

The Texas Natural Resource Conservation Commission (commission) proposes new §297.57, relating to Emergency Suspension of Permit Conditions.

The purpose of the proposed rule is to set forth the procedures and criteria to be used by the commission in its review and action on a petition by a water right holder for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an “emergency” if there are no practicable, feasible alternatives to the suspension pursuant to Texas Water Code, §11.148.

Proposed new §297.57 establishes the purpose for which a petition may be submitted and describes an emergency condition necessitating the submission of a petition. Also, it establishes minimum requirements for the contents of the petition and provides that the petition must be filed with the Texas Parks and Wildlife Department at the same time it is filed with the commission.

Also, the proposed rule requires the commission to conduct a hearing within 15 days of the date on which the order to suspend is issued to determine if the suspension should be continued.

Additionally, the proposed new rule would provide that if the water right holder has a water conservation plan and/or drought contingency plan, the suspension of permit conditions may be contingent upon the full implementation of such plans and measures corresponding to the staged reduction of releases for existing instream uses and beneficial inflows to the bays and estuaries.

The proposed rule includes provisions for the passage of existing instream flows up to that amount necessary to maintain water quality standards for the affected stream segment.

Finally, the proposed new rule provides that if a water right already contains provisions for the suspension or partial suspension of permit conditions for the maintenance of instream flows or freshwater inflows to the bays and estuaries, further or different relief requested in the petition may be denied unless the petitioner can show significantly changed circumstances or an emergency condition not contemplated when the water right condition was issued.

Steve Minick, Budget and Planning Division, has determined that there will be some fiscal impacts to water right holders based on the cost for preparing the petition and gathering the necessary information to complete the petition. However, those impacts could be more than offset by the benefits derived from the suspension of permit conditions and the preservation of water supplies. Mr. Minick has also indicated the potential for some impact to the agency program charged with the processing of the petition, in the form of manpower and time requirements.

The public benefit anticipated as a result of the amendments would be the clarification of commission interpretation and application of its rules, the Water Code, and other applicable law.

Written comments may be mailed to Lutrecia Oshoko, Office of Policy and Regulatory Development, Texas Natural Resource Conservation Commission, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087. All comments should reference Rule Log Number 96157-297-WT. Comments must be received

by 5:00 p.m., 30 days from the date of publication of this proposal in the *Texas Register*. For further information, please contact Bruce Moulton, Water Policy Division, at (512) 239-4900.

The commission has prepared a Takings Impact Assessment for this rule pursuant to Texas Government Code Annotated, Section 2007.043. In its Assessment, the commission finds that the primary purpose of this rule is to provide assistance to water right holders in understanding what will be required for the submission, review, and approval of a petition pursuant to §11.148, Texas Water Code. Promulgation and implementation of this rule will not affect the private property which is the subject of the rule.

This rule is proposed under the Texas Water Code, §5.102, which provides the commission with general powers to carry out duties under the Texas Water Code, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provision of the Texas Water Code and the laws of the state.

There are no other codes, statutes, or rules that will be affected by this proposal.

**SUBCHAPTER E : ISSUANCE AND CONDITIONS OF WATER RIGHTS OR
CERTIFICATE OF ADJUDICATION**

§297.57

These rules are proposed under Texas Water Code §5.103, 5.105, and 5.120 which provide the commission with the authority to promulgate rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the State.

§297.57. Emergency Suspension of Permit Conditions.

(a) The purpose of this section is to implement Texas Water Code §11.148 to protect public health, safety, and welfare during an emergency.

(b) Upon petition filed by the affected water right holder in accordance with this section, the commission shall consider and may approve the temporary suspension of all or a part of conditions in a water right relating to beneficial inflows to affected bays and estuaries and instream uses if the commission finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The burden of demonstrating that the petition should be granted in accordance with this section is on the petitioner. For purposes of this section, an emergency is a condition which constitutes an imminent peril to the public health, safety, or welfare and may include the reduction of public water supplies to critical levels as a result of a severe and sustained drought.

(c) The petition must be sworn and contain the following information:

(1) the name of the petitioner and copies of the affected permits, certificates of adjudication, or certified filings;

(2) a description of the emergency and its impact on public health, safety, and welfare;

(3) a summary of existing water supplies available to the petitioner and their use;

(4) a summary of the examination made by the petitioner of whether feasible, practicable alternatives exist to the suspension of permit conditions;

(5) copies of the water right holder's water conservation and drought contingency plans, if any, and a summary of their status and implementation;

(6) a copy of the reservoir operating procedures, if applicable; and

(7) the proposed conditions and trigger levels for the suspension and reinstatement of the releases.

(d) A copy of the petition must be filed with the Texas Parks and Wildlife Department (TPWD) at the same time it is filed with the commission.

(e) Notice of the time and location of commission's consideration of a petition shall be provided to TPWD as soon as possible but not less than 72 hours prior to the time the commission takes such action. The TPWD shall be provided an opportunity to submit comments on the proposed suspension prior to the commission taking action and the commission shall consider those comments before taking action on the petition.

(f) The commission may suspend the conditions in the water right without individual notice to any other person other than TPWD. However, notice of the suspension of water right conditions, if granted, shall be provided by the petitioner immediately following a favorable commission decision on the petition by publication in a newspaper of general circulation in the affected area. Such published notice must contain a summary of the information contained in the petition as provided by subsection (c) of this section and the time and location of the subsequent commission hearing provided by subsection (g) of this section. Such publication shall occur not later than seven calendar days prior to such hearing.

(g) The commission shall conduct a hearing within 15 days of the date on which the order to suspend is issued to determine whether the suspension should be continued.

(h) In determining whether feasible, practicable alternatives exist to the suspension of water right conditions, the commission shall examine the amount and purposes of use for water currently being used by the petitioner, all evidence relating to the availability of alternative, supplemental water supplies to the petitioner, and the petitioner's efforts to curtail water use not essential for the protection

of the public health, safety, and welfare. If the water right holder has a water conservation plan and/or drought contingency plan, the suspension of water right conditions may be contingent upon the full implementation of such plans and measures corresponding to the staged reduction of releases for existing instream uses and beneficial inflows. If the water right holder does not have a water conservation plan and drought contingency plan in accordance with Chapter 288 of this title (relating to Water Conservation Plans, Guidelines and Requirements), the commission order granting a petition under this section shall require the permittee to develop and implement such plans within a prescribed time period as provided in the order.

(i) In granting a petition, all existing instream flows shall be passed up to that amount necessary to maintain water quality standards for the affected stream. Additional flows necessary to protect a species in accordance with the federal Endangered Species Act or other species that are considered to be of “high interest” (self-sustaining wild populations that are endemic to the affected stream, have significant scientific value, or commercial value) may also be required.

(j) In order to assist in the preparation and planning for water management during an emergency, the commission may provide conditions in a water right necessary for relief consistent with applicable portions of this section when the water right is initially granted or subsequently amended. These conditions may include a staged approach to the reduction in the pass-through amounts that provide for the pass-through of water for instream uses and bays and estuaries when it is available, and allow water to be captured or diverted for the protection of the public health, safety and welfare during an emergency, subject to the protection of stream flows necessary under subsection (i) of this section

for the maintenance of water quality standards. Such conditions may also include full implementation by the water right holder of water conservation and drought contingency plans as a precondition for obtaining relief.

(k) If the petitioner's water right already contains provisions for the temporary, total or partial suspension of permit conditions for the maintenance of instream flows or freshwater inflows to bays and estuaries, further or different relief requested in the petition may be denied unless the petitioner can show new or changed circumstances or an emergency condition not contemplated when the water right condition was issued.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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