

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §303.32 and new §303.35 concerning enforcement actions and field citations by the Watermaster.

#### EXPLANATION OF PROPOSED RULE

Proposed 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 proposed 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 contemplated under the proposed 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 proposed 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 the proposed 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. TNRCC 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 proposed 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.

#### FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for each year of the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. There will be no estimated cost to state and local governments expected as a result of enforcing or administering the rule. Local governments will not be enforcing this rule. The state previously enforced these rules but did not issue field citations. There will be no cost to issue field citations. There will be no estimated reduction in costs to local governments expected as a result of enforcing or administering the rule. Local governments will not be enforcing this rule nor have they administratively enforced these types of violations in the past. The

state is expected to gain a slight reduction in operating costs associated with the enforcement of violations of the terms of water rights permits within the affected watermaster jurisdiction and subject to these sections. This reduction is due to a savings of investigation and litigation expenses. There will be no estimated loss or increase in revenue to the state or to local governments. Local governments will not be enforcing this rule and the state cannot contemplate any change to the very small amount of revenue collected. These cost savings are anticipated to be minor. There are no significant fiscal implications anticipated for local governments.

The proposed rule will have no adverse economic effect on small business. The rule provides for the assessment of penalties for violations of the law. Small business are already subject to these types of violations. Therefore, there is no cost of compliance for small business as contemplated by Texas Government Code §2006.002.

#### PUBLIC BENEFIT

Mr. Minick has also determined that, for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be enhancement in the level of enforcement and more cost-effective enforcement of water rights permit provisions and improved management and conservation of surface water resources. Holders of water rights permits subject to these provisions will be subject to administrative penalties as a result of the issuance of a field citation. While these costs are new costs, it is anticipated that these penalties will be significantly less than the penalty and procedural costs associated with existing formal enforcement actions. Additionally, these rules are proposed to streamline the enforcement of rules already in

existence. The enforcement of the rules through the issuance of field citations should not be considered a cost to violators. It is a punishment for alleged wrongdoing. There are no other economic costs anticipated to any person, including small business, required to comply with the sections as proposed.

#### REGULATORY IMPACT ANALYSIS

Mr. Minick 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, Ch.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. This newly proposed section 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 proposed 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.

#### SUBMITTAL OF COMMENTS

Written comments on the proposal should refer to Rule Log No. 97147-304-WT and may be mailed to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P. O. Box 13087, Austin, Texas 78711-3087, (512) 239-4640. Comments may be faxed to (512) 239-5687, but must be followed up with the submission and receipt of the written comments within three working days of when they are faxed. Written comments must be received by 5:00 p.m. on October 5, 1998. Such comments will not receive individual responses, but will be addressed in the preamble of the adopted rules and published in the *Texas Register*. A hearing is not currently scheduled for this rule. For further information, please contact John Sadlier, Enforcement Division, (512) 239-6012.

#### STATUTORY AUTHORITY

The new sections are proposed 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 TNRCC 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 proposal.

**SUBCHAPTER D : 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; [or]

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

(5) [(4)] 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)**

**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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On March 25, 1998, a draft copy of the rule was mailed to the South Texas Watermaster Advisory Committee for review. TNRCC 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.

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existence. The enforcement of the rules through the issuance of field citations should not be considered a cost to violators. It is a punishment for alleged wrongdoing. There are no other economic costs anticipated to any person, including small business, required to comply with the sections as proposed.

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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 statutes or rules that will be affected by this proposal.

**SUBCHAPTER D : 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; [and/or]

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

(6) [(5)] 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**

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<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