to the commission's Web site at least 30 days before the date of action on the petition by the commission. A temporary outage of service of the commission's Web site during the 30-day notice period does not prevent the

commission's consideration of the petition. The inadvertent failure of the executive director to mail notice to a navigation district that is not an appropriator of water does not prevent the commission's consideration of the petition.

(d) The commission may act on the petition without holding a public hearing. The commission shall consider all written public comment received on the petition prior to the commission's decision on the petition.

(e) A motion for rehearing of the commission's action must be filed no later than 23 days after the Chief Clerk mails (or otherwise transmits) the decision on the petition and provides instructions for requesting that the commission reconsider the decision or hold a contested case hearing. The following may file a motion for rehearing under this chapter:

- (1) the commission on its own motion;
- (2) the executive director;
- (3) the water right holder;
- (4) Texas Parks and Wildlife Department; and
- (5) affected persons, when authorized by law.

(f) A motion for rehearing by an affected person must be in writing, and must be filed with the Chief Clerk within the time provided by subsection (e) of this section.

(g) If the motion for rehearing is granted, the commission may refer the matter to the State Office of Administrative Hearings.

(h) The environmental flow adjustment, in combination with any previous adjustments made under this section may not increase the amount of the environmental flow pass-through or release requirement for a water right permit by more than 12.5% of the annualized total of that requirement contained in the permit as issued or of that requirement contained in the amended water right and applicable only to the increase in the amount of water authorized to be stored, taken, or diverted under the amended water right permit. Any new permit conditions must be consistent with the environmental flow standards to the maximum extent practicable.

(1) For environmental flow conditions expressed in cubic feet per second, the maximum adjustment is calculated by summing the monthly rate in cubic feet per second for each month and then multiplying the sum of the monthly rates in the original standard in cubic feet per second by 12.5% to generate the maximum annualized

adjustment expressed in cubic feet per second. The adjustment, in combination with all previous adjustments, cannot increase the annualized flow requirement above the sum of the original annualized flow requirement plus the original 12.5% adjustment.

(2) For environmental flow conditions, such as a pulse, expressed with multiple characteristics, such as frequency, peak flow, volume, and duration, the maximum adjustment is calculated by summing the original pulse volume for each season and multiplying that volume by 12.5% to generate the maximum annualized adjustment amount. The combination of all previous adjustments, and any new adjustment, cannot increase the annualized pulse volume above the sum of the original annualized pulse volume requirement plus the original 12.5% adjustment.

(i) The environmental flow adjustment must be based on appropriate consideration of the priority dates and diversion locations of any other water rights granted in the same river basin that are subject to adjustment under this section.

(j) The environmental flow adjustment must be based on appropriate consideration of any voluntary contributions to the Texas Water Trust, and of any voluntary amendments to existing water rights to change the use of a specified quantity of water to or add a use of a specified quantity of water for instream flows dedicated to environmental needs or bay and estuary inflows as authorized by Texas Water Code, §11.0237(a), that actually contribute toward meeting the applicable environmental flow standard. Any water right holder who makes a contribution or amends a water right as described herein is entitled to appropriate credit for the benefits of the contribution or amendment against the adjustment of the holder's existing water right permit conditions under this section.

(1) Water rights that are voluntarily contributed to the Texas Water Trust or voluntary amendments to change the use where the total volume of water is available in at least 75% of the years, are entitled to credit the contribution or amendment against the adjustment only by spreading out the amount contributed evenly over the year, or, if the underlying permit limits the portion of the year when use is authorized, over that portion of the year when use is authorized in the underlying permit; and

(2) Water rights that are voluntarily contributed to the Texas Water Trust or voluntary amendments to change the use where the reliability of the water does not meet the criteria that the water is available in at least 75% of the years, or amendments to add a use of a specified quantity of water for instream flows dedicated to environmental needs or bay and estuary inflows are entitled to credit the contribution or amendment against the adjustment only by spreading out one half of the amount contributed evenly over the year, or, if the underlying permit limits the portion of the year when use is authorized, over that portion of the year when use is authorized in the underlying permit; and

(3) For water rights that are voluntarily contributed to the Texas Water Trust and include storage, and providing that the underlying water right authorizes diversion from that storage, allowing the water to be provided in at least 75% of the years, the commission may allow credit for the contribution without spreading the amount of the contribution evenly across the year if the commission determines that doing so would better ensure protection of the standards and any applicable environmental flow set-aside.

Adopted April 20, 2011

Effective May 15, 2011