

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §303.32 and new §303.35, concerning enforcement actions and field citations by the watermaster. The amendments are adopted without changes to the proposed text as published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9170) and will not be republished.

#### EXPLANATION OF ADOPTED RULE

Amendments to §303.32 and new §303.35 represent changes made to the watermaster program as authorized and required in the Texas Water Code §11.0843 through legislation passed by the 75th Texas Legislature in 1997. Under new §303.35, upon witnessing a violation of a rule or order or a water right, the watermaster or the watermaster's deputy, may issue the alleged violator a field citation and provide the alleged violator the option to either pay the penalty amount or request a hearing on the alleged violation. Also, this section establishes penalty amounts corresponding to the types of violations. The rule authorizes watermasters or their deputies to issue field citations to water rights holders who may violate certain and limited regulations. A field citation is an administrative allegation of violation, which may be paid without admitting or denying the alleged violation, or contested. Historically, the violations in these rules were referred to the Office of Attorney General for civil or criminal investigation and litigation. This process was costly to both the state and the alleged violator. The field citation rule herein will result in a savings of much of the costs of litigation while preserving the right of the alleged violator to contest the issue of responsibility. The maximum penalty for a violation under these rules is \$500. The number of water rights holders affected by this rule are limited and the maximum penalty provided is \$500.

On March 19, 1998, a draft copy of the rule was mailed to the Rio Grande Watermaster Advisory Committee for review. Commission staff subsequently met with the committee on March 26, 1998, to further discuss the field citation rules and address any concerns about the applicability of the rules in the Rio Grande Watermaster program region. Based on comments from the advisory committee, the initial draft of proposed rules were changed to include only those violations that may occur in this watermaster region and that would warrant a field citation.

The commission has determined that the adopted rule will not effect a local economy. The rule is limited in scope to a small number of very specific violations. The persons affected by this legislation are holders of water rights who violate the law and are a small and defined group. In addition, the rule seeks to punish illegal activity, as mandated by the legislature.

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has determined that a regulatory impact analysis is not required because the rule is not a major environmental rule and will not have an adverse affect in a material way on the economy, environment or public health and safety of any sector of the state. In addition, this rule is specifically required by law, namely Texas Water Code §11.0843. (Added by Acts 1997, 75th Legislature, Chapter 1010, §3.02, effective September 1, 1997.)

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make the rules consistent with statutory authority and adopt new requirements relating to watermaster enforcement actions as provided by Senate Bill 1, 75th Legislature, 1997. The rule also provides for issuance of field citations and to establish penalty amounts corresponding to the types of violations. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules. These amended sections will not involve a physical invasion, dedication, or exaction of real property, does not restrict or limit a property right that would otherwise exist, and does not eliminate any economic uses of private real property.

#### COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the CMP.

#### COMMENTS

The proposed rule was published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9170), with a 30-day comment period which closed on October 12, 1998. No comments were received.

#### STATUTORY AUTHORITY

The amended sections are adopted under the Texas Water Code, §5.103 which provides the commission authority to adopt rules necessary to carry out its powers and duties and under the provisions of the Texas Water Code and §11.0843 which provides the commission with authority to issue field citations and establish penalty amounts corresponding to the types of violations.

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

**ENFORCEMENT REGARDING WATERMASTER OPERATION**

**§303.32, §303.35**

**§303.32. Enforcement Actions.**

(a) - (b) (No change.)

(c) The executive director may:

(1) seek voluntary compliance;

(2) refer a case to the attorney general for any appropriate legal remedy in a court of competent jurisdiction, which may include a penalty assessment of not more than \$1,000 for each day the violator continues the taking, diversion, or appropriation as set forth in the Texas Water Code, §11.082;

(3) seek an action before the commission culminating with the issuance of an appropriate order, which if subsequently violated, may be referred to the attorney general for appropriate action in a court of competent jurisdiction;

(4) issue a field citation in accordance with §303.35 (relating to Field Citation by Watermaster); or

(5) seek any other appropriate remedies or actions which are available at law.

**§303.35. Field Citation by Watermaster.**

(a) Upon witnessing a violation set forth in subsection (d) of this section, the watermaster or the watermaster's deputy, may issue the alleged violator a field citation. The field citation will allege a violation has occurred and require that the alleged violator pay the administrative penalty and take remedial action as provided in the field citation.

(b) The alleged violator may either pay the administrative penalty assessed by the field citation without admitting or denying the alleged violation or request a hearing on the alleged violation.

(c) If the alleged violator fails to either pay the administrative penalty or take remedial action pursuant to a field citation issued under subsection (a) of this section, the executive director may proceed with enforcement action in accordance with Chapters 70 and 80 of this title.

(d) Violations for which the watermaster may issue a field citation are as follows.

**Figure : §303.35(d)**

<b>Violation</b>	<b>1st time noted within previous 24 months</b>	<b>2nd time noted with in previous 24 months</b>	<b>3rd time noted with in previous 24 months</b>
1. Diversion without a watermaster approved diversion certification (applicable to water right holders only)	On-site inspection notice (warning)	Citation/fine of \$200 for minors*; \$500 for majors**	Initiation of formal enforcement action
2. Failure to provide a measuring device or alternative method of measurement	On-site inspection notice (warning)	Citation/fine of \$200 for minors; \$500 for majors unless corrected within 30 days	Initiation of formal enforcement action
3. Water right holder does not pass water which the holder is not entitled to hold or impound in accordance with special conditions of water rights or watermaster (applicable to water right holders located between Fort Quitman and Amistad reservoir and water right holders on tributaries of the Rio Grande only)	On-site inspection notice (warning)	Citation/fine of \$200 for minors; \$500 for majors	Initiation of formal enforcement action
4. Late pump operation reports	On-site inspection notice (warning)	Citation/fine of \$200 for minors; \$500 for majors	Initiation of formal enforcement action

\*minor: A water right of 5000 acre-feet or less

\*\*major: A water right of greater than 5000 acre-feet

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#### EXPLANATION OF ADOPTED RULE

Amendments to §304.33 and new §304.34 represent changes made to the watermaster program as authorized and required in the Texas Water Code §11.0843 through legislation passed by the 75th Texas Legislature in 1997. Under new §304.34, upon witnessing a violation of a rule or order or a water right, the Watermaster or the Watermaster's deputy, may issue the alleged violator a field citation and provide the alleged violator the option to either pay the penalty amount or request a hearing on the alleged violation. Also, this section establishes penalty amounts corresponding to the types of violations. The rule authorizes watermasters or their deputies to issue field citations to water rights holders who may violate certain and limited regulations. A field citation is an administrative allegation of violation, which may be paid without admitting or denying the alleged violation, or contested. Historically, the violations in these rules were referred to the Office of Attorney General for civil or criminal investigation and litigation. This process was costly to both the State and the alleged violator. The field citation rule herein will result in a savings of much of the costs of litigation while preserving the right of the alleged violator to contest the issue of responsibility. The maximum penalty for a violation under these rules is \$500. The number of water rights holders affected by this rule are limited and the maximum penalty provided is \$500.

On March 25, 1998, a draft copy of the rule was mailed to the South Texas Watermaster Advisory Committee for review. Commission staff subsequently met with the committee on April 22, 1998, to further discuss the field citation rules and address any concerns about the applicability of the rules in the South Texas Watermaster program region. Based on comments from the advisory committee, the initial draft of proposed rules were changed to include only those violations that may occur in this Watermaster region and that would warrant a field citation.

The commission has determined that the adopted rules will not effect a local economy. The rule is limited in scope to a small number of very specific violations. The persons affected by this legislation are holders of water rights who violate the law and are a small and defined group. In addition, the rule seeks to punish illegal activity, as mandated by the legislature.

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#### TAKINGS IMPACT ASSESSMENT

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#### COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

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There are no other statutes or rules that will be affected by this adoption.

## ENFORCEMENT REGARDING WATERMASTER OPERATION

### §304.33, §304.34

#### §304.33. Enforcement Actions.

When a violation under §304.32 of this title (relating to Violations) occurs, the watermaster or the executive director may seek voluntary compliance, or may pursue appropriate enforcement action.

In the absence of voluntary compliance:

- (1) the watermaster may refuse to recognize a declaration of intent;
- (2) the watermaster may lock headgates or pumping facilities or take other necessary actions to effectively cease diversion, impoundment or release of state water under the account associated with the violation; provided, however, that for violations of §304.32(a)(4) or (a)(5) of this title (relating to Violations), the diverter shall be given at least 10 days notice prior to any such action by the watermaster;
- (3) the executive director may seek a hearing before the commission culminating with the issuance of an appropriate order; if such an order is subsequently violated, the matter may be referred to the attorney general for appropriate action in a court of competent jurisdiction;

(4) the executive director may refer the violation to the attorney general for appropriate legal remedy in a court of competent jurisdiction, which may include a penalty assessment to the maximum extent allowed by law;

(5) the watermaster may issue a field citation in accordance with §304.34 (relating to Field Citation by Watermaster); and/or

(6) the executive director may seek any other appropriate remedies or action available at law.

**§304.34. Field Citation by Watermaster.**

(a) Upon witnessing a violation set forth in subsection (d) of this section, the watermaster or the watermaster's deputy, may issue the alleged violator a field citation. The field citation will allege that a violation has occurred and require that the alleged violator pay the administrative penalty and take remedial action as provided in the citation.

(b) The alleged violator may either pay the administrative penalty assessed by the field citation without admitting or denying the alleged violation or request a hearing on the alleged violation.

(c) If the alleged violator fails to either pay the administrative penalty or take remedial action pursuant to a field citation issued under subsection (a) of this section, the executive director may proceed with enforcement action in accordance with Chapters 70 and 80 of this title.

(d) Violations for which the watermaster may issue a field citation are as follows. **Figure :**

**§304.34**

**Figure : §304.34**

<b>Violation</b>	<b>1st time noted within previous 24 months</b>	<b>2nd time noted within previous 24 months</b>	<b>3rd time noted within previous 24 months</b>
1. Diversion without a watermaster approved declaration of intent (applicable to water right holders only)	On-site inspection notice (warning)	Citation/fine of \$200 for minors*; \$500 for majors**	Referral for formal enforcement action
2. Failure to provide a measuring device or alternative method of measurement	On-site inspection notice (warning)	Citation/fine of \$200 for minors; \$500 for majors unless corrected within 30 days	Referral for formal enforcement action
3. Water right holder does not pass water which the holder is not entitled to hold or impound in accordance with special conditions of water rights or watermaster	On-site inspection notice (warning)	Citation/fine of \$200 for minors; \$500 for majors	Referral for formal enforcement action
4. Late report of diversion, release, or impoundment	On-site inspection notice (warning)	Citation/fine of \$200 for minors; \$500 for majors	Referral for formal enforcement action

\*minor: A water right of 5000 acre-feet or less

\*\*major: A water right of greater than 5000 acre-feet