

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §303.53 *without change* to the proposed text as published in the August 16, 2013, issue of the *Texas Register* (38 TexReg 5226) and, therefore, will not be republished.

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

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

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

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

### **Section Discussion**

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

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

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

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

### **Final Regulatory Impact Determination**

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

This amended rule is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment, and it is not for the purpose of reducing risks to human health from environmental exposure. This rule does not regulate any type of pollution or waste. The rule will help irrigators who purchase water to use water in a way that maximizes the beneficial use of the water and does not result in loss of the irrigator's investment.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission received no comments regarding the draft regulatory impact analysis determination.

### **Takings Impact Assessment**

The commission evaluated this adopted rule and performed an analysis of whether this amendment constitutes a taking under Texas Government Code, Chapter 2007. The commission has determined that it does not constitute a taking. The specific purpose of the adopted rule is to amend §303.53(a)(8) to delete the requirement that contracts for the purchase of all or a part of the annual authorized amount of use for a water right in the Middle or Lower Rio Grande be limited to one year and to provide that contracts for DMI water shall terminate on the last Saturday of the calendar year in which the contract was entered, and the effective date and termination date for all other contracts shall be determined by the interested parties. Cities that use irrigation contracts for

pushwater to move municipal water through irrigation conveyances may not be able to use all of the contracted water in one year and run the risk of facing unanticipated expenses and losing a part of their investment. The rulemaking would substantially advance this stated purpose by allowing these contracts to be for longer than a year while maintaining the requirement that allocations of water be put to beneficial use within two consecutive calendar years or the account will be reduced to zero.

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

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

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

Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. The commission received no comments regarding the consistency of this rulemaking.

### **Public Comment**

The commission held a public hearing on September 10, 2013. The comment period closed on September 16, 2013. The commission did not receive any comments regarding this rule.

## **SUBCHAPTER F: CONTRACTUAL SALES**

### **§303.53**

#### **Statutory Authority**

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

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

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

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

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

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

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

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

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

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

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

(8) the effective date and termination date of the contract:

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

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

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

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

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

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

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