

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** March 23, 2012

Thru: Bridget C. Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Docket No.: 2011-1252-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 36, Suspension or Adjustment of Water Rights During Drought or
Emergency Water Shortage
HB 2694 (5.03): Water Curtailment
Rule Project No. 2011-033-036-LS

Background and reason(s) for the rulemaking:

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to changes to the TCEQ's statutory authority and continuation of the agency for 12 years. HB 2694, §5.03 added §11.053 to the Texas Water Code (TWC), which was part of the commission's sunset report. That section states that the executive director may temporarily suspend or adjust water rights during times of drought or other emergency shortage of water. The commission must adopt rules to implement this section, including rules defining a drought or other emergency shortage of water, and specifying the conditions under which the executive director may issue an order under this section and terms of an order issued under this section, including the maximum duration of a temporary suspension or adjustment under this section. The rules must also set out procedures for notice of, and opportunity for a hearing on, and the appeal to the commission of an order issued under this section.

Scope of the rulemaking:

These rules define "drought" and "emergency shortage of water," as well as other terms, and provide that the executive director may issue an order for the temporary suspension or adjustment of water rights during a drought or emergency shortage of water, and set out the conditions that must apply. The priority doctrine will still govern in that senior water rights must be experiencing these conditions. The factors set out in the bill can also be considered in deciding which water rights should be suspended or adjusted. The order is for 180 days, unless otherwise specified in the order, and can be extended for 90 days per extension. The proposed rule provided that the order could be issued without notice and hearing, but a hearing must be held before the commission to affirm, modify, or set aside, with notice to all water rights affected. The adopted rule would say that the hearing to affirm, modify, or set aside must be within 20 days of the issuance of the order, and must be preceded by at least ten days notice.

A.) Summary of what the rulemaking will do:

Re: Docket No. 2011-1252-RUL

The rulemaking allows the executive director to temporarily suspend or adjust water rights in times of drought or emergency water shortage.

B.) Scope required by federal regulations or state statutes:

As provided by state statute, the rulemaking allows the executive director to temporarily suspend or adjust water rights in times of drought or emergency water shortage.

C.) Additional staff recommendations that are not required by federal rule or state statute:

The statute is very broad and required staff to determine a procedure for implementation.

Statutory authority:

TWC, §5.013, providing the commission's authority over water rights permitting and enforcement; §5.102, providing the commission's general powers to perform acts authorized or implied by law; §5.103, providing the commission's authority to adopt rules; and §11.053, providing the executive director the authority to temporarily suspend or adjust water rights during a drought or other emergency shortage of water.

Effect on the:

A.) Regulated community:

Because of the existing priority doctrine, water rights should not be impacted more than they are currently; however, the considerations in the bill could provide some flexibility in making suspensions or adjustment. Commenters argue that their water rights and the economy will be impacted if they are suspended and other water rights are not.

B.) Public:

Only water right holders will be impacted.

C.) Agency programs:

The agency will have to issue an order, but this is unlikely to require more work than currently required to respond to senior calls, except for appeal procedures. Water rights, enforcement programs, and legal programs will have more work on appeal procedures but can absorb any additional work or costs with current resources.

Stakeholder meetings:

An informal stakeholder meeting was held on August 11, 2011. Stakeholder comments were allowed from August 11 - 26, 2011. Comments were on the stringency of the rules in general, including the definitions of drought and emergency shortage of water. All comments were considered. Most commenters requested that the priority doctrine be upheld. Many commenters wanted strong enforcement of drought management plans.

Public comment:

Re: Docket No. 2011-1252-RUL

A public hearing was held for this rulemaking on December 1, 2011, and the public comment period ended on December 5, 2011. The commission received comments from twenty-eight individuals, groups, or entities. Comments were received from river authorities, electric power groups, agricultural users, environmental groups, a business group, a water utility, a water district, industry groups, industry, the commission's Office of Public Interest Counsel, and state agencies. The majority of comments were not favorable to the rulemaking based primarily on concerns about impairing the priority doctrine, and about notice provisions. Many commenters were concerned about some water right holders (municipal and power generation water rights) not being suspended while others would be. Some commenters supported the general idea of the rulemaking. Many amendments to the rules were suggested.

Significant changes from proposal:

Several changes were made to the proposal. Other than grammar or wording changes, the most significant changes were the addition of a definition of "affected person" to mean all persons affected by an executive director order. In the preamble, it is explained that this could be the junior water rights being curtailed, and could include the senior water right being protected. Another change was to add a specific time of 20 days for the commission hearing to affirm, modify, or set aside the executive director's order, and a ten-day notice for the hearing. Additionally, "impoundment of inflows" was added to what a senior water right holder obtains, and a junior water right could be precluded from under an executive director order.

Potential controversial concerns and legislative interest:

Rulemaking will be very controversial on all issues including definitions, how suspensions and adjustments are made, drought contingency plans, conditions for issuing an order, and appeal procedures.

Several commenters argue that this rulemaking is a taking because not all water rights will be suspended under the priority doctrine. They argue that those who are not suspended, or someone, should have to compensate those who are. The use of preferences was attacked as a reason to suspend or adjust water rights. On conservations plans, the commenters were divided on whether implementation or enforcement of these plans should be considered in an adjustment or suspension. Another issue is whether the senior water right making the call, or being protected by the executive director's order, could also be adjusted based on preference or conservation plan implementation.

Does this rulemaking affect any current policies or require development of new policies?

This rulemaking adds clarity and factors that the executive director must consider in addition to the commission's current senior call procedures. The intent of the rules is to

Re: Docket No. 2011-1252-RUL

include those policies already developed by the executive director in responding to senior calls during the past and present drought.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If the rulemaking does not proceed, the TCEQ will not be in compliance with the statute, which requires rulemaking. There are no alternatives.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: November 4, 2011

Anticipated Texas Register publication date: April 27, 2012

Anticipated effective date: May 3, 2012

Six-month Texas Register filing deadline: May 4, 2012

Agency contacts:

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Attachments

HB 2694, Section 5.03

cc: Chief Clerk, 2 copies
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