

**SUSPENSION OR ADJUSTMENT OF WATER RIGHTS DURING DROUGHT
OR EMERGENCY WATER SHORTAGE**

§§36.1 - 36.8

EFFECTIVE MAY 3, 2012

§36.1. Applicability.

(a) Except as otherwise provided by this section, this chapter applies to water rights in the state.

(b) This chapter does not apply to any water rights in a watermaster area created in or under Texas Water Code, Chapter 11.

(c) This chapter does not apply to a water user that is exempt from permitting under Texas Water Code, §§11.142(b) - 11.1422.

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§36.2. Definitions.

The following words or terms, as used in this chapter, shall have the following meaning, and these definitions do not apply to any other chapter of this title or in any context other than this chapter:

(1) Adjustment -- The partial curtailment of one or more water rights, or a modification to the timing or rates of diversion under one or more water rights .

(2) Affected water right holder -- Those water right holders that are affected by the executive director's Suspension or Adjustment Order.

(3) Drought -- A drought occurs when at least one of the following criteria are met:

(A) drought conditions in the watershed or the part of the watershed subject to the executive director's Suspension or Adjustment Order are classified as at least moderate by the National Drought Mitigation Center;

(B) streamflows at United States Geological Survey gaging stations in the drainage area are below the 33rd percentile of the period of record available for the impacted watershed; or

(C) below normal precipitation in the watershed or part of the watershed subject to the Executive Director's Order, for the preceding three-month period, as reported in the Texas Climatic Bulletin (Office of the Texas State Climatologist), a senior call is made, and the demand for surface water exceeds the available supply as evidenced by a senior water right holder making a senior call.

(4) Emergency Shortage of Water -- The inability of a senior water right holder to take surface water under its water right during:

(A) emergency periods posing a hazard to public health or safety; or

(B) conditions affecting hydraulic systems which impair or interfere with conveyance or delivery of water for authorized users.

(5) Senior water right -- A water right that has a priority date that is earlier than another water right holder, or a superior right under Texas Water Code, §11.001(a) and common law and §11.142(a) .

(6) Suspension or Adjustment Order, or Order -- An order issued by the executive director to suspend or adjust water rights under this chapter. The order may be in the form of a letter signed by the executive director or the executive director's designee.

(7) Suspension -- The complete curtailment of either the entire water right or the right to use water for a certain type of use or based on a certain priority date in the water rights.

(8) Water right -- A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water. This term includes water users for purposes that are superior or exempt from permitting under Texas Water Code, §11.001(a) and common law and §11.142(a) , but only to the extent that such a water right may be benefitted by a Suspension or Adjustment Order issued under this chapter. The term includes holders of the water rights where the context requires.

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§36.3. Executive Director Action.

(a) During a period of drought or other emergency shortage of water, the executive director may, in accordance with the priority doctrine in Texas Water Code, §11.027:

(1) temporarily adjust the diversion of water by water right holders; and

(2) temporarily suspend the right of any person who holds a water right to use the water.

(b) The temporary suspensions or adjustments must be made on water rights in the smallest area practicable that is necessary to allow the senior water right holder to obtain water.

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§36.4. Suspension or Adjustment Order.

The executive director's temporary suspension or adjustment under §36.3 of this title (relating to Executive Director Action) must be made by a Suspension or Adjustment Order, as defined in §36.2(6) of this title (relating to Definitions).

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§36.5. Conditions for Issuance of Suspension or Adjustment Order.

(a) The executive director may issue a Suspension or Adjustment Order or modify or extend an existing order under §36.4 of this title (relating to Suspension or Adjustment Order) if the following conditions have been met:

(1) at the time of issuance of the order, all or part of the river basin is in a drought, or an emergency shortage of water exists;

(2) senior water rights are unable to divert the water they need or store inflows that are authorized under a water right;

(3) one or more senior water right holders who will benefit from the order can beneficially use, as defined in Texas Water Code, §11.002(4), the water they will be able to divert or use under the order; and

(4) suspending or adjusting junior water rights would result in conditions under which the senior water right holder may divert water or impound inflows under its water right for a beneficial use.

(b) The executive director shall ensure that the order:

(1) maximizes the beneficial use of water;

(2) minimizes the impact on water rights holders;

(3) prevents the waste of water;

(4) considers the efforts of the affected water right holders to develop and implement the water conservation plans and drought contingency plans required by Texas Water Code, Chapter 11;

(5) to the greatest extent practicable, conforms to the order of preferences established by Texas Water Code, §11.024; and

(6) does not require the release of water that, at the time the order is issued, is lawfully stored in a reservoir under water rights associated with that reservoir.

(c) The executive director may determine not to suspend a junior water right based on public health, safety, and welfare concerns. If the executive director decides not to suspend a junior water right based on public health, safety, and welfare concerns, the executive director may:

(1) require that the junior water right holder provide to the executive director, within 14 days of the issuance of the executive director's order, information demonstrating that it has made reasonable efforts to obtain alternative water sources;

(2) require that the junior water right holder demonstrate to the maximum extent practicable that reasonable efforts have been made to conserve water by providing its water use data to the executive director every 14 days. The water use data shall indicate the amount of and place of use of the water used by the water right holder on a daily basis and be sufficient to provide a historical context for the water right holder's use of surface water; and

(3) require that the junior water right holder provide information on what it has done to identify long-term additional or alternative water sources within 30 days of the issuance of the executive director's order.

(d) If the executive director decides to require the information in subsection (c)(1) - (3) of this section, and the junior water right holder does not provide the information by the applicable deadline, or the executive director finds that the information provided does not demonstrate reasonable efforts to comply to the maximum extent practicable with subsection (c)(1), (2), or (3) of this section, the executive director may use existing regulatory authority to ensure the junior water right

holder's efforts to secure alternative sources of water and conserve water, including, but not limited to, adjusting the diversion rate downward or ordering a full suspension.

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§36.6. Contents of a Suspension or Adjustment Order.

A Suspension or Adjustment Order issued under §36.4 of this title (relating to Suspension or Adjustment Order) must contain:

- (1) the specific water rights subject to the order, and the location, including the river basin and county, of the suspension or adjustment;
- (2) an explanation of the reasons for the suspension or adjustment; and
- (3) the duration of the suspension or adjustment.

(A) The duration of a Suspension or Adjustment Order may not be longer than 180 days.

(B) A Suspension or Adjustment Order may be extended once for up to 90 days .

(C) A Suspension or Adjustment Order may be modified by the executive director based on changed conditions and the requirements of this chapter.

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§36.7. Implementation of Water Conservation Plans and Drought Contingency Plans.

(a) The efforts of affected water right holders to develop and implement water conservation plans and drought contingency plans that the executive director will consider when deciding whether to issue an order under §36.4 of this title (relating to Suspension or Adjustment Order) include but are not limited to:

- (1) the water right holders' compliance with commission regulations in Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements) and approval of the plans by the commission and Texas Water Development Board; and

- (2) the water right holders' implementation and enforcement of the plans.

(b) If the executive director decides not to suspend or adjust a junior water right based on public welfare concerns, the executive director may require the implementation of water conservation plans and drought contingency plans at more restrictive levels than required by the junior water right's water conservation and drought contingency plans at the time of issuance of the order.

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§36.8. Notice of and Opportunity for Hearing on the Issuance of a Suspension or Adjustment Order.

(a) An order under this chapter may be issued by the executive director without notice and an opportunity for hearing.

(b) If an order is issued under this chapter without notice or a hearing, the order shall set a time and place for a hearing before the commission to affirm, modify, or set aside the order to be held as soon as practicable after the order is issued by the executive director, but not more than 45 days after the order is issued. Notice of this hearing shall be at least ten days prior to the hearing.

(c) Notice of the hearing at which the commission determines whether to affirm, modify or set aside the Suspension or Adjustment Order is not subject to the requirements of Texas Water Code, §11.132, but notice shall be given to all holders of water rights that were suspended adjusted under the order.

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