

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** March 9, 2012

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

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

Docket No.: 2011-1244-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 298, Environmental Flow Standards for Surface Water
Environmental Flow Standards 2: Colorado/Lavaca and Guadalupe/San
Antonio and Revisions to the schedule for the Sabine and Neches Rivers
Rule Project No. 2011-059-298-OW

Background and reason(s) for the rulemaking:

House Bill 3 and Senate Bill 3 (HB 3/SB 3), 80th Legislature, 2007, created the environmental flows process and established the Environmental Flows Advisory Group (Advisory Group) to oversee its implementation. HB 3/SB 3 also established the Environmental Flows Science Advisory Committee, local bay and basin area stakeholder committees (BBASC), and local bay and basin expert science teams (BBEST). A BBEST develops environmental flow analyses and recommends an environmental flow regime, based solely on the best science available, to their basin's BBASC. A BBASC, while considering the BBEST's recommendations and other factors, develops recommendations regarding environmental flow standards and strategies to meet the environmental flow standards and submits those recommendations to the Advisory Group and to the commission for rulemaking. The BBASCs also developed a work plan for adaptive management which includes a schedule for review and potential revision of the standards and strategies and submits the work plan to the Advisory Group for approval. HB 3 was authored by Representative Robert Puente and Representative Harvey Hilderbran. SB 3 was authored by Senator Kip Averitt.

Article 1, HB 3 and Article 1, SB 3 amended Texas Water Code (TWC), §§11.002, 11.023, 11.0235, 11.0841, 11.134, 11.147, 11.1471, 11.148, and 11.1491. HB 3/SB 3 added TWC, §§11.0236, 11.02361, 11.02362, 11.0237, and 15.4063. These HB 3/SB 3 amendments to the TWC codified the environmental flows process and its implementation. The amendment to TWC, §11.1471 specifically instructed the commission to adopt environmental flow standards by rule. The amendment to TWC, §11.1471 and §11.02362, provided for adaptive management and codified a process for revision to the standards if the BBASC's recommended a schedule other than every ten years.

This rulemaking implements TWC, §11.1471(a), through 30 Texas Administrative Code Chapter 298, by proposing appropriate environmental flow standards for the river and bay systems consisting of the Colorado and Lavaca Rivers and Matagorda and Lavaca Bays, and the Guadalupe, San Antonio, Mission, and Aransas Rivers and Mission, Copano,

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Aransas, and San Antonio Bays. This rulemaking also implements TWC, §11.1471(f) and §11.02352(p) by amending §298.290 for the Sabine and Neches Rivers and Sabine Lake Bay to incorporate the schedule in the approved work plan for these basin and bay systems.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The scope of the proposed rulemaking is to implement the directive in TWC, §11.1471 for the two river basin and bay systems consisting of the Colorado and Lavaca Rivers and Matagorda and Lavaca Bays, and the Guadalupe, San Antonio, Mission, and Aransas Rivers and Mission, Copano, Aransas, and San Antonio Bays. The rulemaking will propose appropriate environmental flow standards. Additionally, the rulemaking will amend the schedule for the revision of standards for the Sabine and Neches Rivers and Sabine Lake Bay.

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

TWC, §11.1471(a) states that the commission by rule shall adopt appropriate environmental flow standards for each river basin in the state; establish an amount of unappropriated water, if available, to be set aside to satisfy environmental flow standards. TWC, §11.1471(f) states that the adopted environmental flow standards may be altered by the commission in a rulemaking process undertaken in accordance with a schedule established by the commission that considers the approved work plan.

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

None.

Statutory authority:

TWC, §§5.102, 5.103, 5.105, 11.0235, 11.02362, 11.147, and 11.1471.

Effect on the:

A.) Regulated community:

Members of the regulated community who apply for a new appropriation of state water will be affected by the environmental flow standard recommended by this proposed rulemaking. An application for a new appropriation of state water will be recommended for issuance only if there is water available after the environmental flow standard has been met. The result will be that there could be less state water available for appropriation. However, because the proposed standards are expected to function similarly to current streamflow restrictions for applications, the proposed standards are not expected to have significant fiscal implications for the regulated community.

The amendment to §298.290 for the Sabine and Neches Basins and Sabine Lake Bay should have no impact on members of the regulated community because the amendment only changes an existing schedule for review of standards.

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B.) Public:

The proposed rules may affect applicants for new appropriations and amendments that increase the amount of water to be taken, stored, or diverted which could result in an applicant having to secure an additional source of water. However, because stream-flow restrictions are currently applied to new appropriations of water under existing practice and the proposed standards are expected to function similarly to current streamflow restrictions for applications, the proposed standards are not expected to have significant fiscal implications for the public.

The amendment to §298.290 for the Sabine and Neches Basins and Sabine Lake Bay should have no impact on members of the public because the amendment only changes an existing schedule for review of standards.

C.) Agency programs:

The proposed rulemaking would have little impact on agency programs. The Water Availability Division will implement the rules when processing applications for new appropriations in the affected river basins. Currently, program staff uses a desktop methodology to determine instream flow requirements. Assigning a flow requirement by rule will have little or no impact on processing times or workloads. The impact on the Office of Compliance and Enforcement will likewise be insignificant. Presently, enforceable instream flow requirements are placed in water use permits. After the proposed rulemaking is effective, those flow requirements will come from a different source (the adopted rule), but will not be enforced any differently by the Office of Compliance and Enforcement.

Changing the schedule for review and possible revisions of the rules will not affect agency programs because the review and possible revision of the rules would currently occur under the existing adopted rules.

Stakeholder meetings:

A stakeholder meeting was held on November 3, 2011, in Austin, Texas. TCEQ staff presented general information about the proposed rulemaking and asked the stakeholders for feedback on the issue of balancing human and other competing needs for water. The meeting was attended by 29 stakeholders representing a broad spectrum of interests in the basins affected by this rulemaking and across the state. The commission received over 2,100 comment letters from stakeholders and their feedback has been considered in development of the proposed rules. Additionally, the TCEQ will hold a public hearing during the comment period.

Potential controversial concerns and legislative interest:

HB 3/SB 3 has legislative interest. The Advisory Group consists of nine members, appointed by the Governor, Lieutenant Governor, and Speaker of the House of Representatives. Six of those members are legislators, including the chairs of the Senate and House Natural Resource Committees.

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Colorado and Lavaca Rivers and Matagorda and Lavaca Bays

The stakeholders submitted a consensus recommendation. TCEQ staff is unaware of any potential controversial concerns at this time.

Guadalupe, San Antonio, Mission, and Aransas Rivers and Mission, Copano, Aransas, and San Antonio Bays

A potential controversial concern related to the proposed rulemaking lies in the fact that the BBASC for this basin and bay system adopted their recommendations by a majority vote. Some stakeholders expressed concerns regarding freshwater inflow standards and implementation of those standards as well as concerns regarding the complexity of the recommended environmental flow standards for the Guadalupe River and its associated tributaries.

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

HB 3/SB 3 established a new policy for application of instream flow requirements in applications for new appropriations of state water. This rulemaking proposes to implement that policy and replace existing TCEQ practices for the affected river basins.

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

TWC, §11.1471 directs the commission to adopt a rule by September 1, 2012. This rulemaking complies with the statute and keeps the environmental flows process on schedule. Any alternative course of action would not be in compliance with the timetables established by HB 3/SB 3, as amended by the Advisory Group.

TWC, §11.1471(f), states that the adopted environmental flow standards may be altered by the commission in a rulemaking process undertaken in accordance with a schedule established by the commission that considers the approved work plan. The work plan for the Sabine and Neches Rivers and Sabine Lake Bay was approved by the Advisory Group on September 8, 2011 and recommends a different schedule than that in the currently adopted rule for this basin and bay system.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: March 28, 2012

Anticipated *Texas Register* publication date: April 13, 2012

Public hearing date (if any): May 8, 2012

Public comment period: April 13, 2012 - May 14, 2012

Anticipated adoption date: August 8, 2012

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Attachments

SB 3, 80th Legislative Session

HB3, 80th Legislative Session

cc: Chief Clerk, 2 copies
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