

TCEQ Interoffice Memorandum

To: Commissioners

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

From: L'Oreal W. Stepney, P.E., Deputy Director

Date: September 5, 2012

Subject: Evaluation of river basins for the need for Watermaster programs

Background

Section 5.05 of HB 2694 of the 82nd Legislature added the following language to Chapter 11, Subchapter G, §11.326(g)(h) of the Water Code.

(g) For a water basin in which a watermaster is not appointed, the executive director shall:

- (1) evaluate the water basin at least once every five years to determine whether a watermaster should be appointed; and
- (2) report the findings and make recommendations to the commission.

(h) The commission shall:

- (1) determine the criteria or risk factors to be considered in an evaluation under Subsection (g); and
- (2) include the findings and recommendations under Subsection (g) in the commission's biennial report to the legislature.

In 2012 staff evaluated the Brazos River Basin, the Brazos-Colorado Coastal Basin, the Colorado River Basin, and the Colorado-Lavaca Coastal Basin.

Evaluation Process

Staff's evaluation followed the following criteria outlined during the September 28, 2011 Commissioners' Work Session;

- Is there a court order to create a watermaster,
- Has a petition been received requesting a watermaster,
- Have senior water rights been threatened based on the following:
 - History of senior calls or water shortages within the river basin

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- Number of water right complaints received on an annual basis in each river basin.
- Chapter 36 – Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage just recently became effective (May 3, 2012) and has not been implemented in this basin. When implemented the rule will provide an additional tool for managing the type of extreme drought conditions seen in 2009 and 2011.

Consistent with Commission direction to involve stakeholders in the evaluation process, staff:

- 1) Created a web page exclusively for the evaluation process, with an opportunity for receiving automated updates by email.
- 2) Mailed out initial outreach letters to the stakeholders in each area on February 17, 2012, and accepted comments until March 31, 2012. Stakeholders include all water right holders, county judges and extension agents, river authorities, agricultural interests, industries, environmental organizations, and other interested parties.
- 3) Developed a preliminary evaluation that included 4 options in each area, and solicited additional input by letter of May 22, 2012 announcing public meetings and providing the preliminary evaluation along with the options.
- 4) Between June 4 and June 21, 2012, held 9 stakeholder meetings in Rosenberg, San Saba, Lubbock, Big Spring, San Angelo, Wharton, Waco, Fredericksburg and College Station. A combined total of approximately 252 people attended the stakeholder meetings. In each of these meetings the Watermaster Section Manager, the South Texas Watermaster and either the Director of the Water Availability Division or the Water Rights Permitting & Availability Section Manager were in attendance to present information and answer questions.

Stakeholder Input

- 1) Final stakeholder comments were due July 6. A total of 304 comments have been received to date.
- 2) 245 comments were received from the Colorado stakeholders of which 214 were opposed, 27 were in favor of and 4 were neutral on the appointment of a watermaster.
- 3) 59 comments were received from the Brazos stakeholders of which 42 were opposed, 13 were in favor of and 4 were neutral on the appointment of a watermaster.
- 4) Based on the stakeholder comments, the majority of water right holders are generally opposed to establishing a watermaster in the Brazos or Colorado Basins. Comments included opposition to the required assessment fees; that adding a watermaster would only bring more regulation and bureaucracy with little or no benefit and that if a watermaster program is created it should be done by petition process.
- 5) Many stakeholders said the way in which the TCEQ handled the 2009 and 2011 droughts worked very well with no additional costs to the water right holders.

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Considerations

- No watermaster program be established in either the Brazos or the Colorado River Basins or associated coastal basins.
- A watermaster program that includes the portion of the Brazos River from Possum Kingdom Reservoir (PKR) and below plus the Brazos-Colorado Coastal Basin. Approximate first year cost for this option: \$595,977. Approximate cost for subsequent years: \$449,768.
- A watermaster program that includes the portion of the Colorado River Basin above Lake Buchanan plus the Llano River watershed prior to its confluence with the main stem of the Colorado River. This proposal would not include the Colorado-Lavaca Coastal Basin in a watermaster program. Approximate first year cost for this option: \$610,977. Approximate cost for subsequent years: \$464,768.
- A watermaster program that includes the entire Colorado or Brazos River Basins and the associated coastal basins. Approximate first year cost for this option in the Brazos Basin is \$674,431 and \$729,064 in the entire Colorado Basin. Approximate cost for subsequent years is \$500,709 in the Brazos Basin area and \$492,329 in the Colorado Basin area.
- A watermaster program that includes only the San Saba watershed in the Colorado River Basin. Approximate first year cost for this option is \$112,554. Approximate cost for subsequent years: \$77,041.
- A very limited watermaster program with no more than 3-4 people for the entire Brazos or Colorado Basin which could be centrally located, with no requirement for ongoing regularly scheduled investigations. A program of this scale would likely monitor diversions and streamflows from a central location and would act in the event of low flows to adjust diversion and manage priority calls. Approximate first year cost for this option: \$227,197 - \$292,880 (depending on 3 or 4 staff). Approximate cost for subsequent years: \$232,897 - \$300,139.
- Expand the Concho Watermaster to the Upper Colorado. Approximate first year cost for this option: \$152,587 - \$228,832 (depending on the addition of 2 or 3 staff). Approximate cost for subsequent years: \$99,361 - \$148,993.

Note: Options that would establish a watermaster program would require the Commission to call and hold a hearing to determine if a need exists for watermaster.

- The commission could create a water division for the purpose of administering water rights. Creation of a water division allows the Executive Director to appoint a watermaster for that division. In a water division for which the office of watermaster is vacant, the Executive Director has the power of a watermaster.
- Dedicate additional staff to OCE to work on conditions when water rights are threatened; continue to monitor actions taken.

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- Twenty-five or more water right holders can petition the Commission to establish a watermaster program.
- The legislature may create a watermaster program, as it did in the Concho River watershed.

2009 and 2011 Drought Efforts

In 2009, the TCEQ received a priority call that resulted in the suspension of water rights with a priority date of 1980 and later (except for municipal and power generation uses) in the lower Brazos River Basin that resulted in the suspension of 88 water rights.

In 2011, the TCEQ received a priority call for water that resulted in suspension letters being sent to junior water right holders (except for municipal and power generation uses). There were 600 water rights suspended in the lower Brazos Basin as a result of the calls. In addition to the call in the lower basin, there were two calls made by domestic and livestock (d&l) users. While there were no suspensions associated with these calls, they were included as part of the evaluation.

In 2011, the TCEQ received eight priority calls for water in the Colorado Basin. In the San Saba watershed there were six calls from d&l users that resulted in the suspension of 65 water rights. There was one priority call on the Llano River that resulted in the suspension of 69 water rights and one call on the mainstem of the Colorado River that resulted in the suspension of 14 water rights. A total of 148 water rights were suspended in 2011.

Total Costs to the Agency

In response to events with significant impacts such as the droughts of 2009 and 2011, resources were gathered from around the agency. Drought response was made the top priority, resulting in the following impacts to the agency and included staff in the Office of Water, the Office of Compliance and Enforcement, Sunset, Intergovernmental Relations, the Office of Legal Services, Small Business and Environmental Assistance, and Agency Communications. The financial impacts included salaries, fringe and travel. These efforts included drought meetings, review of water right permits, GIS work, field investigations, streamflow measurements, outreach and workshops, legal work, sunset staff work, media inquiries, outreach to state/local officials and public drinking water system assistance.

2009 Total Cost to Agency (Brazos Basin): \$283,328

2011 Total Cost to Agency (Brazos Basin): \$513,874

2011 Total Cost to Agency (Colorado Basin): \$280,895

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Watermaster Evaluation Costs

Office of Water

The staff costs required to conduct all aspects of the evaluation of need for a Watermaster in the Colorado and Brazos Basins were \$131,012, which included salary, fringe, postage and travel.

Office of Compliance and Enforcement

Regional staff attended the stakeholder meetings for informational purposes. No travel costs were incurred.

Intergovernmental Relations and Executive Director's Sunset staff also attended stakeholder meetings. No travel costs were incurred.

Funding Sources

Resources and funding from around the agency were used to respond to the drought. Funds used to respond included 0153, 0549, 0550, 0151, and General Revenue.

Staff Hours Spent on Drought Response

2009 Total Hours (Water Rights/Water Supply; OCE and OLS staff): 4,708 (Brazos Basin)

2011 Total Hours (OW/OCE/OLS/ED (Sunset staff)/AC/IGR): 10,318 (Brazos Basin) and 4,049 (Colorado Basin)

OCE Investigations

2009	Brazos Basin:	372
2011	Brazos Basin:	325
	Colorado Basin:	144

Impacts to the Agency

Office of Water

Performance Measures 2009 Drought

Performance Measure	Target FY 2009	4Q FY 2009	Target FY 2010	1Q FY 2010
Percent of Water Rights Permit Applications Reviewed within Established Timeframes	80%	73%	*	*
Number of water rights permits issued	100	78	*	*

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Number of applications to address water rights impacts reviewed (shared measure with Field Ops)	595	200 WR (39 FOD)	595	88 WR (45 FOD)
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*Measure is only reported for the 4th Quarter

In 4th quarter FY2009, key staff members assigned to process permit applications were needed to work on drought response activities, and performance was below the target for all three water rights performance measures. In 1st quarter FY2010, performance was within target.

Performance Measures 2011 Drought

Performance Measure	Target FY 2011	3Q FY 2011	4Q FY 2011	Target FY 2012	1Q FY 2012	2Q FY 2012
Percent of Water Rights Permit Applications Reviewed within Established Timeframes	86%	*	71.82%	*	*	*
Number of water rights permits issued	100	*	88	*	*	*
Number of applications to address water rights impacts reviewed (shared measure with Field Ops)	595	31 WR (112 FOD)	120 WR (79 FOD)	595	57 WR (48 FOD)	112 WR (27 FOD)

*Measure is only reported for the 4th Quarter

In 3rd quarter FY2011, performance was within target. In 4th quarter 2011, 1st quarter FY2012, and 2nd quarter 2012, key staff members assigned to process permit applications were needed to work on drought response activities, and performance was below the target for all three water rights performance measures.

Permit Timeframe Targets

Project Type	Target No. of Days	Number Under Review Exceeding Target										
		April 2011	May 2011	June 2011	July 2011	Aug 2011	Sept 2011	Oct 2011	Nov 2011	Dec 2011	Jan 2012	Feb 2012
Water Rights New Permits	300	14	15	14	19	19	21	21	24	26	30	30
Water Rights Amendments w/ Notice	300	18	22	22	21	20	21	24	25	27	27	29
Water Rights Requiring Notice Review Pursuant to Work Session	300	11	10	10	9	11	13	13	9	11	9	8

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Water Rights Amendments w/o notice, Rio Grande Watermaster Area	180	0	0	0	1	1	1	2	2	3	3	2
Water Rights Amendments w/o notice outside Rio Grande Watermaster Area	180	0	0	0	0	0	0	0	0	0	0	0

For Permit Timeframe Targets in the Office of Water, the number of permits in various categories under review exceeding the target timeframe ranged from 1-30 between April 2011 and February 2012.

Office of Compliance and Enforcement

Performance Measures

In FY 2010 and FY 2011, OCE met their LBB commitment for water site investigations, in part because this commitment includes water right reconnaissance investigations. Staff did have to work additional hours to ensure that the agency met Compliance Monitoring Strategy goals. Staff has experienced more impacts in FY 2012 related to the 2011 drought activities. In some areas, staff has been unable to complete certain air investigations due to resource reallocation to conduct investigations in response to the priority calls. Other areas have been unable to conduct as many water quality, storm water, onsite sewage facility and animal feeding operation investigations as they have in previous years.

In FY 2011, OCE conducted 8,736 water site investigations, with the target being 8,800. The following table shows the number of water site investigations and water right reconnaissance investigations for FY 2011. The second table shows the same investigations for the months when suspensions were in place in 2011 and 2012.

TABLE 1	Sept-10	Oct-10	Nov-10	Dec-10	Jan-11	Feb-11	Mar-11	Apr-11	May-11	June-11	July-11	Aug-11	Total
Water Site Investigations, including Water Right Reconnaissance	728	614	687	728	609	757	668	711	892	723	615	1004	8736
Water Right Reconnaissance Investigations	43	26	14	1	3	1	1	0	5	47	66	133	340

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TABLE 2	Apr-11	May-11	June-11	July-11	Aug-11	Sept-11	Oct-11	Nov-11	Dec-11	Jan-12	Feb-12	Total
Water Site Investigations, including Water Right Reconnaissance	711	892	723	615	1004	1042	873	804	852	908	867	9291
Water Right Reconnaissance Investigations	0	5	47	66	133	182	87	45	51	61	41	718

The water right investigations conducted in response to the 2009 drought were completed in August of 2009. However, due to issues with Central Registry, and the need for reformatting of water rights within the database, the investigations were not entered into CCEDS until FY 2010. In FY 2010, OCE conducted 9,393 water site investigations, with the target being 8,800. The following table shows the number of water site investigations and water right reconnaissance investigations FY 2010.

TABLE 3	Sept-09	Oct-09	Nov-09	Dec-09	Jan-10	Feb-10	Mar-10	Apr-10	May-10	June-10	July-10	Aug-10	Total
Water Site Investigations, including Water Right Reconnaissance	669	748	815	551	608	1030	624	722	974	785	809	1058	9393
Water Right Reconnaissance Investigations	0	14	36	4	9	213	56	43	16	20	34	75	520

Priority Call Response

Response to priority calls took an average of 41 days including review of the request, investigations, and technical analysis.

Definition of Threatened Water Right

Staff-proposed definition

A threatened water right is a water right that is unable to divert their authorized amount due to the diversions of junior water right holders. On September 5, 2011, the Commission approved criteria for the watermaster evaluation that included evaluation of whether senior water rights have been threatened based on the history of senior calls or water shortages within the river basin and the number of water right complaints received on an annual basis in each river basin.

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In 2004, the Commission issued an order in response to petitions in the Concho River watershed which further clarifies the language above. The language from the order is as follows:

“Threat” to the rights of senior water rights holders as used in Chapter 11, Subchapter I, of the Water Code implies a set of circumstances creating the possibility that senior water rights holders may be unable to fully exercise their rights – not confined to situations in which other people or groups convey an actual intent to harm such rights. Specifically, in time of water shortage, the rights of senior water rights holders in the basin are threatened by the situation of less available water than appropriated water rights; the disregard of prior appropriation by junior water rights holders; the storage of water; and the diversion, taking, or use of water in excess of the quantities to which other holders of water rights are lawfully entitled.

Additional Information

- The ability of a senior water right to obtain its fully authorized amount of water for diversion and impoundment is subject to the priority date and special conditions in the water right.
- If unauthorized diversions or other violations of a permit condition or complaints are received and a senior water right is not receiving its full authorization, the agency has the authority to respond to the issue. Threats to senior water rights can occur irrespective of drought.
- When a junior water right holder diverts water, such a diversion could impact the ability of a senior water right holder to store or divert their authorized amount of water. This would depend on the specific conditions in the stream at the time the junior water right is diverting. If the junior is diverting and there is not sufficient water for a senior to store or divert their authorized amount, this would impact the senior’s ability to obtain their full authorization.
- The statute requiring the watermaster evaluation process does not contain a minimum threshold to establish a watermaster program. The Commission established criteria to evaluate the need for a watermaster.
- The Hale Clause is a provision in some water rights in the Brazos River Basin which includes limitations on diversions tied to specific gages. This requirement was adopted as a settlement to provide a determination when specific water rights could divert and to protect releases of water to downstream customers from upstream reservoirs. This provision is in place to protect senior water rights. This provision was adopted in approximately 1980.
- Strategy for agency involvement

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- Water Use Data – see attached proposal to address water use reporting issues.
- Water Rights complaints received by basin are as follows:

Brazos Basin

2009 28

2010 14

2011 24

Colorado Basin

2009 18

2010 9

2011 31

*NOTE - Not all Water Rights complaints have an associated Water Right investigation. This is a result of some complainants not providing adequate information for an investigation to be conducted as well as some Water Rights complaints being conducted as other media, such as stormwater, public drinking water, water quality. etc.

- OW/OCE will explore developing a proposal to change TWC §11.031(b) to increase penalties for non-reporting. A possible recommendation is to delete the specific penalty structure for non-reporting and allow the administrative penalty in §11.0842 to take precedence as the penalty structure. Penalties for non-reporting would then be calculated in accordance with the Commission's Penalty Policy, taking into account the Palmer Drought Index level for penalty enhancements and as outlined by statute would not exceed \$5,000 per day/per violation.

Proposal to Address Water Use Reporting Issues

Texas Water Code (TWC), Section 11.031, requires that each water right holder submit an annual water use report to the TCEQ.

Under TWC, Section 11.031(b), the penalty for failing to file an annual report with the TCEQ is \$25, plus \$1 per day for each day after the due date of March 1, to a maximum of \$150. Failure to submit water use reports may result in water right cancellation proceedings under TWC, Section 11.174.

To address the issues of non-reporting of water use by water right holders, the Office of Water (OW) proposes utilizing a “find it, fix it” approach by taking the following steps:

1. OW will send a letter to water right holders who did not submit a water use report for 2011. The letter will explain the applicable statutes and penalties for non-compliance. Blank water use reports and tips for completing the reports will be enclosed with the letter.
2. OW will work with Small Business and Environmental Assistance to develop an outreach strategy that:
 - Develops additional tools (e.g. record keeping forms, plain language instructions for reporting and general requirements)
 - Develops a reminder post card to be sent in early February
 - Post card could also be used as hand outs for extension agents, agency employees etc.
 - Partners with county extension agents to help spread the word and provide assistance to irrigators (This may include workshops to educate the agents on the requirements)
 - Prioritizes the list of non-irrigation permits that have still not reported after Water Availability Division sends an additional letter specifying a deadline for submittal of the report; begins calling water right holders on this list directly (please note: in cases where the agency does not have a phone number for the water right holder, it may take significant time and resources to identify the appropriate contact.)
3. After initial outreach and “find it, fix it” efforts are complete, OCE will initiate proper enforcement action on water right holders who fail to report water use. Enforcement strategy will be as follows:
 - OW will identify non-reporters who did not respond to initial efforts by the specified timeframe
 - OCE will initiate proper enforcement action as warranted through Notices of Violation
4. OW/OCE will explore developing a proposal to change TWC §11.031(b) to increase penalties for non-reporting. A possible recommendation is to delete the specific penalty structure for non-reporting and allow the administrative penalty in §11.0842 to take precedence as the penalty structure. Penalties for non-reporting would then be calculated in accordance with the Commission’s Penalty Policy, taking into account the Palmer Drought Index level for penalty enhancements and as outlined by statute would not exceed \$5,000 per day/per violation.

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

October 1, 2012

Addressee
Address line 1
City, State ZIP

Re: 2011 Water Use Reports

Dear Water Right Holder:

Texas Water Code (TWC), Section 11.031, requires that each water right holder submit an annual water use report to the Texas Commission on Environmental Quality (TCEQ). Our records indicate that you have not submitted an annual water use report for 2011 for your water right or contract.

Enclosed are blank 2011 water use report(s) for your water right(s) and an instruction page for your reference. Please complete and submit each of these reports.

Under TWC, Section 11.031(b), the penalty for failing to file an annual report with the TCEQ is \$25, plus \$1 per day for each day after the due date of March 1, to a maximum of \$150.

Please note that state water must be diverted and used only in accordance with the terms and conditions of your water right. Violations of permit terms, such as over-use, are subject to enforcement under TWC Chapter 11, Subchapter C.

Surface water is a precious resource that we all need to protect. Please do your part to ensure the integrity of water rights in Texas is maintained.

Please submit the enclosed water use report(s) by November 30, 2012. If the report(s) are not received by that date, you may be subject to enforcement action.

If you have questions or need assistance completing the report form, please contact the Water Rights Permitting Team at (512) 239-4691.

Sincerely,

Ron Ellis, Manager
Water Rights Permitting and Availability Section

Enclosures

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ)
REPORT OF SURFACE WATER USED FOR THE YEAR ENDING DECEMBER 31, 2011**

REQUIREMENT TO SUBMIT WATER USE REPORT:

Section 11.031 of the Texas Water Code requires that you submit a water use report for your water right every year. Water right holders who fail to submit water use reports may be subject to enforcement and penalties.

INSTRUCTIONS

Complete a water use report form for each purpose of use authorized in your water right. You may copy this form if you did not receive the appropriate number of forms. Except for the Use, the forms are generic. You may access this form, change of ownership forms, and other Water Right information on-line at:

http://www.tceq.texas.gov/permitting/water_supply/water_rights/wr_applications.html

Please contact the TCEQ at (512) 239-4691 if you have questions or need assistance completing the form. E-Mail inquiries may be made to **Marian.Chervenka@tceq.texas.gov**

Report all figures in acre-feet (conversion figures and abbreviations are below) except the Maximum Diversion Rate column (indicate either CFS or GPM for this column). If you do not have exact figures for any column, estimate the monthly and yearly values. If it is not possible to provide the TCEQ with the information requested in the above format (acre-feet etc.) please provide the units of measure used. Attach a supplemental sheet if necessary to explain any figures reported or to submit any comments.

If there was no diversion based on the authorization in the specified water right, print NO DIVERSION, along with a brief reason why, across the table.

If you used groundwater instead of surface water, indicate the amount used and specify groundwater.

The columns are: **MONTHLY DIVERTED AMOUNT, MONTHLY CONSUMED AMOUNT, and MONTHLY RETURN FLOW.** A brief description of the information that should be reported in each of these columns is below.

The **MONTHLY DIVERTED AMOUNT** column is the amount of water diverted (taken) monthly from the water source (stream, river, lake or impoundment) authorized in your water right.

The **MONTHLY CONSUMED AMOUNT** column is the amount of water (out of the MONTHLY DIVERTED AMOUNT) that was actually used/consumed (not returned to a water body) each month. Some water right holders are authorized to divert a large amount of water but consume only a fraction of the diverted water.

The **MONTHLY RETURN FLOW** column is the amount of water you **may have** returned (monthly) to a stream, lake, river, etc. If applicable, please specify if a portion of the MONTHLY RETURN FLOW is from a source(s) (like groundwater) other than the specified water right.

It is acceptable for the MONTHLY DIVERTED AMOUNT and the MONTHLY CONSUMED AMOUNT to be the same. The MONTHLY RETURN FLOW may also be zero.

Water Right Types:	
1	Permit/Application
2	Claim
3	Certified Filing
6	Certificate of Adjudication
9	Water Supply Contract

Abbreviations/Conversions:
GPM - G allon(s) p er M inute
CFS - C ubic F eet per S econd
1 Acre-Foot = 325,851 Gallons
1 CFS = 448.8 Gallons per Minute