

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §§36.1 - 36.8.

Sections 36.2 - 36.8 are adopted *with changes* to the proposed text as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7463). Section 36.1 is adopted *without change* to the proposed text and will not be republished.

### **Background and Summary of the Factual Basis for the Adopted Rules**

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to changes to the TCEQ's statutory authority and continuation of the agency for 12 years. HB 2694, §5.03 added §11.053 to the Texas Water Code (TWC). That section states that the executive director may issue orders to temporarily suspend or adjust water rights during times of drought or other emergency shortage of water.

### **Section by Section Discussion**

The commission adopts §36.1, Applicability, to explain the scope of the rulemaking. Subsection (a) provides that the chapter applies to water rights except as provided in subsections (b) and (c). Subsection (b) provides that the rulemaking is not intended to apply to a watermaster area, and subsection (c) provides that it is not intended to require suspension or adjustment of an exempt right under TWC, §§11.142(b) - 11.1422. The watermaster areas are not included under the applicability of this rule because the

watermaster's authority is set out in TWC, Chapter 11. The rights in subsection (c) are exempt from permitting and therefore not covered by the rule. Domestic and livestock rights that are superior riparian rights under TWC, §11.001 and common law or TWC, §11.142(a) cannot be curtailed or suspended under this rulemaking, but may be protected (See the definition of "senior water right" and "water right" under §36.2(4) and (7)).

The commission adopts §36.2, Definitions, which defines eight terms as used in Chapter 36, with changes. The introductory provision of §36.2 was changed in response to comment to add that the following terms "are not meant to apply to any other chapter of this title or in any context other than under these rules." Paragraph (1) was proposed to define "adjustment" as a "partial curtailment of one or more water rights or an adjustment in the timing of diversions under a water right." In response to comment, this paragraph was changed to state "or a modification to the timing or rates of diversion under {a} one or more water rights." The executive director may issue an order for adjustment, which would be partial curtailment, under the statute. There will be instances when a water right does not need to be completely suspended, and adjusting the timing or the rate of the diversions has been a useful tool in water right management during low flows. For instance, the rate of diversion in water rights could be modified to rates reflective of non-peak periods.

Paragraph (2) is the definition of "affected water right holder" which was added to the rule in response to comment. Affected water right holders are any water right holder that may be affected or impacted by the executive director's order, but the term does not include the senior water right holder. The term "affected water right holders" is used in §36.5(b)(4).

Paragraph (3), renumbered from proposed paragraph (2) because of the addition of a definition of "affected water right holder," is the definition of "drought." In response to comment, the introductory language of this paragraph was changed to add that "a drought occurs when at least one of the following criteria are met." There are over 150 different definitions of drought used by academics and water management professionals. For a "drought" under this chapter, the commission proposed to use the measure of moderate drought intensity developed by the National Drought Mitigation Center; streamflows at United States Geological Survey gaging stations that are below the 33rd percentile of the period of record; or demand for surface water exceeds the available supply. The first definition was changed to add the word "the" in front of "part of the watershed" in response to comment. The second definition of "drought" in §36.2(2)(B) was changed in response to comment to add "available for the impacted watershed" at the end of the definition. In response to comment, the proposed definition in subparagraph (C) was changed to add a meteorological criteria, "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) "to "demand for surface water exceeds the available supply, as evidenced by a senior water right holder making a call." This definition relates to the effects of low precipitation on water supply. The intent is to have a "bright line" test that indicates when a shortage of precipitation has resulted in a shortage of water available for all existing water rights.

*(<http://drought.unl.edu/DroughtBasics/TypesofDrought.aspx>).*

A definition of "drought" is required by TWC, §11.053. This definition is based on scientific data but also includes times of drought that are not as extreme, but are still causing shortages that could adversely impact senior water rights.

Renumbered paragraph (4) is a definition of "emergency shortage of water." This is defined as "the inability of a senior water right holder to take surface water during emergency periods posing a hazard to public health or safety or conditions affecting hydraulic systems which impair or interfere with conveyance or delivery of water for authorized users." In response to comment, the word "their" has been changed to "its." A definition of "emergency shortage of water" is required by TWC, §11.053. The commission believes the definition of "emergency shortage of water" was intended to be different than the definition of "drought" and intends to include emergency conditions that are not necessarily the result of drought.

In renumbered paragraph (5), the definition of "senior water right" was modified in response to comment. The proposed rule included senior priority permits and certificates of adjudication, and superior domestic and livestock riparian rights. The definition was changed to take out the reference to TWC, §11.303(l) for "domestic and livestock rights and to insert in its place "§11.001(a) and common law." This paragraph is necessary to describe what water rights the executive director's order will protect and the change was needed to more accurately describe the nature of domestic and livestock rights.

Renumbered paragraph (6) defines a "Suspension or Adjustment Order, or Order," that is issued by the executive director under this chapter. This definition is necessary to provide a reference to the order for clarity.

Renumbered paragraph (7) provides that "suspension" means the complete curtailment of either the entire water right or the right to use water for a certain type of use or based on a certain priority date in the water rights. This definition is necessary to indicate what an order under this chapter may require.

In renumbered paragraph (8), the definition of "water right" was changed in response to comment. The proposed rule clarified that only permits, certificates of adjudication, and riparian domestic and livestock users are included in the term. As for "senior water

right," the definition was changed to insert "\$11.001(a) and common law" for TWC, §11.303(l). The term will also mean "water right holder" where the context requires. This definition is necessary to clarify what is included in the chapter and to more accurately state the nature of domestic and livestock rights.

The commission adopts §36.3, Executive Director Action, with one change. This section specifies the action that the executive director may take during droughts or other emergency shortages of water, and that it must be made "in accordance with the priority doctrine in the Texas Water Code" for both drought and emergency shortage of water. It also provides the scope of the impact of the order. As previously stated, the priority doctrine is still the governing principle in TWC, §11.053. Subsection (b) was changed in response to comment to take out the words "or superior" in front of "water right holder to obtain water" because the definition of "water right" includes the superior rights.

Section 36.4, Suspension or Adjustment Order, is adopted without change and provides that the executive director may act under §36.3 by issuing a Suspension or Adjustment Order. This section states the language in TWC, §11.053.

Section 36.5, Conditions for Issuance of Suspension or Adjustment Order, is adopted with change. This section provides what conditions must be met for the executive director to issue an order, and what the executive director shall consider in deciding

which water rights the order will protect, suspend, or adjust. The executive director must consider certain factors in determining whether to issue an order in times of drought and in times of emergency shortage of water. These factors include need for the water, ability to beneficially use any water that can be obtained from a suspension or adjustment, and whether a suspension or adjustment would result in any relief. In response to comment, §36.5(a)(2) was changed from proposal to add "one or more" in front of senior water rights and to add that the senior may also need to "store inflows" that are authorized under a water right. In response to comment, §36.5(a)(3) was changed to "senior water right holders who will benefit from the order can beneficially use, as defined in Texas Water Code, §11.002(4) the water they will be able to take under the order" for clarity. Subsection 36.5(a)(4) was also changed to add "or impound inflows under its water right" to the requirement of the senior water right's beneficial use. Additionally, the considerations specified in TWC, §11.053(b) are set out. Subsections (c) and (d), allowing the executive director to require information concerning water use and efforts to obtain additional or alternative supplies from a junior that is not cut off, were added in response to comments. The purpose of this additional language is to balance the fact that the junior water right is not suspended with the junior's use of water for municipal or power generation purposes. This section is required by TWC, §11.053 and provides the basis for a Suspension or Adjustment Order.

The commission adopts §36.6, Contents of a Suspension or Adjustment Order, which requires the order to contain the specific water rights subject to the Suspension or Adjustment Order, the location of the suspension or adjustment, an explanation of the reasons for the suspension or adjustment, and the duration of the Suspension or Adjustment Order. In response to comment, §36.6(3)(B) was changed to provide that only one 90-day extension could occur. Although the commission recognizes the possible need for several extensions of the Suspension or Adjustment Order during extended times of low flows, TWC, §11.053 requires that the rule provide a "maximum duration" of the executive director's order. The section also allows the executive director to modify the order based on changed conditions and the requirements of the chapter. This section is required by TWC, §11.053.

Commission staff noted that the title of §36.6 did not include the full title of the order, and therefore makes a non-substantive change to change the title to: "Contents of a Suspension or Adjustment Order."

The commission adopts §36.7, Implementation of Water Conservation Plans and Drought Contingency Plans, with changes. The changes made from proposal were not substantive. That rule describes what actions the executive director may take when considering the efforts of the affected water rights holders to develop and implement the water conservation plans and drought contingency plans established by TWC, Chapter

11, as required in §36.5(c)(4). The executive director shall consider whether the plans were approved by the TCEQ and the Texas Water Development Board, and whether they were implemented, and if the executive director does not adjust or suspend a junior water right for public welfare reasons, the executive director may require implementation of higher levels of the plans if required to maximize beneficial use, avoid waste, and minimize impacts. This section is necessary to provide how the executive director will consider this factor as required by TWC, §11.053.

The commission adopts §36.8, Notice of and Opportunity for Hearing on the Issuance of a Suspension or Adjustment Order, with changes. That rule provides procedures for notice, hearing, and appeal of an order to the commission under this chapter. This procedure follows the procedure for other emergency orders issued by the commission. The order may be issued by the executive director without notice, but there must be a hearing to affirm, modify, or set aside the order before the commission. Notice of the hearing shall be given to all water rights that were suspended or adjusted under the order. In response to comments, the commission added a maximum 45-day timeframe from the issuance of the order to the hearing to affirm, modify, or set aside, and a ten-day notice period. This section is required by TWC, §11.053.

### **Final Draft Regulatory Impact Analysis**

The commission evaluated these new rules and performed an analysis of whether these

rules require a regulatory impact analysis under Texas Government Code, §2001.0225. This rulemaking is specifically required by TWC, §11.053. The specific intent of these rules is to establish criteria, procedures, and definitions for executive director action to temporarily suspend or adjust water rights in times of drought or emergency shortage of water. This new chapter 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. These rules do not relate to impacts from any type of pollution. Even if the rules were a major environmental rule, a regulatory impact analysis is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government to implement a state and federal program, or adopt rules solely under the general powers of the agency instead of specific state law. Therefore the rulemaking does not come under the Texas Government Code, §2001.0225 and no regulatory impact analysis is required under for this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. One comment was received on the draft regulatory analysis determination.

Trinity River Authority (TRA) asserts that several statements in the regulatory analysis raise more questions than they answer. The analysis states several times that the rules protect senior water rights. Why do senior water rights need any more protection than already afforded to them? This rulemaking just adds uncertainty.

**The commission responds that TWC, §11.053 provides that the executive director order must be based on the priority doctrine. Therefore, the executive director is protecting senior water rights under this statute.**

TRA comments that statements in the Regulatory Impact Analysis concerning senior water rights not being harmed are incorrect and "sometimes incoherent." Not cutting off a municipality, even if the municipality is a junior water right holder, is a detriment to water rights in ill-defined situations.

**The commission is reasonably exercising its police powers to protect public health and welfare when it does not cut off junior municipal water users for senior calls. The fact that a junior water right is not being cut off does not change the fact that other junior water right holders are subject to the senior call. Each water right is subject to senior water rights. The senior right is taking water authorized under its water right.**

### **Takings Impact Assessment**

The commission evaluated this rulemaking and performed an analysis of whether these rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these rules is to establish criteria, procedures, and definitions for the executive director's temporary suspension or adjustment of surface water rights during times of drought and other emergency shortage of water. Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property.

Specifically, the authority granted to the executive director to suspend water rights based on the priority doctrine already exists under TWC, §5.013(a)(1) and §11.027, and this statute was meant to clarify and further define this authority. While some water rights may be suspended or adjusted under these rules, other water rights will be able to divert water that they otherwise could not have diverted without issuance of an order under these rules. Additionally, water rights are granted with express conditions that they are junior to and subject to a senior water rights ability to take their authorized water. If a senior water right is not able to use the water that it is authorized to under the law and needs that water, the junior water right holder does not have a right to that water and it is not a statutory or constitutional taking. Thus, this rulemaking does not burden nor restrict or limit the owner's right to existing property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations.

The same reasoning applies to a temporary suspension or adjustment based on emergency shortage of water because the executive director action will be based the rights of a senior or superior water right holder. The decision to suspend or adjust must be based on the priority doctrine, and several other factors will be used in making the adjustment or suspension. The agency must enact rules to define "other emergency shortage of water," specifying the conditions under which an order may be issued and terms and duration of the order, and providing for notice and an opportunity for a hearing and appeal to the commission.

While the rules provide some flexibility in responding to the protection of senior water rights, the commission does not believe that this rulemaking would give rise to a measurable impact on other water rights. The impact to water rights is caused by the drought or emergency shortage of water. The purpose of this rulemaking is to mitigate that impact, based on the priority doctrine. The commission would be able to consider preferences of use if it is "practicable," but this consideration of preferences would generally be to allow some water rights, such as municipalities, to continue to take water under their water rights as needed for human health and safety concerns such as drinking water, or similar actions.

Thus, the "drought" and "other emergency shortage of water" sections of this

rulemaking are actions that are not takings because junior water rights take water under their water rights subject to senior rights, or are taken in response to a real and substantial threat to public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose. When persons or entities cannot obtain water, particularly for domestic or municipal uses, due to some emergency circumstance, their need for water can be a significant health and safety concern and may be immediate. This rulemaking would help provide water to senior water right holders that may have an emergency need for the water.

Additionally, the commission not only has the authority to protect the public health and welfare under the police powers doctrine, it has the duty not to manage water rights in a way that is detrimental to the public health and welfare. A maxim of takings jurisprudence holds that "all property is held subject to the valid exercise of the police power." The exercise of the police power is not a compensable taking (*City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex.1984) (citing *Lombardo v. City of Dallas*, 124 Tex. 1, 73 S.W.2d 475, 478 (1934))). The legislature has determined that "the commission is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and protection of the environment." TWC, §5.012, "Water regulation is essentially a legislative function. The Conservation Amendment recognizes that

preserving and conserving natural resources are public rights and duties (TEX. CONST. art. XVI, §59(a)." *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 633 (Tex. 1996)). The court in that case concluded that the Edwards Aquifer Act, which required management of groundwater resources by the Edwards Aquifer Authority, was "necessary to safeguard the public welfare of the citizens of this state." (925 S.W.2d at 634)). The TWC requires that the TCEQ consider the public welfare when issuing water rights, TWC, §11.134(b)(3)(C). The commission has the authority and duty to act in the public interest and welfare, and this rulemaking is a reasonable exercise of its police powers.

Therefore, this rulemaking is either not covered by or is exempt from the coverage of Texas Government Code, §2007.003(b)(13).

The commission invited public comment regarding the Takings Impact Assessment during the public comment period. Two comments were received specifically addressing the Takings Impact Assessment.

TRA argues that the takings analysis in the rulemaking is incorrect. These rules are not a taking only if the rules allowed curtailment to be done according to priority. They do not. The executive director could order that water be taken from vested water rights holders and given to junior water rights holders. This is unconstitutional.

The Texas Farm Bureau (TFB) comments that the Takings Impact Assessment of this rulemaking is incorrect because it is based on the faulty presumption that the TCEQ has the authority to not curtail water rights because of public health and welfare concerns. If during curtailment a junior water right holder is allowed to continue to take water while a more senior holder is curtailed, the junior water right holder has effectively "taken" the water under TWC, §11.139. Using preference of uses also devalues agriculture and industrial rights.

**The commission disagrees that any taking is implicated by these rules because the "more senior" junior water right holder is still junior to the senior water right making the call or being protected, and may legally be cut off by the call, whether or not the municipal user is cut off. The "adjustment" provision in the statute may help balance the impact of curtailment of water rights.**

**The commission not only has the authority to protect the public health and welfare under the police powers doctrine, it has the duty not to manage water rights in a way that is detrimental to the public health and welfare. A maxim of takings jurisprudence holds that "all property is held subject to the valid exercise of the police power." The exercise of the police power is**

**not a compensable taking (*City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex.1984) (citing *Lombardo v. City of Dallas*, 124 Tex. 1, 73 S.W.2d 475, 478 (1934))). The legislature has determined that "the commission is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and protection of the environment." TWC, §5.012, "Water regulation is essentially a legislative function. The Conservation Amendment recognizes that preserving and conserving natural resources are public rights and duties (TEX. CONST. art. XVI, §59(a)." *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 633 (Tex. 1996)). The court in that case concluded that the Edwards Aquifer Act, which required management of groundwater resources by the Edwards Aquifer Authority, was "necessary to safeguard the public welfare of the citizens of this state." (925 S.W.2d at 634)). The TWC requires that the TCEQ consider the public welfare when issuing water rights, TWC, §11.134(b)(3)(C). The commission has the authority and duty to act in the public interest and welfare, and this rulemaking is a reasonable exercise of that authority.**

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

The commission reviewed the rulemaking and found that the rulemaking is subject to

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

CMP goals applicable to the rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the rules include those contained in 31 TAC §501.33.

The rules implement TWC, §11.053, which provides that the executive director may temporarily suspend or adjust water rights during a drought or "other emergency shortage of water." Any impact to coastal natural resources is caused by the drought or other emergency shortage of water. This rulemaking should not result in less water flowing to coastal areas than would occur absent this rule under full exercise of all water rights. Ensuring that senior water rights are able to divert under their water rights allows for economic development by allowing the senior water rights to use the water to

accomplish their municipal, industrial, agricultural, or other beneficial uses. The curtailment or suspension of water rights based on "other emergency shortage of water" sections of this rulemaking are actions that are taken in response to a real and substantial threat to public health and safety, and are designed to significantly advance the public health and safety purpose, which allows for continuing multiple human uses of the coastal zone. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the rules are consistent with these CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received.

### **Public Comment**

The commission held a public hearing on December 1, 2011. The comment period closed on December 5, 2011. The commission received comments from 28 individuals, groups, or entities. Some commenters supported the rulemaking. The majority of comments were not favorable to the rulemaking based on concerns about impairing the priority doctrine, the broad scope of definitions of "drought" and "emergency shortage of water," the applicability of TWC, §11.139 (emergency authorizations), and notice and hearing provisions. Many modifications to the rules were suggested. Comments were received from: two individuals; Gwen Webb, Attorney; Webb & Webb, Attorneys at Law (Webb);

Lloyd Gosselink, Rochelle & Townsend, PC (LG); City of Waco (Waco); TRA; Brazos River Authority (BRA); Lower Colorado River Authority (LCRA); Lower Neches Valley Authority (LNVA); Dallas Water Utilities (DWU); Former President of Devers Canal Rice Growers Association; FPL Farming, LTD; FPL Real Estate, LTD; FVL, LTD; TFB; Texas Irrigation Council (TIC); Commissioner Todd Staples, Texas Department of Agriculture (TDA); TDA; Texas Parks and Wildlife (TPWD); Texas Oil and Gas Association (TxOGA); Titanium Environmental Services (TES); Association of Electric Companies of Texas, Inc. (AECT); American Electric Power (AEP); Texas Association of Business (TAB); TCEQ Office of Public Interest Counsel (OPIC); National Wildlife Federation (NWF); Sierra Club (SC); West Central Texas Municipal Water District (WCT); Texas Industry Project (TIP); Texas Chemical Council (TCC); and Calpine Corporation; and Public Citizen, Texas Office (Public Citizen).

## **Response to Comments**

### *GENERAL COMMENTS*

#### *Prior Appropriation/Takings*

TRA states that if enforcement of the prior appropriation doctrine is no longer the rule, this should also affect how water availability modeling is done.

**The commission respectfully disagrees. The priority doctrine remains the basis of the water availability determinations for new water rights. TWC,**

**§11.053 provides that the executive director act in accordance with the prior appropriation doctrine, which is consistent with water availability modeling. The reliability of a water right once issued is subject to many variables. Allowing a junior municipal water right holder to continue to take water for municipal use under its water right is based on public health and welfare concerns. No changes were made to the rules in response to this comment.**

TRA asks what happens if the municipal junior user of water is downstream from the senior water right? Would the rules prohibit the upstream senior from diverting water?

**The question depends on whether the upstream senior water right makes a senior call or is being protected. If the upstream senior water right is making a call or being protected, the commission does not intend that the senior have to pass any water to a junior water right. If another senior water right is making a call or being protected, and the upstream right is junior to that senior, the upstream right would either be suspended (if it is not a municipal or power generation water right) or be adjusted to allow it to take some water. No changes were made to the rules in response to this comment.**

TRA asks what if the senior water right the executive director wishes to curtail is a municipal water right?

**Municipal water rights are senior to some water rights and junior to others. The executive director may not suspend municipal water rights based on public health and welfare concerns. No changes were made to the rules in response to this comment.**

TRA asks how water right holders will determine reliability of their water right if the water rights are granted on a priority basis, but not enforced according to priority? Projections of water available are based on priority-date enforcement.

**The reliability of the water should not be impacted by these rules unless there is an extreme drought such as the one that occurred in 2011. In such extreme cases, water rights may not be reliable unless the water right includes the right to impound water. No changes were made to the rules in response to this comment.**

TRA asserts that these rules actually hurt senior water right holders because it is their water which will be taken to help junior rights holders. Senior water rights are already protected and don't need more protection. An example is an upstream city, that has

done all it could to plan, reaching a critical shortage of water during a drought. Its water rights are junior to a downstream industrial user. Under these rules, the city could ask for water from the industrial user without compensation.

**The commission respectfully disagrees that the city could call on the industrial user in the proposed scenario. A water right holder cannot pick and choose which water right to "call on." Under these rules, a junior municipal water right holder whose municipal water use is not cut off under a senior call or executive director order may not call on junior water rights for municipal or any other purpose. Additionally, a senior water right holder cannot call on a single junior water right holder when other junior water rights are also subject to the call. No changes were made to the rules in response to this comment.**

DWU comments that the rules do not appear to accurately represent the intent of the legislature in passing TWC, §11.053. The intent was not to change the prior appropriation doctrine that now exists or to develop a daily water management plan for the commission, but to reaffirm or clarify the commission's authority to suspend and adjust water rights as a method of last resort as needed in times of drought or emergencies.

TRA comments that none of the statutory authority cited by these proposed rules allows the commission to abrogate the first in time, first in right principles of TWC, §11.027. These are vested rights that the commission cannot affect except in adjudication or cancellation.

FPL Real Estate, LTD comments that "the TCEQ's attempt to overturn long established Texas law and possibly United States law is appalling." The commission could curtail certain junior and senior water right holders in order to supply other junior water right holders without compensation.

FPL Farming, LTD comments that it opposes the short-sighted changes to the TWC proposed by the commission, and that the Legislature did not intend for the agency to completely realign years of "tried and true" water law particularly without notice to stakeholders.

BRA and TIC comment that unintended consequences and potential takings are a real threat under the rules if there is not strict adherence to the seniority doctrine.

LCRA comments that the proposed rules are silent on how the commission will ensure that senior water rights are not impaired. If this is done outside of the priority doctrine, the commission should require compensation to adversely affected water right holders.

TFB comments that they oppose any action that would unfairly transfer water rights away from agricultural use. Actions taken based on threats to public health and welfare should provide compensation, as set out in TWC, §11.139.

**The commission recognizes that TWC, §11.053 requires the executive director to act "in accordance with the priority doctrine." A Suspension or Adjustment Order cannot be issued unless a senior water right cannot receive water that it needs and is authorized to take. However, TWC, §11.053 contains several factors that the executive director can consider when deciding whether to issue an order. The executive director's considerations of preference of use or drought and conservation plans would allow some water rights, such as municipalities and power generators, to continue to take water under their water rights as needed for human health and safety concerns. The amount, timing and rate of diversions in water rights may also be "adjusted" in order to avoid total suspension of water rights.**

**Allowing municipal and power generation water rights to take water under a senior call is not a taking of, or transfer of water from, a non-municipal or power junior water right that was suspended under the call. The non-**

**municipal or non-power junior water right was legally suspended pursuant to a senior call and could not take water from the river. Under these rules, the executive director has the flexibility to adjust water rights rather than totally suspend or not suspend junior water rights when there are public health and welfare concerns.**

**Nothing in these rules precludes a water right holder from pursuing any remedy against another water right holder if the water right holder, including TWC, §11.139, deems it appropriate. No changes were made to the rules in response to these comments.**

The TIC comments that the purpose of TWC, §11.053 and the rules is to better define the process by which existing law of appropriation will be enforced during droughts and water shortage periods.

**The commission agrees that TWC, §11.053 was meant to clarify the executive director's authority to respond to water shortages under the prior appropriation doctrine. However, the legislature also added other factors for the executive director to consider when deciding whether to issue these orders. No changes were made to the rules in response to this comment.**

*TWC, §11.139*

TRA comments that TWC, §11.148 provides for emergency suspension of environmental conditions and set asides when emergency conditions exist. These rules must acknowledge that commission action under TWC, §11.039 will only occur after action occurs pursuant to TWC, §11.148.

**The commission assumes that TRA means TWC, §11.053 rather than TWC, §11.039. The commission respectfully disagrees because TWC, §11.053 does not mention TWC, §11.148, and concerns a different subject matter, suspending or adjusting water rights during a drought or other emergency shortage of water based on the prior appropriation doctrine and consideration of other factors. No changes were made to the rules in response to this comment.**

TIC argues that this rulemaking should more closely track TWC, §11.139, concerning emergency authorizations. This statute provided a process in which water right holders would be compensated for water needed in emergency authorizations. Before "adjusting" a water right, the executive director should make a finding that the water right holder in need has pursued acquisition of water by lease or purchase and is unable to do so, does not have an available groundwater supply, and other conditions, and compensate water rights adversely affected by an "adjustment."

TFB urges the commission to use TWC, §11.139 to allocate water when there are public health and safety concerns. The fact that it has not done so in 2011 has caused confusion. Thus, the commission would not allow municipal and power water rights to take water without those entities filing a request under TWC, §11.139.

Webb argues that there should be a requirement that the executive director has tried other means of lawfully administering water rights under drought or emergency conditions before resorting to the issuance of an order. TWC, §11.139 is preferable to an order under these rules.

**The commission respectfully disagrees that it is necessary to use TWC, §11.139 for TWC, §11.053 suspensions and adjustments. There is no reference to TWC, §11.139 in TWC, §11.053. TWC, §11.139 allows entities or persons who do not have adequate water supplies during emergencies involving imminent threats to health and safety to obtain transfers of water from one water right to another. In addition, these two statutes apply to different conditions and TWC, §11.139 does not mention the priority doctrine. No changes were made to the rules in response to these comments.**

**Nothing in these rules precludes a water right holder from pursuing any remedy against another water right holder, including TWC, §11.139, if the water right holder deems it appropriate. No changes were made to the rules in response to these comments.**

TDA comments that the beneficiary of an executive director order should meet the findings of TWC, §11.139, in that they should show that conditions present an imminent threat to the public and override the necessity to comply with established procedures, and that there are no feasible, practical alternatives.

**The commission responds that TWC, §11.139 is a separate provision than TWC, §11.053 and addresses different conditions. TWC, §11.053 regulates senior calls during drought and emergency shortage of water. No compensation was included in this statute. Each water right is subject to senior water rights. TWC, §11.139 does not mention the prior appropriation doctrine, but contains a process for emergency relief from emergency situations, including an order for a transfer of all or part of a water right from another water right holder if there is an emergency, and compensation for the transfer. No changes were made to the rules in response to this comment.**

TDA and LNVA comment that the commission should consider the harm created when curtailment occurs. The rules should contain compensation for curtailments and reference TWC, §11.139.

TIC argues that if under the priority doctrine junior water rights have been curtailed and there is still no water for the senior that needs the water, a water supply may be available through other means such as TWC, §11.139.

LCRA comments that the commission should clarify that the appropriate provision for granting relief to retail or wholesale suppliers is TWC, §11.139 and not TWC, §11.053, if the effect of the relief requested would be to effectively cause the transfer of right from a senior non-municipal or non-domestic user.

**The commission agrees that TWC, §11.139 is another option for a water right holder that needs water under emergency conditions, particularly if the water right holder is very junior in priority. However, TWC, §11.053 is meant to apply under different conditions. Because TWC, §11.053 is based on the priority doctrine, and because water rights are issued subject to senior water rights, there is no "taking" to compensate.**

**The executive director may decide not to suspend junior municipal and**

**power water rights when issuing an order to protect senior water rights based on public health and welfare concerns. TWC, §11.053 allows the executive director to consider other factors in making his determination. The commission believes that this action is part of its police powers to protect public health and welfare, and is not subject to a takings claim. Moreover, if the executive director decides to adjust junior municipals and power generators, any impact can be mitigated. No changes were made to the rules in response to these comments.**

LCRA comments that TWC, §11.053 should only be exercised in response to a specific concern raised by water rights holders, consistent with TWC, §11.139 and §11.148. The proposed rules appear to contemplate this authority as being initiated solely from within the commission, not from third parties.

**TWC, §11.053 does not require an actual senior call. However the commission anticipates that there will be a senior call because outside of watermaster areas, the executive director cannot monitor the day-to-day needs of water rights. No changes were made to the rules in response to this comment.**

TFB comments that the intent of TWC, §11.053(b)(5) is to ensure that preference of use

is used when temporarily reallocating water for emergency authorizations as provided in TWC, §11.139. When the commission says in the "discussion paper" that the rules will not "significantly affect current practices with regards to water rights," this is true because the executive director is currently misinterpreting the law by not following 30 TAC §297.17 (TWC, §11.1139).

TRA comments that the commission needs to "harmonize" TWC, §11.139 and §11.053. The new statute cannot be viewed in a vacuum and TWC, §11.139 was already in the law. These rules should only be used in emergency situations and as a last resort after negotiations have failed and "less disruptive" statutory provisions such as TWC, §11.039 and §11.139 have failed to achieve a result that safeguards health and safety.

**TWC, §11.053 is a separate provision from TWC, §11.139 and does not refer to TWC, §11.139. The legislature is presumed to be aware of TWC, §11.139 and intended TWC, §11.053 to apply to different conditions than TWC, §11.139. TWC, §11.039 is not enforced by the commission, and TWC, §11.148 only concerns relief from environmental flow conditions.**

**TWC, §11.139 allows "temporary transfers" of a water right and recognizes compensation for that transfer. TWC, §11.139 does not mention or rely on the priority doctrine. It addresses situations where "all or part" of permits,**

**certified filings, or certificates of adjudication can be transferred to another water right based on imminent threat to health and safety concerns, rather than senior needs under the priority doctrine. No changes were made to the rules in response to this comment.**

TPWD disagrees with the rule fiscal note finding that there will be no fiscal implications to units of state and local government as a result of administration or enforcement of these rules. TPWD owns water rights and may be suspended under these rules on the basis of preference of use.

**The executive director may decide not to suspend municipal and power generation rights based on protection of the public health and welfare under the police powers doctrine. No changes were made to the rules in response to this comment.**

*Local Drought Management/Stakeholders*

Webb comments that the executive director did not provide opportunity for public participation when it enforced senior calls in 2011. This should not be the rule. These orders should be issued after stakeholder involvement. Due to the fiscal impact of these orders, the executive director's action should be subject to the most open communication.

**The commission respectfully disagrees that the executive director's order should be issued only after stakeholder involvement. Instead, due to the need for flexibility to act quickly, there is an opportunity for notice and a hearing before the commission to appeal the executive director's order. The statute does not require that notice and hearing occur before the issuance of the executive director's order. A requirement to provide notice and opportunity for a hearing prior to issuance could render any action moot due to the passage of time before the hearing is held. Any hearing should be before the commission, after the executive director's order is issued. Also, when a senior call is made, juniors can be cut off; everyone takes his water right subject to senior water rights. No changes have been made to the rules in response to this comment.**

TFB comments that possibly a stakeholder group of water right holders should be formed to help draft these rules.

Gwen Webb comments that water right holders should be able to address drought concerns at a local or regional level and specific opportunities to do that should be included in these rules. Consensus building at the local level is superior to a fiat from the state.

DWU comments that there must be collaboration among water right holders and water suppliers at the local level before the executive director issues an order. TCEQ should facilitate discussion to provide the opportunity for affected persons to address drought conditions locally. At the very least, the commission should hold a stakeholders' meeting in the affected area to develop consensus regarding possible responses or solutions to the drought or water shortage.

**The commission supports any local or regional consensus or planning related to drought. If affected water right holders can come to consensus or agreement locally on ways to allocate water rights during water shortages on a short term or long term basis, this could be an effective way to resolve these issues. However, new TWC, §11.053 contains specific requirements for the executive director to adjust or suspend water rights.**

**Senior calls must be enforced by the commission rather than by the individual senior water right. A senior water right does not have the resources to determine the junior water rights that could be suspended or adjusted, and cannot pick and choose which water right to "call on." The executive director must be able to act as quickly as possible when these situations arise. No changes have been made to the rules in response to**

**these comments.**

*State and Regional Plans*

TIC comments that the executive director should consider state and regional water plans to determine if the beneficiary of water has adhered to the management strategies in the plan. The executive director should determine if the beneficiary could have adequately planned to avoid the problem.

TRA comments that an executive director order should not be available to entities that have not planned for their needs as identified in the State Water Plan, and the order should not last after adequate time has passed to develop additional supplies or conservation measures.

**The commission respectfully disagrees because neither the prior appropriation doctrine nor TWC, §11.053 require or allow such a determination. The commission does not believe that the executive director has the authority to require senior water rights that call for or need water to show that they have adequately planned for their needs. No changes have been made to the rules in response to these comments.**

*Electric Generation*

AECT comments that the priority of electric generating has become more critical to public health, safety, and welfare of the citizens of Texas as Texan's daily lives depend more and more on a reliable supply of electricity.

**The commission agrees with the comment. No changes have been made in response to this comment.**

An individual and Public Citizen request that the rules include in the preamble some questions and discussion regarding the valuation of different power plants which may be subject to water curtailment. Some plants are more efficient users of water than others and can generate more electricity per acre foot withdrawn or consumed. The commission should curtail power plants based on the ratio of energy produced to water consumed so that the Electric Reliability Council of Texas may continue to dispatch plants based on their cost effectiveness.

**The commission declines to make these determinations at this time. This study of energy generation is beyond the TCEQ's general authority in the TWC and specific authority in TWC, §11.053. No changes were made in response to this comment.**

*Continued Oversight*

AECT comments that notwithstanding its support for proposed §36.5, the executive director should continuously monitor the drought conditions and take actions that are designed to prevent or delay the onset of drought or emergency shortage of water. The executive director actions should include requesting input from water users regarding their unique situations and using the existing State Drought Prepared Plan to mitigate the impacts of a foreseeable drought.

BRA comments that timely enforcement is the key to drought management and that waiting until there are effectively no flows to allocate is waiting too long to enforce priority of water rights.

**The commission acknowledges this comment and agrees that preventative action is the best management for drought consequences. TCEQ staff has had weekly meetings since March, 2011, concerning the drought conditions and response with the Texas Water Development Board and the Governor's Office, Department of Emergency Management. The executive director has responded to the drought conditions by suspending water rights based on priority calls. The executive director's response to drought is discussed on the following commission Web page:**

***<http://www.tceq.texas.gov/response/drought>***

**Also discussed in the above Web site, the commission has been proactive in reaching out to water users and communities to inform them and provide assistance in meeting their water needs.**

**TWC, §11.053 allows the executive director to respond before there is a senior call, which will allow the executive director to act more proactively and quickly. No changes were made to the rules in response to these comments.**

*Miscellaneous*

TIC comments that more tools, such as proper measuring devices at proper locations on a stream, are necessary in various watersheds to provide sufficient data in dealing with periods of drought or water shortages.

**The commission agrees that more tools would be helpful for managing the drought. The commission will work with all interested parties to develop and refine all available appropriate tools to ensure the maximum efficient management of drought response. The commission is currently evaluating the need for watermasters throughout the state as required by HB 2694, §5.05. No changes were made to the rules in response to this comment.**

Gwen Webb comments that in the drought of 2011, there was too little reliance on accounting plans.

**The commission agrees that accounting plans can be a useful tool for protecting senior water rights. However, many water rights do not have accounting plans at this time. No changes were made to the rules in response to this comment.**

DWU is concerned that the Proposal Executive Summary for rulemaking states that "only water rights will be affected." It argues that there will be impacts from these rules to public regional water suppliers and their customers.

**The commission responds that this impact already exists under the prior appropriation doctrine. Additionally, TWC, §11.053 does not give the TCEQ the authority to suspend or adjust non-water right holders. No changes were made to the rules in response to this comment.**

An individual (former president of the Devers Canal Rice Growers Association) is concerned that these rules will be adopted on April 11, 2012, approximately 30 days after the optimum planting date for rice in the coastal area, making planning for the 2012 crop year an exercise of chance.

**The commission respectfully disagrees that this rulemaking will impact rice growing in the coastal areas because it is the drought conditions which drive the inability to obtain water from the river. Also, TWC, §11.053 allows the executive director to "adjust" water rights without completely suspending those rights, which may mitigate impacts. No changes were made to the rules in response to this comment.**

TRA comments that the commission should appoint a watermaster to address issues of water shortages as related to water rights. The watermaster has powers at law and in equity.

**This statute does not allow the commission to appoint a watermaster rather than implement TWC, §11.053. However, the commission, pursuant to HB 2694, §5.05, is conducting a review of the river basins to determine if there is a need for a watermaster. No changes were made to the rules in response to this comment.**

*COMMENTS ON SPECIFIC RULES*

*Section 36.1*

LCRA comments that domestic and livestock users should be subject to executive

director orders issued under this statute. Some but not all "exempt users" are exempt from coverage of the rules. Nothing in TWC, §11.142 and §11.1422 conclusively suggests that domestic and livestock exemptions are any more essential to the public welfare during a drought.

TAB comments that the fact that domestic and livestock users are exempt from drought contingency and conservation plan requirements is a concern in drought management.

**All exempt rights except domestic and livestock impoundments are exempted from Chapter 36 because they cannot be suspended or make a senior call. Domestic and livestock rights are "senior water rights," as defined in §36.2(5), and as the superior right in the river, cannot be suspended or adjusted, but may be the beneficiary of an executive director order.**

**Common law has consistently determined that these domestic and livestock riparian rights are superior to appropriative rights (permits or certificates of adjudication) in the stream (*Cummins v. Travis County Water Control and Improvement District No. 17*, 175 S.W.3d 34, 44 - 45 (Tex. App. - Austin 2005) *rev. denied*). TWC, §11.001(a) provides that nothing in TWC, Chapter 11 affects "private" vested rights unless they were changed by TWC, §11.303.**

**TWC, §11.303 required that irrigation rights had to be adjudicated, but that domestic and livestock rights did not. Therefore, the executive director has continued to consider these rights to be superior rights in the stream, and issues water rights subject to those superior rights. "Domestic" and "livestock" uses are defined in 30 TAC §297.1.**

**However, the reference to TWC, §11.303(l) in the definition of "senior water right" and "water right," in §36.2 is not as clear as it could be since the statutory provision is an exemption from adjudication. Therefore the commission has changed the definitions in those two paragraphs to delete this reference and insert "§11.001(a) and common law" instead of "§11.303(l)." This is also discussed below under the responses to comments for those sections.**

TES comments that these rules should only apply to surface water.

**The commission agrees that these rules implementing TWC, §11.053, only apply to surface water. The commission does not regulate the appropriation of groundwater. However, information that may be requested concerning alternate water supplies and planning in §36.5(b) and (c) may relate to groundwater sources.**

*Section 36.2*

LG comments that the term "affected water right holders" in this section should be defined.

**The commission agrees and to be as inclusive as possible, adds the following definition as adopted §36.2(2): Affected water right holder - those water right holders that are affected by the executive director's suspension or adjustment order. However, this term is not meant to cover the senior water right making the call or being protected by the executive director's order.**

Webb comments that it is concerned about the lack of any kind of technical standards regarding the determinations of "drought" or "emergency shortage of water." There is no statement of how the data will be used to determine a drought or shortage, or how the executive director will justify an order.

**The commission responds that the executive director must have some flexibility in making the decision of whether there is a drought, emergency shortage of water, or whether to issue an order. The executive director will work with the beneficiary of the order and those water rights that are**

**suspended or adjusted, and look at any data it may have when considering an executive director order. No changes were made to the rule in response to this comment.**

OPIC recommends renumbering this section and also §36.6 to conform to the sequence in the remainder of Chapter 36.

**The commission responds that the numbering of the rules was changed prior to publication of the proposal. No changes were made to the rules in response to this comment.**

*§36.2(1)*

AECT comments that the definition of "adjustment" in §36.2(1) should be amended to change "the partial curtailment of one or more water rights, or the timing of diversions under a water right" to "the partial curtailment of one or more water rights, or a change in the timing or rates of diversion under one or more water rights."

NWF requests that this text in §36.2(1) be changed to "the partial curtailment of one or more water rights, or a limitation on the timing of diversions under one or more water rights."

SC requests that the definition be changed to "the partial curtailment of one or more water rights, or a "change to" or "modification to" "the timing of diversions under a water right."

TPWD requests that this definition be changed to "the partial curtailment of one or more water rights or the modification of the timing of diversions under a water right."

**The commission agrees that these changes to the definition of "adjustment" are clearer. The commission also determines that the term should include modifying diversion rates as well and adopts the following: "the partial curtailment of one or more water rights, or a modification to the timing or rates of diversion under one or more water rights." The commission also adds "rates of diversion" because a change in a rate of diversion could be a helpful tool in water management.**

*§36.2(3)*

AECT comments that the proposed definition of "drought" is appropriate because it would not require or allow the executive director to consider whether a water conservation or drought contingency plan has been triggered when determining whether a drought is occurring.

**The commission agrees that a decision on whether a drought is occurring is not related to the affected water rights' drought or conservation plans. No changes have been made to the rule in response to this comment.**

BRA, NWF, DWU, TPWD, and SC comment that the definition of "drought" is unclear concerning whether one or all of the criteria have to be met.

AECT comments that the introductory provision in the definition of "drought" in proposed §36.2(2) should be amended to state that "A drought occurs when at least one of the following criteria are met."

**The commission acknowledges that several commenters found the introductory language in proposed §36.2(2) to be confusing, and makes this change. The commission intends that satisfaction of any one of the criteria would constitute a "drought" for the purposes of this rule. The introductory provision in the definition of "drought" in adopted §36.2(3), states that "{a} drought occurs when at least one of the following criteria are met."**

TRA comments that the definition of "drought," standing alone, is not objectionable, but it is contrary to the express purpose of the statute and will result in invoking action in situations that are not an emergency. The commission needs to state that the rule is only

going to be applied in emergencies, and provide more information about what those will be.

**The commission responds that the intent of the rule is to apply in drought situations which include demand exceeding supply, and other emergency conditions as specified in "emergency shortage of water." Drought, causing shortage of water supply, is an emergency for many water users. No changes were made to the rule in response to this comment.**

*§36.2(3)(A)*

TDA comments that the most commonly used and accepted determination for drought and its severity is the United States Drought Monitor. It uses multiple drought indices such and soil and crop moisture and available water supply to measure drought severity.

**The commission has used the United States Drought Monitor for one definition of drought. No changes were made to the rule in response to this comment.**

NWF comments that drought definition of "moderate" drought conditions does not appear to justify the authority provided by TWC, §11.053 because the section refers to a period of drought or "other emergency shortage of water." This indicates that "drought"

is also supposed to be an emergency shortage of water.

TRA comments that staff's statement in the proposal preamble that the definition of "drought" includes times of drought that are not as extreme, but are still causing shortages that could adversely impact senior water rights is clearly not the intent of TWC, §11.053, which requires emergency situations, as shown by the "drought" or "other emergency shortage of water" language in the statute.

**The commission respectfully disagrees with the comments because it intends for the term "drought" to be broadly defined. A drought will always constitute an "emergency shortage of water" to someone, regardless of the level. The executive director must be able to suspend or adjust water rights any time a drought exists that is defined as at least moderate under the National Drought Mitigation Center (NDMC), or when the flows are below the threshold, or when the rainfall is low and a senior water right holder makes a call and needs the water it is authorized to take. Considering the broad scope of the statute, any other interpretation of the statute could leave the commission or executive director without authority to enforce senior calls absent very severe drought conditions.**

**The commission also respectfully disagrees that this statement does not**

**reflect legislative intent. As many commenters have pointed out, there is an existing statute, TWC, §11.139, that applies to emergency water needs. The commission believes that the intent of TWC, §11.053 was to apply specifically to times of shortages of water. A moderate drought is still a drought, and the statutory language that states that the executive director can issue an order in time of "drought or other emergency shortage of water" does not require that the drought be severe, extreme, or exceptional. No changes were made to the rule in response to these comments.**

NWF comments that the commission should not use the term "drought" as an operative term in the definition of "drought." Moderate drought is the least intense drought, and is recognized as being short term. It is highly unlikely that this would be considered an emergency shortage of water. Short term moderate droughts are likely to be common occurrences and this authority should not be triggered on a routine basis. The executive director should not have this broad authority.

**The commission responds that there are numerous definitions of drought in the literature. Since different levels of drought are already defined by the NDMC, the commission is reasonable in using one of these definitions to define the term "drought" for the purposes of these rules. A moderate drought is a drought, which could cause an emergency shortage of water for**

**a water right holder. Furthermore, if the executive director must suspend or adjust water rights outside of a watermaster area under this rule, and still has the responsibility to enforce senior calls and the priority doctrine, it must define these terms broadly. No changes were made to the rule in response to this comment.**

DWU comments that the definition of "drought" in proposed §36.2(2)(A) is too broad. The "moderate drought" as determined by the NDMC occurs statewide approximately 24% of the time, and in the Upper Trinity River Basin, from 2005 to 2011 approximately 51% of the time. Also, the rule does not state the length of time the NDMC classification must be in place.

TPWD, TES, and TxOGA comment that moderate droughts are not unusual, and the drought definition should be a drought severe enough to warrant the triggering of emergency action. It suggests a "severe" drought for a period of at least one month.

SC comments that "extreme" and "exceptional" should be the threshold for a drought for these rules. "Moderate" drought allows too much latitude for the agency to adjust or curtail water rights when such action is not necessary during a short dry period.

WCT comments that "moderate" drought is a low criterion and could trigger the

opportunity for an order when the need is not there.

Webb comments that the rule was meant to be extraordinary response to extraordinary drought and should be a "severe drought" for at least 30 days.

**The commission respectfully disagrees that the definition of "drought" is too broad. The commission intends for the executive director to be able to suspend or adjust water rights any time a drought is at least moderate under the NDMC, or when the flows are below the threshold, or when rainfall is low and a senior water right holder makes a call and needs the water it is authorized to take. Considering the broad scope of the statute, any other interpretation of the statute could leave the commission or executive director without authority to enforce senior calls absent severe drought conditions. No changes were made to the rule in response to these comments.**

TFB comments that "drought" should be defined solely as "when drought conditions in the watershed or part of the watershed are classified as at least moderate by the National Drought Mitigation Center." The other two definitions of "drought," are not reliable indicators of drought, and should not be indicators of drought outside of these rules.

**There are numerous definitions of drought in the literature, and there is no single definition of drought that all interested persons will approve or that would be applicable in all parts of the state. Conditions vary across the state and this rule is intended to be flexible to allow the executive director to consider different factors under these rules. The commission also intends that the definition of "drought" be broad and cover conditions when water right holders may need to call on junior water rights. No changes were made to the rule in response to this comment.**

WCT comments that "part of the watershed subject to the executive director's" order could mean "any part of the entire watershed that happens to have another separate part of the same watershed that is subject to" an order. It suggests that changing the phrase to "drought conditions in the watershed or *the* part of the watershed subject to" the order.

**The commission agrees and adopts the change.**

*§36.2(3)(B)*

DWU comments that the rule does not state the length of time the streamflow must be below the 33rd percentile.

**The commission intends that the rule be broad enough to account for varying conditions across the state and allow the executive director some flexibility in implementing the rules, including deciding whether a drought exists. Defining this term too narrowly could result in the executive director's inability to enforce a senior call and negate the intent of the legislation. No changes were made to the rule in response to this comment.**

WCT comments that the United States Geological Survey Web page uses a table that lists the 25th and 75th percentile flow based on the period of record. Using the 25th percentile may be easier for water right holders to understand and monitor, while triggering roughly the same criteria as the 33rd percentile.

**The commission respectfully disagrees. Streamflow conditions vary across the state. There are locations in the state where the threshold of the 25th percentile, or lower, would not be practical. The streamflow level is one factor the executive director can consider in deciding whether to issue an order under this rule. No changes were made to the rule in response to this comment.**

SC comments that the 33rd percentile definition of "drought" also gives the agency too

much latitude. This percentile is not necessarily rare and the threshold should be set at a far less common occurrence, such as 10th to 20th percentile. "The rules should clarify what is meant to "gaging stations in the drainage area"- are these all gaging stations, or a majority percentage of gaging stations? Is a "drainage area" a watershed?

LNVA commented that the 33rd percentile definition will occur approximately 1/3 of the time or an average of four months of every year. The definition also fails to consider seasonal variations in streamflow.

TPWD and TxOGA comment that the 33rd percentile flow for the period of record is too high, and could be affected by conditions other than drought. Also, streamflows are measured at an instantaneous, daily, or monthly rate - the commission should clarify which apply. It suggests that the rule require a 10th percentile streamflow.

Webb comments that 33rd percentile of the period of record is too vague without a definition of the period of record. Is this the Water Availability Model, gage, or some other period of record? How did the TCEQ determine that it should be 33rd percentile? Also, 33rd percentile is not extraordinary.

BRA and NWF are concerned about the 33rd percentile definition for a drought in §36.2(2)(B) because it is not specific. The definition is "streamflows at United States

Geological Survey gaging stations in the drainage area are below the 33rd percentile of the period of record." "Gaging stations in the drainage area" is unclear. BRA comments that the 33rd percentile average daily flow for the year is not the same as the 33rd percentile daily flow for a month or a season. Must all gaging stations be under 33rd percentile or just one of them?

**The commission respectfully disagrees that the 33rd percentile threshold gives the agency too much latitude. Streamflow conditions vary across the state. There are locations in the state where a threshold of the 25th percentile, or lower values, would not be practical. Furthermore, if the executive director can only suspend or adjust water rights under this TWC, §11.053, and has the responsibility to enforce senior calls outside of watermaster areas, it must define these terms broadly. However, because the rule language could be clearer, the commission has added "available for the impacted watershed" to "period of record" in response to comments. The requirement that streamflows be below the 33rd percentile would apply regardless of the season, therefore, seasonal variations are recognized by the 33rd percentile standard. No changes were made to the rules based on this comment.**

DWU states that the 33rd percentile streamflow for the period of record needs to be

defined further because if it is calculated using the entire period of record, or the period of record for the 7Q2 values, the flows are different.

LCRA comments that the definition of drought in proposed §36.2(2)(B) should clarify that the relevant "period of record" will be that period of record available for the watershed of concern.

**The commission agrees and has changed proposed §36.2(2)(B), adopted as §36.2(3)(B), as follows: "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".**

LCRA and NWF comment that the definition of drought in proposed §36.2(2)(B) should clarify that the relevant "drainage area" could be an entire watershed or part of a watershed, depending on where the impacted water rights are located. NWF recommends the term "watershed."

**A "drainage area" could be an entire watershed, part of a watershed, or more than one watershed. The commission does not intend to unduly restrict the executive director in making this determination. No changes were made to the rule in response to these comments.**

*§36.2(3)(C)*

BRA also suggests that the definition of drought in proposed §36.2(2)(C) be amended to say "demand for surface water exceeds the available supply as determined by the executive director."

**The executive director may not have all the information necessary to make this determination, and may have to rely on water rights to provide this information. The executive director will make the decision, however, on when a "drought" exists in order to issue the order. The executive director's issuance of the order is subject to appeal to the commission. The commission declines to make the change.**

Gwen Webb comments that the definition of "drought" that includes "demand exceeds supply" should include the requirement that a senior water right holder cannot obtain the water they are permitted to use, based on the region's knowledge or the senior water right holder.

**The commission respectfully disagrees that this change is needed in the definition of drought because under §36.5(a)(2) the executive director may not issue an order of suspension or adjustment, unless a senior water right**

**is unable to obtain all the water that it is authorized to take and it needs. No changes were made to the rule in response to this comment.**

NWF comments that the third criterion for drought, "demand exceeds supply," is too vague. Demand should be measured taking into account reasonable implementation of conservation and drought contingency measures.

NWF, LNVA, TES, and TxOGA comment that the criterion is too broad because it will occur too often and it could cover non-drought situations such as equipment failure. "Other emergency shortage" is designed to address such language.

TPWD comments that "demand" be defined or the term should be used to characterize the demand after taking into account water conservation and drought contingency measures. During dry periods, the commission should consider whether meeting full demand is appropriate. Demand can influence, positively or negatively, potential for water shortage. The commission should consider when the senior and/or junior has the ability to reduce demand and avoid water shortage. This definition could give the executive director perpetual authority to suspend or curtail water rights.

SC comments that it is concerned about the definition that "demand for surface water exceeds the available supply" because demand for water can be managed and did not

necessarily cause the drought.

TES comments that the state is over appropriated, and therefore, this definition would result in a continual uninterrupted shortage of water.

Waco comments that it is not clear whether this criteria should be measured based on the entire basin, or part of the basin. It suggests that the language be changed to "basin demand for water exceeds the available supply."

**The commission responds that "demand exceeds supply" will typically exist because of low flows due to drought. In an "adjustment" situation the executive director may consider conservation and drought measures by affected persons. The commission intends for the executive director to be able to suspend or adjust water rights when flows are low in a watershed or part of a watershed, and a senior water right holder needs the water it is authorized to take. However, the commission agrees that the definition could be specifically tied to low rainfall and therefore changes the definition to the following: "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 available supply as evidenced by a senior water right holder making a senior call."**

**The commission requires a three-month period of below normal precipitation as opposed to another period because the commission does not want to be unable to address a legal senior call. The commission intends to be as flexible as possible.**

*§36.2(4)*

OPIC comments that the revision to this definition at the agenda meeting made by Commissioner Rubinstein more clearly specifies the circumstances in which an emergency shortage will exist.

**The commission acknowledges the comment. No changes were made to the rule in response to this comment.**

DWU comments that the term "hydraulic systems" in the definition of "emergency shortage of water" does not appear to be defined and is subject to being interpreted as a broad range of conditions that are not affected by drought or low flow conditions. The commission should also define "conditions affecting."

**The commission respectfully disagrees because it intends for the two terms to be broadly defined. "Emergency shortage of water" is a separate term and does not have to be connected to drought. The commission interprets TWC, §11.053(a) concerning when the executive director can issue these orders, in times of "drought" or "other emergency shortage of water," to indicate that "emergency shortage of water" is not necessarily a drought. The term "emergency shortage of water" would typically be tied to "low flow" conditions or shortage of water (caused by the emergency periods or conditions affecting hydraulic conditions) for which a senior water right can make a call. No changes were made to the rule in response to the comment.**

LCRA comments that the definition of "emergency shortage of water" does not define "emergency."

**The commission respectfully disagrees that "emergency" is not defined because the adopted §36.2(4)(A) and (B) provide situations that would be considered to come under this definition of "emergency shortage of water."**

LCRA comments that "hazard" is not defined and may be overly broad. LCRA recommends that "emergency shortage of water" be limited to those times when no

feasible alternative supplies are available, similar to the requirements of TWC, §11.139.

**The commission respectfully disagrees that "hazard" be defined to require that no alternative supplies are available. The commission needs to be flexible and define this term broadly to be able to respond when water right holders cannot take authorized water that they need and can beneficially use. Additionally, unlike TWC, §11.139, TWC, §11.053 does not require a determination of feasible alternatives. The commission believes that the legislature intended that TWC, §11.053 apply to different situations than TWC, §11.139. However, the commission does believe that it is reasonable to add a requirement that if a junior water right is not suspended for a drought or emergency shortage of water, the executive director may require information be provided concerning water use and efforts to obtain additional or alternative supplies. Therefore, the commission has added the language in §36.5(c) and (d). No changes were made to the rule in response to this comment.**

LCRA comments that the executive director should only issue an order to address an "emergency shortage of water" after it has fully enforced the prior appropriation doctrine to address the problem. For example if implementation of prior appropriation would cause a junior municipal right to experience an emergency shortage of water, a

Chapter 36 order could be issued.

**The commission intends that Chapter 36 will operate much in the way LCRA suggests, except that the definition of "emergency shortage of water" would not cover the municipal junior water right in the above scenario. For "drought" or "emergency shortage of water," the executive director will require that a senior water right needs and can beneficially use authorized water from water rights that are junior to it. However, if one or more of the junior water right holders are a municipality or a power generator, or another high level of preference of use, the executive director may "adjust" water rights to prevent a public health and welfare concern. Preference of use and conservation and drought contingency plans could be considered in this adjustment. No changes were made to the rule in response to this comment.**

LCRA comments that this section should specifically exclude situations in which water levels in a reservoir drop below water intakes installed in such reservoir. It is the responsibility of the owner to address varying levels of reservoirs and emergency relief should not be ordered. Persons relying on releases from these reservoirs could be significantly impaired.

**The commission declines to make the change, but generally agrees that it is the responsibility of the reservoir owner to anticipate varying levels of reservoirs. The executive director will consider this fact in deciding whether an "emergency shortage of water" has occurred.**

NWF comments that the legislation seems to contemplate this additional category or condition that would trigger the executive director's authority, but this category should not be defined so broadly. Rather than a senior's inability to "take" surface water, it suggests that it be the inability to "obtain" surface water because of the unavailability of surface water at the authorized diversion point. The undefined terms "emergency periods" and "hydraulic systems" add inappropriate ambiguity.

**The commission intends that these terms be broad enough to cover a number of situations that the executive director can consider when deciding whether an "emergency shortage of water" exists. To define this term too narrowly could result in the executive director's inability to enforce a senior call and negate the intent of the legislation. Additionally, the commission declines to replace "take" with "obtain." This rule requires that a senior be able to take water under its water right in these "emergency shortage of water" situations. No change has been made to the rule in response to this comment.**

NWF requests that the definition be changed to state "the inability of a senior water right holder, even after implementing reasonable alternatives including aggressive water conservation and drought measures, to obtain surface water because of conditions that can reasonably be addressed by a Suspension or Adjustment Order applicable to water rights with a more junior priority . . . ."

**The commission declines to make this change because the requirement would be very difficult to demonstrate or determine, and the commission believes that it goes beyond the intent of the statute.**

TPWD comments that shortage of water may not be unique to a senior water right holder. It is not clear what type of assessment is required to determine if public health, safety, the environment, or economic welfare are endangered by the inability to take water. The commission should outline the type of information is necessary. What does "economic welfare" mean?

**The commission agrees that any water right can suffer a shortage, but intends to base an executive director order on a senior water right needing the water authorized under its water right. Also, an assessment of harm to "public health, safety, the environment, and economic welfare" is not**

**required by the rule.**

**For clarity, the commission also adopts the following change to §36.2(4)**

**"the inability of a senior water right holder to take surface water under its water right during: . . ."**

*§36.2(5)*

TIC comments that neither TWC, §11.303(l) (domestic and livestock rights are exempt from the adjudication act, TWC, §§11.303, *et seq.*) nor TWC, §11.142(a) (impoundments for domestic and livestock use of 200 acre feet or less are exempt from permitting) states that domestic and livestock use is a superior use to appropriative water rights.

**The commission acknowledges that neither of these sections directly state that domestic and livestock users are superior. However, common law has consistently determined these domestic and livestock riparian rights to be superior rights in the stream. *Cummins v. Travis County Water Control and Improvement District No. 17*, 175 S.W.3d 34, 44 - 45 (Tex. App. - Austin 2005) *rev. denied*. TWC, §11.001(a) provides that nothing in TWC, Chapter 11 affects "private" vested rights unless they were changed by TWC, §11.303. TWC, §11.303 required that irrigation rights had to be adjudicated, but that domestic and livestock rights did not. Therefore, the commission has**

**continued to consider these rights to be superior rights in the stream, and issues water rights subject to those rights. "Domestic" and "livestock" uses are defined in the commission's rule in 30 TAC §297.1.**

**However, the reference to TWC, §11.303(I) in the definition of "senior water right" is not as clear as it could be since it is an exemption from adjudication. Therefore the commission deletes this reference and inserts "§11.001(a) and common law" instead of "§11.303(I)."**

LCRA is concerned about defining "senior water right" to include "superior" riparian water rights that are superior to appropriative rights under common law. These domestic and livestock riparian rights should not be considered to be "senior" water rights like senior rights in the appropriative system.

**The commission defined "senior water right" to include domestic and livestock riparian rights for convenience in these rules, not as a proposed global renaming of the right. The commission believes that domestic and livestock riparian "superior" rights can make calls on appropriative rights, and therefore included these rights under Chapter 36 as those that could be benefitted by an executive director order under Chapter 36. Also, see comment above.**

**Concerning TWC, §11.142(a), exempt domestic and livestock riparian rights, the commission recognizes that whether these impoundments are "superior" riparian rights has been questioned. The executive director has taken the position that these rights are superior riparian rights in commission proceedings, and although the commission has not ruled on this issue, the executive director has considered these rights to be superior riparian rights in enforcement matters and permitting questions that arise. Therefore, absent clear statutory or common law authority that these are not riparian (as well as statutorily exempt) water rights, the commission continues to consider these domestic and livestock impoundments to be superior riparian rights.**

Gwen Webb comments that there is no provision in the rules for addressing drought concerns for domestic and livestock water users. TAB comments that the commission needs to make difficult decisions about restricting these uses if they are not truly domestic or livestock uses. DWU comments that domestic and livestock users should not be exempt from Chapter 36 because these uses have become "suspect" with urbanization, and these users can make calls on appropriative water rights. If they can make calls, they should be able to be cut off.

**The commission respectfully disagrees that there should be any provisions suspending or adjusting domestic and livestock water users because domestic and livestock users are superior to appropriative rights in the stream. Domestic and livestock users cannot be "called on" by appropriative water right holders (See TWC, §1.001(a)). They are also not required to prepare conservation or drought contingency plans. The commission agrees that these users should be able to show that they are using the water for domestic and livestock uses as defined in 30 TAC §297.1. No changes were made to the rule in response to these comments.**

*§36.2(6)*

TES comments that "suspension" should not be defined as the complete curtailment of water "of a certain type" or use because this would change the priority doctrine.

**The commission respectfully disagrees because the definition of "suspension" reflects that water rights can be completely cut off for a certain type of use based on the priority doctrine. The term "type" or "use" is merely meant to be descriptive and the commission does not intend for this term to be used to authorize curtailments out of priority order. No changes were made in response to this comment.**

*§36.2(7)*

TFB and TPWD comment that the definition of "suspension" exceeds the commission's authority under TWC, §11.053. That section does not allow the commission to suspend or adjust based on the type of use.

**This definition was written to cover water rights that authorize multiple uses, as well as municipal. For example, under a Suspension or Adjustment Order, a junior water right that authorizes multiple purposes of use may only continue to take water for municipal purposes.**

Commission staff commented that "use of a certain type" in the definition would be clearer if it stated "use for a certain type."

**The commission agrees and adopts the change.**

*§36.2(8)*

LG comments that "water right" should be defined the same as in TWC, §11.002(5), "a right acquired under the laws of this state to impound, divert, store, convey, take, or use state water."

**The commission declines to make this change because definition of "water**

**right" in §36.2(8) is very similar to the definition in the TWC, but tracks exactly the definition of "water right" in the TCEQ rules at 30 TAC §297.1(60) by adding "or any amendment thereto" after "right." The definition also adds clarification concerning "superior" and "exempt" rights that the commission considers necessary for this rulemaking.**

LCRA comments that it is concerned about the definition of "water right," which like "senior water right," includes water rights that are "superior or exempt from permitting under TWC, §11.142(a) or §11.303(l), but only to the extent that such a water right may be benefitted by a Suspension or Adjustment Order issued under this chapter."

Conditions under which a common law riparian or exempt user might be covered by the rule would be more appropriate. Moreover, the executive director should regulate water use during drought between competing domestic and livestock users, whether exempt or riparian. The watermaster rules provide that a watermaster can order a domestic and livestock user to pass inflows to other domestic and livestock users.

**This rulemaking does not cover watermaster areas, and is intended to apply only outside of watermaster areas. There are no TCEQ rules requiring domestic and livestock riparian rights to pass inflows to other riparian rights outside of watermaster areas. See responses to other comments**

**above under §36.2(5).**

**However, the reference to TWC, §11.303(l) in the definition of "water right" is not as clear as it could be since it is an exemption from adjudication. Therefore the commission deletes this reference and inserts "§11.001(a) and common law" instead of "§11.303(l)."**

**Additionally, although §36.2 states that "the following words or terms, as used in this chapter, shall have the following meaning," the commission adopts the following change to make it clearer that the definitions only apply to this rulemaking: "The following words or terms, as used in this chapter, shall have the following meaning, and these definitions do not apply to any other chapter of this title or in any context other than under this chapter:".**

*§36.3(a)*

TCC and TIP support the agency's work on the proposal, particularly in light of the controversial nature of water rights in Texas at this time of extreme drought. TCC especially appreciates the language in proposed §36.3(a), which explicitly states that any adjustment made by the executive director will be in accordance with the priority doctrine.

TPWD suggests that this section be revised to state under what conditions the priority doctrine will be bypassed.

**The priority doctrine still governs; however, §36.5, allows the executive director to consider other factors when deciding which water rights should be suspended or adjusted in an order. The commission has described under those sections that it will consider preferences and drought and water conservation plans when it does not cut off a junior water right holder for public health and welfare concerns. The result of that consideration may be some adjustments of water rights instead of a complete suspension.**

TES suggests that this section be revised to correspond with its comments concerning the definition of drought, above.

**The commission responds that this rule only refers to the terms "drought" and "emergency shortage of water" and does not define them. The definitions are in §36.2. No changes were made to the rule based on the comment.**

*§36.3(b)*

AECT comments that the words "or superior" should be deleted from proposed §36.3(b) because these words are redundant due to the inclusion of "superior right" under the definition of a "senior water right."

**The commission agrees with this comment and deletes "or superior" from §36.3(b).**

LCRA comments that it agrees with the use of "senior or superior water right" in this section.

**Because the commission has defined "senior right" to include a "superior right" for the purposes of this rulemaking, "superior right" has been deleted from this section in response to another comment.**

LNVA and TES comment that a senior water right holder should be able to make a senior call to invoke an executive director order under this chapter.

**The commission agrees and believes that an executive director order will most likely be initiated by a senior call. No changes were made to the rules in response to this comment.**

TES comments that the holder of a water right making a senior call should bear the burden of proof on showing what the smallest area practicable for the executive director order.

**The executive director will review whatever information is available when making his decision to issue an order, and the area that will be covered by the order, and will document its findings in a memorandum. No changes were made to the rules based on this comment.**

TES comments that this section should state that the executive director's order cannot affect an interbasin transfer of water.

**The commission recognizes that if a junior water right is subject to a senior call and is not curtailed, it should not send state water outside the basin under an interbasin transfer. When the executive director decides whether to curtail a junior water right that provides water to another basin, the executive director will consider what action will maximize the beneficial use of water and minimize the impact on water right holders under §36.5(b). No changes were made to the rules based on this comment.**

TES comments that this section should make it clear that all four subsections must be met for the issuance of an executive director order.

**The commission believes that this section is clear that all four subsections must be met for the issuance of the order. No changes were made to the rule.**

AECT comments that proposed §36.5 is correct in not allowing or requiring the executive director to ensure that the order addresses environmental flows.

**The commission agrees that this rulemaking to implement TWC, §11.053 does not contemplate suspending or adjusting water rights for environmental uses, unless there is a senior water right for that use. No changes were made to the rule in response to this comment.**

An individual (former president of the Devers Canal Rice Growers Association) comments that the lack of water for rice that will result from this rulemaking will greatly affect the ecosystem of the marshes and bays which depend on flow of water from the rice fields.

**The commission respectfully disagrees that the environment will be**

**impacted by these rules. The commission agrees that this rulemaking TWC, §11.053 does not contemplate suspending or adjusting water rights for environmental uses, unless there is a senior water right for that use. No changes were made to the rules in response to this comment.**

TIC comments that in ensuring that the executive director's order maximizes beneficial use of water and prevents the waste of water, and that the beneficiary of the water will beneficially use its water, the executive director should ensure that the beneficiary is not making a "futile call."

**The commission agrees that the executive director should make this determination. The executive director has made and is making these determinations on all senior calls it has received prior to the effective date of these rules. No changes were made to the rules in response to this comment.**

TPWD suggests that the commission add a rule requiring that the executive director provide public notice of the declaration of a "drought" or "emergency shortage of water." While these conditions will be a prerequisite to an executive director order, there is no mechanism provided to document the declaration. Notice is appropriate to inform people of hazard situations affecting public health, safety, and environment or economic

welfare. Notice could be on the TCEQ Web site and published, if practicable, ten days before the issuance of the executive director order.

**The commission declines to provide the notice suggested by TPWD as it is not required by TWC, §11.053 and would be unnecessary based on the definitions of "drought" and "emergency shortage of water." The commission believes that the intent of the statute was to allow the executive director to continue to respond to senior calls and not require a public health and welfare condition to act. Additionally, the commission points out that the "public health and safety and environment," and "economic welfare" provisions of the "emergency shortage of water" definition were removed from the rule defining "emergency shortage of water" by the commission at the agenda meeting for the rule proposal. No changes were made to the rule in response to this comment.**

*§36.5(a)*

Webb comments that there needs to be more information in the rule on how the executive director will decide to issue an order," especially since there is no opportunity for input prior to issuance. There should be more transparency in the rules.

**The order will contain the findings required by the rule. To support the**

**order the executive director will review relevant information and prepare memoranda that will document how it reached its conclusions for the findings in these rules. To the extent that a privilege does not exist, these memoranda will be public information. No changes were made to the rule in response to this comment.**

AECT requests that in §36.5(a), "Suspension or Adjustment Order" be changed to "order."

**The commission does not agree that this change is necessary. Although other portions of the rule use the term "order" this full title is further clarification of the type of order being discussed. No changes were made to the rule in response to this comment.**

TFB comments that §36.5(a)(1) - (3) should be more specific. It is impossible to tell what "beneficial use" and "waste" of water actually mean.

**"Beneficial use" and "waste" are defined as those terms are defined in the 30 TAC §297.1, and in TWC, Chapter 11. No changes were made to the rule in response to this comment.**

AECT requests that §36.5(a)(2) be amended to say "one or more senior water rights holders are unable to divert the water they need that is authorized under a water right."

**The commission agrees that "one or more" senior water rights holders is clearer than the current rule language and adopts that change. The commission also makes another change to this subsection, as discussed below.**

LCRA is concerned about the language in §36.5(a)(2) and (4) that require an senior water right holder to be unable to "divert" the water it needs and is entitled to. Senior water right holders may also need to store inflows at these times.

**The commission acknowledges and agrees with this comment. Therefore, in §36.5(a)(2) the commission adds "or store inflows" after the word "need" and changes the word "is" to "are."**

NWF comments that §36.5(a)(2) should contain an explicit tie to the inability to divert water to the drought or other emergency shortage of water.

**The commission respectfully disagrees because §36.5(a) contains several factors, including being in a drought or emergency shortage of water, and**

**inability of a senior to divert water, all of which must be met for the executive director to issue an order.**

AEP comments that "drought" is meant to be a type of "emergency shortage of water" because TWC, §11.053 requires definitions of "drought or other emergency shortage of water," and therefore the rules should link the two. AEP recommends that §36.5(a)(1) be amended to require that "at the time of the issuance of the order, all or part of the river basin is in a drought 'creating an emergency shortage of water'." Or the commission could define "drought" to mean "demand for surface water exceeds the available supply 'thereby creating an emergency shortage of water'."

**The commission respectfully disagrees that this change is necessary. A drought or "other emergency shortage of water" both refer to low streamflow or rainfall conditions. However, the two definitions are for different scenarios and therefore should remain separate and distinct. No changes were made to the rule in response to this comment.**

*§36.5(a)(2)*

TES comments that this subsection should again state that the senior water right holder must have an "actual" need for the water, and not just an appropriated amount.

**The commission responds that §36.5(a)(2) provides that the senior water right holder must need the water. This is a clear reference to need as opposed to the amount of water authorized in the senior's water right. No changes were made to the rules based on this comment.**

*§36.5(a)(3)*

AECT suggests that §36.5(a)(3) be amended to state "senior water right holders who will benefit from the order can beneficially use, as defined in TWC, §11.002(4), the water they will be able to receive under the order."

TES suggests that "the additional volume of water which will result from the curtailment or adjustment" be added to "senior water rights can beneficially use water" in this subsection.

**The commission agrees with both commenters that the language should be changed, and agrees that AECT's language is clearer and adopts the changes, except that it changes the word "receive" to "divert or use".**

NWF requests that this section be changed to provide that before rights are suspended or adjusted, the senior water right holder that would be benefitted should be required to demonstrate all reasonable efforts have been made through conservation and drought

contingency measures to obtain more water.

**TWC, §11.053 does not allow the executive director to suspend or adjust the amount of water that a senior water right holder requests under a call based in whole or in part on whether certain levels of its conservation or drought contingency plans are implemented. However, the commission strongly encourages the senior water right holder to conserve water and implement its drought plans to minimize the amount of water that it needs under its water right. Additionally, the commission added §36.5(c) and (d), relating to the executive director's authority to request information on water use and planning, in response to other comment. No changes were made to the rule in response to this comment.**

*§36.5(a)(4)*

LCRA is concerned about the language in §36.5(a)(2) and (4) that require a senior water right holder to be unable to "divert" the water it needs and is entitled to. Senior water right holders may also need to store inflows at these times.

**The commission agrees and makes the following change to §36.5(a)(4):  
"suspending or adjusting junior water rights would result in conditions under which the senior water right holder may divert water or impound**

**inflows under its water right for a beneficial use."**

*§36.5(b)(1)*

TES comments that this section should be modified to add that the executive director shall consider maximizing beneficial use of water "without considering the particular type of use."

**The commission respectfully declines to make this change because another factor in this subsection provides that the commission consider preferences of use, to the greatest extent practicable. The commission believes it is best to use the statutory language for §36.5(b)(1).**

*§36.5(b)(4)*

AECT and TES comment that the executive director should consider, when issuing a Suspension or Adjustment Order, the effectiveness of conservation or drought contingency plans at mitigating the drought or emergency shortage of water. If implementation of the plans has been ineffective at mitigating drought or emergency shortage of water, the executive director should not include the plans in the order. If the implementation of the plans has been effective, the order should include a requirement that those provisions continue to be implemented, or that they be implemented to a greater degree. Section 36.5(b)(4) should add "and the effectiveness of implementation

of those plans on mitigating the drought or emergency shortage of water."

**The commission respectfully disagrees. Making a determination of whether conservation or drought contingency plans have been effective in mitigating droughts or emergency shortages of water would not be feasible for the executive director. The executive director's staff does not have sufficient data on which to make these determinations, or sufficient resources, and the analysis would be more time consuming than the circumstances (drought or emergency shortage of water) would allow.**

**The executive director has requested junior water right 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 right 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 water right. No changes were made to the rule in response to this comment.**

TAB comments that the commission should state in the preamble that it is really taking

primarily industrial water rights and that the commission will do so only in the conditions in which the person receiving the water has done everything humanly possible to conserve water. Is the commission really going to enforce §36.5(b)(4) that it will "consider the efforts of the affected water right holders to develop and implement the water conservation and drought contingency plans required by the Texas Water Code?"

LG and TES comment that this section should require a senior water right holder to demonstrate any level of water conservation implementation before it can benefit from an executive director order. TES suggests that the senior benefitting from the order should receive "Maximum Conservation Order" (MCO) before an executive director order is issued. All water rights should be required to minimize their diversion of water so the impacts of drought conditions are minimized for all.

LG and LNVA comment that the commission needs to clarify the degree of discretion the executive director will employ in determining whether a water right holder has sufficiently developed and implemented its conservation and drought contingency plans. LNVA specifically comments that municipalities will be discouraged from proper planning if they are not curtailed under these rules.

NWF comments that the commission should add "all" in front of "affected water rights"

in this paragraph. This criterion should apply to the beneficiary of the water as well as all juniors that are being considered for suspension or adjustment.

TIP and TxOGA comment that the commission should clarify that under §36.5(b)(4) and §36.7(a), "affected water right holders" is intended to include all junior water rights holders within the area for which the executive director is issuing an order regardless of the order of preferences.

**The executive director has requested junior water right holders for municipal or power generation use which were not curtailed due to public health and welfare concerns, in areas where there has been a senior call, to implement stringent levels of their water conservation plans and 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 right 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 water right.**

**All actions of the executive director under this rule will require that a senior water right needs water it is authorized to take under its water right**

**and can beneficially use the water. The commission does not believe it has the authority to require any more than this under the priority doctrine or TWC, §11.053. Consideration of the efforts of the affected water right holders concerning drought and conservation must be balanced with the priority doctrine. If the executive director is concerned about suspending municipal or power generation water rights based on public health and welfare concerns, the executive director may consider whether the municipal or power water right has a plan or has not enforced their plan at stringent levels. The executive director may also, under this rule, temporarily adjust how much junior water rights will be adjusted if the other water rights affected do not have a plan or have not enforced their plan. No changes were made to the rule in response to these comments.**

TES comments that a senior water right requesting an executive director order should prepare an application containing at a minimum, certification that it has received an MCO, the effect of the MCO on flows, all efforts by the senior water right holder to mitigate drought or emergency conditions, the volume of water needed and proposed use, general notice in the *Texas Register*, notice and opportunity for hearing on the proposed application.

**The commission respectfully disagrees. These requirements are not**

**supported by TWC, §11.053 or the priority rights doctrine. This procedure would take a great deal of time when a drought or emergency shortage occurs. The executive director must be able to act as quickly as possible when senior water rights call on water they need and are authorized to take. No changes to the rule were made based on this comment.**

Waco comments that this section be changed to add that the executive director will also consider the efforts of the affected water right holders "to develop and effectively utilize their water sources."

**The commission disagrees with adding this language to the rule, but agrees that information concerning the use and planning efforts of a junior water right that is not curtailed may be useful information. The commission has changed the rule to add §36.5(c) and (d) providing that the executive director may require that junior water right holders provide this information.**

*§36.5(b)(5)*

The City of Waco supports this subsection because it is vital to the public health and welfare of this state.

**The commission acknowledges the comment and agrees that curtailing municipalities can have detrimental impact to the public health and welfare.**

LCRA is very concerned about how the commission will interpret and apply the factors set forth in this section while honoring the priority doctrine. Allowing junior water rights to divert water would only appear to be appropriate when passing that water to a downstream senior in need presents a futile call or would be waste.

TRA asks how the preferences in TWC, §11.024 are to be implemented. The rules provide little guidance. Will a semiconductor manufacturer be allowed to take municipal water from a junior water right holder that came from curtailment of a chemical plant holder's senior water right?

**The commission will follow the prior appropriation doctrine and will consider whether suspension of junior water rights presents a public health and welfare concern. TWC, §11.053 allows the executive director to "adjust" the municipal and power generation junior water rights, as well as other water rights without completely suspending those rights for these concerns, hopefully mitigating the impact of suspension on junior water rights.**

**The commission respectfully does not agree that a senior making a call on a junior water right holder is "taking water" from the junior. The senior is taking water under its own water right. The junior water right has no right to that water under the terms of its own water right. No changes were made to the rule in response to this comment.**

TRA comments that the commission may be bringing the Wagstaff Act back without compensation. The Wagstaff Act gave preferences to municipal users of water for permits issued after 1931 and provided that other water rights could be changed to municipal rights without compensation. It was repealed in 1997.

**The commission is not changing water rights for other uses to municipal rights. The exemption from suspension under a senior call in this rulemaking is to protect public health and welfare and is not a taking of any other water rights without compensation. All rights junior to the senior call are subject to suspension by the call. No changes have been made to the rule in response to this comment.**

Gwen Webb comments that the commission should recognize the economic interests of agricultural uses and consider that this use is a high preference use in TWC, §11.024, the preference of use statute.

An individual comments that the rules primarily impact agricultural users with no reimbursement to farmers whose livelihood has been affected. Large cities claim this water and have greater leverage to pay for water than those they are taking water from.

**The commission understands that agricultural interests are important to the economy and are one of the higher preference uses. The commission will follow the prior appropriation doctrine and may consider preference of use if suspension of junior water rights presents a health and welfare concern. TWC, §11.053 allows the executive director to "adjust" the municipal and power generation junior water rights, as well as other water rights without completely suspending those rights for these concerns, hopefully mitigating the impact of suspension on other water rights. No changes were made to the rules in response to these comments.**

TFB comments that the commission seems to have interpreted TWC, §11.053(b)(5) to mean that they have the authority to curtail (or not curtail) water rights based on the preference of use and not the priority doctrine. The intent of TWC, §11.053(b) was not to circumvent the priority doctrine.

**The commission will follow the prior appropriation doctrine and may**

**consider preference of use if suspension of some junior water rights presents a health and welfare concern. No changes were made to the rule in response to this comment.**

TFB comments that the draft rule gives municipalities the right to continue to use water after more senior water rights have been curtailed, but doesn't address the type of use within the municipalities.

**These municipalities are only allowed to continue to use their water right for municipal purposes. The commission will look at the implementation of water conservation plans and drought contingency plans to consider whether these municipalities are using municipal water for public health and welfare purposes such as drinking water. No changes were made to the rule in response to this comment.**

**The commission has added §36.5(c) and (d) to this rule in answer to this and several other comments. Section 36.5(c) and (d) allows the executive director to request additional information concerning use and planning from a junior water right holder that is not curtailed.**

TFB comments that agricultural and industrial water right users will be fiscally

impacted more than municipalities. The Small Business and Micro-Business Assessment and Small Business Regulatory Flexibility Analysis should be re-evaluated taking this into consideration.

TRA asks how the loss of water taken by a junior water right holder will be allocated when multiple senior water right holders are impacted?

**Agriculture and industrial users are curtailed under the priority doctrine, rather than because some municipalities may not be curtailed due to public health and safety concerns. Additionally, under these new rules, agricultural and industrial customers are a higher preference than some other uses, which may be considered in the "adjustments" allowed by TWC, §11.053 when some junior water rights are not curtailed or suspended. No changes were made to the rule in response to these comments.**

TIC comments that the apparent intent of the reference to preferences in this section is that the executive director should consider the need for water to the greatest extent possible in issuing these orders. This is a challenging analysis that cannot be inconsistent with the priority doctrine.

**The commission respectfully disagrees that the executive director is to**

**consider who needs the water the most when issuing these orders. Because the prior appropriation doctrine remains the governing principle of surface water allocation, the commission interprets the statute to allow the executive director to use preferences when determining if a junior water right should be suspended or adjusted. With TWC, §11.053, the executive director has the authority to adjust water rights, which allows the executive director flexibility beyond simply suspending or allowing full use of a water right in these situations. Instead, the executive director can "adjust" these rights so that all water right holders may be able to use some water. Primarily the commission is concerned about suspending municipal and power generation water supplies because of public health and welfare concerns, but is also concerned about completely suspending other types of water rights. No changes were made to the rule in response to this comment.**

TRA comments that the commission must make it clear that a municipal user cannot use TWC, §11.053 to have senior irrigation rights curtailed when it continues to allow watering of its customers' athletic fields or golf courses, or similar things.

**The commission does not believe that TWC, §11.053 gives the executive director the authority to tell a water right holder making a priority call for**

**municipal water how it can use that water if the use falls within the definition of municipal use. For junior water rights that are not cut off because they are for municipal or power generation use, the commission will look at the implementation of water conservation plans and drought contingency plans to consider whether these municipalities are using municipal water for public health and welfare purposes such as drinking water. No changes were made to the rule in response to this comment.**

Calpine Corporation comments that the use of water for efficient generation of electricity supports the interest of public welfare as addressed in the order of preferences established by TWC, §11.024. Calpine supports the inclusion of consideration of the preferences in TWC, §11.024 in the rule for deciding whether to issue a Suspension and Adjustment Order.

**The commission acknowledges the comment. No changes were made to the rule in response to this comment.**

An individual (former president of the Devers Canal Rice Growers Association) is greatly concerned that the commission is considering rules that are contrary to long established Texas Water Law. Many irrigation rights are senior in nature, but will be subservient under the proposed plan, constituting a taking. How will agricultural users protect

themselves when federal crop insurance does not protect farmers from any and all risk?

The priority doctrine allows farmers to protect their priority rights.

**Under these rules, if agriculture water rights are senior, they can only be suspended or adjusted if someone senior to them makes a call or cannot obtain its authorized water and the executive director determines that they need the water and the other provisions of the rule are met. Agriculture users could be junior to a senior call. For public health and safety reasons, the executive director may not suspend municipal and power generators that are junior to the call, but may "adjust" these or other rights under this rule, mitigating impact to other junior water rights. No changes were made to the rule in response to this comment.**

Commissioner Todd Staples, TDA, comments that the agriculture industry has realized a loss of \$5.2 billion in the current drought which impacts the livelihoods of farmers, ranchers, and rural communities, and likely all Texans, as decreased supplies of agricultural products often result in consumers pay increased prices for basic food and clothing needs.

**The commission understands that the agriculture industry is very important to this state. No changes were made to the rule in response to**

**this comment.**

TDA recommends that for improvement of the rules and efficient water management, the commission should review existing regulations, such as watermaster program rules, to determine if they are being fully implemented.

**The watermaster program does have similar authority to that contained in these rules. HB 2694, §5.05 required that the commission develop a procedure to evaluate at least once every five years water basins that do have a watermaster program to determine if the establishment of such a program would be beneficial. Following the evaluation, TCEQ staff is required to submit findings and recommendations for a commission determination. TCEQ staff has begun its Fiscal Year 2012 evaluations of four water basins. Findings and recommendations are expected this summer. No changes were made to the rules in response to this comment.**

LNVA comments that the commission should require that the benefitting party for an executive director order show that he has tried to purchase water or lease water, and does not have other available water supplies.

**The commission agrees in part with this comment and has amended §36.5**

**to add subsections (c) and (d), allowing the executive director to request use and planning information from junior water right holders that are not curtailed.**

TES comments that TWC, §11.024, relates specifically to only the initial appropriation of water rights.

**The commission does not know what the commenter would suggest as a change in the rules for this concern. No changes were made based on this comment.**

*§36.5(b)(6)*

FVL LTD comments that the proposed rules provide that the commission does not have to release stored water to senior water right holders who have bought and paid to store the water in the reservoirs. As a result of this uncertainty, rice farmers cannot plan for a crop.

An individual (former president of the Devers Canal Rice Growers Association) comments that senior water rights have paid for dams and reservoirs to provide water during drought through years of water rate payments. Under the proposed rules water may be released to senior water right holders. This is patently unfair.

**Under TWC, §11.053, reservoir owners do not have to pass water they have lawfully stored under their water rights to a downstream senior water right that has made a call. This is not a new practice in water management. This requirement does not relate to a person's right to contract for stored water in a reservoir. Under the contract, the reservoir owner can send contracted water to the person who contracted for the water regardless of a senior call. No changes were made to the rules in response to these comments.**

TIC comments that this provision requires the executive director to review the storage of a reservoir to make sure that the water was properly stored under the water right at the time it was stored. An order issued could allow "use of water in storage which could be found to be available under proper guidelines and by agreement with compensation for lawfully stored water consistent with prior appropriation law."

BRA acknowledges that the proposed rule protects water rights from having to release stored under a Suspension or Adjustment Order.

**The commission agrees that under the proposed rule, a Suspension or Adjustment Order would not require the release of stored water. No changes were made to the rule in response to these comments.**

*§36.6*

AECT and TxOGA comment that the Suspension or Adjustment Order should not stay in effect beyond the date of cessation of the drought or "emergency shortage of water" the order is issued to address. The language in §36.6(3)(A) should be changed to state, "The duration of a Suspension or Adjustment Order shall be until the date the executive director determines the drought or emergency shortage of water that led to the issuance of the order has ceased, or for 180 days, whichever is shorter, unless otherwise specified in a Suspension or Adjustment Order."

**The commission agrees that there should be a definite time period for the duration of the order and extensions. Therefore, it has changed the rule to provide a duration of 180 days and one 90-day extension.**

**The commission declines to adopt the shorter periods for duration of the order and extensions because drought conditions or "emergency shortage of water" conditions do not change immediately and often last for some time.**

AECT comments §36.6(3)(B) should be changed to state that a Suspension or Adjustment Order may be extended for up to 90 days for each extension, "provided the

conditions of §36.5 are still met."

DWU comments that an effective date of 180 days and 90 day extension is too long. Water right holders could be prejudiced for indefinite time periods under their water rights without the opportunity for input or review of the executive director's decision making. The time limit should be no more than 60 days with no opportunity for extension unless the commission extends it after the hearing with specific terms and conditions that must occur for extensions.

TES comments that the order should not be effective for longer than 90 days. For each 90-day extension, there should be a public hearing, with the senior water right holders benefitting from the order bearing the burden of proof for its continuance. There should be no automatic extensions.

LG comments that the duration of the Suspension or Adjustment Order should be for a maximum of 60 days. The 180th day duration is too long, particularly if there will be automatic 90-day extensions and junior water rights may be harmed by this duration.

TDA comments that no order should be issued for longer than 30 days at a time. It can be renewable if the applicant can demonstrate that reasonable steps have been taken to acquire additional water sources and effective and that an enforceable drought

contingency plan has been implemented.

LG, TxOGA, and OPIC comment that the last part of §36.6(3)(A), stating that the duration of an order is 180 days (unless otherwise specified in a Suspension or Adjustment Order," be stricken. Junior water right holders need a degree of certainty on how long they can beneficially use their water rights.

NWF and TPWD comment that the proposed rule does not specify "the maximum duration of a Suspension or Adjustment Order" because it purports to allow an order with a duration longer than the rule state. The rule should simply allow 180 days as the maximum duration, and provide that "the actual duration of the order shall not be longer than is justified by the conditions being addressed." Likewise, the rule should not be extended more than once for 90 days.

**The commission agrees that there should be a definite time period for the duration of the order and extensions. Therefore, it has changed the rule to provide a maximum duration of 180 days and one 90-day extension. The commission respectfully disagrees to shorter time frames because the executive director and the commission need flexibility in issuing these orders and droughts often last for long periods of time. The commission believes that the rule is clear in §36.3 and §36.5 that the executive director**

**must base the order, and the requirements of the order, on the conditions being addressed.**

LG comments that the duration of the order is too long "because the issuance of a Suspension or Adjustment Order may not afford junior water right holders an opportunity for a contested case hearing." Also, extensions should be no longer than 30 days per extension.

**A junior water right holder will be able to attend a commission hearing to affirm, modify, or set aside the executive director's order. The junior water right holder can request a contested case hearing; however, TCEQ rules provide that there is no automatic contested case hearing for emergency orders, 30 TAC §295.174. A contested case hearing would be at the discretion of the commission. The commission has changed extensions to an order to once for 90 days in response to other comments. No changes were made to the rule in response to the comment.**

BRA suggests that the contents of a Suspension or Adjustment Order include an estimation of the amount of water expected to be made available for beneficial use by a senior user under the order. If the order is appealed, the TCEQ should not only have to

defend the rationale behind the order, but also the estimated amounts of savings goal so that the junior water right holder can make an informed case against the order.

**The commission respectfully disagrees that the executive director's order should include estimated amounts of water made available. Nothing in TWC, §11.053 would put this additional burden on the executive director. While the executive director will make a determination of whether a senior water right could be able to take water for a beneficial use, it is not feasible to have a "savings goal" or a definitive estimate of an amount of water that the senior could receive. The commission notes that the priority doctrine already allows senior water rights to call on junior water rights, which is enforceable by a watermaster or the executive director, and that there is precedent for doing so. No changes were made to the rule in response to this comment.**

OPIC recommends that the duration of the executive director order reflect the provisions related to emergency authorization in TWC, §11.139 and §11.148. These sections provide for a duration of 120 days, with only one extension of 60 days. This would be appropriate because droughts are usually seasonal and 180 days appears longer than the typical drought condition. The duration of the current drought may be unusually long and should not govern the rule language on duration. Second,

consistency among similar authorizations reduces confusion among water right holders. The provision of TWC, §11.139 and §11.148 appear adequate to deal with drought or emergency shortage of water.

**The commission believes that TWC, §11.053 was meant to be separate authority than §11.139 and §11.148, although the procedures in Chapter 36 can be similar to those sections. Extensions to the executive director's order were changed to once for 90 days in response to other comments. Also, the section was changed to provide a maximum 180-day period for the initial order in response to other comments. No changes were made to the rule in response to this comment.**

TPWD comments that §36.6(1) is unclear on whether the order will identify only the suspended or adjusted rights or whether it identifies all rights that were considered in the executive director's decision. The order should contain all rights that were considered by the executive director, and provide reasons for why they were or were not suspended, and an explanation of how the executive director satisfied all the necessary elements required by TWC, §11.053(b). Also, the order should note any decision to require implementation of water conservation and drought contingency plans at higher levels.

**The commission respectfully disagrees that the amount of detail suggested by the commenter is required by statute or commission rule. The order will contain the findings required by the rule. However, to support the order the executive director will review relevant information and prepare documents that will explain how it reached its conclusions for the findings in these rules. No changes were made to the rule in response to this comment.**

TxOGA recommends that the commission consider the impact of a curtailment on infrastructure critical to homeland security. The commission should implement curtailment on such facilities only in the most extreme circumstances.

**The commission acknowledges the comment and will consider these facts if they are presented to it. No changes were made to the rule based on this comment.**

*§36.6(3)(C)*

TES comments that this subsection should be deleted in its entirety and that an executive director order not be modified except after notice and hearing, with the burden of proof on the senior water right benefitted by the order.

**The commission respectfully disagrees that this additional notice and**

**opportunity for hearing would be necessary. The executive director must be able to make changes to this order based on changed circumstances without additionally hearings in order to be able to respond quickly. Specifically, an initial order may not provide the amount of water the senior can use that it needs and is authorized to take, and the executive director may have to go back to earlier priority dates. Or the executive director may be able to go back to later priority dates for suspension and adjustment.**

*§36.7*

Waco comments that it is concerned about the commission approving a Water Conservation Plan and then later determining that it is inadequate.

**The commission acknowledges the comment; however, it must also recognize that if not curtailed during a drought or emergency shortage of water, municipalities should use their municipal water for public health and welfare purposes.**

TFB comments that it supports §36.7(a) as it provides the commission a way of ensuring that those seeking curtailments are implementing conservation plans and drought contingency plans during periods of drought.

**The commission acknowledges the comment. No changes were made to the rule in response to this comment.**

TFB comments that the commission does not have the authority to decide whether to suspend or adjust a junior water right holder under §36.7(b). This authority was not granted to the commission in TWC, §11.053.

**The commission believes that it has this authority and duty under its police powers to protect public health and welfare and manage water rights in a way that will not impair public health and welfare. No changes were made to the rule in response to this comment.**

TPWD comments that the rule should be clarified to explain how water conservation plans and drought contingency plans are considered by the executive director for sufficiency and compliance with an executive director order.

**The commission responds that it has set out the factors the executive director should consider in the rule, and it desires for the executive director to retain some flexibility in deciding when and how to consider these factors. No changes were made to the rule in response to this comment.**

AECT comments that the following changes should be made to §36.7: "Section 36.7(a) and (b) should state 'water conservation plans and/or drought contingency plans' instead of 'water conservation and drought contingency plans'."

**The commission agrees that the suggested language is reasonable, but prefers to keep the "and" instead of the "and/or." Otherwise, the change is adopted.**

AECT comments that §36.7(a)(1) and (2) should state "holders'" instead of "holder's."

**The commission agrees that the recommended changes are correct and adopts the changes.**

LCRA and SC agree with the ability of the commission to require the implementation of water conservation at more restrictive levels when it does not cut off a junior water right due to public health and welfare concerns in §36.7(b).

**The commission acknowledges the comment. No changes have been made to the rule in response to these comments.**

CC supports the proposed §36.7 and the manner in which the implementation of water

conservation plans and drought contingency plans will be considered in the final rule.

**The commission acknowledges the comment. No changes have been made to the rule in response to this comment.**

LCRA comments that the commission should also require the implementation of water conservation at more restrictive levels for the water rights that will benefit from the order. This should be tempered by recognition that only reasonable and affordable measures, and those which would be effective, should be required. The rules should state that the executive director should consider the effectiveness of the drought measures.

**The commission respectfully disagrees that the drought contingency levels can be considered for the senior water right in the rulemaking. TWC, §11.053 does not provide the authority to condition a senior call on drought contingency measures. The commission determines that it has the authority to condition the ability to not suspend or to adjust a junior water right based on public health and welfare concerns, and may not require senior water rights that need water under their water right to meet certain levels of their plans. Also, the executive director cannot consider the effectiveness of drought conservation measures when it is issuing an order under this**

**chapter. It does not have the authority, data, or the resources to perform this task. No changes were made to the rule in response to this comment.**

SC believes that the agency needs to expand its overview of water conservation and drought contingency plans in general to be able to make the most effective use of such authorization. They request more specific agency guidance on who will be required to develop these plans.

TDA comments that water conservation and drought contingency plans should be implemented by municipalities and industry prior to curtailment of agricultural water rights.

TES comments that the rule should include the executive director's ability to monitor implementation of water conservation plans and drought contingency plans, with the power to levy fines for non-compliance.

**TWC, §11.1271 and §11.1272 set out the requirements for developing water conservation plans and drought contingency plans. However, neither statute provides TCEQ direct authority to enforce the implementation of these plans. Under its police powers to protect public health and welfare, the commission has the authority to not suspend a junior water right. In**

**addition, under TWC, §11.053(b), the executive director may consider preferences and whether affected water right holders have met certain levels of their plans in ordering an adjustment. No changes were made to the rule in response to this comment.**

TDA comments that municipal and industrial drought contingency plans should include a requirement to develop additional supplies of water to avoid the use of an order as a management strategy.

**The commission does not believe that it has the authority to make this a requirement under TWC, §11.053 or any other statute. No changes were made to the rule in response to this comment.**

TRA asks how the public welfare under TWC, §11.053 will be invoked to allow a holder of a municipal or power right to fill its storage, or does this apply only to run of the river rights?

**"Public welfare" is discussed in §36.7(b). A junior water right subject to a call can be precluded from storing inflows in a reservoir. A municipal water right or power generation right might be allowed to impound some inflows for municipal or power generation purposes. No change was made to the**

**rule in response to this comment.**

NWF supports the clarification in this section.

**The commission acknowledges the comment. No changes were made to the rule in response to this comment.**

*§36.8*

AECT supports §36.8.

**The commission acknowledges the comment and agrees that public participation is an important part of rulemaking. No changes were made to the rule in response to this comment.**

TCC appreciates the robust public participation process that the agency employed in the development of this rulemaking.

NWF and TPWD comment that TWC, §11.053, where it provides that the commission must establish "procedures for notice of, opportunity for a hearing on, and the appeal to the commission of an order," requires that the commission provide for notice and an opportunity for hearing, at least the submission of comments, at the time of the issuance

of the executive director order itself, not a later hearing to affirm, modify, or set aside.

NWF recommends that the rules provide for an initial written notice to all directly affected water rights along with the Texas Water Development Board and TPWD. These state agencies should be included because there may be "broader public interest issues at play."

**The commission respectfully disagrees that the executive director's order should be issued only after public participation. Instead, due to the need for flexibility for the executive director to act quickly, there is an opportunity for notice and hearing before the commission to appeal the order. The statute does not require notice and hearing to occur before the issuance of the executive director's order. A requirement to provide notice and opportunity for a hearing prior to issuance could render any action moot due to the passage of time before the hearing is held. Any hearing should be before the commission after the executive director's order is issued. No changes were made to the rule in response to these comments.**

An individual (former president of the Devers Canal Rice Growers Association) comments that several concerned and affected people have been denied their right to protest because they have not received notice of these rules.

**This is a rulemaking which requires notice in the *Texas Register*. Notice of and a discussion of these proposed rules were also placed on TCEQ's Web site and there were two public meetings on this rulemakings. The commission has complied with the notice provisions of the Administrative Procedure Act for the proposed rules. No changes were made to the rules in response to this comment.**

TRA recommends that prior to adopting these rules, the commission form a task force of various experts and interests.

**The commission respectfully declines to form a task group at this time. The state is currently in severe drought conditions which are expected to continue. The commission believes that the rulemaking should be adopted in a timely manner in order to address this drought. No changes were made to the rules in response to this comment.**

BRA comments that §36.8(a) provides that the executive director may issue an order without notice or "the opportunity for a hearing," while §36.8(b) provides that there will be notice and a hearing to affirm, modify, or set aside the order. BRA believes that this is confusing.

**The commission respectfully disagrees that the language is confusing. The rule states that the order can be *issued* without notice and a hearing, but if that occurs, a hearing must be held before the commission after issuance as soon as is practicable. In response to other comments, the proposed rule was revised to set a 45-day deadline for the hearing to be held after the issuance of the order.**

TES comments that notice should be given long before a Suspension or Adjustment Order is issued. Droughts do not develop over-night but are very foreseeable. These rules should provide for one if not more preliminary steps to reduce water use prior to imposing the draconian remedy of suspension or adjustment.

**The commission respectfully disagrees because TWC, §11.053 does not provide for these interim measures and the executive director needs to be able to address senior calls in a timely manner. The commission has added language to §36.5(c) and (d) that allows the executive director, after issuing an order, to require information concerning water use and planning from junior water right holders that are not suspended. The commission believes that this is a more expeditious approach. No changes were made to the rules in response to this comment.**

DWU is concerned about the timing of notice and hearing after the executive director's order is issued. This hearing should be no later than two weeks from the issuance of the order. That way, the executive director has "an incentive not to issue an order without allowing sufficient hearing by affected parties as part of the executive director's ordering process." Water right holders need to be able to provide information as soon as possible to support or contest the executive director's conclusion that the requirements of §36.5 have been met.

LG requests that a procedure be set for the hearing to affirm, modify, or set aside the executive director's order, which is confusing and may prevent lack of public participation. These rules are unconstitutional unless the commission establishes enough due process for the significant real property rights.

LG comments that the commission should set out in the executive director's order the time for the hearing, not later than 20 days after issuance of the order. Notice should be provided to all affected water right holders.

NWF comments that a maximum time between the order and the hearing should be set at least two weeks prior to the hearing.

**The commission agrees that a specific time for a hearing on the executive**

**director's order is appropriate. The commission believes that 14 days may be too short a time to set the hearing before the commission due to the timing of agenda meetings. Therefore, the commission adopts a 45-day deadline for the commission to set a hearing to affirm, modify, or set aside the executive director's order. Notice of the hearing shall be provided at least 10 days before the hearing. Section 36.8(c) provides that notice shall be given to all holders of water rights that were suspended or adjusted in the order because these water rights are the affected water right holders.**

TPWD comments that it is unclear whether the commission hearing described in the rule is intended to be the appeal referenced in the statute.

**As stated above, the most reasonable and practical interpretation of the statute is that there is one hearing, and that the "appeal" to the commission is the hearing. This interpretation provides more assurance of review because the "opportunity for hearing" is a mandatory commission hearing.**

OPIC comments that the commission modify the procedural provision to reflect those for emergency authorization in TWC, §11.139 and 30 TAC §295.156 and §297.17 to say that if emergency conditions exist, the executive director may act without a hearing as long as notice is provided to the governor, and a hearing to affirm, modify, or set aside

shall be held within 20 days. Also, any hearing must be conducted in accordance with Texas Government Code, Chapter 2001, and the rules of the commission.

TDA comments that the commission should follow the notice and hearing procedures in TWC, §11.139.

**Based on other comments, the commission has revised the rule to set a 45-day deadline between issuance of the order and the commission hearing. The commission respectfully does not agree that the other changes are necessary. Notice to the governor is not required by the statute nor does it provide additional notice to affected water right holders. In addition, a hearing to affirm, modify, or set aside the order is not governed by Texas Government Code, Chapter 2001 because it is not a contested case hearing.**

SC comments that notice of the hearing on the executive director's orders should require full public notice provisions and the ability of the public to make comments at such hearing.

**The commission respectfully disagrees that notice of the commission hearing should be provided to persons other than the water right holders because the water rights are the ones directly impacted by the executive**

**director order.**

**§§36.1 - 36.8**

**Statutory Authority**

The new sections are adopted under Texas Water Code, §5.013, providing the commission's authority over water rights permitting and enforcement; §5.102, providing the commission's general powers to perform acts authorized or implied by law; §5.103, providing the commission's authority to adopt rules; and §11.053, providing requirements for executive director suspension or adjustment of water rights during drought or emergency shortage of water.

The adopted new sections implement Texas Water Code, §11.053.

**§36.1. Applicability.**

(a) Except as otherwise provided by this section, this chapter applies to water rights in the state.

(b) This chapter does not apply to any water rights in a watermaster area created in or under Texas Water Code, Chapter 11.

(c) This chapter does not apply to a water user that is exempt from permitting under Texas Water Code, §§11.142(b) - 11.1422.

**§36.2. Definitions.**

The following words or terms, as used in this chapter, shall have the following meaning, and these definitions do not apply to any other chapter of this title or in any context other than this chapter:

(1) Adjustment -- The partial curtailment of one or more water rights, or a modification to the timing or rates of diversion under one or more water rights .

(2) Affected water right holder -- Those water right holders that are affected by the executive director's Suspension or Adjustment Order.

(3) Drought -- A drought occurs when 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.

(4) Emergency Shortage of Water -- 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; or

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

(5) Senior water right -- A water right that has a priority date that is earlier than another water right holder, or a superior right under Texas Water Code, §11.001(a) and common law and §11.142(a) .

(6) Suspension or Adjustment Order, or Order -- An order issued by the executive director to suspend or adjust water rights under this chapter. The order may be in the form of a letter signed by the executive director or the executive director's designee.

(7) Suspension -- The complete curtailment of either the entire water right or the right to use water for a certain type of use or based on a certain priority date in the water rights.

(8) Water right -- A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water. This term includes water users for purposes that are superior or exempt from permitting under Texas Water Code, §11.001(a) and common law and §11.142(a) , but only to the extent that such a water right may be benefitted by a Suspension or Adjustment Order issued under this chapter. The term includes holders of the water rights where the context requires.

**§36.3. Executive Director Action.**

(a) During a period of drought or other emergency shortage of water, the executive director may, in accordance with the priority doctrine in Texas Water Code, §11.027:

(1) temporarily adjust the diversion of water by water right holders; and

(2) temporarily suspend the right of any person who holds a water right to use the water.

(b) The temporary suspensions or adjustments must be made on water rights in the smallest area practicable that is necessary to allow the senior water right holder to obtain water.

#### **§36.4. Suspension or Adjustment Order.**

The executive director's temporary suspension or adjustment under §36.3 of this title (relating to Executive Director Action) must be made by a Suspension or Adjustment Order, as defined in §36.2(6) of this title (relating to Definitions).

#### **§36.5. Conditions for Issuance of Suspension or Adjustment Order.**

(a) The executive director may issue a Suspension or Adjustment Order or modify or extend an existing order under §36.4 of this title (relating to Suspension or Adjustment Order) if the following conditions have been met:

(1) at the time of issuance of the order, all or part of the river basin is in a drought, or an emergency shortage of water exists;

(2) senior water rights are unable to divert the water they need or store inflows that are authorized under a water right;

(3) one or more senior water right holders who will benefit from the order can beneficially use, as defined in Texas Water Code, §11.002(4), the water they will be able to divert or use under the order; and

(4) suspending or adjusting junior water rights would result in conditions under which the senior water right holder may divert water or impound inflows under its water right for a beneficial use.

(b) The executive director shall ensure that the order:

(1) maximizes the beneficial use of water;

(2) minimizes the impact on water rights holders;

(3) prevents the waste of water;

(4) considers the efforts of the affected water right holders to develop and implement the water conservation plans and drought contingency plans required by Texas Water Code, Chapter 11;

(5) to the greatest extent practicable, conforms to the order of preferences established by Texas Water Code, §11.024; and

(6) does not require the release of water that, at the time the order is issued, is lawfully stored in a reservoir under water rights associated with that reservoir.

(c) The executive director may determine not to suspend a junior water right based on public health, safety, and welfare concerns. If the executive director decides not to suspend a junior water right based on public health, safety, and welfare concerns, the executive director may:

(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 reasonable efforts have been made to conserve water by providing its water use data 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 (c)(1) - (3) of this section, and the junior water right holder does not provide the information 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), or (3) of this section, the executive director 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.

**§36.6. Contents of a Suspension or Adjustment Order.**

A Suspension or Adjustment Order issued under §36.4 of this title (relating to Suspension or Adjustment Order) must contain:

- (1) the specific water rights subject to the order, and the location, including the river basin and county, of the suspension or adjustment;
- (2) an explanation of the reasons for the suspension or adjustment; and
- (3) the duration of the suspension or adjustment.

(A) The duration of a Suspension or Adjustment Order may not be longer than 180 days.

(B) A Suspension or Adjustment Order may be extended once for up to 90 days .

(C) A Suspension or Adjustment Order may be modified by the executive director based on changed conditions and the requirements of this chapter.

**§36.7. Implementation of Water Conservation Plans and Drought Contingency Plans.**

(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 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.

**§36.8. Notice of and Opportunity for Hearing on the Issuance of a Suspension or Adjustment Order.**

(a) An order under this chapter may be issued by the executive director without notice and an opportunity for hearing.

(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.