

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** July 26, 2013

**DATE OF REQUEST:** July 3, 2013

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Patricia Durón, (512) 239-6087

**CAPTION: Docket No. 2013-0948-RUL.** Consideration for publication of, and hearing on, proposed amendment to 30 TAC Chapter 303, Operation of the Rio Grande, Section 303.53.

The proposed rulemaking would remove the requirement that contracts, excluding those for Domestic, Municipal, and Industrial water, for the purchase of all or part of the annual authorized amount of use for a water right in the Middle or Lower Rio Grande be limited to one year and would clarify that all contracts for water would remain subject to Section 303.22, Allocation of Accounts. (Amy Settemeyer, Robin Smith) (Rule Project No. 2013-031-303-OW)

Kim Wilson for L'Oreal Stepney  
**Deputy Director**

Allison Woodall for Kellye Rila  
**Division Director**

Patricia Durón  
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**Copy to CCC Secretary? NO X**

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** July 3, 2013

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

**From:** L'Oreal W. Stepney, P.E., Deputy Director  
Office of Water

**Docket No.:** 2013-0948-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 303, Operation of the Rio Grande  
Contractual Sales in the Rio Grande Relating to Documents Needed to File  
Rule Project No. 2013-031-303-OW

### **Background and reason(s) for the rulemaking:**

This rulemaking will remove the one-year limitation for certain water contracts in the Rio Grande Watermaster Program. Under the existing rule, water contracts in the Rio Grande may also serve as pushwater contracts to move municipal water through irrigation conveyances. These contracts have a maximum duration of one year as per 30 TAC §303.53(a)(8). With this one-year limitation, unused water purchased by a municipality under contract is returned to the system and no longer available to the municipality. By removing the one-year limitation, the water rights holders' investments will be better protected and reduce the risk of losing part of the monetary investment in contract water.

### **Scope of the rulemaking:**

**A.) Summary of what the rulemaking will do:** The proposed rulemaking would amend §303.53(a)(8) to remove the requirement that contracts for the purchase of all or a part of the annual authorized amount of use for a water right in the Middle or Lower Rio Grande be limited to one year.

The commission also proposes to add §303.53(d) to clarify that all contracts for water would remain subject to §303.22, Allocations to Accounts. This would maintain the requirement that allocations of water be put to beneficial use within two consecutive calendar years; otherwise, the account will be reduced to zero as per §303.22.

The proposed amendment will not allow for speculative purchase and resale of water under contract. The change would not remove any other requirements related to water contracts. The change also would not apply to contracts for Domestic, Municipal, and Industrial (DMI) water. These DMI contracts expire on the last Saturday of the year.

**B.) Scope required by federal regulations or state statutes:** There are no changes required by federal regulations or state statutes.

**C.) Additional staff recommendations that are not required by federal rule or state statute:** None.

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**Statutory authority:**

TWC, §§5.103, 5.102, and 11.3271.

**Effect on the:**

**A.) Regulated community:** This rulemaking would affect holders of Class A and B water rights on the Middle and Lower Rio Grande, as well as holders of municipal, domestic, and industrial water rights, by removing the one-year limitation for water contracts.

**B.) Public:** With the removal of the one-year limitation, municipalities will not be forced to purchase multiple contracts if they do not use all of the contract water before a year is expired. The purchases of these contracts are often passed on to the municipalities' customers to recover some of the costs. By allowing contracts for more than a year, the municipalities would likely be able to lessen the increased expense on their customers.

**C.) Agency programs:** Rio Grande Watermaster Program forms and procedures would need to be updated. The Texas Watermaster Accounting System (TXWAS) would require an update for the contract expiration field.

**Stakeholder meetings:** There will be no stakeholder meetings associated with this rulemaking; however, there will be a rule public hearing on September 10, 2013.

General information on the proposed rule change will be communicated to water right holders in the Rio Grande Watermaster area by mail through the monthly reports. In addition, information about this rule change will also be included in the mailing for the budgets assessments scheduled to be sent this summer.

**Potential controversial concerns and legislative interest:**

Staff does not expect any controversial concerns.

Staff does expect some legislative interest as the water issues facing the Rio Grande System have had high legislative interest in the recent months.

**Will this rulemaking affect any current policies or require development of new policies?**

The TCEQ Rio Grande Watermaster program's policy regarding contractual sales will change with this rule. This policy change may require some changes to forms and will require a change to TXWAS to allow for contracts to extend past one year.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

A rule change would be necessary to remove the one-year contract term limit. If no action is taken, then certain cities may be required to purchase multiple contracts if they are not able to utilize the entire contracted amount during the one-year term of the contract.

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During a drought situation and under an emergency proclamation by the governor, the executive director may be provided the authority to suspend certain rules or regulations that may inhibit or prevent prompt response to the drought.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** July 26, 2013

**Anticipated *Texas Register* publication date:** August 16, 2013

**Anticipated public hearing date (if any):** September 10, 2013

**Anticipated public comment period:** August 16, 2013 - September 16, 2013

**Anticipated adoption date:** November 6, 2013

**Agency contacts:**

Amy Settemeyer, Rule Project Manager, 239-2588, Water Availability Division

Robin Smith, Staff Attorney, 239-0463

Patricia Durón, Texas Register Coordinator, 239-6087

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Anne Idsal  
Curtis Seaton  
Tucker Royall  
Office of General Counsel  
Amy Settemeyer  
Patricia Durón

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §303.53.

### **Background and Summary of the Factual Basis for the Proposed Rule**

This rulemaking will remove the one-year limitation for certain water contracts in the Rio Grande Watermaster Program. Under the existing rule, water contracts in the Rio Grande may also serve as pushwater contracts to move municipal water through irrigation conveyances. Under §303.53(a)(8), these contracts have a maximum duration of one year. With this one-year limitation, unused water purchased by a municipality under contract is returned to the system and no longer available to the municipality. By removing the one-year limitation, the water rights holders' investments will be better protected and reduce the risk of losing part of the monetary investment in contract water.

The commission also proposes to add §303.53(d) to the rule to clarify that all contracts for water will remain subject to §303.22, Allocations to Accounts. This will maintain the requirement that allocations of water be put to beneficial use within two consecutive calendar years; otherwise, the account will be reduced to zero as per §303.22.

The proposed amendment will not allow for speculative purchase and resale of water under contract. The change would not remove any other requirements related to water

contracts. The change also would not apply to contracts for Domestic, Municipal, or Industrial (DMI) water. These DMI contracts expire on the last Saturday of the year.

### **Section Discussion**

Section 303.53(a)(8) limits the length of the contract for the purchase of water to one year. The commission proposes to remove the requirement that contracts for the purchase of all or a part of the annual authorized amount of use for a water right in the Middle or Lower Rio Grande be limited to one year. This will allow municipalities to avoid the risk of losing part of their investment if they do not use all of the water they purchases within that timeframe. Further, this will allow municipalities to avoid the expense of entering into additional contracts for pushwater. These additional contract costs are typically passed on to a municipality's water customers.

The commission proposes to add §303.53(a)(8)(A) and (B) to the rule to clarify that contracts for DMI water must terminate by the last Saturday of the calendar year in which the contract was entered. All other contracts shall terminate at a date determined by the interested parties.

The commission also proposes to add §303.53(d) to the rule to clarify that all contracts for water would remain subject to §303.22. This would maintain the requirement that allocations of water be put to beneficial use within two consecutive calendar years;

otherwise, the account will be reduced to zero as per §303.22.

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

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. Other units of state or local government may experience cost benefits since the proposed rule may allow them access to unused purchased water longer than allowed by current rule and potentially decrease the frequency of water purchases.

Under current rule, contracted sales of water in the Middle or Lower Rio Grande are limited to one year whether or not the buyer has fully used the amount of water purchased. The proposed rule would amend Chapter 303, Subchapter F to allow water purchased, but unused, to remain allocated to the purchaser until the contract terminates if the requirements found in §303.22 regarding beneficial use are met. The rulemaking does not allow for speculative purchase and resale of water under a contract and does not remove any other requirements related to water contracts. The rule also does not apply to contracts for DMI water. These DMI contracts expire on the last Saturday of the calendar year in which the contract was entered.

The proposed rule would only affect regulated entities (units of local government,

holders of Class A and B water rights, and domestic and industrial water rights holders, etc.) in the Middle and Lower Rio Grande. Agency records indicate that there may be as many as 935 water rights in the Lower Rio Grande and 246 water rights in the Middle Rio Grande that could be affected by the proposed rule. Of these, the agency estimates that there may be as many as 123 water rights that belong to units of local government and six that belong to the state in the Lower Rio Grande and as many as 17 water rights owned by local governments in the Middle Rio Grande. Under the proposed rule, these governmental entities could experience cost savings, especially those related to pushwater contracts, since they would be allowed to keep the rights to their unused purchased water for a period longer than a year if allowed by the terms of the purchase contract. The amount of any cost savings due to less frequent water purchases would depend on a number of factors including the price of water, the termination date of contracts for the purchase of water, conservation efforts, evaporation rates, and the ability of the governmental entities to manage their purchased water efficiently.

### **Public Benefits and Costs**

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule could be stable prices for water purchased in the Middle and Lower Rio Grande areas of the state.

Individuals in these areas could experience more stable prices for water as a result of the proposed rule. A water utility typically passes higher contract costs to individuals and other customers. As the frequency for purchasing water under a contract decreases or as the amount of new water purchased decreases, individuals are expected to benefit from stable costs and less exposure to price variability during drought conditions.

The proposed rule could benefit businesses in the Middle and Lower Rio Grande that purchase water. Businesses could experience more stable prices than expected during a drought since their supplier would be allowed to keep unused purchased water for a longer period and use it to supply their customers. Any cost savings would depend on a variety of factors including the future price of water, the water use patterns of other customers, the length of duration of any unused water supply, other environmental factors, and the ability of the water supplier to manage water efficiently.

Businesses that sell water in the Middle and Lower Rio Grande are not expected to experience adverse fiscal implications as a result of the proposed rule. Sellers of water are expected to sell available water at the market price at the time they enter into a contract. Sellers are expected to negotiate for the most favorable contract terms they can obtain.

The agency does not have a tracking mechanism to easily distinguish between water

suppliers that are a large or small business. However, the agency estimates that there may be as many as 800 accounts owned by businesses in the Lower Rio Grande and as many as 228 owned by businesses in the Middle Rio Grande.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses in the Middle or Lower Rio Grande that purchase water. These small businesses should experience the same stability in prices as those experienced by large businesses. If a small business supplies water in this area of the state, it is not expected to experience adverse fiscal impacts from the proposed rule. A seller of water is expected to sell available water at the prevailing market price and negotiate favorable contract terms.

### **Small Business Regulatory Flexibility Analysis**

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

### **Local Employment Impact Statement**

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not

adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission evaluated the proposed rule and performed an analysis of whether this proposed rule requires a regulatory impact analysis under Texas Government Code, §2001.0225. The specific intent of this rule is to amend §303.53(a)(8) to delete the requirement that contracts for the purchase of all or a part of the annual authorized amount of use for a water right in the Middle or Lower Rio Grande be limited to one year and to provide that contracts for DMI water shall terminate on the last Saturday of the calendar year in which the contract was entered, and the effective date and termination date for all other contracts shall be determined by the interested parties. This rule is needed because cities that use irrigation contracts for pushwater to move municipal water through irrigation conveyances may not be able to use all of the contracted water in one year and run the risk of facing unanticipated expenses and losing a part of their investment. This rulemaking will not allow speculative purchase and resale of water under contract because §303.22(c), which requires that allocations of water be put to beneficial use within two consecutive calendar years, will remain. This amended rule is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment, and it is not for the purpose of reducing risks to human health from

environmental exposure. This rule does not regulate any type of pollution or waste. The rule will help irrigators who purchase water to use water in a way that maximizes the beneficial use of the water and does not result in loss of the irrigator's investment.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated this amended rule and performed an analysis of whether this amendment constitutes a taking under Texas Government Code, Chapter 2007. The commission has determined that it does not constitute a taking. The specific purpose of the propose rule is to amend §303.53(a)(8) to delete the requirement that contracts for the purchase of all or a part of the annual authorized amount of use for a water right in the Middle or Lower Rio Grande be limited to one year and to provide that contracts for DMI water shall terminate on the last Saturday of the calendar year in which the contract was entered, and the effective date and termination date for all other contracts shall be determined by the interested parties. Cities that use irrigation contracts for pushwater to move municipal water through irrigation conveyances may not be able to use all of the contracted water in one year and run the risk of facing unanticipated expenses and losing a part of their investment. The proposed rule would substantially

advance this stated purpose by allowing these contracts to be for longer than a year while maintaining the requirement that allocations of water be put to beneficial use within two consecutive calendar years or the account will be reduced to zero.

This rule is not a taking because promulgation and enforcement of this amended rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The rule provides that contracts for water covered by §303.53 may be longer than one year. The water rights of the water right holders selling the water will not be impacted.

### **Consistency with the Coastal Management Program**

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the

contact person at the address listed under the Submittal of Comments section of this preamble.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Harlingen on September 10, 2013 at 9:00 a.m. at the Texas State Technical College Service Support Center (TSTC), Conference Room 145. The TSTC Service Support Center is at 1902 North Loop 499 in Harlingen, Texas. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

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

### **Submittal of Comments**

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted

at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-031-303-OW. The comment period closes September 16, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Amy Settemeyer, Watermaster Section, at (512) 239-2588.

## **SUBCHAPTER F: CONTRACTUAL SALES**

### **§303.53**

#### **Statutory Authority**

The amendment is proposed under Texas Water Code (TWC) §5.013(1), concerning the jurisdiction of the commission over water rights; §5.102, concerning the commission's general powers; §5.103, concerning rules; and §5.105, concerning general policy, which authorizes the commission to adopt rules as necessary to carry out its power and duties under the TWC. The amendment is also proposed under TWC, §11.3271, concerning the powers and duties of the Rio Grande Watermaster.

The proposed amendment implements TWC, §§5.013, 5.102, and 11.3271.

#### **§303.53. Documents Needed to File.**

(a) A contract of sale of water to be filed with the executive director in accordance with §303.52(d) of this title (relating to General Filing Requirements) shall indicate all of the following:

(1) the specific certificate of adjudication or other water right under which the water is being sold;

(2) the specific certificate of adjudication or other water right under which the bought water is to be used;

(3) the name and address of the seller and buyer;

(4) the total quantity of water being purchased in acre-feet;

(5) the purpose of use for which the water is to be used;

(6) the cost of water to the buyer per acre-foot;

(7) the diversion point to which the buyer is requesting deliveries to be made;

(8) the effective date and termination date of the contract; [(contract period can not exceed one year);]

(A) contracts for Domestic, Municipal, and Industrial water shall terminate on the last Saturday of the calendar year in which the contract was entered; and,

(B) for all other contracts, an effective date and termination date shall be determined by the interested parties;

(9) the acreage to be irrigated, if applicable; and

(10) the contract executed by all verified owners of the water right from which water is purchased.

(b) The contract will be accompanied by an aerial photograph or United States Geological Survey topographic map with the location of diversion points and areas to be irrigated described thereon. In water-in-transit contractual sales, the contract must also include an aerial photograph or United States Geological Survey topographic map with the location of the discharge point(s).

(c) The executive director may require any additional information needed to approve the contract, including any agreements with diverters if the buyer is not pumping from his own diversion point and deeds of any tracts to be irrigated.

(d) All contracts for water, irrespective to termination date of the contract, remain subject to the requirements of §303.22(c) of this title (relating to Allocations to Accounts).