

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §35.101.

Section 35.101 is adopted *without change* to the proposed text as published in the November 19, 2010, issue of the *Texas Register* (35 TexReg 10143) and will not be republished.

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

In 2007, the 80th Legislature, passed House Bill 3 (HB 3), relating to the management of the water resources of the state, including the protection of instream flows and freshwater inflows; and Senate Bill 3 (SB 3), relating to the development, management, and preservation of the water resources of the state. HB 3/SB 3 amended Texas Water Code (TWC), §5.506 and §11.148, to provide that the commission may, in an emergency, temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards setting of TWC, §11.1471(a)(2).

The prior version of TWC, §5.506 and §11.148, already provided that the commission could suspend a water right permit condition relating to beneficial inflows to affected bays and estuaries and instream uses in an emergency where the situation could not practically be resolved in another way. The statute set out certain notice and procedural

requirements. The commission had implemented the prior statute by adopting §35.101.

The purpose of this adopted amendment is to implement HB 3/SB 3, §§1.01, 1.02, 1.15, and 1.16, relating to emergency authority to make available water set aside for beneficial inflows to affected bays and estuaries and instream uses and to provide the rules and procedures for the temporary authorization to use the set aside water and to allow the executive director to make an initial action on an emergency suspension of permit conditions or to make set aside water temporarily available without a hearing. The commission would still have to hold the subsequent hearing or refer the matter to the State Office of Administrative Hearings (SOAH).

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts new 30 TAC Chapter 298, Environmental Flow Standards for Surface Water.

### **Section Discussion**

*§35.101, Emergency Suspension of Permit Conditions Relating to, and Emergency Authority to Make Available Water Set Aside for, Beneficial Inflows to Affected Bays and Estuaries and Instream Uses*

The commission adopts the amendment to §35.101 to include emergency authorizations to temporarily make state water available that had previously been set aside from

permitting in the environmental flows process and standards. The commission also adopts minor changes to make it clear that temporary authorizations to use set-asides were covered by this rule as well as the suspension of those permit conditions.

Subsection (a) allows either the commission or the executive director to review or take action on an application in specific circumstances. To ensure consistency throughout §35.101 and make clear that either the commission or executive director can take the actions allowed by this section, the commission adopts the addition of "executive director" to the last sentence in subsection (a) and in subsections (b), (f) - (i), (k), and (n). Additionally, in subsection (e), the commission adopts new rule language to clarify that for applications considered by the executive director the TCEQ's Office of the Chief Clerk will provide notice to the Texas Parks and Wildlife Department (TPWD) and the TCEQ's Public Interest Counsel. Further, in subsection (l), the name of Chapter 288 is corrected to add the words "Drought Contingency Plans." This adopted amendment implements HB 3/SB 3, §§1.01, 1.02, 1.15, and 1.16.

### **Final Regulatory Impact Analysis Determination**

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" as defined in the statute.

A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted amendment is to amend §35.101 to be consistent with TWC, §5.506 and §11.148, as amended by HB 3/SB 3. The statutes were amended to provide that the commission may, in an emergency, temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards setting of TWC, §11.1471(a)(2). The purpose of this statutory amendment was to allow flexibility to use water that would otherwise be reserved for instream flows when an emergency condition requires it. The adopted amendment provides the rules and procedure to implement this emergency authority.

The adopted amendment is not a "major environmental rule" because it is not adopted to protect the environment or reduce risks to human health from environmental exposure and will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that the adopted rulemaking does not meet the definition of a major environmental rule.

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

### **Takings Impact Assessment**

The commission evaluated the adopted amendment to Chapter 35 and performed an assessment of whether the amendment would constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted amendment is to provide the rules and procedure by which the commission may, in an emergency, temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards setting of TWC, §11.1471(a)(2). The adopted amendment would substantially advance this purpose by amending §35.101 to set forth the rules and procedure related to emergency authority to make available water set aside for beneficial inflows to affected bays and estuaries and instream uses and to make conforming changes throughout the section.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted amendment does 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 amendment provides standards and procedures regarding the commission's emergency authority. These standards and procedures do not burden, restrict, or limit an owner's right to property, or reduce its value. Therefore, the rule will not constitute a taking under the Texas Government Code, Chapter 2007.

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

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rule, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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

## **Public Comment**

The commission held a public hearing for this rule on December 16, 2010, in Austin, Texas. The comment period closed on December 20, 2010. The commission received written comments from Bayou Preservation Association (BPA); Lloyd Gosselink Rochelle and Townsend, P.C., on behalf of its clients (LGRT); TPWD; Webb and Webb (WW); and, one individual.

The commission received comments from one commenter in support of the proposed rule. The commission received comments from two commenters against the proposed rule. The commission received comments from four commenters that suggested changes to the proposed rule.

## **Response to Comments**

BPA comments that the rule proposal language represents that the emergency suspensions will "only be utilized during extremely rare circumstances" for public benefits that "could include water for human consumption, agricultural use, or any other beneficial use under TWC, §11.023" and that the same circumstance of drought that could justify granting such emergency suspension could also be a circumstance that is critical to broader public and environmental needs for instream flow in bayous and rivers and freshwater inflows to bays and estuaries. In recognition of these broader

needs, BPA requests that in coordination with TPWD, the TCEQ require the applicants under §35.101 to monitor for environmental resource effects related to the granting of such emergency suspensions and report all monitoring results as soon as practical to the TPWD and TCEQ. Such environmental monitoring parameters would be required on an application by application specific basis and could include, but not be limited to: dissolved oxygen, salinity, and observed fish kills. At any time, should environmental monitoring indicate degradation of environmental resources, the TCEQ should review the emergency authorization issued under §35.101 for the consideration of suspending such authorization.

**The commission responds that the changes made to TWC, §11.148, by HB 3/SB 3 did not require monitoring for environmental resource effects related to emergency suspensions of the environmental flow set asides. TWC, §11.148, does not currently contain that requirement. The rule has not been changed in response to this comment.**

BPA urges that the TCEQ and the TCEQ's executive director use extreme caution in granting applications under the authority of §35.101, as these may result in serious consequences to the water flows in bayous and rivers for instream uses and freshwater inflows to bays and estuaries.

**The commission agrees that this chapter should be exercised cautiously because of the possible effects of a decrease in water available for instream uses and freshwater inflows. For that reason, the rule includes language designed to ensure that applications under this rule are only granted when absolutely necessary. The rule requires findings that an emergency exists and that there is no feasible, practicable alternative to the suspension prior to granting such an application. Further, the rule defines an emergency as a condition where water supplies available to the applicant have been reduced or impaired to such an extent that an imminent peril to the public health, safety, or welfare exists. No change was made in response to this comment.**

LGRT supports the amendments to this chapter to expand TCEQ's right to suspend water rights, even environmental flow set-asides, when the needs of man require it.

**The commission acknowledges LGRT's comment supporting the amendments.**

TPWD comments that the proposed rule amendments are not supported by the authority provided in the HB 3/SB 3 amendments to TWC, §5.506 and §11.148, because HB 3/SB 3 did not specifically delegate power to the TCEQ's executive director to determine emergency suspensions. TPWD requests that all proposed rule amendments providing that authority should be deleted. HB 3/SB 3 did not provide authority for TCEQ to create a new finding that emergency conditions "override the need to maintain the balance between protecting environmental flow needs and other public interests and relevant factors." This new finding is unnecessary in that the suspension of environmental flow protection permit conditions and set-asides under existing authority automatically replaces any balancing with a finding that environmental needs are subordinated to other needs in an emergency. The rule amendments necessary to implement HB 3/SB 3 require only language that reflects the new commission authority to temporarily make available environmental flow set-aside water for other beneficial uses if the commission finds that an emergency exists that cannot be practically resolved in another way to adequately and accurately describe the new TCEQ authority, the rule could duplicate the statutory language and use a short description of the referenced commission action such as "temporary use of environmental set-aside water" in the appropriate rule sections that lay out the notice and procedural requirements for emergency suspensions.

**The commission respectfully disagrees with this comment. Delegation of authority to the executive director is necessary to respond quickly in the event of an emergency. This delegation is authorized by TWC, §5.501, which specifies that the commission by rule may delegate to the executive director the authority to issue emergency orders. No change was made in response to this comment.**

TPWD notes that there appears to be a disconnect between the specific language of the legislative findings and directives in HB 3/SB 3 to establish environmental set-asides and TCEQ's determination that set-asides should not be established. In the rule proposal for Chapter 298 regarding environmental flow standards, TCEQ finds that there is no reasonable basis to establish set-asides, yet amendments to §35.101 attempt to implement requirements of TWC, §5.505 and §11.148, that allow temporary use of set-aside water for emergencies. It is inconsistent for the TCEQ in the Chapter 298 rule proposal to conclude that it will not establish environmental set-asides at the same time it proposes amendments to §35.101 to address the temporary use of such set-asides under emergency conditions. East Texas basins have significantly higher average annual rainfall than West Texas and, in general, have more unappropriated water available. If TCEQ does not establish set-asides in the eastern basins, it is difficult to understand why it would establish set-asides in the remaining basins. Such a potential precedent is of

concern to TPWD. This finding against set-asides contravenes the intent of HB 3/SB 3 and makes the amendments to §35.101 unnecessary.

**The commission respectfully disagrees with this comment. The commission recognizes that no set-asides have yet been established. However, the process for determining environmental flow standards is ongoing; therefore, the establishment of set-asides is possible. The commission has determined that the most prudent course of action is to put rules in place during this rulemaking process so that the state will be prepared in the event of an emergency, whether or not water has been set aside for environmental flows at the time of the emergency. No change was made in response to this comment.**

WW notes that proposed §35.101 sets forth an expedited emergency type proceeding which is followed by an expedited hearing and that the procedures should allow for consideration of the issues associated with the emergency suspension of beneficial inflows by all interested parties on a reasonable basis.

**The procedure for emergency action laid out in the rule provides that the initial action on an application must be taken within 72 hours of TPWD's receipt of notice of the application. Then, the rules require that notice of the action be published immediately. Next, a hearing to affirm, modify, or set aside the initial action must be held no later than 15 days after the initial action, and notice of this hearing must be provided to affected persons not later than ten days prior to the hearing. This procedure provides adequate notice to and a reasonable opportunity for hearing for persons affected by an emergency action. No change was made in response to this comment.**

One individual is concerned that "temporary suspension" is not defined here even though the proposed rule allows up to six months of "temporary authorization." Once a river and or stream goes dry or stops providing freshwater to a bay or estuary immense damage is done which either may not be reversible or may take many years or decades to recover. Even if this loss of freshwater occurs only one time or only one time of the year the damage is devastating. TCEQ should be required to explain what positive and negative environmental impacts are if this occurs due to a "temporary suspension" or "authorization."

**The commission respectfully disagrees with this comment. Section 35.22 limits an emergency order issued under Chapter 35 to a reasonable time specified by the order, which may not exceed 180 days and may be renewed once for an additional period not to exceed 180 days by submittal of a new application. Furthermore, the rule requires a temporary order to be limited to a reasonable time specified by the order. A temporary suspension may last up to 180 days (an initial period of 120 days, followed by the possibility of a single 60-day extension). No change was made in response to this comment.**

WW comments that the proposed rules provide some flexibility in the analysis of the emergency. For example, either the commission or the executive director must find that emergency relief can be granted if emergency conditions exist which: "override the need to maintain the balance between protecting environmental flow needs and other public interest and relevant factors . . ." the emphasized text allows all parties to raise any matter, whether or not foreseen or predictable, which should impact the commission's or the executive director's decision regarding the emergency conditions.

**If a hearing occurs regarding the commission's or executive director's decision, it would be held at SOAH and subject to the evidentiary rules**

**applicable to an administrative hearing, including the Texas Rules of Evidence regarding admissibility of evidence. At hearing, the Administrative Law Judge will determine the admissibility of information related to any matter brought up under "other public interest and relevant factors." No change was made in response to this comment.**

One individual would like to know how the TCEQ defines "temporarily available."

**Section 35.22 limits an emergency order issued under Chapter 35 to a reasonable time specified by the order, which may not exceed 180 days and may be renewed once for an additional period not to exceed 180 days by submittal of a new application. Further, the rule requires a temporary order to be limited to a reasonable time specified by the order. Thus, temporary availability refers to availability for a reasonable period of no more than 180 days. No change was made in response to this comment.**

One individual would like to know what constitutes the reduction of public water supplies to "critical levels."

**The reduction of public water supplies to critical levels appears in §35.101(b)(1), which is a portion of Chapter 35 that is not being amended in this rulemaking. It describes a general situation, which is an example of a circumstance in which an application may be considered by the commission or executive director. The commission needs to maintain some flexibility in defining that term based on the specific fact situation. No change was made in response to this comment.**

One individual would like to know what constitutes "significant contamination" of a public water supply.

**"Significant contamination" of a public water supply appears in §35.101(b)(3), which is a portion of Chapter 35 that is not being amended in this rulemaking. It describes a general situation, which is an example of a circumstance in which an application may be considered by the commission or executive director. Since it is a general term, used in an example, it is not specifically defined. The commission needs to maintain some flexibility in defining that term based on the specific fact situation. No change was made in response to this comment.**

One individual would like to know how TCEQ defines "welfare" and whether this definition allows for damage or destruction of rivers, streams, and bays and estuaries so that businesses can continue to operate, and if it does, what ecological, biological, and economic damage would occur. Since ecosystems are the very basis for the entire economy, their protection is a matter of human survival and public interest and their severe damage or destruction should not be allowed.

**The term "welfare" is not specifically defined in the rules; therefore, none of the considerations listed in the comment are excluded from consideration under the rule. However, the commission is limited to consideration of those matters that are within the jurisdiction granted to it by the legislature. The commission needs to maintain some flexibility in defining that term based on the specific fact situation. No change was made in response to this comment.**

One individual requests that the rule should also require that the Texas General Land Office (GLO) be notified since this is the agency that implements the Texas Coastal Zone Management Program which is supposed to protect the health of our bays and estuaries.

**The commission responds that HB 3/SB 3 (TWC, §11.148(b)) specifically names the TPWD as the agency to receive notice of any emergency actions to temporarily make water available that was set aside for environmental flows. The commission shares the responsibility of protecting the health of the state's bays and estuaries with the GLO and several other agencies and organizations. Further, the commission is a member of the Texas Coastal Coordination Council, which includes the GLO. Due to the commission's own responsibilities and the coordination among state agencies in the Texas Coastal Coordination Council, the commission finds it is unnecessary to separately notify the GLO of applications under this section. No change was made in response to this comment.**

One individual comments that three days (72 hours) is not long enough to provide the TPWD and GLO with an opportunity to analyze the situation and provide comments of significant importance to TCEQ. This individual proposes at least a five - seven day time period for TPWD and GLO comments.

**The commission responds that HB 3/SB 3 (TWC, §11.148(b)) specifically defines 72 hours as the period in which the TPWD must submit comments after receiving notice of any emergency actions to temporarily make water**

**available that was set aside for environmental flows. No change was made in response to this comment.**

One individual is concerned that the proposed rule does not require that a "temporary authorization" *will be* contingent upon the full implementation of water conservation and/or drought contingency plans but only says that it may be contingent upon the implementation of these plans and that if this is allowed, permanent and or long-term severe damage to these ecosystems is virtually ensured. The rule should require full implementation of water conservation and/or drought contingency plans before a temporary authorization can be approved.

**The commission respectfully disagrees that this provision "virtually ensure(s) permanent or long-term severe damage to these ecosystems." The word "may" rather than "shall" was chosen for this provision in order to allow the flexibility necessary for response to an evolving emergency situation. Additionally, §35.101(I) states that the emergency suspension may be contingent on full implementation of the plans and measures, and that if the permittee does not have a water conservation plan and drought contingency plan, the permittee shall be required to develop and implement**

**those plans in a required time period. No change was made in response to this comment.**

One individual notes that the proposed rule apparently allows federally endangered species, those species of "high interest," and those that have significant scientific value or commercial value to perish or be severely damaged since it does not require that water be kept in the stream but only says that water "may also be required." This individual opposes this insensitive, ultimately self-defeating, and harmful action which puts human survival at risk.

**Emergency authorizations require a balancing of often competing interests. The commission has strictly drafted the emergency authorization rules so that human health and safety will be protected while mitigating and minimizing the risk of harm to other species. No change was made in response to this comment.**

WW comments that proposed §35.101(l) and (n) contain references to water conservation plans and drought contingency plans but that the language is inconsistent between the two subsections. Section 35.101(l) states that the emergency suspension

may be contingent on full implementation of the plans and measures, and that if the permittee does not have a water conservation plan and drought contingency plan, permittee shall be required to develop and implement those plans in a required time period. Section 35.101(n), however, only states that the order granting emergency or temporary suspension may require full implementation of the water conservation plans and drought contingency plans "as a precondition for obtaining relief." Because the proposed rules for Chapter 35 contemplate emergency suspensions of environmental conditions in water rights permits, it seems that the rules should require full implementation of water conservation and drought contingency plans or measures and any inconsistency between §35.101 (l) and (n) should be clarified by changing "may" to "shall" in the last sentence of §35.101(n).

**The commission respectfully disagrees with this comment. The sections cited are not inconsistent. Section 35.101(l) provides that the agency will require development and implementation of water conservation and drought contingency plans, if the applicant has none, in a prescribed time period subsequent to granting the authorization. Section 35.101(n) provides that the agency may require full implementation of those plans as a precondition to relief, that is, prior to granting the authorization. No change was made in response to this comment.**

## **SUBCHAPTER D: EMERGENCY SUSPENSION OF BENEFICIAL INFLOWS**

### **§35.101**

#### **Statutory Authority**

This amendment is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; TWC, §5.105, which establishes the commission's authority to set policy by rule; and TWC, §5.501, which establishes the commission's authority to adopt rules necessary to administer and carry out emergency and temporary orders.

The adopted amendment implements TWC, §5.506 and §11.148.

#### **§35.101. Emergency Suspension of Permit Conditions Relating to, and Emergency Authority to Make Available Water Set Aside for, Beneficial Inflows to Affected Bays and Estuaries and Instream Uses.**

(a) The purpose of this section is to set forth the procedures and criteria to be used by the commission or the executive director in its review and action on an application by a water right holder either for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses

during an emergency, or to make state water temporarily available that is set aside by the commission to meet the needs for freshwater inflows to affected bays and estuaries and instream uses, under Texas Water Code, §5.506 and §11.148. The emergency relief provided by this section shall only be used when the commission or executive director finds that:

(1) emergency conditions exist that present an imminent threat to the public health, safety, and welfare and that: [override the necessity to comply with general procedures and criteria for changing the conditions in a water right; and]

(A) override the necessity to comply with general procedures and criteria for changing the conditions in a water right; or

(B) override the need to maintain the balance between protecting environmental flow needs and other public interests and relevant factors; and

(2) there are no feasible, practicable alternatives to the emergency authorization.

(b) The commission or executive director may approve an application filed by the affected water right holder for 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, or to make state water temporarily available that is set aside by the commission to meet the needs for freshwater inflows to affected bays and estuaries and instream uses, if the commission or executive director finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The burden of demonstrating that the application should be granted in accordance with this section is on the applicant. For purposes of this section, an emergency is a condition where water supplies available to the applicant have been reduced or impaired to such an extent that an imminent peril to the public health, safety, or welfare exists. This condition may include, but not be limited to:

(1) the reduction of public water supplies to critical levels as a result of a severe and sustained drought;

(2) the failure of a dam for a public water supply reservoir;

(3) the significant contamination of a public water supply; or

(4) the failure or destruction of public water supply pipelines or other distribution systems.

(c) The application shall be filed in accordance with and must contain the information required by §35.24 of this title (relating to Application for Emergency or Temporary Order), and the following:

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

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

(3) a description of all existing and potential water supplies available to the applicant and their corresponding uses and costs;

(4) a summary of the examination made by the applicant of whether feasible, practicable alternatives exist to the suspension of permit conditions and reasons why those alternatives do not exist;

(5) the amount of water over and above available supplies that is [are] necessary to alleviate emergency conditions;

(6) copies of the water right holder's water conservation and drought contingency plans, if any, and a summary of their status and implementation, including the reasons why any remaining conservation or drought contingency measures provided by the plans have not or will not be implemented;

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

(8) the proposed conditions and trigger levels for the suspension and reinstatement of the releases or other affected permit conditions.

(d) A copy of the application must be filed by the applicant with the Texas Parks and Wildlife Department (TPWD) at the same time it is filed with the chief clerk.

(e) For applications considered by the commission, upon [Upon] receipt of the application, the chief clerk shall provide notice of the time and location of the commission's consideration of the application to the TPWD, executive director, and public interest counsel as soon as practicable after receipt of the application, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD. For applications considered by the executive director, upon receipt of the application, the chief clerk shall provide notice of the date of the executive director's consideration to the TPWD and public interest counsel as soon as practicable after

receipt of the application, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD.

(f) The TPWD, executive director, and public interest counsel shall be provided an opportunity to submit comments on the application before the commission action. The applicant shall be afforded opportunity to respond to all comments at the time of the commission's or executive director's consideration of the matter.

(g) The commission's or executive director's order shall set out the extent of any suspension, [and] any special condition upon which a suspension is granted, or the amount of any set aside made temporarily available. The commission's initial order may also indicate the referral of the matter to State Office of Administrative Hearings [SOAH] for an expedited hearing under subsection (i) of this section.

(h) Published notice of the initial action [suspension of water right conditions], if granted, shall be provided and paid for by the applicant immediately following a favorable commission or executive director initial decision by publication in a newspaper or newspapers of general circulation in the affected area. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. Such published notice must contain a summary of the information contained in the application as provided by

subsection (c) of this section and the time and location of the subsequent commission hearing provided by subsection (i) of this section. Such publication shall occur not later than seven calendar days before this hearing. For the purposes of this rule, the affected area shall be each county, in whole or in part, downstream of the diversion point or impoundment authorized under the affected water right. The applicant shall file with the chief clerk a publisher's affidavit as proof that such notice was published in accordance with this subsection.

(i) If the commission or executive director initially grants an emergency suspension of permit conditions, or a temporary authorization, without a hearing, the commission shall hold the hearing required by §35.25 of this title (relating to Notice and Opportunity for Hearing) as soon as practicable, but in no event later than 15 days after the initial emergency suspension is granted to determine whether to affirm, modify, or set aside the initial emergency action [suspension]. Written notice of the hearing shall be provided to the TPWD and affected persons not later than ten days before the hearing.

(j) An emergency order, or temporary authorization, granted under this section may be for a period of not more than 120 days if the commission finds that emergency conditions exist that present an imminent threat to public health, safety, and welfare and that override the necessity to comply with permit conditions and there are no

feasible, practicable alternatives to the emergency authorization. This emergency authorization may be renewed once for not longer than 60 days.

(k) In determining whether feasible, practicable alternatives exist to the suspension of water right conditions, the commission or executive director shall examine:

(1) the amount and purposes of use for water currently being used by the applicant;

(2) all evidence relating to the availability of alternative, supplemental water supplies to the applicant; and

(3) the applicant's efforts to curtail water use not essential for the protection of the public health, safety, and welfare.

(l) If the water right holder has a water conservation plan and/or drought contingency plan, the suspension of water right conditions, or a temporary authorization, may be contingent upon the full implementation of those 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, Drought Contingency Plans, Guidelines and Requirements), the order granting an application under this section shall require the permittee to develop and implement those plans within a prescribed time period as provided in the order.

(m) In granting an application, 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.

(n) In order to assist in the preparation and planning for water management during an emergency, the commission or executive director 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, but shall not be limited to, 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 (m) of this section for the maintenance of water quality standards. These conditions may also include full implementation by the water right holder of water conservation and drought contingency plans as a precondition for obtaining relief.

(o) If the applicant'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 an application submitted under this section generally will be denied unless the applicant can show new or changed circumstances or an emergency condition not contemplated when the water right condition was issued.