

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for a Petition for Rulemaking

AGENDA REQUESTED: June 18, 2013

DATE OF REQUEST: June 7, 2013

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Charlotte Horn, (512) 239-0779

CAPTION: Docket No. 2013-1045-RUL. Consideration of a petition for rulemaking under Section 20.15 of 30 TAC Chapter 20, Rulemaking.

The petition was filed with the Texas Commission on Environmental Quality on May 22, 2013 by the University of Texas Regulatory Oversight Group (petitioner). The petitioner requested that the commission amend 30 TAC Chapter 36 to redefine "drought" and "emergency shortage of water;" require that the drought be in effect for no more than 30 days at the time of issuance of an executive director (ED) order unless the commissioners have made a finding that the conditions warrant empowering the ED to issue an order and limiting this finding to six months unless renewed by the commissioners; require 30 days notice and allow requests for a hearing before the ED issues an order; require that junior water rights holders who are not suspended must provide water use and alternative information and must go to more restrictive levels in their drought contingency and water conservation plans when an ED order is issued. (Robin Smith, James Aldredge) (Project No. 2013-034-PET-NR)

David Timberger for Caroline Sweeney
Deputy Director

Robert Martinez
Division Director

Charlotte Horn
Agenda Coordinator

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: June 7, 2013

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Caroline Sweeney, Deputy Director
Office of Legal Services

Subject: Consideration of a Petition for Rulemaking

Docket No.: 2013-1045-RUL

Project No.: 2013-034-PET-NR

Who Submitted the Petition

On May 22, 2013, the Texas Commission on Environmental Quality received a petition for rulemaking from the University of Texas Regulatory Oversight Group (petitioner). The petition is attached as Exhibit A.

What the Petitioner Requests

The petitioner requests that 30 Texas Administrative Code (TAC) Chapter 36 be amended to "clarify the circumstances under which the executive director can suspend senior water rights and incentivize conservation." The petitioner also requests that the TCEQ: redefine "drought" and "emergency shortage of water;" require that the drought be in effect for no more than 30 days at the time of issuance of an executive director (ED) order unless the commissioners have made a finding that the conditions warrant empowering the ED to issue an order, limit this finding to six months unless renewed by the commissioners; require 30 days notice and allow requests for a hearing before the ED issues an order; require that junior water rights holders who are not suspended must provide water use and alternative information and must go to more restrictive levels in their drought contingency and water conservation plans.

Specifically, petitioner requests that:

Section 36.2(3) be amended to redefine "drought" as follows (requested new language is underlined):

"A drought occurs when for at least 30 days preceding a suspension or adjustment order, the counties in the river basin subject to the suspension or adjustment order

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must have been classified by the national Drought Mitigation Center as being in a severe drought.”

Delete the rest of the drought definition.

Section 36.2(4), the definition of "emergency shortage of water," be amended as follows (requested new language is underlined):

“The inability of a senior water right holder, even after exercising reasonable intelligence and reasonable diligence to conserve water, to take surface water under its water right during to obtain surface water, which the senior right holder can demonstrate it will put to beneficial use, during the conditions in subpart (A) or (B) below:

(A) emergency periods posing a hazard to public health or safety; or
(B) conditions affecting hydraulic systems which impair or interfere with conveyance or delivery of water for authorized users.”

Section 36.5(a)(5) be added as follows (petitioner refers to § 36.5(a)(7) but it is assumed that § 36.5(a)(5) was intended since (a) currently contains subsections (1) - (4)):

“The drought must have been in effect for no more than 30 days or, after the first 30 days of drought, the commissioners must have made a finding that conditions warrant empowering the executive director to issue the order; provided further, that a finding will expire after six months unless renewed by the commissioners.”

Section 36.5(c) be amended to:

require the junior water right holder that is not suspended to request and demonstrate the need for an exemption from the suspension; and

provide that the ED "shall" instead of "may" require water use and additional/alternative source information in §36.5(c)(1) - (3).

Section 36.5(d) be amended to:

provide that if the junior does not provide the information required in §36.5(c) the ED “shall revise the suspension or adjustment order to include the junior water

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right holder until such time as the junior water right holder satisfactorily complies with subsections (d)(1) - (3);” and

delete the language wherein the ED “may use existing regulatory authority to ensure junior water right holder's efforts to secure alternative sources of water and conserve water, with these provisions including, but not limited to, adjusting the diversion rate downward or ordering a full provision.”

Section 36.7(a) be amended to:

provide that 30 days notice of the ED's order must be sent to affected water right holders, and that 14 days after receiving notice, a "person" may request a hearing to affirm, modify, or set aside the proposed order, and if there is a request, the commission shall hold the hearing before the proposed order takes effect.

Section 36.7(d) be amended to:

provide that the ED may issue an order without providing notice or hearing prior to the effective date of the order, if "a sudden and unexpected emergency requires."

Section 36.7(b) be amended to:

provide that the ED "shall" instead of "may" require that junior water right holders that are not suspended implement water conservation plans and drought contingency plans at more restrictive levels at the time of issuance of the order.

Recommended Action and Justification

Summary: The ED recommends denial of the petition because: 1) the requests relating to notice and hearing and definition of drought are impractical due to the need for timely regulatory action; 2) many of the suggested changes would deny the ED and the commission needed flexibility to address health, safety and welfare concerns; 3) some of the requested rule changes are already allowed under existing rules; and 4) as the commissioners have stated in public meetings, the commission will continue to refine implementation of these rules.

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DISCUSSION OF PETITION

General Comments: The petitioner argues that Chapter 36 incorrectly interprets Texas Water Code, §11.053, gives the ED and commission too much flexibility, reallocates water from unpreferred to preferred appropriators without providing compensation, creates inequities between companies that have their own water rights and those who receive water from municipal suppliers, casts doubt on the scope and security of existing water rights, and buries price signals that would otherwise encourage conservation.

Petitioner refers to three bills introduced in the 83rd legislative session. Petitioner states that House Bill (HB) 2720 would have allowed the commission to issue a curtailment order only "to address an imminent hazard to the health, safety, or welfare of the public." The bill did not pass, but the last version of the bill (engrossed) would not have limited the ED's suspension or adjustment powers, but would have added that the ED could "temporarily require a water right holder to implement mandatory drought contingency measures to mitigate an imminent hazard to the health, safety, or welfare of the public." HB 1780 would have required 30 days notice to affected appropriators before the ED could issue an order, and the ability to request a hearing within that 30 days. HB 1776 would have redefined "drought" to mean only an "exceptional" drought under the National Drought Mitigation Center. Neither of these bills made it out of the assigned House committee. These requested changes are discussed further below.

Concerning petitioner's arguments that the rules cause inequities and uncertainties, as well as constitute a disincentive to conservation, the ED disagrees. Petitioner argues that the rules are inequitable because a senior water right holder for industrial water will be cut off, while an industrial facility that does not have a water right will be able to buy water from a municipality, which will not be cut off. The alleged inequities to a senior industrial water right holder will not occur under the petitioner's scenario because municipalities cannot use or sell permitted water for municipal purposes for anything but uses relating to public health and safety purposes. The ED sent letters to all suspended municipalities for the Dow senior call, informing them that their municipal water rights were not suspended at that time, but only municipal water use for public health and safety purposes such as drinking water were allowed. An example of this letter is included as Exhibit B.

Concerning the allegation that the current rules cause uncertainty, these orders are temporary and will be modified as necessary to reflect information related to the non-suspended water right holders' use of their water. The ED will not risk causing a public health and welfare crisis by totally suspending a municipality or power generator's water

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right in the first order addressing a senior call. However, the ED will require information from the senior water right holder, as well as non-suspended junior water right holders, and will review any relevant data to determine whether the junior municipal and power generation rights should remain unsuspended. Under the commission's direction and guidance, the ED will modify these orders to suspend or adjust these water rights if the information indicates there will not be a health, safety or welfare concern. The ED exercised this type of flexibility in response to the senior call from Dow Chemical, the only time the ED has issued an order under Chapter 36. The ED issued a modified suspension and adjustment order for the Dow call in late 2012 when continued in effect through early 2013. The ED suspended or adjusted several non-suspended water rights based on information the water right holders provided and other data available to the ED. More adjustments could have occurred; however, Dow rescinded its call in mid-January.

Concerning the petitioner's argument that the rules are a disincentive to conservation, the basis for the argument is that the rule gives the ED too much flexibility, that the rule doesn't require beneficial use on the part of the senior caller, and that the rule does not require implementation of high levels of the drought contingency or water conservation plan from the senior caller. These arguments are either incorrect or beyond the ED's authority, as discussed further below.

Definitions: Concerning petitioner's proposed definition of drought, the commission chose "moderate drought" and the other factors listed in the definition precisely because the definition needed to be flexible. As stated in the commission's preamble to the adopted rules, the ED and commission must be able to protect senior water rights when a call is made, and valid senior calls may be made in times of low flow or moderate drought (*see* the April 27, 2013, issue of the *Texas Register* at 37 TexReg 3105). In the preamble, the commission did not agree that Texas Water Code, Section 11.053 was enacted to limit the commission's authority, but believes that it was enacted to clarify how the commission should address senior calls (*see* the April 27, 2012, issue of the *Texas Register* at 37 TexReg 3106). The petitioner also requests that the rules include a requirement that drought conditions must have existed for no more than 30 days, or that the commissioners must have made a finding (subject to a six-month expiration date unless renewed) that conditions warrant empowering the ED to issue the order, and that conditions warrant the ED order. This change is unnecessary because the commission's existing rule in Section 36.5 requires that the ED find that a drought, as defined in the rules, has occurred, and the commission must affirm this determination.

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Concerning the petitioner's proposed definition of "emergency shortage of water," petitioner states that the commission and senior water rights must undertake certain reasonable mitigation efforts before an "emergency shortage of water" is in effect, including conservation and beneficial use. As stated in the commission's preamble to the adopted rules, the commission does not believe that it has the authority to require a water right holder to implement certain conservation levels prior to making a senior call (see the April 27, 2012, issue of the *Texas Register* at 37 TexReg 3112). However, the rules do require a finding that the senior water right holder can "beneficially use" the water that could be made available for the ED to issue an order (Section 36.5(a)(3) and (4)).

Procedures: The ED does not agree that a 30-day notice and a right to a hearing prior to issuance of the ED's Order is workable or reasonable for issuing suspension and adjustment orders for a senior call. The commission recognized the need to address senior calls immediately, because of the serious drought conditions in the state, in the preamble to the adopted rules and at two commission open meetings (see the April 27, 2012, issue of the *Texas Register* at 37 TexReg 3117) and webcasts of the commission's December 5, 2012, and January 30, 2013, meetings at www.tceq.texas.gov). Additionally, persons can request to address the commission at the hearing to affirm, modify, or set aside the ED order, which is required to be held within 45 days of the issuance of the order.

Adding a provision to §36.7 to allow the ED to issue an order without notice and an opportunity for hearing if a "sudden and unexpected emergency requires" is inconsistent with Section 11.053 if the order is based on a senior call during a drought. If a senior water right holder in a part of a river basin that is in a drought cannot obtain the surface water he is entitled to under the Texas prior appropriation doctrine, and the other provisions of the Chapter 36 rules are met, the senior water right holder has a right to that water. No "sudden and unexpected emergency finding" is required by Section 11.053 or Chapter 36.

Conservation: In terms of requiring water use and additional/alternative source information, as well as implementation of higher levels of water conservation and drought contingency plans from non-suspended junior water rights, the ED may require that information under current rules. Indeed, the ED did require the water use and additional/alternative source information through a letter at the time the Dow order was issued by the ED (an example is attached in Exhibit C), and the commission modified the ED's order to specifically include this requirement in the order. Also, shortly after the Dow ED order was issued, non-suspended water right holders were directed to implement more restrictive levels in their water conservation plans and drought contingency plans (as

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referenced previously, an example is attached as Exhibit B). This is allowed order under existing rules.

Since these actions are allowed under existing rules, the ED does not recommend amending Chapter 36 solely for this purpose.

Non-suspension of Junior Water Right Holders: Petitioner requests that in order to not be suspended, a water right holder must request non-suspension and demonstrate the need for an exemption from the suspension. Because these water right holders will not know whether they are suspended until they receive the order, this rule change is not practicable or workable. However, under the current rule and commission guidance, the ED can request this information in his order to determine whether the water right holder should be suspended or adjusted. Thus, no rule change is necessary.

Petitioner also requests the rule be changed to state that if the junior water right holder does not provide the information or it is not sufficient, the junior water right shall be suspended until the water right holder satisfactorily complies with subsection (c)(1) - (3). As the rule is currently worded, this option is already available to the ED. The ED "may use existing regulatory authority . . . including but not limited to, adjusting the diversion rate downward or ordering a full suspension." Thus, no rule change is necessary.

Applicable Law

- Texas Government Code, Section 2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule;
- 30 TAC Section 20.15, which provides such procedures specific to the commission; and
- Texas Water Code, Section 11.053, which governs ED suspension or adjustment orders during drought or emergency shortage of water.

Agency Contacts

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Attachments

Petition

Letter dated December 14, 2012

Commissioners

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June 7, 2013

Re: Docket No. 2013-1045-RUL

Letter dated November 19, 2012

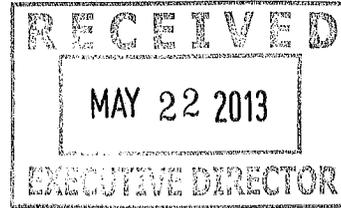
cc: Chief Clerk, 2 copies
Executive Director's Office
Anne Idsal
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Exhibit A

40049
DLS

May 21, 2013

Zak Covar
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087



**Petition re: Rule Suspension or Adjustment of Water Rights during Drought or
Emergency Water Shortage. §§36.1 - 36.8**

Mr. Covar:

As per 30 Texas Administrative Code (“TAC”) § 20.15 Petition for Adoption of Rules, the University of Texas Regulatory Oversight Group (“UTROG”)¹ respectfully requests that the Texas Commission on Environmental Quality (“Commission”) act upon its authority under Texas Water Code §§ 5.103 and 11.053 and revise 30 TAC §§ 36.1 - 36.8 (the “Drought Curtailment Rule”).²

Ensuring water security will require creative and committed actions on the part of numerous stakeholders but cannot be achieved without the Commission’s leadership and involvement. The Drought Curtailment Rule represents a well-intentioned first effort to craft a mechanism that could balance competing interests while shepherding the state through water shortages. Recent litigation³ and policy debates⁴ have resulted in controversy about the rule and

¹ UTROG is comprised of graduate students from law, science, engineering and geosciences at the University of Texas at Austin who work with law professors to identify opportunities to ensure greater public engagement and participation in federal and state regulatory programs. UTROG’s goal is to provide an independent, balanced, and rigorous analysis of important regulatory issues.

² Note that, unless specified otherwise, all references to the TAC will be to title 30.

³ Plaintiffs’ Original Petition and Request for Injunctive Relief, *Texas Farm Bureau v. Commission*, No. D-1-GN-12-003937 (Travis County District Court December 14, 2012).

⁴ E.g., Asher Price, *Farmers Battle State Environmental Agency in Brazos River Basin Dispute*, AUSTIN AMERICAN-STATESMAN, Dec. 26, 2012, available at <http://www.statesman.com/news/news/state-regional/farmers-battle-state-environmental-agency-in-brazo/nTf9w/>.

its implementation. These proposed amendments are designed to clarify the circumstances under which the executive director can suspend senior water rights and incentivize conservation.

Briefly stated, UTROG proposes that TCEQ (1) adjust the definitions of the terms “drought” and “emergency shortage,” which, in their present state, are overly broad and grant the Commission too great an authority to disrupt water rights in potential non-emergency situations; (2) expand the procedural rights of appropriators affected by curtailment orders; and (3) modify the rule to encourage conservation.

This petition is divided into two parts. The first part discusses the need for revisions and the “injur[ies] or inequit[ies]”⁵ that could flow from the Drought Curtailment Rule in its current form. The second part proposes specific revisions to the rule.

Under the Texas Administrative Procedure Act, the Commission has 60 days from the date of receiving this petition to either deny the petition in writing, stating its reasons for the denial, or initiate a rulemaking procedure.⁶ The UTROG estimates the 60-day deadline will fall on approximately July 20, 2013.

⁵ 30 TAC § 20.15(a)(3)(D).

⁶ Tex. Gov’t Code § 2001.021.

PART I – NEED FOR A DROUGHT MANAGEMENT RULE

This section considers: (A) the vulnerability of Texas toward droughts; (B) the development of the Drought Curtailment Rule; and (C) the “injur[ies] or inequit[ies]”⁷ that could result if the Commission continues to exercise the Drought Curtailment Rule as it currently stands.

A. Droughts are Endemic to Texas

Droughts have been a problem in Texas throughout the State’s recorded history, to such a degree that the Texas Supreme Court has observed: “The story of water law in Texas is also the story of its droughts.”⁸

As the Commission knows, the current drought has exacted enormous economic,⁹ environmental,¹⁰ and cultural¹¹ tolls and is on course to become the second worst on record.¹² March inflows from the Lower Colorado River were 10,888 acre-feet, which is about 12 percent of March’s historical average of 91,373 acre-feet; February inflows were 8,949 acre-feet, which is about 10 percent of February’s historical average of 85,739 acre-feet; and January inflows

⁷ 30 TAC § 20.15(a)(3)(D).

⁸ *In re Adjudication of Water Rights of Upper Guadalupe Segment etc.*, 642 S.W.2d 438, 441 (Tex. 1982). For an overview of the historical evolution of Texas water law, see Legislative Reference Library of Texas, Texas Water Law Timeline, <http://www.lrl.state.tx.us/legis/waterTimeLine.cfm> (last visited April 15, 2013, 1:00 pm).

⁹ E.g., NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL DROUGHT EARLY WARNING OUTLOOK (Feb. 21, 2013) (“The 2012/2013 drought has serious implications for agriculture, navigation, recreation and municipal water supplies, costing the nation at least \$35 billion in economic losses.”), available at <http://www.drought.gov/media/eventfiles/National%20Drought%20Outlook%20Feb%202013%20FINAL.pdf>.

¹⁰ E.g., *Aransas Project v. Shaw*, 2013 U.S. Dist. LEXIS 33258 (S.D. Tex. Mar. 11, 2013).

¹¹ E.g., Stephanie Strom, *A Stubborn Drought Tests Texas Ranchers*, N.Y. TIMES, April 5, 2013, http://www.nytimes.com/2013/04/06/business/a-long-drought-tests-texas-cattle-ranchers-patience-and-creativity.html?pagewanted=all&_r=0.

¹² Matthew Tresaugue, *Texas Drought Could Rival State's Worst Dry Years*, HOUSTON CHRON., Feb. 5, 2013, <http://www.chron.com/news/article/Texas-drought-could-rival-state-s-worst-dry-years-4253137.php>.

were 15,258 acre-feet, which is about 23 percent of January's historical average of 65,597 acre-feet.¹³

As painful as the recorded droughts have been, Texas could find itself confronting much worse. Scientists have found evidence of multi-decade mega-droughts in the rings of Texas trees.¹⁴ Climate change could amplify droughts by making temperatures hotter and precipitation patterns more variable.¹⁵ And federal environment regulations could restrict the use of surface waters, as recently occurred on the Guadalupe and San Antonio rivers.¹⁶ Population and economic growth, meanwhile, are projected to drive demand.¹⁷

B. Drought Curtailment Rule

Surface water is the property of the state.¹⁸ With certain exceptions, a party must obtain a permit from the state to appropriate surface waters.¹⁹ Permits to put surface water to beneficial use are intended to avoid the “instability and uncertainty” that plagued the state before it moved to its current system.²⁰ To perfect a water right, a permittee must put its appropriation toward the permitted beneficial use.²¹ The doctrine of beneficial use, in turn, requires “reasonable intelligence and reasonable diligence [to be] used in applying the water to that purpose and shall

¹³ Lower Colorado River Authority, *Texas Drought*, available at: <http://www.lcra.org/water/drought/index.html>, accessed April 9, 2013.

¹⁴ Malcolm L. Cleaveland, et al, *Extended Chronology of Drought in South Central, Southeastern and West Texas*, TEXAS WATER JOURNAL (2011).

¹⁵ E.g., Letter from Tom Curtis, deputy executive director, American Water Works Association, to Rep. Henry A. Waxman and Sen. Sheldon Whitehouse, Feb. 20, 2013;

Eric Berger, *Texas Climatologist: Global temperatures “likely” to Set a New Record this Year*, HOUSTON CHRON., Mar. 20, 2013, <http://blog.chron.com/sciguy/2013/03/texas-climatologist-global-temperatures-likely-to-set-a-new-record-this-year>; DEPARTMENT OF INTERIOR, WATERSMART STRATEGIC IMPLEMENTATION PLAN (Mar. 22, 2011), http://www.usbr.gov/WaterSMART/docs/FedRegister_WaterSMART_Implementation_plan_FINAL.PDF.

¹⁶ *Aransas Project v. Shaw*, 2013 U.S. Dist. LEXIS 33258 (S.D. Tex. Mar. 11, 2013).

¹⁷ TEXAS WATER DEVELOPMENT BOARD, POPULATION AND WATER PROJECTS, <http://www.twdb.state.tx.us/waterplanning/data/projections> (last visited April 16, 2013, 1:00 pm).

¹⁸ Texas Water Code § 11.021 (“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 storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.”).

¹⁹ Texas Water Code §§ 11.022 and 11.121.

²⁰ *Lower Colo. River Auth. v. Tex. Dep't of Water Res.*, 683 S.W.2d 357 (Tex. 1984).

²¹ Texas Water Code § 11.026.

include conserved water.”²² Even perfected water rights remain usufructory rights, however.²³ Ownership of the corpus stays with the state,²⁴ “in trust for the public.”²⁵ Permits are based on seniority so that, “as between appropriators, the first in time is the first in right.”²⁶

The Commission has general jurisdiction over water and water rights.²⁷ It thus falls to the Commission to manage water resources during droughts. Multiple statutes give the Commission the authority to reallocate water supplies in ways that could lessen the economic impacts of drought-related water shortages. Texas Water Code § 11.033 recognizes that all subdivisions of the state have the right to take water through eminent domain for domestic and municipal supply purposes, with appropriate compensation to the water right holder.. Texas Water Code § 11.139 also authorizes the Commission to reallocate water if it finds “that emergency conditions exist which present an imminent threat to the public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible practicable alternatives to the emergency authorization.” Texas Water Code § 11.148 allows the Commission to suspend environmental inflows if “an emergency exists and cannot practically be resolved in other ways.”

Taken as a whole, this authority grants the Commission broad power. Nevertheless, certain stakeholders deemed this power inadequate and in 2011 pressed the Texas Legislature to pass the enabling legislation that has served as the basis for the Drought Curtailment Rule. This subsection reviews: (1) the origins of the authority for the rule within the Commission’s 2011

²² Texas Water Code § 11.002(4). *See also* §§ 11.025 (recognizing appropriations only for beneficial uses); and 11.026 (providing that an appropriation cannot be perfected until it has been beneficially used).

²³ *In re Adjudication of Water Rights of Upper Guadalupe Segment etc.*, 642 S.W.2d 438, 444 (Tex. 1982) (“A usufruct has been defined as the right to use, enjoy and receive the profits of property that belongs to another.”).

²⁴ *See, e.g., Texas Water Rights Comm’n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971).

²⁵ Texas Water Code § 11.0235(a).

²⁶ Texas Water Code § 11.027.

²⁷ Texas Water Code § 5.013(a)(1).

sunset review process; (2) the statutory basis for the rule; (3) the promulgation of the rule; and (4) the pending court challenge to the rule.

1. **Sunset Recommendations**

In its 2011 review of the Commission, the Sunset Advisory Commission (Sunset Commission) recommended “clarify[ing]” that the Commission’s executive director has authority to curtail water use during water shortages and droughts.²⁸ The commission further suggested that the Water Code should be amended “to ensure senior water rights are protected and adequate water supplies are available for domestic and municipal needs.”²⁹

2. **H.B. 2694**

When the legislature implemented the Sunset Commission recommendations, it included a section allowing the executive director to “temporarily adjust the diversions of water by water rights holders...in accordance with the priority of water rights established by” the section of the Texas Water Code, 11.027.. The enrolled version of the bill added a statute on “Emergency Order[s] Concerning Water Rights” to the Water Code, as Section 11.053.

Sec.A11.053. EMERGENCY ORDER CONCERNING WATER RIGHTS. (a)

During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, in accordance with the priority of water rights established by Section 11.027:

- (1) temporarily suspend the right of any person who holds a water right to use the water;
- and
- (2) temporarily adjust the diversions of water by water rights holders.

²⁸ Sunset Advisory Commission, Final Report: Texas Commission on Environmental Quality at 54 (July 2011), available at http://www.sunset.state.tx.us/82ndreports/tceq/tceq_fr.pdf.

²⁹ *Id.* at 54.

(b) The executive director in ordering a suspension or adjustment under this section shall ensure that an action taken:

- (1) maximizes the beneficial use of water;
- (2) minimizes the impact on water rights holders;
- (3) prevents the waste of water;
- (4) takes into consideration the efforts of the affected water rights holders to develop and implement the water conservation plans and drought contingency plans required by this chapter;
- (5) to the greatest extent practicable, conforms to the order of preferences established by Section 11.024.

Section 11.027, which is referenced by Section 11.053(a), establishes the first-in-time principle. Section 11.024, which is referenced by Section 11.053(b)(5), sets forth the preferences TCEQ must follow when choosing from among competing applications for appropriation permits. These preferences are: (1) domestic and municipal uses; (2) agricultural and industrial uses; (3) mining; (4) hydroelectric power; (5) navigation; (6) recreation; and (7) other beneficial uses. In 1955, a federal court rejected a contention that the predecessor of Section 11.024 entitled the city of El Paso to the first claim to Rio Grande water.³⁰ “Article 7471 simply regulates priorities prospectively in the subsequent issuance of appropriation permits, so that in acting on pending applications from time to time or in holding foresighted reserves preference will be given by this statutory guide, but said article does not manifest any intention to upset the normal time priority of then or thereafter outstanding permits once duly issued.”³¹

³⁰ *El Paso County Water Improv. Dist. No. 1 v. El Paso*, 133 F. Supp. 894 (W.D. Tex. 1955).

³¹ *Id.* at 908.

A hierarchy of preferences that applies only to future appropriations would seem to have no place in a statute like Section 11.053 that governs the management of existing appropriations. The only way to reconcile the citation to Section 11.024 with the purpose of Section 11.053 is to assume that Section 11.053 incorporates the preferences from Section 11.024 but puts them toward different ends than Section 11.024 does. Interpreted in this way, Section 11.053 could arguably empower the TCEQ executive director to suspend or adjust water rights in way that follows the priority system of Section 11.027 and, “to the greatest extent possible,” the usage preferences of Section 11.024.

Texas follows a similar model in the Rio Grande basin, where the Commission has granted a watermaster³² the authority to allocate usable water in storage only after setting aside 225,000 acre-feet to maintain a “reserve for municipal, domestic, and industrial uses.”³³ This requirement effectively prioritizes municipal and other privileged uses above non-privileged uses like agriculture. Section 11.053, by contrast, does not clearly and unambiguously grant the Commission the authority to deviate from the existing seniority-based appropriations system and orient the system around usage preferences during droughts.

This legislative session, three bills have been proposed that would require the Commission to revisit the Drought Curtailment Rule, two of which are discussed in greater detail below. The third bill, H.B. 2720, from state Rep. Allan Ritter, would modify Section 11.053 to allow the Commission to issue a curtailment order only “to address an imminent hazard to the health, safety, or welfare of the public.”³⁴ If interpreted according to their plain meaning, these terms would prohibit the Commission from curtailing water rights unless a “hazard” (a danger posing a greater risk than discomfort or inconvenience) is “imminent” (on the cusp of occurring).

³⁴ *Id.* at Section 2.

The Ritter bill amendments would thus circumscribe the conditions under which the Commission could exercise the drought curtailment rule. Water shortages would have to pose genuine peril and amount to more than routine constraints on supply.

3. Promulgation of Drought Curtailment Rule

The Commission released a proposed draft of the Drought Curtailment Rule in November 2011.³⁵ The Commission received thirty comments in total, from a a diverse range of stakeholders. The most contentious aspects of the rule were that it allowed the Commission to exempt certain junior appropriators from curtailment orders for “public health, safety, and welfare concerns” and that it did not require that suspended senior appropriators be compensated for water that was effectively reallocated to unsuspended junior appropriators.

Commentators requested that the Commission clarify the relationship between the new Drought Curtailment Rule and existing emergency authority under Texas Water Code § 11.139,³⁶ which allows the Commission to temporarily reallocate water if “emergency conditions” present “an imminent threat to the public health and safety.” Section 11.139(j) mandates that “the person granted an emergency authorization ... is liable to the owner and the owner’s agent or lessee from whom the use is transferred for the fair market value³⁷ of the water transferred as well as for any damage caused by the transfer of use.” In April 2012, the Commission promulgated the final version of the Drought Curtailment Rule.³⁸

4. Texas Farm Bureau Challenge

³⁵ Commission, Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage, 36 Tex. Reg. 7463, Nov. 4, 2011.

³⁶ To carry out Section 11.139, the Commission has promulgated 30 TAC § 297.17.

³⁷ “Whenever the law requires the payment of fair market value for a water right, fair market value shall be determined by the amount of money that a willing buyer would pay a willing seller, neither of which is under any compulsion to buy or sell, for the water in an arms-length transaction and shall not be limited to the amount of money that the owner of the water right has paid or is paying for the water.” Texas Water Code § 11.0275.

³⁸ Commission, Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage, 37 Texas Register 3096 (April 27, 2012).

The Commission has exercised its power under the Drought Curtailment Rule only once – on the Brazos River, in November 2012, in response to a priority call from Dow Chemical Company (Dow).³⁹ The Texas Farm Bureau and several agricultural interests (collectively, Farm Bureau) brought suit in Travis County District Court, seeking declaratory judgment that the Drought Curtailment Rule and the Brazos River order were invalid.⁴⁰ On January 23, 2013, Dow rescinded its call and the Commission terminated its curtailment order.⁴¹

The Farm Bureau argued that the Drought Curtailment Rule is facially invalid because it exceeds the statutory authority granted under Section 11.053 by disregarding seniority and effectively requiring senior water right holders to provide water rights to preferred junior uses.⁴² The Commission countered that Section 11.053 requires it to consider factors that together mandate that decisions as to the scope of curtailment orders “be made on factors other than strict time priority alone.”⁴³ The Commission further argued that the Texas Constitution’s conservation amendment⁴⁴ and several sections of the Texas Water Code⁴⁵ give rise to a general “duty to consider and act in the public interest and/or public welfare.”⁴⁶ The Travis County District Court is scheduled to hold a summary judgment hearing May 23, 2012.

C. Injuries and Inequities that Would Result from Exercise of Drought Curtailment Rule

³⁹ Executive Order Suspending Water Rights on the Brazos River (November 19, 2012); An Order Affirming and Modifying the Executive Director’s Order Suspending Water Rights in the Brazos River Basin, TCEQ Docket No. 2012-2421-WR (Dec. 12, 2012).

⁴⁰ Plaintiffs’ Original Petition and Request for Injunctive Relief, Texas Farm Bureau v. Commission, No. D-1-GN-12-003937 (Travis County District Court December 14, 2012).

⁴¹ Letter from Commission Executive Director Zak Covar to water right holders, re: Priority Call Rescinded in the Brazos River Basin, dated Jan. 24, 2013.

In its current form, the Drought Curtailment Rule would result in four principal types of injuries and inequity: (1) it would reallocate water from unpreferred to preferred appropriators without providing compensation; (2) it would create inequities between companies that receive water through their own appropriations and those that receive it through municipal suppliers; (3) it would cast doubt over the scope and security of existing water rights; and (4) it would, by reallocating water to preferred appropriators for essentially no cost, bury price signals that would otherwise encourage conservation.

1. Uncompensated Reallocations

Once perfected, usufructory water rights are constitutionally protected property rights,⁴⁷ subject to beneficial use and other statutorily mandated requirements. In promulgating the final Drought Curtailment Rule, the Commission put forward several arguments as to why it believed that exercising the rule would not result in a taking. The Commission claimed, for instance, that it was acting according to its police power and that a curtailment order does not affect the existing seniority of appropriations.

But taking property through the exercise of its police powers does not free a government agency from its duty to pay for taken property (subject to individual circumstances).⁴⁸ Indeed, the Commission did not explain the reasons that reallocating water through the Drought Curtailment Rule would not require compensation while reallocating it through other mechanisms (such as eminent domain or Section 11.139 transfers) would.

Also, the Drought Curtailment Rule does affect established seniority. If a senior appropriation is suspended while a junior appropriation is not, the senior appropriation effectively becomes more junior; it may maintain its seniority on paper, but in practice, its

⁴⁷ Tex. Const. Art. I, § 17. *See also* Texas Gov. Code § 2007.003(b)(13); *Texas Water Rights Comm'n v. Wright*, 267 S.W.2d 641 (Tex. 1971).

⁴⁸ *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980).

appropriation will not be as valuable or as reliable. If the Commission extends the geographical scope of a curtailment order further upriver than would be necessary if it had not exempted preferred junior appropriators, then the agency has reallocated water from the upriver appropriators to the downstream preferred junior appropriators.⁴⁹

2. Equity within Industries

The Drought Curtailment Rule allows the Commission to suspend junior industrial appropriators but to exempt municipal appropriators who may, in turn, sell water to industrial customers. An industrial facility that holds even a relatively senior appropriation to divert directly may be worse off than another facility that uses just as much water but that receives its water from a relatively junior municipal appropriator. This lack of fairness presents a problem, in that it arbitrarily benefits companies that receive water from municipal suppliers as compared to similarly situated companies that receive water under their own, more senior appropriations.

3. Undermined Property Rights

Water markets can play a vital role in addressing scarcity by allocating water to its highest-value uses and incentivizing conservation.⁵⁰ Texas has adopted statutes intended to facilitate markets and voluntary water transfers.⁵¹ The Western Governors Association (WGA) – of which Governor Rick Perry is a member – has adopted as a matter of policy that “states should identify and promote innovative ways to allow water transfers from agricultural to other

⁴⁹ The Texas Water Code once included a section under which “an appropriation ... for any purpose other than domestic or municipal use is subject to the right of any city or town to make further appropriations of the water for domestic or municipal use without paying for the water.” Arguably, this section could have authorized the sort of uncompensated reallocations that result when the Commission exempts preferred appropriators from curtailment orders. But the legislature repealed the section in 1997 and replaced it with the current Section 11.139, which authorizes the Commission to mandate transfers during droughts but requires that injured appropriators be compensated. Robert E. Beck, *Use Preferences for Water*, 76 N. DAK. L. REV. 753, 775 (2000).

⁵⁰ E.g., Ronald A. Kaiser, Texas Public Policy Foundation, Solving the Texas Water Puzzle: Market-Based Allocation of Water (March 2005), available at http://texaswater.tamu.edu/resources/solving_the_texas_water_puzzle.pdf; Ronald A. Kaiser, *Texas Water Marketing in The Next Millennium: A Conceptual and Legal Analysis*, 27 TEX. TECH. L. REV. 181 (1996).

⁵¹ E.g., Texas Water Code §§ 11.0275 and 11.055.

uses (including urban, energy and environmental) while avoiding or mitigating damages to agricultural economies and communities.”⁵² Water transfers have soared in recent years due to the drought. In Texas, “more than 1.7 million AF were transferred in 2011,” according to the WGA, “as compared to an average of 150 thousand AF between 2007 and 2009.”⁵³

But the Drought Curtailment Rule chills markets in four ways. First, by reallocating water to preferred appropriators, it cuts into the demand for voluntary transfers. A preferred appropriator who can expect to receive a cost-free allocation from the Commission has reduced incentive to seek out market-rate transactions. Second, markets depend on firm and fixed property rights,⁵⁴ but the rule muddies property rights by confusing seniority and injecting arbitrariness into curtailment orders. Third, curtailment orders could encourage conflict and competition among the appropriators who have reason to show that the orders should not apply to themselves. Finally, by dampening transfers, the Drought Curtailment Rule could prevent water market institutions from maturing and developing in efficiency and scale.

4. Conservation Price Signals

Article XVI, Section 59, of the Texas Constitution provides that the “preservation and conservation” of water are “public rights and duties.”⁵⁵ In interpreting this provision, the Texas Supreme Court has opined: “The Conservation Amendment recognizes that preserving and conserving natural resources are public rights and duties ... Conservation of water has always been a paramount concern in Texas, especially in times, like today, of devastating drought.”⁵⁶

⁵² WESTERN GOVERNORS ASSOCIATION AND WESTERN STATES WATER COUNCIL, *WATER TRANSFERS IN THE WEST: PROJECTS, TRENDS, AND LEADING PRACTICES IN VOLUNTARY WATER TRADING*, vi (December 2012).

⁵³ *Id.* at viii.

⁵⁴ Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 TEX. L. REV. 1873, 1888 (2005).

⁵⁵ Tex. Const. art. XVI § 59.

⁵⁶ *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 626, 633 (Tex. 1996).

The Texas Legislature and the Commission have developed numerous policies intended to address this concern.⁵⁷

In the Drought Curtailment Rule, the Commission fails to follow through on its conservation duties. As discussed in Sections I.B.1, I.B.2 and I.B.3 above, the rule scrambles existing water rights and results in several injustices and inequities. The Commission could have drafted the Drought Curtailment Rule so that it used curtailments to leverage greater conservation. Despite these positives, the rule requires no conservation from senior appropriators and very little from the preferred junior appropriators who benefit from reallocation of water under curtailments.

TAC § 36.2(4), for instance, defines an “emergency shortage of water” to exist when a senior appropriator cannot divert all of its surface water rights and certain other conditions are met. But that definition does not require the senior appropriator to have attempted to implement conservation measures that, at an aggregate level, might be more reasonable and less onerous than the costs of a curtailment order. Aside from a general directive to the agency to “maximize[] the beneficial use of water”⁵⁸ in suspension orders, the rule does not recognize that, inherent within water appropriations, is the requirement that appropriators must beneficially use⁵⁹ and reasonably conserve water.⁶⁰ Similarly, TAC § 36.5(a)(3) allows the executive director to issue or modify an order if “senior water rights [holders] are unable to divert the water

⁵⁷ E.g., Texas Water Code §§ 16.401 and 16.402.

⁵⁸ 30 TAC § 36.5(b)(1).

⁵⁹ Tex. Water Code § 11.025 (“A right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also *to the amount which is being or can be beneficially used for the purposes specified in the appropriation, and all water not so used is considered not appropriate.*”) (Emphasis added).

⁶⁰ Tex. Water Code § 11.002(4) (defining beneficial use to mean “the use of the amount of water that is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose.”); *Texas Water Rights Com. v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971) (“Inherently attached to a permit to appropriate waters, therefore, is the duty that the appropriator will beneficially use the water. The State, in administering its water resources, is under a constitutional duty to conserve water as a precious resource and that duty is also inherent in the grant of a water permit.”).

they need or store inflows that are authorized under a water right.” The rule could have required that senior appropriators be entitled to water *and* have demonstrated that the water will be beneficially used.

TAC § 36.5(c)(2), the executive director “may” require preferred junior appropriators to “demonstrate to the maximum extent practicable that reasonable efforts have been made to conserve water.” But the executive director does not have to require such a demonstration and, even if he does, the terms “maximum extent practicable” and “reasonable” are not defined. The executive director may interpret “maximum extent practicable” in a way that does not fully recognize the latest technologies or the pace-setting practices used in other jurisdictions. And “reasonable” is as subjective in this context as in any other.

The rule does not require preferred junior appropriators to show that they direly need suspended water. During the rulemaking process, the Commission said: “The executive director has requested junior water rights holders for municipal use which were not curtailed due to public health and welfare concerns, in areas where there has been a senior call, to implement high levels of their drought contingency plans. This was not a direct enforcement of the user’s implementation of its plans, but was a condition precedent if the junior water rights holder was to continue to take water. The commission intends for the executive director to continue this practice when he issues an adjustment or suspension of water rights when a senior needs water under its right.”⁶¹

The Commission did not, however, revise the rule to require drought contingency plans as conditions precedent to receiving suspended water. Such a requirement would help the rule to achieve its animating purpose and could improve water planning in Texas. At this point, a weak spot in planning is that conservation and reuse requirements are rarely enforceable other than

⁶¹ 37 Tex. Reg. at 3120.

between retailers and end users. To encourage greater compliance, the rule could exempt from suspension only preferred junior appropriators who have demonstrated that they have adopted and implemented water conservation and drought contingency plans. More aggressively, the agency could require preferred junior appropriators to have met certain benchmarks within those plans.

In fact, insulating appropriators from the costs of their water use only discourages conservation. It reduces the benefits that would accrue to appropriators who have invested in conservation technologies and management practices and shields profligate appropriators from the costs of their usage. To the extent that the state wants to meet its long-term water supply goals through conservation and reuse, it should avoid subsidizing usage practices that it does not wish to see perpetuated, while also incentivizing conservation practices.

PART II – PROPOSED REVISIONS TO RULE

Failure to revise this rule can, and likely will, lead to a highly problematic situation. The rule represents a large departure from Texas' established prior appropriations system, around which water rights holders have made investments and formed expectations. Furthermore, it is possible that the definitions of the rule, if improperly interpreted, could give rise to curtailment orders that are administratively, economically and ecologically disruptive but far from necessary for public welfare.

UTROG urges the Commission to revise four aspects of the Drought Curtailment Rule: (A) its definitions of “drought” and “emergency shortage,” which establish the circumstances under which the Commission may exercise the rule; (B) the process through which the Commission may exercise the rule; and (C) the conservation measures required under the rule.

A. Circumstances under which the Commission May Exercise the Rule

TAC § 36.3 allows the Commission's executive director to suspend or curtail water rights during a “drought” or other “emergency shortage of water.” The governing statute, Texas Water Code § 11.053, expressly directs the TCEQ to define those terms. In TAC § 36.2, the Commission has promulgated definitions that are, in the opinion of UTROG, too broad and could have widespread adverse consequences.

UTROG believes that tighter definitions will be more beneficial for minimizing the negative effects of the drought with less intrusion on water rights. To that end, UTROG offers the following clarification and amendments to help guide the commission toward a rule that may be more workable for the State.

1. Definition “Drought”

Under the current definition, a “drought” could be in effect even when hydrological conditions are relatively normal and pose little risk. Specifically, the definition provides that a “drought” occurs when at least one of three criteria is met. This, combined with the emergency powers granted to the Commission during such a period, creates uncertainty and large implications for rights holders in the area.

The first criterion provides: “drought conditions in the watershed or the part of the watershed subject to the executive director's Suspension or Adjustment Order are classified as at least moderate by the National Drought Mitigation Center.”⁶² The use of “moderate” drought conditions under the NDMA does not necessarily demand the rather harsh action of a curtailment order. In fact, under this criterion, the Dallas-Fort Worth metropolitan area would have been in a state of “drought” for more than 50 percent of the months since 2005.⁶³

The second criterion provides: “lows at United States Geological Survey gaging stations in the drainage area are below the 33rd percentile of the period of record available for the impacted watershed.”⁶⁴ Streamflows below that level are common and predictable in August in much of central, southern, and western Texas, however.

The third criterion provides: “below normal precipitation in the watershed or part of the watershed subject to the Executive Director's Order, for the preceding three-month period, as reported in the Texas Climatic Bulletin (Office of the Texas State Climatologist), a senior call is made, and the demand for surface water exceeds the available supply as evidenced by a senior water right holder making a senior call.” While this criterion requires that precipitation be “below normal,” “below normal” conditions may not be particularly severe. And in the future,

⁶² 30 TAC 36.2(3)(A).

⁶³ Denis Qualls, *Comment on TCEQ rule adoption*, City of Dallas, Dec. 5, 2011.

⁶⁴ 30 TAC 36.2(3)(B).

“below normal” conditions may become increasingly “normal” as baseline aridity increases due to climate change.⁶⁵

The definition of “drought” attracted attention during the rulemaking process and has again during the current legislative session, with state Rep. Matt Schaefer introducing H.B. 1776, which would amend Texas Water Code § 11.053 to impose a stricter definition on the Drought Curtailment Rule. It would eliminate the second and third criterion and replace the first criterion with the following: “For the purposes of this section, ‘drought’ means a drought classified as ‘exceptional’ or ‘D4’ by the National Drought Mitigation Center in accordance with the center’s Drought Severity Classification scheme.”

UTROG supports Rep. Schaefer’s proposal in part. UTROG would modify the definition by: (1) eliminating the second two criteria, as H.B. 1776 would; (2) requiring that droughts be “severe” (a less extreme classification than the “exceptional” droughts required under H.B. 1776 but more extreme than the “moderate” droughts currently required); and (3) placing a limitation on the time that a “drought” can last in the state. Since drought conditions could persist for extended periods, the threat of curtailment orders could last for just as long and create regulatory risk. UTROG therefore further recommends, as shown in the markup below, that the Drought Curtailment Rule require a finding by agency commissioners that a drought is in effect.

Proposed Revision: 30 TAC § 36.2(3)

(3) Drought --A drought occurs when, for at least 30 days preceding a suspension or adjustment order, the counties in the river basin subject to the suspension or adjustment order must have been

⁶⁵ E.g., Peter Folger, et al, Congressional Research Service, Drought in the United States: Causes and Issues for Congress (Apr. 2013), *available at* <https://www.fas.org/sgp/crs/misc/RL34580.pdf>.

~~classified by the National Drought Mitigation Center as being in a severe drought; at least one of the following criteria are met:~~

~~(A) drought conditions in the watershed or the part of the watershed subject to the executive director's Suspension or Adjustment Order are classified as at least moderate by the National Drought Mitigation Center;~~

~~(B) streamflows at United States Geological Survey gaging stations in the drainage area are below the 33rd percentile of the period of record available for the impacted watershed; or~~

~~(C) below normal precipitation in the watershed or part of the watershed subject to the Executive Director's Order, for the preceding three-month period, as reported in the Texas Climatic Bulletin (Office of the Texas State Climatologist), a senior call is made, and the demand for surface water exceeds the available supply as evidenced by a senior water right holder making a senior call.~~

30 TAC § 36.5(a)(7)

(7) The drought must have been in effect for no more than 30 days or, after the first 30 days of drought, the commissioners must have made a finding that conditions warrant empowering the executive director to issue an order; provided further, that a finding will expire after six months unless renewed by the commissioners

2. Definition of “Emergency Shortage”

The reasons that the Commission has made the Drought Curtailment Rule applicable during both “droughts” and “emergency shortages of water” are unclear. “Emergency shortages” are presumably meant to encompass situations other than droughts – such as shortages that result from sudden natural disasters (hurricanes, wildfires, tornadoes) or man-made disasters (terrorist attacks, infrastructure failures, and toxic spills). But the definition of “emergency shortage” is vague enough as to raise doubts about exactly when an “emergency shortage” would be in effect. Under the definition, an “emergency shortage of water” is in effect if one of two criteria is met.

The first criterion provides: “The inability of a senior water right holder to take surface water under its water right during: (A) emergency periods posing a hazard to public health or safety.” This definition borders on the circular: an “emergency shortage” exists during “emergency periods.” The Drought Curtailment Rule does not define “emergency periods.” It is unclear whether the term is meant to apply only to severe hazards – such as terrorist attacks or hurricanes – or whether it is meant to encompass more mundane hazards that happen to coincide with reduced water levels. Indeed, the criterion is so porous that a drought that does not qualify under the definition of “drought” could nonetheless be found to trigger an emergency shortage of water.

The second criteria provides: “The inability of a senior water right holder to take surface water under its water right during: (B) conditions affecting hydraulic systems which impair or interfere with conveyance or delivery of water for authorized users.” The definition seems aimed at satisfying senior appropriations in the event natural or built infrastructure fails but does not explain the sorts of “conditions” that must be “affecting hydraulic systems” or the types of “affect[.]” they must have.

To improve the existing definition of “emergency shortage of water,” UTROG recommends that the Commission revise the Drought Curtailment Rule so that it requires, as a precondition, that the Commission itself and senior appropriators must undertake certain reasonable mitigation efforts before a an “emergency shortage of water” will be considered to be in effect. The beneficial use requirement in Texas water law requires that the state itself and that individual appropriators exercise “reasonable intelligence” and “reasonable diligence” to conserve water. Reasonable “intelligence” and “diligence” would presumably include drought mitigation efforts such as lawn watering restrictions and tiered water-usage pricing can help guide water consumers toward a more conservative usage of the resource and, if done on a large scale and adequately enforced, can help to reduce the harsh effects of an extended drought situation.⁶⁶

UTROG proposes that the Commission replace the existing 30 TAC § 36.2(4) with the following language:

Proposed Revision: 30 TAC § 36.2(4)

(4) Emergency Shortage of Water -- The inability of a senior water right holder, even after exercising reasonable intelligence and reasonable diligence to conserve water ~~to take surface water under its water right during~~, to obtain surface water, which the senior right holder can demonstrate it will put to beneficial use, during the conditions in subpart (A) or (B) below;

(A) emergency periods posing a hazard to public health or safety; or

(B) conditions affecting hydraulic systems which impair or interfere with conveyance or delivery of water for authorized users.

B. Procedural Defects

⁶⁶ *E.g., Texas Water Rights Com. v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971) (“Inherently attached to a permit to appropriate waters, therefore, is the duty that the appropriator will beneficially use the water. The State, in administering its water resources, is under a constitutional duty to conserve water as a precious resource and that duty is also inherent in the grant of a water permit.”).

The Drought Curtailment Rule also suffers from some procedural issues. Notably, Section 36.8(a) expressly states that the executive director may issue an order “without notice and an opportunity for a hearing.” The order may be in effect for as long as forty-five days before the commission must hear it and decide whether to affirm, modify or set aside. This truncated process discourages public participation. It removes a check on agency action and risks de-legitimizing curtailment orders – and by extension the Drought Curtailment Rule – among appropriators. And it is particularly troublesome given that the agency may be taking water rights without compensation from senior appropriators.

UTROG is not the only stakeholder to take issue with the lack of process in the Drought Curtailment Rule. During the rulemaking, the Commission received numerous comments on the subject; to its credit, the Commission significantly improved the process provisions in the final version of the rule.

This legislative session, state Rep. Matt Schaefer has introduced H.B. 1780, which would amend Texas Water Code § 11.053 to impose additional procedural constraints on the Drought Curtailment Rule. Specifically, the bill would require the Commission to provide affected appropriators with at least notice at least 30 days before a curtailment is to take effect. If an appropriator requests that the Commission hold a hearing to approve, deny or modify the proposed curtailment order, the Commission must hold that hearing before the order takes effect.

UTROG proposes the Commission implement these changes, regardless of the ultimate fate of H.B. 1780. UTROG believes these suggestions will help to legitimize the process in a way that is fair and equitable, yet functional to serve the needs of the state at large. Note that UTROG has created an exemption to the proposed changes for sudden and unpredictable

emergencies, such as an oil spill or a strong hurricane that has the potential to devastate water infrastructure.

Proposed Revision: 30 TAC § 36.7

(a) An order under this chapter may only be issued by the executive director with notice and an opportunity for hearing, except as provided in subsection (d).

(1) The executive director shall notify the water rights holders who may be affected by an order proposed to be issued under this section of the proposed order not later than the 30th day before the date the proposed order takes effect.

(2) Not later than the 14th day after the date a person receives the notice, the person may request that the commission hold a hearing to affirm, modify, or set aside the proposed order.

(3) If the commission receives a request under subsection (a)(2), the commission shall hold a hearing on the proposed order before the date the proposed order takes effect. At or following the hearing, but not later than the date the proposed order takes effect, the commission shall affirm, modify, or set aside the proposed order.

(b) If an order is issued under this chapter without notice or a hearing, the order shall set a time and place for a hearing before the commission to affirm, modify, or set aside the order to be held as soon as practicable after the order is issued by the executive director, but not more than 45 days after the order is issued. Notice of this hearing shall be at least ten days prior to the hearing.

(c) Notice of the hearing at which the commission determines whether to affirm, modify or set aside the Suspension or Adjustment Order is not subject to the requirements of Texas Water Code, § 11.132, but notice shall be given to all holders of water rights that were suspended adjusted under the order.

(d) The executive director may issue an order under this chapter, without providing notice or a hearing prior to that order taking effect, if a sudden and unexpected emergency requires.

C. Conservation

One of UTROG's biggest concerns with the current Drought Curtailment Rule is that it fails to consider a strong conservation effort, and when it does, it is done in such a manner that

undermines incentives for conservation or even discussion of conservation of resources. Water problems will always be present in the state of Texas, being a semi-arid subtropical climate with a large population that continues to grow at an incredible rate.⁶⁷ With this in mind, the long-term solution to water problems will require greater conservation.⁶⁸

UTROG believes the Executive Director ought to be compelled to require the implementation of water conservation plans and drought contingency plans in advance of any curtailment order, which is not required under the current rule. Alternatively, the ED could be required to show they are implementing conservation practices pursuant to Section 11.025 and 11.053 (b)(1), (4). With conservation plans and drought contingency models in place, troubled communities may have a chance to ameliorate the effects of the drought in advance of the more extreme action, and if diligently applied, these plans may allow for rights holders to avoid more serious problems down the road. Accordingly, UTROG suggests the following amendatory language to encourage conservation, to 30 TAC §§ 36.5(c)-(d) and 36.7.

Proposed Revision: 30 TAC 36.5(C)-(d)

(c) The executive director may determine not to suspend a junior water right based on public health, safety, and welfare concerns if the junior water right holder requests and demonstrates the need for an exemption from the suspension. If the executive director decides not to suspend a junior water right based on public health, safety, and welfare concerns, the executive director ~~may~~ shall:

(1) require that the junior water right holder provide to the executive director, ~~within 14 days of the issuance of the executive director's order,~~ information demonstrating that it has made reasonable efforts to obtain alternative water sources;

(2) require that the junior water right holder demonstrate to the maximum extent practicable that all reasonable efforts have been made to conserve

⁶⁷ Office of Texas Comptroller of Public Accounts, *Texas in Focus: a Statewide View of Opportunities: Demographics*, available at: <http://www.window.state.tx.us/specialrpt/tif/population.html>, accessed April 9, 2013.

⁶⁸ The Texas Water Development Board has called for the state to meet 34 percent of the increase in water demand between now and 2060 through conservation and reuse. Texas Water Development Board, *Water for Texas: 2012 State Water Plan* (January 2012).

water by providing its water use data and a report on implementation of water conservation and drought contingency practices to the executive director every 14 days. The water use data shall indicate the amount of and place of use of the water used by the water right holder on a daily basis and be sufficient to provide a historical context for the water right holder's use of surface water; and

(3) require that the junior water right holder provide information on what it has done to identify long-term additional or alternative water sources within 30 days of the issuance of the executive director's order.

~~(d) If the executive director decides to require the information in subsection (e)(1) —(3) of this section, and the junior water right holder does not provide the information required the under subsection (c)(1),(2) and (3) of this section by the applicable deadline, or the executive director finds that the information provided does not demonstrate reasonable efforts to comply to the maximum extent practicable with subsection (c)(1), (2), and (3) of this section, the executive director shall revise the suspension or adjustment order to include the junior water right holder until such time as the junior water right holder satisfactorily complies with subsections (c)(1), (2), and (3).~~may use existing regulatory authority to ensure the junior water right holder's efforts to secure alternative sources of water and conserve water, including, but not limited to, adjusting the diversion rate downward or ordering a full suspension.~~~~

Proposed Revision: 30 TAC 36.7

(a) The efforts of affected water right holders to develop and implement water conservation plans and drought contingency plans that the executive director will consider when deciding whether to issue an order under § 36.4 of this title (relating to Suspension or Adjustment Order) include but are not limited to:

(1) the water right holders' compliance with commission regulations in Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements) and approval of the plans by the commission and Texas Water Development Board; and

(2) the water right holders' implementation and enforcement of the plans.

(b) If the executive director decides not to suspend or adjust a junior water right based on public welfare concerns, the executive director ~~may~~ shall require the implementation of water conservation plans and drought contingency plans at more restrictive levels than required by the junior water right's water conservation and drought contingency plans at the time of issuance of the order.

Conclusion

Again, we empathize with the plight of many Texans. The state is in desperate need of water, and there isn't much falling. The TCEQ is acting upon direction from the legislature, but changes should be made to make it compliant with statutory intent, reduce the arbitrary nature of the rule, and focus the rule to encourage conservation. We sincerely hope that the suggestions laid out in this petition will help guide the Commission to find the best answer to this ever-present problem. If you have questions regarding this petition, please contact Jeremy Brown at 512-232-1408 or jeremybrown@law.utexas.edu.

Respectfully,

Henry Joel Simmons

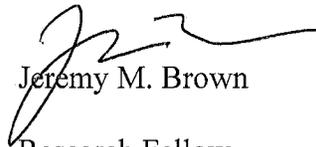
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Jeremy M. Brown

Research Fellow

Center for Global Energy

Cc: Dean Ward Farnsworth, University of Texas School of Law
Associate Dean Robert Chesney, University of Texas School of Law
Melinda Taylor, Center for Global Energy

Exhibit B

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 14, 2012

CERTIFIED MAIL

Re: Implementation of Mandatory Water Use Restrictions

Dear Water Right Holder:

As you are aware, Texas is experiencing widespread drought conditions. Drought conditions are worsening and no substantial relief is projected. Forecasts for early 2013 include below normal rainfall and above normal temperatures. You were previously notified that the Executive Director issued an Order suspending certain diversions in the Brazos River Basin below Lake Possum Kingdom. On December 5, 2012, the Commission voted to affirm that Order and modified it to include the requirements under 30 TAC Chapter 36.5. Your surface water diversions for **municipal or domestic use** were not suspended for public health, safety, and welfare reasons, even though all or part of your water right is junior to the priority call. However, to maintain this status, certain actions are required of you as outlined below.

Although junior permit holders with impoundments are not required to release any previously stored water, you must pass all inflows above those required to maintain sufficient water for public health, safety, and welfare needs. Additionally, the amount of water in storage cannot exceed the amount of water in storage on the date of the Order, November 19, 2012.

Junior water right holders whose diversion rights have not been suspended or adjusted should be using their surface water rights to protect public health, safety, and welfare needs. Public health, safety, and welfare can include needs such as drinking water, fire protection, hospital use, and necessary domestic uses. **Because your water right was not suspended or adjusted, under 30 TAC Chapter 36.7(b) TCEQ is now requiring that you implement higher level mandatory water use restrictions than may otherwise be required by your drought contingency plan.** If you have already taken steps to implement mandatory water use restrictions, you will not need to implement further restrictions at this time.

You should implement these restrictions by December 28, 2012 and notify Ms. Melissa Keller, TCEQ Water Rights Liaison, by electronic mail at melissa.keller@tceq.texas.gov, or by facsimile to 512-239-2249 that you have implemented mandatory levels of your plan. This will assist TCEQ in managing the surface water flows in the basin and may help avoid suspension or adjustment of your water right.

In addition, we received your responses to TCEQ's questionnaire regarding your demonstration that you have made reasonable efforts to conserve water and to obtain additional or alternative water sources. The Executive Director considers these responses in making the decision whether to continue not to suspend or adjust your water right. This will include consideration of your efforts to be proactive in obtaining alternate sources, conserving existing supplies, and identifying future sources. You should update and submit the questionnaire to Ms. Melissa Keller every 14 days, unless there have been no diversions during the relevant reporting period.

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • tceq.texas.gov

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Water Right Holder

Page 2

December 14, 2012

The TCEQ continues to monitor the situation closely. Water is a precious resource – all Texans are encouraged to conserve, especially during times of drought. **Should senior needs not be fulfilled as a result of these suspensions, please be aware that TCEQ may take additional actions to enforce the priority call notwithstanding completion of the questionnaire and implementation of mandatory water use restrictions.** If conditions improve, we may be able to lift restrictions.

You may find additional drought information on TCEQ's drought web page at: <http://www.tceq.texas.gov/response/drought> or by contacting the TCEQ Drought Hotline at 1-800-447-2827. You may also contact your TCEQ Regional Office or Ms. Melissa Keller at 512-239-1768 should you have additional questions on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Zak Covar". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Zak Covar
Executive Director
Texas Commission on Environmental Quality

Exhibit C

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 19, 2012

CERTIFIED MAIL

Re: Suspensions of Permitted State Surface Water Diversions in the Brazos River Basin

Dear Water Right Holder:

The Texas Commission on Environmental Quality (TCEQ) has received a priority call on surface water from a senior water right holder in the Brazos River Basin. In accordance with the Texas Water Code (TWC), §5.013(a)(1), the TCEQ is responsible for enforcing water rights, which requires protecting senior and superior surface water rights and must take action in response to the priority call.

With no immediate relief forecasted, I have issued a suspension order suspending certain diversions in the Brazos River Basin below Lake Possum Kingdom. Suspended water rights include water right permits with a priority date of **February 15, 1942 and later** (excluding those for municipal uses, domestic uses and power generation), term water right permits, and temporary water right permits. Exempt domestic and livestock diversions are not subject to this suspension. That order is included in the mailing.

At this time, **you are not required to suspend your surface water diversion for municipal or domestic use** even though all or part of your water right is junior to the priority call. However, pursuant to 30 TAC Chapter 36.5, we are requiring that you submit the following information to demonstrate that you have made reasonable efforts to conserve water and that you have made reasonable efforts to obtain additional or alternative water sources:

- Water use data indicating the amount, rate of diversion, place and purposes of use of water on a daily basis.
- Information demonstrating that you have made reasonable efforts to obtain alternative water sources within 14 days.
- Information on what you have done to identify long-term additional or alternative water sources within 30 days.

To provide this information, please complete the attached questionnaire and submit it to Ms. Melissa Keller, TCEQ Water Rights Liaison, by electronic mail at melissa.keller@tceq.texas.gov, or by facsimile to 512-239-2249, within 14 days of the date of this letter, with follow-up information provided to TCEQ every 14 days thereafter. Failure to provide this information may result in suspension or adjustment of your water right.

We will consider your responses to the questionnaire in making the decision whether to continue not to suspend or adjust your water right. This will include consideration of your efforts to be proactive in obtaining alternate supplies, conserving limited supplies, and planning for future droughts.

Water Right Holder

Page 2

November 19, 2012

A hearing before the Commission will be held to affirm, modify, or set aside the suspension order. This matter is scheduled for consideration at the Commission Agenda on December 5, 2012, at 9:30 a.m. at 12100 Park 35 Circle, Building E, Room 201S, Austin, Texas 78753.

Water rights issued with multiple uses may continue to divert water for municipal, domestic, and power generation purposes only. Junior permit holders with impoundments are not required to release any previously stored water; however, new inflows to impoundments must be passed downstream in order to meet senior needs.

These actions are guided by the priority doctrine, established in TWC §11.027, which specifies that in times of shortage, permitted water rights will be administered based on the priority date of each water right; that is, the earliest in time is senior. Additionally, certain domestic and livestock uses are superior in priority to permitted rights.

The TCEQ continues to monitor the situation closely. Should senior or superior needs not be fulfilled as a result of these suspensions, please be aware that TCEQ may take additional actions to protect the priority call. If conditions improve, we may be able to lift the suspensions.

You may find additional drought information on TCEQ's drought web page at: <http://www.tceq.texas.gov/response/drought> or by contacting the TCEQ Drought Hotline at 1-800-447-2827. You may also contact your TCEQ Regional Office or Ms. Keller at the TCEQ Central Office in Austin at 512-239-1768 should you have additional questions on this matter.

Sincerely,



Zak Covar
Executive Director
Texas Commission on Environmental Quality

Enclosure

TCEQ – Questions for Junior Municipal Water Right Holders Affected by a Priority Call

A. Contact Information

1. What is the name of the water right holder?
2. What is the contact information (phone number, address, email) for the primary contact?
3. If the water right provides source water for a public water system (PWS), what is the number of active connections currently served by the PWS?
4. In what county is the water right located?
5. Who is the primary contact? Phone number, address, email?
6. If a public water system, how many connections do you have?

B. Sources of Water

1. What is your primary source of water? What is the name of the stream, lake, or aquifer?
2. Do you have alternate sources of water?
3. What amount of water have you used under your permit(s) to date this year by authorized use?
4. How much storage do you currently have? How many days supply is it?
5. If you have a well, how deep is it? What is your pumping capacity? Can you access additional supply by drilling deeper?
6. If applicable: What other PWSs are located nearby?

7. Do you have a water supply contract? Do you have a contract to purchase raw or potable water from a water supplier? If the answer is "yes," then please state if it is raw or potable and with whom you have the contract.

C. System Needs

1. What is the minimum amount your system/customers need for public health and safety, i.e. drinking water, fire protection, hospital use, necessary domestic uses, and power generation? Please answer in cubic feet per second (cfs), acre-feet, or another measurement method as appropriate.
2. What level of streamflow is required to make your diversions or maintain your uses for municipal purposes such as drinking water, fire protection, hospital use, necessary domestic uses, or power generation?
3. What is your average daily usage?
4. How many days of water do you have remaining?
5. How have any mechanical issues been addressed?

D. Actions Taken

1. Within 14 days of the date of the order, provide information demonstrating that you have made efforts to obtain alternate sources to your permitted source (§36.5(c)(1)).
2. Within 14 days of the date of the order, provide daily data indicating the amount and place of use of all surface water diverted under your water right (§36.5(c)(2)). You must continue to provide this information every 14 days for the duration of the order suspending or adjusting water rights.
3. Within 30 days of the date of the order, provide information on what you have done to identify long term additional or alternative water sources (§36.5(c)(3)).
4. If applicable, provide a reservoir pass through plan to demonstrate compliance with the call.
5. What efforts have you made to conserve water (§36.7(a)(1) and §36.7(a)(2))?

6. Have you enacted your drought contingency plan? Voluntary or mandatory restrictions? (§36.7(a)(1), and §36.7(a)(2))

7. Please indicate the stage of drought contingency plan implementation, and describe the restrictions that are in place. Indicate whether and how these restrictions are being enforced.

8. Please provide any additional information you believe will assist us in our evaluation.

**DECISION OF THE COMMISSION
REGARDING THE PETITION FOR RULEMAKING
FILED BY THE UNIVERISTY OF TEXAS REGULATORY OVERSIGHT
GROUP**

Docket No. 2013-1045-RUL

On June 18, 2013, the Texas Commission on Environmental Quality (Commission) considered the petition for rulemaking filed by the University of Texas Regulatory Oversight Group (petitioner). The petition, filed on May 22, 2013, requests that the agency initiate rulemaking to requested that the commission amend 30 TAC Chapter 36 to redefine "drought" and "emergency shortage of water;" require that the drought be in effect for no more than 30 days at the time of issuance of an executive director (ED) order unless the commissioners have made a finding that the conditions warrant empowering the ED to issue an order and limiting this finding to six months unless renewed by the commissioners; require 30 days notice and allow requests for a hearing before the ED issues an order; require that junior water rights holders who are not suspended must provide water use and alternative information and must go to more restrictive levels in their drought contingency and water conservation plans when an ED order is issued.

IT IS THE DECISION OF THE COMMISSION pursuant to Administrative Procedure Act, Texas Government Code, § 2001.021 and Texas Water Code, § 5.102 to deny the petition. The petition is denied because: 1) the requests relating to notice and hearing, and drought, are unworkable and impractical due to the need for quick response; 2) many changes would deny the executive director and the commission needed flexibility; 3) some of the requested rule changes are already allowed under existing rules; 4) litigation is pending which may impact Chapter 36 and how Texas Water Code (TWC), §11.053 is interpreted; and 5) the rules have been used for only one senior call and should be amended, if necessary, as other senior calls are made, information is obtained, and the commission determines better ways to respond.

This Decision constitutes the decision of the Commission required by the Texas Government Code, § 2001.021(c).

Issued date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman