

Comments on the proposed rule regarding the executive director's suspension or adjustment of water rights during drought or emergency water shortage are attached. The deadline for filing comments was December 1, 2011.

Accessibility:

TCEQ is committed to making website content as accessible as possible to all persons.

The following attachments are in PDF format to preserve the content and layout of the comments as originally received. If you require a more accessible version, please contact

Mark Kolar at 512-239-0624.



1005 Congress Ave., Suite 600
Austin, Texas 78701
512.474.6725
512.474.9670

FAX

To: TCEO From: AECT

Fax#: 512 239-4808 Pages: 11

Phone: Date: Dec 5, 2011

Re: Comments Rule #2011-033-036-LS cc:



December 5, 2011

Fazker McCollugh
Chair

Phil Wilson
Vice Chair

John W. Painter, Jr.
President & CEO

Walton L. Baum, III
Executive Vice President

Christopher Miller
Corporate Secretary

Michael Parrish
MC 205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Via first class mail and fax to (512) 239-4808

Re: The Association of Electric Companies of Texas' comments to proposed rules to implement new Texas Water Code §11.053; Rule Project Number 2011-033-036-LS

Member Companies

AEF SWEPCO

AEF Texas

CenterPoint Energy

El Paso Electric Company

Entergy Texas

Exelon Generation

Luminant

NRG Texas

Oncor

PNM Resources

Reliant Energy

TXU Energy

Xcel Energy

Dear Mr. Parrish:

The Association of Electric Companies of Texas ("AECT") appreciates this opportunity to provide these comments to proposed new Chapter 36, which will implement new Texas Water Code §11.053.

Electric generating units are critical to the public health, safety, and welfare of the citizens of Texas. The priority of water usage for the generation of electricity has long been recognized, and in recent decades, has become even more critical as Texans' daily lives depend more and more on a reliable supply of electricity – such as for air conditioning, computer systems, water pumping stations, drinking water treatment and transport, sewage treatment, and hospitals.

AECT's comments regarding the sections of proposed new Chapter 36 are provided below:

Proposed §36.2 - Definitions

Except for the minor revisions suggested below, AECT concurs with the proposed definitions of "drought" and "emergency shortage of water" because they generally address AECT's comments regarding these definitions on pages 1-2 of the enclosed August 26, 2011 comment letter that AECT submitted as part of the TCEQ's stakeholder process for this rulemaking. AECT incorporates as part of its comments in this letter its comments regarding the definitions of those terms in its August 26, 2011 letter, which is enclosed.

AECT also concurs with TCEQ's drafting of the proposed definition of "drought" in that it would not require or allow the executive director to consider when he is determining whether a drought is occurring, whether a water conservation or drought contingency plan has been triggered per the terms of a given plan. The executive director should not be required or allowed to delay determining whether a drought is occurring until he can see

1005 Congress, Suite 600
Austin, Texas 78701
Phone: (512) 474-6725
Fax: (512) 474-9670
www.aect.net
info@aect.net

what impact the implementation of a water conservation or drought contingency plan might have on drought conditions.

Notwithstanding AECT's general concurrence with the proposed definitions of "drought" and "emergency shortage of water", AECT suggests that those proposed definitions, and the proposed definition of "adjustment", be revised to read as follows, with proposed new language underlined and proposed deleted language indicated by strike through:

§36.2. Definitions

(1) Adjustment -- The partial curtailment of one or more water rights, or a change in the timing or amount of diversions under one or more a water rights.

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

(A) drought conditions in the watershed or 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; or

(C) demand for surface water exceeds the available supply.

(3) Emergency Shortage of Water -- The inability of a senior water right holder to

(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.

Proposed §36.3 – Executive Director Action

AECT requests that the words "or superior" in proposed §36.3(b) be deleted. The inclusion of those words would be redundant due to the inclusion in the definition of "senior water right" of the reference to "superior right under Texas Water Code, §11.142(a) or §11.303(1)".

Proposed §36.5 – Conditions for Issuance of Suspension or Adjustment Order

AECT supports proposed §36.5, but it requests that a few revisions be made to certain parts of it. The only one of such revisions that is substantive (rather than merely for clarification purposes) is the proposed new language in proposed §36.5(b)(4). The purpose for that proposed new language is to address AECT's position that if at the time a suspension or adjustment order ("order") is issued, water conservation plans and drought contingency plans have been developed and are being implemented by some or all water rights holders in

the affected area that are required to have such plans, in preparing the order, it is important that the executive director consider the effectiveness of those plans at mitigating the drought or emergency shortage of water. More specifically, if implementation of the provisions of a conservation plan or drought contingency plan has been ineffective at mitigating the drought or emergency shortage of water, the executive director should not include those provisions in the order. Conversely, if implementation of the plan provisions has been effective at mitigating the drought or emergency shortage of water, the executive director should include in the order a requirement that those provisions continue to be implemented, or that they be implemented to a greater degree.

AECT also supports that proposed §36.5 does not require or allow the executive director to ensure that the order addresses environmental flows. AECT provided its reasons in support of that position on page 4 of its enclosed August 26, 2011 comment letter, which it incorporates as part of its comments in this letter.

Accordingly, AECT requests that proposed §36.5 be revised to read as follows, with proposed new language underlined and proposed deleted language indicated by strike through:

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

(a) The executive director may issue a Suspension or Adjustment Order ("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~~ for all or part of the river basin;

(2) ~~one or more senior water rights holders~~ are unable to divert the water they need that is authorized under a water right;

(3) ~~senior water rights holders who will benefit from the order can beneficially use water as defined in Texas Water Code, §11.002(4), the water they will receive under the order;~~ and

(4) ~~suspending or adjusting junior water rights would result in conditions under which the senior water rights holders may divert water 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, and the effectiveness of implementation of those plans on mitigating the drought or emergency shortage of water;

(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.

Notwithstanding AECT's support for proposed §36.5 as AECT has proposed above that if director may take before issuing an order, AECT encourages the executive director to continuously monitor conditions that may signal the future onset of a drought or emergency shortage of water, and take actions that are designed to prevent or delay the onset of a drought or emergency shortage of water. If such actions by the executive director do not prevent a drought or emergency shortage of water, they will increase the likelihood that the executive director will be able to issue an order as soon as possible upon the onset of a drought or emergency shortage of water, which will mitigate the impacts of the drought or emergency shortage of water. These executive director actions should include requesting input from water users regarding their unique situations and using the existing state preparedness structure. In its *State Drought Preparedness Plan*, the Texas Drought Preparedness Council recognizes that pivotal, pre-emptive actions must be undertaken before the onset of drought conditions to mitigate the impacts of a foreseeable drought. For example, "continuous monitoring of factors indicating the onset and extent of drought conditions" is requisite to a proactive approach to drought management. "This approach serves to lessen the element of surprise and allows time for planning and implementing drought mitigation strategies."

Proposed §36.6 - Contents of Suspension or Adjustment Order

AECT concurs with proposed §36.6, except as discussed below.

AECT believes that an order should not remain in effect beyond the date of cessation of the "drought or emergency shortage of water" the order is issued to address. In addition, AECT believes that proposed §36.6(3)(B) should be revised by adding language to clearly state that a Suspension or Adjustment Order may be extended only if the conditions of §36.5 are still met. Accordingly, AECT requests that proposed §36.6(3)(A) and (B) be revised to read as follows, with proposed new language underlined and proposed deleted language indicated by strike through:

§36.6. Contents of a Suspension or Order.

...

(3) the duration of the suspension or adjustment.

(A) The duration of a Suspension or Adjustment Order shall be until the date the executive director determines the drought or emergency shortage of water that led to the issuance of the order has ceased, or may not be longer than for 180 days, whichever is shorter, unless otherwise specified in a Suspension or Adjustment Order.

(B) A Suspension or Adjustment Order may be extended for up to 90 days for each extension, provided the conditions of §36.5 are still met.

AECT believes it is critical that the rules clearly provide the executive director with the authority to modify an order in response to changes in the severity of the drought or emergency shortage of water that led to the issuance of the order. Accordingly, AECT supports the concept and language of proposed §36.6(3)(C), but it believes that such language is misplaced and should be moved to be a new paragraph (4) under proposed §36.6. Since proposed §36.6(3) relates only to the duration of an order, the inclusion of such language in proposed §36.6(3)(C) would appear to limit the executive director's authority to modify an order to making a modification that addresses the duration of the order. That is too limited authority. To provide the executive director with authority to modify all aspects of an order in response to changes in the severity of the drought or emergency shortage of water that led to the issuance of the order, AECT request that proposed §36.6(3)(C) be renumbered as §36.6(4), and that it be revised to read as follows, with proposed new language underlined and proposed deleted language indicated by strike through:

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

Proposed §36.7 – Implementation of Water Conservation Plans and Drought Contingency Plans

AECT suggests that following minor revisions to proposed §36.7 (with proposed new language underlined and proposed deleted language indicated by strikethrough) because not every entity is required to have a drought contingency plan, and the language of proposed §36.7 could be read to indicate that every entity must have a drought contingency plan, in addition to a water conservation plan.

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

(a) The duties of affected water right holders to develop and implement water conservation plans and/or 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 holder's' 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 holder's' implementation and enforcement of the plans.

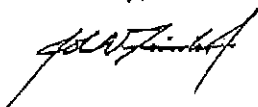
(b) If the executive director decides not to suspend or adjust a junior water right based on public welfare concerns, the executive director may require the implementation of water conservation plans and/or drought contingency plans at more restrictive levels than required by the junior water right's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

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

Since according to the language of §11.053 of the Water Code, an order under Chapter 36 is an "emergency order," AECT believes that the notice, hearing, and appellate procedures associated with an order should not be required until after issuance of the order, and that any notice, hearing, and appellate procedures after issuance of the order should be streamlined and expedited. AECT believes proposed §36.8 satisfies AECT's position, and thus, AECT supports proposed §36.8.

Thank you for your time and consideration of these comments. If you have any questions or require any additional information, please contact Walt Baum, 512-474-6725.

Sincerely,



John Fainter
The Association of Electric Companies of Texas



Via Facsimile (512.239.0606) &
Electronic Mail (olsadmin@tceq.texas.gov)

August 26, 2011

Parker McCollugh
Chair

Phil Wilson
Vice Chair

John W. Painter, Jr.
President & CEO

Walton L. Brum, III
Executive Vice President

Christopher Miller
Corporate Secretary

Ms. Robin Smith
Texas Commission on Environmental Quality
Office of Legal Services (MC-173)
P.O. Box 13087
Austin, Texas 78711-3087

Re: Preliminary Comments on Water Curtailment Rulemaking: H.B. 2694,
Section 5.03; Texas Water Code § 11.053

Dear Ms. Smith:

The Association of Electric Companies of Texas ("AECT") appreciates this opportunity to provide preliminary comments on the five questions raised by TCEQ in its development of proposed rules to implement the provisions of Section 5.03 of H.B. 2694, which amended the Texas Water Code by adding § 11.053.

Electric generating units are important to the public health and welfare of the citizens of Texas. The priority of water usage for the generation of electricity from power plants has long been recognized and in recent decades has become even more important as each Texan's daily life depends more and more on a reliable supply of electricity – air conditioning, water pumping stations, drinking water treatment and transport, sewage treatment, and reliable power for hospitals are among the many examples of priority uses of electricity.

The following are AECT's comments on the five questions put forward by TCEQ:

I. How should "drought" and "emergency shortage of water" be defined?

There is no singular, universally-accepted definition of "drought."¹ Instead of attempting to provide one catch-all definition, AECT believes that the flexibility of a river basin-by-basin approach is necessary to address the complexities of emergency orders concerning water rights. Such orders should conform to the greatest extent possible to the order of preferences established under § 11.024 of the Water Code.

¹ See Texas Drought Preparedness Council, *State Drought Preparedness Plan*, (Feb. 15, 2006), available at <http://www.txdps.state.tx.us/dem/CouncilsCommittees/droughtCouncil/droughtPrepPlan.pdf>; see also, e.g., National Oceanic and Atmospheric Administration, National Climatic Data Center, *Definition of Drought*, available at <http://www.ncdc.noaa.gov/climate-monitoring/dyk/drought-definition>.

1005 Congress, Suite 600
Austin, Texas 78701
Phone: (512) 474-6725
Fax: (512) 474-9670
www.aect.net
info@aect.net

An "emergency shortage of water" should be defined as a water supply or availability deficiency caused by an event when such deficiency creates, or may present, an immediate threat to public health or welfare, including the development of power by means other than hydroelectric. Examples of such an "emergency shortage of water" would include when the normal operation of an electric generating unit is jeopardized by a water supply or availability deficiency.

In the Texas Drought Preparedness Council's *State Drought Preparedness Plan*, the Council recognizes that drought in Texas "is frequently widespread and can cover several regional climatic areas," and, therefore, that "the State may incur inconsistent levels of drought intensity from one region to another on a statewide basis." The *Plan* notes further "that it is the opinion of the Drought Preparedness Council that the climatic regions in Texas are so large that drought indices developed across regions of this magnitude will routinely mask smaller, regional drought problems and emerging drought conditions." For this reason, the Council has adopted a goal of enhancing "drought monitoring by greatly reducing the scale upon which drought is reported." Consistent with this goal, and for the same reasons, TCEQ should define and take action under Water Code § 11.053 in response to "a period of drought or other emergency shortage of water" on the smallest regional scale for which reliable drought data are available, preferably on the level of a river sub-basin or smaller geographic scale, but under no circumstances should the scale extend beyond the level of a river basin. Each river basin in the State is unique in terms of what may constitute a "drought" or an "emergency shortage of water."

To accomplish its task of drought monitoring and prediction, the Texas Drought Preparedness Council relies upon "real-time climate, streamflow, aquifer, and reservoir information" collected by "a network of data-gathering sites, operated by various state and federal agencies." "This approach serves to lessen the element of surprise and allows time for planning and implementing drought mitigation strategies. Monitoring activities are increased as conditions warrant, and they continue as long as drought conditions persist. Monitoring provides continuous feedback to decision-makers and helps determine the short-term planning for assessment and response actions." For these reasons, TCEQ should take a similar approach with respect to the data that the Commission considers and relies on for purposes of taking action under Water Code § 11.053. TCEQ should use the Council's data gathering and assessment infrastructure process that is already in place as much as possible. There will be information, such as water usage information that TCEQ can access and use to augment the Council's information for purposes of determining if it is appropriate to issue a new order.

2. How should development and implementation of conservation plans be considered?

Water Code § 11.053(b)(4) provides that an order issued under § 11.053 must take "into consideration the efforts of the affected water rights holders to develop

and implement water conservation plans and drought contingency plans." If the relevant water conservation or drought contingency plans are mere forms lacking real substance and the binding commitments necessary to combat a drought, TCEQ should not be constrained by such plans when issuing an order under § 11.053.

Additionally, if, at the time an order is issued, water conservation plans and drought contingency plans have not been developed or fully implemented by all water rights holders in the affected area that are required to have such plans, then the order should require the development and full implementation of such plans for those water rights holders. This approach recognizes that some priority users, such as electric generators and the agriculture industry, have established priority-of-use after domestic users and municipalities, but are not required to develop drought contingency plans. See Tex. Water Code § 11.1272. AECT believes that all orders issued should recognize and comport with this existing provision.

If, at the time an order is issued, water conservation plans and drought contingency plans have been developed and implemented by some or all water rights holders in the affected area that are required to have such plans, then the order should take into consideration the effectiveness of those plans at mitigating drought conditions. If the provisions of an implemented plan have proven ineffective, then TCEQ should not replicate those provisions in its order. Conversely, if plan provisions have been effective at mitigating drought conditions, then TCEQ may order that such efforts be continued or increased.

Furthermore, whether a water conservation or drought contingency plan has been triggered per the terms of a given plan is not determinative of whether drought conditions exist that require issuance of an order under § 11.053 of the Water Code. If "a period of drought or other emergency shortage of water" exists, then TCEQ is authorized to act in response to such conditions under § 11.053. The Commission need not – and should not – "wait and see" what implementation of a water conservation or drought contingency plan may yield when drought conditions are affecting beneficial uses in the State according to the order of preferences of usage.

3. What conditions should be required for issuance of an order?

By the express terms of Water Code § 11.053, an order under that section may only be issued by TCEQ "[d]uring a period of drought or other emergency shortage of water." Thus, before issuing such an order, TCEQ must first find that there is currently present "a period of drought or other emergency shortage of water." However, § 11.053 does not limit the actions that TCEQ may take short of issuance of an order. As noted above in its State Drought Preparedness Plan, the must be undertaken before the onset of drought conditions to mitigate the impacts of a foreseeable drought. For example, "continuous monitoring of factors indicating the onset and extent of drought conditions" is requisite to a proactive approach to drought management. "This approach serves to lessen the element of surprise and allows time for planning and implementing drought mitigation strategies."

TCEQ should take input from water users on their unique situations and the existing state preparedness structure already in place before undertaking the issuance of an order under Water Code § 11.053. TCEQ should continuously monitor conditions that may signal the future onset of a drought and take actions preparatory to issuance of an order under § 11.053. Such an approach will allow TCEQ to issue an order under § 11.053, as necessary, immediately upon the onset of a drought, thereby mitigating the impacts of the drought.

Additionally, while Water Code § 11.053 limits issuance of an order under that section to "a period of drought or other emergency shortage of water," the section does not prescribe a specific drought level or degree that must be realized before an order may be issued. Accordingly, TCEQ may issue an order under § 11.053 in the first stage of a drought – the Commission need not wait until the drought has reached a severe or extreme level or degree – but should assess the impacts on the preferences of water usage set forth in § 11.024.

Also, TCEQ is not obligated by law to provide for freshwater inflows and instream flows in an order issued under § 11.053. Multiple provisions of the Water Code specify that flows are only to be provided "to the extent practicable." *See, e.g.*, Tex. Water Code §§ 11.0235(c), 11.147(d), (e); *see also id.* § 11.1471(a)(1)-(2), (b)(7)-(8) (providing for environmental flow standards "to the maximum extent reasonable considering other public interests and other relevant factors," including "human water needs" and "economic factors"). Furthermore, the law expressly provides that "all permit conditions relating to freshwater inflows . . . and instream flow needs must be subject to temporary suspension if necessary for water to be applied to essential beneficial uses during emergencies." *Id.* § 11.0235(c); *see also id.* § 11.148(a-1) ("State water that is set aside by the [C]ommission to meet the needs for freshwater inflows . . . may be made available temporarily for other essential beneficial uses if the [C]ommission finds that an emergency exists that cannot practically be resolved in another way."); 30 Tex. Admin. Code § 297.57 (providing that a water right holder may petition the Commission "for the temporary suspension of conditions in the water right relating to beneficial inflows . . . during an emergency").

4. What should the duration of the temporary order be?

The maximum duration of an order issued under Water Code § 11.053 should be contemporaneous with the duration of the "drought or other emergency shortage" of water that prompted issuance of the order. Once the relevant "period of drought or other emergency shortage of water" has ceased, so should the order.

Additionally, in the rules that TCEQ will propose to implement § 11.053, the Commission should clarify that it has the ongoing authority to modify an order issued under § 11.053 while that order is in effect, in response to changes in the

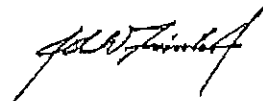
severity of the "drought or other emergency shortage of water." For instance, an order issued in the first stage of a drought may need to be modified if the drought persists and increases in degree to a severe or extreme drought. And the reverse is also true—if the drought lessens in degree, TCEQ may find that some ordering provisions are no longer necessary or should otherwise be modified. To allow for such revisions in an orderly, foreseeable fashion, TCEQ should provide that the Commission will revisit the terms of any order issued under § 11.053 at the conclusion of each 90 to 180 day period following issuance of the order until the order is terminated.

5. What type of notice, opportunity for hearing, and appeal is required after this order is issued?

Since an order issued under § 11.053 is — by the statute's term — an "emergency order," notice, hearing, and appellate procedures should be streamlined and expedited, or provided for following issuance of the order, so as not to delay TCEQ's response to the emergency.

Thank you for your time and consideration of these comments. If you have any questions or require any additional information, please contact myself at 512 474-6725.

Sincerely,



Bcc: Robin Smith rsmith@tceq.state.tx.us



American Electric Power
400 West 15th Street, Suite 1500
Austin, TX 78701
aep.com

Via first class mail and fax to (512) 239-4808

December 5, 2011

Mr. Michael Parrish
MC 205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Comments to Proposed Rules to Implement New Texas Water Code §11.053
Proposed New Rule §§ 36.1-36. 8
Rule Project Number 2011-033-036-LS

Dear Mr. Parrish

On behalf of Southwest Electric Power Company (SWEPCO) and Public Service Company of Oklahoma (PSO), units of American Electric Power Inc. (AEP), AEP submits the following comments to TCEQ's proposed new rule implementing the TCEQ's Sunset Bill, House Bill (HB) 2694, Regular Session, Legislature, 2011. This bill contained Section 5.03, which added § 11.053 EMERGENCY ORDER CONCERNING WATER RIGHTS to the Texas Water Code. SWEPCO and PSO own and operate electrical generation and distribution facilities in the State of Texas.

Generally, AEP supports the TCEQ's proposed new rule that provides for a temporary suspension or adjustment of water rights in the event of a "drought or other emergency shortage of water." AEP also generally supports the comments of the Association of Electric Companies of Texas or AECT, which are being provided separately.

However, AEP does recommend adding an additional phrase to the proposed rule with the understanding that this phrase would be beneficial for keeping the proposed rule consistent with the perceived intent of the statute. As AEP interprets the statutory language, the use of the word "other" in the phrase "drought or *other* emergency shortage of water" can be read to mean that a drought as determined by the Executive Director must create an emergency situation requisite to issuing a temporary suspension or adjustment order under TWC § 11.053.

While it may be the TCEQ's intent that a drought, in and of itself, is an emergency and therefore linking the concept or definition of "emergency shortage" to a "drought" determination is unnecessary, neither the definition of "drought" in proposed new § 36.2, nor the conditions for issuing a Suspension or Adjustment Order in proposed new §36.5 clearly link a "drought" to an "emergency." Given the title of HB 2694 and the use of the word "other" in the statutory language, AEP recommends that either the new definition of "drought" or the conditions for issuance of a Suspension or Adjustment

Order be modified to contain some language which clearly indicates that a drought either creates or is considered an emergency. Without some further language limiting the current definition of drought, AEP fears that the rule, if implemented as currently proposed, could be read to allow the issuance of a Suspension or Adjustment Order when drought parameters as defined by proposed § 36.2 (A) and (B) are met, and yet there is no concomitant emergency.

Therefore, AEP recommends amending the proposed new §36.5 (a)(1) as follows:

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

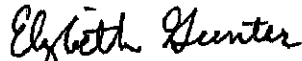
Alternatively, TCEQ could amend the definition of "drought" to include the following phrase at the end of proposed new §36.2 (2)(C):

- (C) demand for surface water exceeds the available supply thereby creating an emergency shortage of water.

In closing, AEP appreciates this opportunity to provide comments to the proposed new rule for TCEQ's consideration.

Please do not hesitate to contact me if you have any questions.

Respectfully submitted,



L. Elizabeth Gunter

Cc: Gary Gibbs, AEP
Greg Carter, SWEPCO

**Brazos River Authority**

QUALITY • CONSERVATION • SERVICE

December 5, 2011

Mr. Michael Parrish
Texas Commission on Environmental Quality
P.O. Box 13087, MC205
Austin, TX 78711-3087

RE: Rule Project Number 2011-033-036-LS

Dear Mr. Parrish:

The Brazos River Authority (BRA) appreciates the opportunity to provide comments on the Texas Commission on Environmental Quality's (TCEQ) rulemaking proposal for the new Chapter 36, Texas Administrative Code. The BRA recognizes the challenge this rulemaking presents to the TCEQ, especially in the context of the current drought. The BRA will continue to offer itself as a resource to the TCEQ through this rulemaking and through drought response in general as we move forward into 2012.

Earlier this year the BRA submitted written comments to TCEQ prior to the publication of this proposed rule. In those comments the BRA stressed that in creating rules that would allow for the curtailment or suspension of water rights, TCEQ should take special care to insure that the integrity of prior appropriation is maintained. TCEQ has stated that the purpose of the rulemaking is to mitigate the impact to water rights caused by drought or an emergency shortage of water, based on the priority doctrine. Section 36.3 (a) of the proposed rule states that the executive director may only take this action in accordance with the priority doctrine in Texas Water Code, Section 11.027.

The BRA appreciates the deference shown to the priority doctrine in the proposed Chapter 36. However, efforts to "mitigate" the impacts to water rights during a period of drought as intense as the one experienced since October, 2010, may prove to be a futile task, whether it's being done through the enforcement of the priority doctrine or additional authority such as Chapter 36. Timely enforcement remains the key. As the BRA stated in previous comments, waiting until there are effectively no flows to allocate is waiting too long to enforce priority of water rights.

**Brazos River Authority**

QUALITY • CONSERVATION • SERVICE

The priority system was established to allocate water resources as drought conditions lessen the amount of flows available to water users. TCEQ states in the preface that the executive director's authority to suspend water rights already exists under current law, specifically pointing to Section 5.013(a)(1) and Section 11.027 of the Texas Water Code. The BRA recognizes the specific directive set forth by House Bill 2694 (82nd Legislature), but the BRA can't help but question the value of layering such a controversial rulemaking over well settled law. While the intent of the statute may be to clarify and further define TCEQ's authority in this area, the BRA fears the unintended consequences and potential takings arguments that come from picking winners and losers.

One of the more significant and consequential components of this rule is the definition of "drought". The rule sets forth criteria for the definition, but it is unclear whether one or all of the criteria must be met before for the definition to be satisfied. Section 36.2 (a) states that "a drought occurs when the following criteria are met". Three criteria are listed thereafter, but section (B) closes with the word "or". If the intent is for all of the criteria to be met, perhaps the word "and" should be in place of the "or" to make the definition all-encompassing.

Separately, the BRA has concerns with regard to the use of the "33rd percentile" in Section 36.2 (2)(B). The section references streamflows being below the "33rd percentile of the period of record." The concern is that the criteria should be more specific. The 33rd percentile average daily flow for the year, for example, is not the same as the 33rd percentile average daily flow for a particular month or season. The section also references gaging stations in a "drainage area". Must all gaging stations in a drainage area be below the 33rd percentile or just one of them? The BRA suggests clarification of this section as interpretations can vary greatly.

Lastly regards to the definition of drought, section 36.2 (C) lists the final criteria being the "demand for surface water exceeds the available supply". The BRA suggests adding "as determined by the executive director" to clarify that this determination will be made by the TCEQ.



Brazos River Authority



QUALITY • CONSERVATION • SERVICE

From the perspective of a river authority with permitted storage in multiple reservoirs, the BRA believes the rule as drafted protects the BRA's ability to sell water under its permits so long as that water is lawfully stored in a reservoir. HB 2694 stated that the executive director must not require the release of lawfully stored water in making a suspension or adjustment under this new authority. The rule as drafted follows that directive in Section 36.5 (b)(6)(Conditions for Issuance of Suspension or Adjustment Order).

Section 36.06 provides for the required contents of a suspension or adjustment order. The BRA recommends adding to these requirements an estimation of the amount of water expected to be made available for beneficial use by a senior user(s) should the suspension or adjustment occur. Once a junior water right is suspended or adjusted, the aggrieved party will have an opportunity to appeal the order. The TCEQ should not only have to defend the rationale behind the order, but also an estimated amount or savings goal so that the junior water right holder can make an informed case against the order. The proposed order could be likened to receiving a speeding ticket but not being told how fast you were driving. Providing an estimation of water to be made available will allow the suspended or adjusted water right holder the ability to make a fully informed defense.

Section 36.08 sets forth procedures for notice and appeal of a commission order to suspend or adjust a water right. The TCEQ explains that an order may be issued by the executive director without notice which follows the commission's current procedure for other emergency orders. Including the words "opportunity for hearing" in subsection (a) may complicate the reference to "hearing" in subsection (b). Perhaps the rule would read more clearly if subsection (a) simply stated that the order may be issued without notice. Subsection (b) can follow by stating that an opportunity for hearing will occur after the order has been issued. Referencing "hearing" in both sections can confuse when and if an opportunity for hearing will be made available.



Brazos River Authority



QUALITY • CONSERVATION • SERVICE

The Brazos River Authority welcomes the opportunity to serve as a resource to the TCEQ as the agency continues forward with the challenges at hand. We hope that you will call upon the BRA if we can be of further assistance.

Best Regards,

A handwritten signature in black ink that reads "Phil Ford".

Phil Ford

GM/CEO



CALPINE CORPORATION

Patrick Blanchard
Director EHS Texas
717 Texas Avenue
Suite 1000
Houston, TX 77002
713-830-8717

December 5, 2011

Texas Commission on Environmental Quality
Attn: Michael Parrish
Office of Legal Services, MC 205
P.O. Box 13087
Austin, TX 78711-3087

Subject: Comments to TCEQ Rule Project Number 2011-033-036-LS:
Suspension or Adjustment of Water Rights During Drought or Emergency
Water Shortage

Dear Mr. Parrish:

Calpine is a major North American power company with a generation capacity of over 28,000 megawatts of clean, reliable, and fuel-efficient electricity for customers and communities in twenty-one states. Calpine's Texas operations include twelve combined cycle gas-fired power generation and cogeneration facilities with a capacity of approximately 7,200 MW, representing almost ten percent of the state's installed capacity.

The combined cycle gas-fired power generation and cogeneration facilities owned and operated by Calpine are designed to incorporate water conservation and energy efficiency measures. Combined cycle gas-fired power generation and cogeneration facilities withdraw and consume significantly less water than other fossil fuel generation technology plants with once-through or recirculating cooling. We believe the use of water for efficient generation of electricity supports the interest of public welfare as addressed in the order of preferences established by Texas Water Code, §11.024.

With regard to the water rights suspension rulemaking associated with House Bill (HB) 2694, Calpine supports the codification in the TCEQ rules of the aforementioned order of preferences. Additionally, the changes proposed to Chapter 36 further define and reinforce the existing water rights framework while acknowledging the need for unique measures during emergency conditions. Calpine specifically supports the Commission's proposed rulemaking for the clarity provided by the definition of terms used to describe conditions regulated under this rule.

We additionally support the proposed process for consideration and reconsideration of Adjustment and Suspension Orders. Calpine, similar to other industrial users, obtains water through contractual agreements with existing water rights holders such as regional water authorities, municipalities, and other private entities. Therefore, the proposed process should require the consideration of the actual uses of water contracted for through a water right slated for adjustment or suspension.

Again, Calpine appreciates the opportunity to comment on this proposal. Please let me know if I can provide the commission with additional information on this matter.

Respectfully,

Patrick Blanchard
Director EHS
On Behalf of Calpine Corporation



December 5, 2011

Mr. Michael Parrish, MC 205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087, MC 173
Austin, Texas 78711-3087

Re: 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.

Dear Mr. Parrish:

These comments are filed on behalf of Dallas Water Utilities, the water utility department for the City of Dallas. Dallas Water Utilities provides water and wastewater services to approximately 2.4 million people in Dallas and 26 nearby communities. DWU appreciates the opportunity to make comments on the proposed rules for the new 30 Texas Administrative Code Chapter 36, Suspension or Adjustment of Water Rights During Water Shortage.

Dallas Water Utilities was an active participant in the passage of HB 2694, by adding and modifying language to the bill that ultimately passed, and by providing comments during the subsequent rule making process. The following comments on the proposed Chapter 36 rules are based on Dallas Water Utilities' concerns that the proposed rules, published in the Texas Register Volume 36, Number 44 dated November 4, 2011, do not appear to accurately represent the intent of the Texas Legislature in passing HB 2694 regarding water curtailment. The legislative intent, supported by the efforts of Dallas Water Utilities and others in developing the text of HB 2694, Section 5.03, Water Curtailment, was not to change the prior appropriation system that now exists in the State or to develop a daily water management plan for the TCEQ, but to reaffirm and clarify the authority of the Texas Commission on Environmental Quality (TCEQ) to suspend and adjust water rights as a method of last resort as needed in times of drought or emergencies.

Dallas is concerned that the effect on the public as indicated in the Texas Commission on Environmental Quality Interoffice Memorandum dated September 29, 2011 accompanying the proposed Chapter 36, Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage is significantly understated. In the Memorandum, TCEQ staff states: "Only water rights holders will be impacted." This statement ignores the significant public impacts on water rights holders who are regional water suppliers. For example, if the City of Dallas' water rights were suspended or adjusted, that action would impact approximately 2.4 million citizens

Our Vision: To be an efficient provider of superior water and wastewater service and a leader in the water industry

1500 Marilla • Room 4AS • Dallas, Texas 75201
Telephone: (214) 670-3861 • Fax: (214) 670-5244

of the State as well as others within the State and outside of the State who utilize goods and services produced throughout the Dallas Water Utilities service area. This large scale public impact is true not only of Dallas but other water rights holders who are also major water suppliers.

Dallas is concerned that the definition of “Drought” contained in the proposed §36.2(2) is overly broad. Dallas consultants evaluated data based on the requirement that from §36.2(2)(A) that drought conditions be at least moderate as determined by the National Drought Mitigation Center (“the NDMC”). The NDMC uses the Palmer Drought Severity Index to classify drought conditions based on the moisture content of soil in the area. The reports of the monthly statewide average of the Palmer Drought Severity Index from 1895 to present indicates that the “Moderate Drought” classification has occurred statewide approximately 24 percent of the time. When looking at the Upper Trinity River Basin, from 2005 to 2011, the NDMC data indicates that the “Moderate Drought” classification has occurred in the Dallas area approximately 51 percent, over half of the time.

At the same time, Dallas consultants evaluated §36.2(2)(B) the stream flow at USGS gaging stations being below 33rd percentile of the period of record, for the Upper Trinity River Basin area, using data from the Rosser Gage. Using the entire period of record from 1924 to 2011 (i.e. August 1924 to September 1925 and November 1938 through November 2011), the 33rd percentile was calculated to be 678 cfs. Then, during the period from 2005 to 2011, a period of “Extreme” drought, the Rosser Gage stream flows did not fall below 678 cfs. If however the 33rd percentile is calculated considering the period of record to be from 1978 to 2005 (which corresponds to the period of record that TCEQ uses to calculate the 7Q2 value) the 33rd percentile was calculated to be 936 cfs, which for the period from 2005 to 2011 the gaged stream flow fell below 936 cfs 17 percent of the time.

Based on proposed definition of drought in §36.2(2)(B) and Dallas’ consultants’ analysis, the following is evident:

- First, the period of record referenced in §36.2(2)(B) is not defined and depending on its definition, there are significant differences in the definition of drought.
- Second, considering the two drought conditions independently, (as the draft rules are written through the use of the word “or”) the Dallas area would have been in drought approximately 55 percent of the months since 2005.

Additionally, the definition of “Drought” contained in the proposed §36.2(2) does not include any length of time the NDMC classification must be in place or the length of time the stream flow must be below the specified 33rd percentile before a drought is declared. Nor does there appear to be anything in the proposed §36.2(2) requiring a projection of how long the defining conditions will remain in place. Without a time frame associated with the drought definition it is possible to have a drought based on the NDMC classification to oscillate between “mild” and “moderate” weekly and the stream flow percentile could oscillate above and below the stream flow percentile every 15 minutes. Without a defined time frame the defining parameters are

vague and ambiguous. The length of time a drought condition must exist should also apply to proposed §36.5(a).

The term “hydraulic systems” in §36.2(3)(B) does not appear to be defined and could be interpreted as a wide range of systems most of which are not affected by drought or low flow conditions. The proposed rule should define both the “conditions affecting” and “hydraulic systems” which the Executive Director believes would constitute or be related to an emergency shortage of water.

Chapter 36.5(a) is unclear as to whether any of the conditions are to be met or if all of the conditions are to be met; therefore change § 36.5(a) to read “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) only if each of the following conditions have all been met:”

As mentioned in comments filed on behalf of Dallas Water Utilities on August 26, 2011, related to the development of the Chapter 36, Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage, it is important that there be collaboration among water rights holders and water suppliers at the local level first, before the Executive Director issues a temporary Suspension or Adjustment Order. The TCEQ should act to facilitate discussions among the affected parties. The goal should be to provide the opportunity to the greatest extent possible for affected persons to address drought conditions locally and regionally by agreement, rather than by Order of the Executive Director. At the very least, before an order is issued, TCEQ should hold a stakeholders’ meeting in the affected area to determine or develop consensus regarding possible responses or solutions to the drought or emergency water shortage. Such local and/or regional discussions would allow the water suppliers and users to “take ownership” of the local and regional drought conditions, and would create a more meaningful and implementable temporary order or could even eliminate the need for a temporary order by virtue of implementing the local solutions. Most importantly, the opportunity for decision making by the affected persons could result in better, more efficient orders than the periodic TCEQ suspensions without discussion.

Dallas has concerns with the notice and hearing aspects of proposed Chapter 36. Proposed §36.6 allows for the issuance of a Suspension or Adjustment Order by the Executive Director without notice and hearing, which Order would be effective for up to 180 days. The Suspension or Adjustment Order may be extended for up to 90 days for each extension. The proposed rules do state in § 36.8 that if an order is issued without notice and hearing, then the order shall set a time and place for Commission consideration of the order “as soon as practicable after the order is issued.” When Dallas originally commented on implementation of Texas Water Code, §11.053, and considered 180 days an appropriate amount of time for a suspension or adjustment order, Dallas was considering the following: (1) That drought conditions would likely be seasonal, so that the order could be in effect for the duration of the season (winter, spring, summer or fall); and (2) That there would be notice and hearing on the Suspension or Adjustment Order shortly after its issuance, if not before issuance. The proposed rules merely provide for hearing “as soon as is practicable,” and do not provide any certainty as to the timing of the hearing. As a result of

the indefinite nature of the practicability standard, water rights holders could be significantly prejudiced for indefinite time periods as to the exercise of their duly issued water rights, without the opportunity for input or review as to the Executive Director's decision making.

As an alternative to the vaguely defined opportunities for notice and hearing by affected parties regarding Suspension or Adjustment Orders issued by the Executive Director, Dallas suggests changes as follows:

- (1) Limit the length of time of a Suspension or Adjustment Order issued by the Executive Director to no more than 60 days, with no opportunity for extensions, unless the Commission issues an Order after hearing (as set forth in the Executive Director's Order) which provides for extending the effective date of the Order, and which sets forth the specific terms and conditions which must occur for any extensions, including a 30 day length for any extensions; and
- (2) Require that a Suspension or Adjustment Order issued by the Executive Director establish the opportunity for hearing before the Commission no later than 2 weeks from the date of issuance of the Order. That way, the TCEQ staff has an incentive not to issue an order without allowing sufficient hearing by affected parties as part of the Executive Director's ordering process.

The opportunity for hearing by affected water rights holders is especially important because there is no information in the proposed rules regarding how the Executive Director will determine that the requirements of proposed §36.5 are met. Water rights holders need to be able to provide information as soon as possible to support—or contest—the conclusion by the Executive Director that those four requirements have been met.

Domestic and livestock use should be addressed in these proposed rules, if the domestic and livestock water use, although not permitted, is a senior and/or superior water use. As Texas has become more urban along some sections of its streams and rivers the domestic uses have become suspect. As an example as a city in the Dallas area went from Stage 1 to Stage 3 of its Drought Contingency plan in 2011, a \$3.4 million, 3 acre estate, irrigated its grounds under the domestic and livestock exemption, which was confirmed by the TCEQ through an water rights complaint investigation (RN104032909). Although Dallas and other water providers in the Dallas area have made significant strides in water conservation, loopholes exist in the Texas Water Code that allows uninhibited usage of streams and rivers by domestic and livestock uses. Additionally, as the proposed Chapter 36 is written, while not being subject to any conservation or drought contingency planning, implementation or enforcement, individuals utilizing the domestic and livestock use permit exemption are senior and have the ability to make a call on junior water rights. If domestic and livestock users are exempt from proposed Chapter 36 requirements, then they should not be able to make use of Chapter 36 to make senior calls for water for domestic and livestock use.

Thank you for your consideration of Dallas Water Utilities comments. I look forward to continuing to work with TCEQ staff to address the concerns raised in this letter. Please do not hesitate to call me if you have any questions or would like to discuss this issue further.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a long horizontal line that ends in a small arrowhead pointing to the right.

Denis W. Qualls, P.E., D.WRE
Interim Planning Division Manager

cc: Jo M. (Jody) Puckett, P.E., Director, Dallas Water Utilities
Gwen Webb, Webb & Webb

From: <dalef@ci.waco.tx.us>
To: <dalef@ci.waco.tx.us>
Date: 12/5/2011 3:41 PM
Subject: 2011-033-036-LS

12/05/2011 03:41 PM

This email is a confirmation of the comment that was submitted for the referenced rulemaking.

First Name: Dale
Last Name: Fisseler
Company/Organization: City of Waco
E-mail Address: dalef@ci.waco.tx.us
Street Address: 300 Austin Ave. PO Box 2570
City: Waco
State: TX
Zip Code: 76702-2570
Phone Number: 254.750.5640
Fax Number: 254.750.5880

Rule: 2011-033-036-LS

Comments:

The City of Waco appreciates the opportunity to comment on the proposed new Chapter 36 rules regarding Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage. The City generally supports the adoption of the draft rules, but provides the following comments.

Proposed Rule, Definition of Drought: Section 36.2(2)

(2) Drought - A drought occurs when the following criteria are met:

- (A) drought conditions in the watershed or 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; or
- (C) demand for surface water exceeds the available supply.

Comment on Proposed 36.2(2)

Proposed Section 36.02(2)(C) provides that a drought occurs when "demand for surface water exceeds the available supply."

As currently written, it is unclear whether supply and demand are to be evaluated on a basin-wide level, or for a particular source of supply, or at a single diversion point. A declaration of drought for a river basin (or sub-basin) should only occur when demand for surface water exceeds the available supply throughout the entire basin (or sub-basin). Therefore, the City recommends revising the Section 36.02(2) definition of drought to provide that a drought occurs when "basin demand for water exceeds the available supply," or similar clarifying language.

Proposed Rule, Conditions for Issuance of Suspension or Adjustment Order: Section 36.5

* * *

(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.

Comments on Proposed 36.5

(a) Many Texas municipalities have invested hundreds of millions of dollars in enhancing their water supply infrastructure, including increasing storage capacity and their ability to utilize direct and indirect reuse options. From a policy perspective—and in fairness to taxpayers in these areas—these types of investments should be encouraged and recognized. Accordingly, the City suggests the addition of the following (or similar) language (underlined below) to proposed 36.5(b)(4):

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

(b) The City does not have another suggested revision to offer at this time, but does want to take this opportunity to support the inclusion of proposed Section 36.5(b)(5), which requires that the Executive Director ensure that an order suspending or adjusting a water right conforms to the order of preferences established by Texas Water Code Section 11.024 to the greatest extent practicable. This provision, which tracks the legislature's language in new Water Code Section 11.053 as adopted during the 82nd Legislative Session earlier this year, is vital to the protection of public health and safety in this state. As contemplated by the legislature, proposed Section 36.05(b)(5) enables the Executive Director to take into consideration the detriment to public health and safety that could result from a suspension or adjustment of a municipal water right.

Proposed Rule, Implementation of Water Conservation Plans and Drought Contingency Plans: Section 36.7(b)

(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 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.

Comment on Proposed 36.7(b)

A governmental entity's water conservation and drought contingency plans serve not only as plans of action to be implemented, but also as notification to the public of what to expect under particular circumstances. This latter function is obviated to the degree that a plan is approved by TCEQ and then later found to be inadequate and essentially set aside. While the City appreciates and supports the desire to include an option for the executive director that is less severe than completely suspending or adjusting a junior water right, this suggested provision seems to call into question the effectiveness of existing, approved plans.

Thank you again for this opportunity and please contact me at 254.750.5640 if any additional information is needed.

From: <kevinlynch@dellcity.com>
To: <kevinlynch@dellcity.com>
Date: 12/5/2011 06:23 PM
Subject: 2011-033-036-LS

12/05/2011 06:23 PM

This email is a confirmation of the comment that was submitted for the referenced rulemaking.

First Name: John
Last Name: Lynch
Company/Organization: CL Ranch
E-mail Address: kevinlynch@dellcity.com
Street Address: 296 South Main Street
City: Dell City
State: tx
Zip Code: 79837
Phone Number: 9159642841
Fax Number: 9159642426

Rule: 2011-033-036-LS

Comments:

Do not approve this rule change that would allow the exec. dir. to adjust or suspend water rights. Although this pertains to surface water, the state and its various agencies will soon be treating groundwater similarly with respect to the state's right to take control of privately held water rights and divert that resource, with no compensation to the owners. Please vote NO on this rule change.

FPL FARMING, LTD.

J. M. FROST, III
PRESIDENT and TREASURER

FROST VENTURES, L.L.C.
GENERAL PARTNER

1351 Lamar, Suite 1350
Houston, Texas 77010
(713) 658-8000
FAX (713) 658-8008
E-MAIL frost-hf@swbell.net

FORD J. FROST
VICE PRESIDENT and SECRETARY

December 1, 2011

Michael Parrish
Office of Legal Service, MC 205
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78710-3087

Re: Rule Project No. 2011-033-036-LS:

Comments on the Chapter 36 - Suspension or Adjustment of
Water Rights during Drought or Emergency Water Shortage

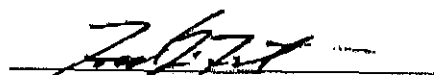
Dear Mr. Parrish:

As the holder of senior water rights for irrigation, we are writing this letter to oppose the short-sighted changes to the Texas Water Code proposed by the TCEQ. It is doubtful that the Texas Legislature intended for an agency to completely realign years of tried and true water law, particularly without notice to stakeholders covered by the proposed process.

The TCEQ should not act on any of the proposed rules and regulations, but should rely upon the tools at hand to cover the current emergency.

Very truly yours,

FPL Farming, Ltd., a Texas Limited
Partnership, acting by and through
Frost Ventures, L.L.C., as General Partner



Ford J. Frost
Vice President

FJF:lds

J. M. FROST, III
PRESIDENT and TREASURER
FORD J. FROST
VICE PRESIDENT and SECRETARY

FPL REAL ESTATE, LTD.
FPL REAL ESTATE MANAGEMENT, L.L.C.
GENERAL PARTNER

1331 LAMAR, SUITE 1350
HOUSTON, TEXAS 77010
(713) 658-8000
FAX (713) 658-8008
E-MAIL frost-ht@swbell.net

FAX TRANSMISSION COVER SHEET

TO: Michael Parrish, MC 205
Office of Legal Services, TCEQ

FROM: Ford J. Frost

DATE: December 5, 2011

FAX NO: 512 239-4808

SUBJECT: Rule Project Number 2011-033-036-LS

NUMBER OF SHEETS, INCLUDING THIS COVER SHEET: 2

IF YOU HAVE ANY PROBLEMS WITH THIS TRANSMISSION, PLEASE CALL (713) 658-8000.

COMMENTS:

Please see attached letter concerning the referenced Rule Project Number 2011-033-036-LS.

NOTICE OF CONFIDENTIALITY

The information contained in and transmitted with this facsimile is:

1. SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE,
2. ATTORNEY WORK PRODUCT, OR
3. CONFIDENTIAL.

This fax is intended only for the individual or entity designated above. You are hereby notified that any dissemination, distribution, copying, use of, or reliance upon the information contained in and transmitted with this facsimile by or to anyone other than the recipient designated above by the Sender is unauthorized and strictly prohibited. If you have received this facsimile in error, please notify Sender by telephone at (713) 658-8000 immediately. Any facsimile erroneously transmitted to you should be immediately returned to Sender by U.S. Mail, or if authorization is granted by the Sender, destroyed.

THIS COMMUNICATION WILL NOT BE CONTRACTUAL IN ANY MANNER, PROVIDED, HOWEVER, THAT IF THIS MESSAGE OR ANY ATTACHED LEGAL DOCUMENT CONTAINS THE WORD "CONTRACT," "AGREEMENT," "AGREED" OR A SIMILAR WORD OR WORDS IN ITS TITLE AND CLEARLY STATES ITS CONTRACTUAL NATURE, THEN THIS MESSAGE OR SUCH LEGAL DOCUMENT WILL BE DEEMED CONTRACTUAL TO THE EXTENT SO CLEARLY STATED.

J. M. FROST, III
PRESIDENT and TREASURER

FORD J. FROST
VICE PRESIDENT and SECRETARY

FPL REAL ESTATE, LTD.
FPL REAL ESTATE MANAGEMENT, L.L.C.
GENERAL PARTNER

1331 Lamar, Suite 1360
Houston, Texas 77010
(713) 658-0000
FAX (713) 658-8008
E-MAIL: frost-hj@swbell.net

December 1, 2011

Michael Parrish
Office of Legal Service, MC 205
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78710-3087

Re: Rule Project No. 2011-033-036-LS:

Comments on the Chapter 36 - Suspension or Adjustment of
Water Rights during Drought or Emergency Water Shortage

Dear Mr. Parrish:

We are writing this letter as the landlord of some 1,200 acres of rice production per year with an estimated exposure of \$1,080,000 per year for our tenants.

Under the proposed rules and regulations Chapter 36.7 (6), the TCEQ could curtail water availability to certain junior and senior water right holders in order to supply other junior water right holders without compensating the shorted water right holder, contrary to Texas and US law as exemplified by a recent US Supreme Court ruling. Because of the lack of clarity in the availability of water, our farmers cannot take the risk of planting crops and, as such, not pay rent. The TCEQ attempt to overturn long-established Texas law and possibly US law is appalling.

Very truly yours,

FPL Real Estate, Ltd., a Texas Limited
Partnership, acting by and through
FPL Real Estate Management, L.L.C.,
as General Partner



Ford J. Frost
Vice President

FJF:lds

J. M. FROST, III
PRESIDENT and TREASURER

FORD J. FROST
VICE PRESIDENT and SECRETARY

FVL, LTD.
FVL MANAGEMENT, L.L.C.
GENERAL PARTNER

1331 Lamar, Suite 1350
Houston, Texas 77010
(713) 856-8000
FAX (713) 856-8008
E-MAIL frost-hf@swbell.net

December 1, 2011

Michael Parrish
Office of Legal Service, MC 205
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78710-3087

Re: Rule Project No. 2011-033-036-LS:

Comments on the Chapter 36 - Suspension or Adjustment of
Water Rights during Drought or Emergency Water Shortage

Dear Mr. Parrish:

I am writing this letter to protest the blatant attempt to usurp established Texas water laws by the TCEQ.

Because of the uncertainty of senior water right holders to receive available water, the ability to conduct rice farming has been all but eliminated due to the inability to insure crops. Under Section 11.053 (6) 6 of the proposed rules for allocating water under drought or water shortage conditions, the TCEQ does not have to release water that is stored in upstream reservoirs to senior water right holders, who, for the most part, have bought and paid for upstream reservoirs to store water for conditions such as we are now facing through years and years of water rate payments that take into account the construction of reservoirs. As the result of such uncertainty, it is impossible to plan for and produce a crop, thus greatly lowering the value of "once" irrigated farm land.

Very truly yours,

FVL, Ltd., a Texas Limited Partnership, acting
by and through FVL Management, L.L.C.,
as General Partner


Ford J. Frost
Vice President

FJF:lds

From: [REDACTED]
To: [REDACTED]
Date: 12/4/2011 12:29 PM
Subject: 2011-033-036-LS

12/04/2011 12:28 PM

This email is a confirmation of the comment that was submitted for the referenced rulemaking.

First Name: Randal
Last Name: Bennett
Company/Organization:

[REDACTED]

City: quitman
State: tx
Zip Code: 75783
Phone Number:
Fax Number:

Rule: 2011-033-036-LS

Comments:

The above rule primary affects agricultural users. The proposed rule would suspend those users water rights who have priority by law. There is no provision for reimbursement to those farmers whose livelihood has been affected. In effect, it is a taking of resources by those who lessor claim over those with priority claim without reimbursement. Large cities which are going to claim this water have greater leverage to pay for these resources than those they are taking these resources from.

Our founding fathers established this country with protections against "taking" that was secured under our constitution.

This water grab by those in power is similiar to the mineral right grabs in the early 20th century. Land owners today still fight over poor stewardship of resources by those who have controled underground mineral interests.

This bill is a step by those who are using water as the next mineral grab. At least those loosing right should be compensated so that they don't loose their livelihood. Do whats right for a change!

December 1, 2011

Michael Parrish
Office of Legal Service, MC 205
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78710-3087

Re: Rule Project No. 2011-033-036-LS:

Comments on the Chapter 36 - Suspension or Adjustment of
Water Rights during Drought or Emergency Water Shortage

Dear Mr. Parrish:

I am writing this letter as the former President of the Devers Canal Rice Producers Association, which, under my presidency, gave its assets and water rights to the Lower Neches Valley Authority to provide for the long-term continuance of rice irrigation water to the some 17,000 acres of rice production, that have been produced for the past several years within our former service area.

It is with great concern that I learned that the TCEQ is considering rules and regulations that are contrary to long-established Texas water law, which will affect the rice producers of Texas in many negative ways as briefly explained below:

1. Many irrigation water rights are senior in nature, but will be subservient under the proposed plan, depriving rice farmers from their allocated water, their livelihood, without compensation; therefore, being a taking under Texas and US Law.
2. Because of the uncertainty of supplying water, federal crop insurance will not be written to protect farmers from any and all risk, even depriving preventative planting payments in times of true drought, such as we may be currently facing. Under present law if water supplies are curtailed, farmers would be covered for loss since farmers' priority water rights would be protected, rather than under a new scheme of ambiguity.
3. Senior water right holders have paid for dams and reservoirs to provide water through times like we are presently facing through years of water rate payments, which include these costs; but under the new proposed scheme, water may not be released to the senior water right holders. This is blatantly unfair; junior water right holders could have and should pay for new dams and reservoirs to provide

Michael Parrish
Texas Commission on Environmental Quality
December 1, 2011
Page 2

an assured amount of water, or they could have chosen to locate where a source of water was assured, just as senior water right holders have done.

4. At this time, there are great numbers of concerned and affected people who have been denied their opportunity to voice their protests of these proposed attempts to circumvent established Texas water law, through the failure to notify the owners of the land that depend on a stable supply of water through long-established service areas for which water rights have been allocated by the state regulating process.
5. As farmers on the coastal plane, we recognize the lack of water for rice production will greatly affect the eco systems of the marshes and bays that depend on a flow of water from rice fields, which acts as a filter from upstream contaminants.
6. The TCEQ is planning to adopt the proposed rules and regulations on April 11, 2012, approximately 30 days after the optimum planting date for rice in the coastal area making planning for the 2012 crop year an exercise of chance.

These are a few of my concerns that possibly are the unintended consequences of the TCEQ adopting these proposed rules and regulations as a result of not being totally studied, which will cause great economic and environmental harm and lead to years of litigation.

Very truly yours,



SLD:lds



December 5, 2011

Mr. Michael Parrish
Office of Legal Services, MC 205
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Via internet: <http://www5.tceq.texas.gov/rules/ecomments/>

Dear Mr. Parrish:

This letter provides the Lower Colorado River Authority's (LCRA) comments on the Commission's proposed rules implementing TEX. WATER CODE § 11.053, which were published in the Texas Register on November 4, 2011.

(1) Applicability ((30 TEX. ADMIN. CODE § 36.1(c))

LCRA believes that all water users should be subject to any order that might be issued under this new authority, regardless of whether the water use is exempt from permitting requirements. Accordingly, LCRA suggests that the exemption for some (but not all) exempt users be removed. While the fact that these users are exempt from permitting may bear on how these users are treated by the Commission during its exercise of this new authority, nothing in TEX. WATER CODE §§ 11.142 or 11.1422 conclusively suggests that these uses are any more essential to the public welfare during a drought. While the Commission's proposed rules appear to intend to specifically benefit exempt domestic and livestock uses, the effect of remaining entirely silent on the other exempt uses essentially provides broad protection for the other exempt uses.

(2) Definition of "drought" (30 TEX. ADMIN. CODE § 36.2(2))

LCRA suggests the following clarifications to 30 TEX. ADMIN. CODE § 36.2(2)(B), which defines a drought as occurring when "streamflows at United States Geological Survey gaging stations *in the drainage area* are below the 33rd percentile of the *period of record*":

- a. TCEQ should clarify that the relevant 'drainage area' could be an entire watershed or part of a watershed, depending on where the impacted water rights are located.
- b. TCEQ should also clarify that the relevant 'period of record' will be that period of record available for the watershed (or portion thereof) of concern. This may be most appropriately addressed by including a definition 'period of record' that recognizes the period of record can vary by watershed.

(3) Definition of “emergency shortage of water” (30 TEX. ADMIN. CODE § 36.2(3))

LCRA generally supports the proposed definition, but would offer the following observations:

- a. The definition uses the term ‘emergency’ without defining it.
- b. The term ‘hazard’ is not defined and may be overly broad. LCRA recommends that an emergency shortage of water be limited to those times when no feasible alternative supplies are available, similar to the requirement set forth in TEXAS WATER CODE § 11.139.
- c. LCRA believes the Commission should only issue an order to address an ‘emergency shortage of water’ after it has fully implemented and enforced the priority of water rights in an attempt to address the problem(s). For example, if implementation of prior appropriations to benefit a senior agricultural right would cause a junior municipal right to experience an emergency shortage of water, then this provision could be triggered.
- d. LCRA suggests that section 36.2(3)(B) regarding hydraulic conditions that might create an emergency shortage of water be clarified to specifically exclude situations in which water levels in a reservoir drop below water intakes installed in such reservoir. It is generally the responsibility of the owners of these intake structures to address the necessarily varying levels of reservoirs as part of the design of these structures. To allow emergency relief to be ordered that would require lake levels to be raised above these structures would be wholly inappropriate in this case and also has the potential to significantly impair use by others who rely on releases from the reservoir.

(4) Definition of “senior water right” and “water right” (30 TEX. ADMIN. CODE §§ 36.2(4) & (7))

LCRA generally agrees that it may be appropriate to afford some protection under this statute to certain exempt and common law riparian domestic and livestock (D&L) users under the definition of ‘water right’; however, LCRA does not agree that all exempt domestic and livestock users should be afforded an automatic status as ‘senior water rights’ as proposed by Section 36.2(4). LCRA believes that common law riparian rights are ‘superior’ but not ‘senior.’ The term ‘senior water right’ should be limited to water rights that have either been formally adjudicated or subsequently granted by permit from the Commission, both of which are assigned a specific priority date. Common law riparian domestic and livestock users’ rights fall within the category of ‘superior rights’ as that term is used within the Texas Water Code, Commission rules, and Certificates of Adjudication, water use permits and amendments issued by the Commission.¹ Such rights are superior to adjudicated water rights because they are not subject to the Adjudication Act, are not subject to the State’s permitting requirements, are not limited by any priority date, and may require a holder of an adjudicated water right to pass through inflows downstream for the reasonable riparian use.² While statutorily exempt domestic and livestock users also have a special right to use state water, that right should not be characterized as a ‘senior water right.’ With the exception of

¹ Certificates of Adjudication, permits and amendments issued by the Commission include standard language that the Certificate, permit or amendment is issued subject to *both senior and superior* water rights in the applicable basin.

² Commission rules provide, in part, that “a person may directly divert and use water from a stream or watercourse for domestic and livestock purposes on land owned by the person and that is adjacent to the stream without a permit.” 30 TEX. ADMIN. CODE § 297.21(a). It also provides that “[s]uch riparian domestic and livestock use is a vested right that predates the prior appropriation system in Texas and is superior to appropriative rights. *Id.* (Emphasis added).

D&L reservoirs that were in place prior to the State's first permitting scheme established in 1913, these exempt users are also not 'superior' – they are simply exempt from the certain processes, such as filing and reporting and permitting requirements.

As previously suggested, LCRA is also concerned that the definition of 'water right' and applicability of these rules as a whole excludes entirely other categories of exempt users of state water. LCRA believes these rules should apply to all legally authorized users of state water through a broader definition of 'water right.' Moreover, LCRA is concerned that the proposed definition of 'water right' under Section 36.2(7) would include D&L users only to the extent that such users are 'benefitted' by an order issued under the rules. In this first instance, the conditions under which a common law riparian or exempt user might be affected by an order under these rules would seem more appropriately included under proposed Section 36.5 and not within the definitions. Moreover, it is LCRA's position that the Commission should also exercise authority to regulate water use during drought as between competing domestic and livestock users, whether exempt or riparian, and that in some instances, this could mean an order might be issued that would benefit some of these users while curtailing the use of others. After all, even riparian users are limited to a *reasonable use* standard. Indeed, the Commission's own rules for watermaster operations contemplate requiring exempt D&L users to pass inflows to downstream riparian D&L users. *See* 30 TEX. ADMIN. CODE §304.21(d)(3). While LCRA has previously argued and still maintains that the Commission can and should require certain exempt D&L users to pass inflows to senior holders of adjudicated water rights, at minimum, it seems entirely appropriate for the Commission to at least remain consistent with the approach used in watermaster areas.

(5) Executive Director Action (30 TEX. ADMIN. CODE § 36.3)

LCRA agrees with the proposed rule 36.3(b), which recognizes a distinction between 'senior' and 'superior' water rights. LCRA further suggests that this language be modified to include reference to 'exempt users' and a definition of such users be included in Rule 36.1.

(6) Conditions for Issuance of Suspension or Adjustment Order (30 TEX. ADMIN. CODE § 36.5)

LCRA is very concerned with how TCEQ will interpret and apply the factors set forth under 30 TEX. ADMIN. CODE § 36.5(b)(5) while also honoring the priority doctrine under TEX. WATER CODE § 11.027, as clearly required by TEX. WATER CODE § 11.053. The proposed rules are entirely silent on how the Commission will ensure that senior water rights are not impaired. To allow a junior user that might have a higher preferred use to divert would only appear to be appropriate when passing that water to a downstream senior right in need presents a futile call or would otherwise be inappropriate due to factors such as the mismanagement or waste by the senior right of its available supply. To the extent that any other action is taken by the Commission, LCRA believes it could be appropriate in some situations to require payment to an adversely affected water rights holder similar to that contemplated by TEX. WATER CODE § 11.139. TCEQ should determine as part of these rules the conditions under which compensation might be appropriate. Moreover, TCEQ should clarify that the appropriate provision for granting relief to a retail or wholesale supplier is TEX. WATER CODE § 11.139 and not § 11.053, if the effect of the relief requested (if granted) would be to effectively cause the transfer of rights from a senior non-municipal or non-domestic user. Section 11.053 should not be allowed to circumvent the need to compensate water rights holders who are adversely affected by the need to address human health and safety concerns.

LCRA is also concerned that the proposed rules expressly limit the conditions under which an order might be appropriate to times when a senior water right is 'unable to divert', *see* 30 TEX. ADMIN. CODE § 36.5(a)(2); *see also id.* § 36.5(a)(4). It is without debate that some beneficial uses of water do not require diversion. For example, cooling reservoirs for electrical generating facilities may not require actual diversion of water if those reservoirs are located on-channel. Moreover, the proposed rules lack any specificity with regard to *when* a diversion might be needed to qualify under the rules for an order. While diversions from a reservoir may be ongoing as reservoir levels drop, it is the ability (or lack thereof) to impound additional flows that might *later* prevent diversion for critical needs.

(7) Conditions for Issuance of Suspension or Adjustment Order (30 TEX. ADMIN. CODE § 36.7)

LCRA agrees with the proposed rule that expressly recognizes TCEQ's authority to require junior water rights not subject to a suspension order to implement more restrictive drought or water conservation measures than contemplated by their existing plans. *See* proposed 30 TEX. ADMIN. CODE § 36.7(b). LCRA also believes it would be appropriate under proposed 30 TEX. ADMIN. CODE § 36.7(a) for TCEQ to consider whether an affected water right holder, who is to benefit from the order, should be required to implement more rigorous drought measures before obtaining relief. This should be tempered by recognition that only such additional measures that are reasonable and affordable should be required. In addition to the affordability of additional required measures, whether the measures themselves would result in any significant water savings or create other critical water emergencies should also be considered. Thus, in evaluating implementation, LCRA suggests that the proposed rules expressly recognize consideration of the *effectiveness* of the drought measures that are (or are not) being implemented.

(8) Initiation of Emergency Order Process

LCRA's position is that the authority under TEX. WATER CODE § 11.053 should only be exercised in response to a specific concern raised by water rights holders, consistent with the approach embodied in the rules that implement TEX. WATER CODE §§ 11.139 and 11.148. The proposed rules, however, appear to contemplate this authority as being initiated solely from within the Commission, rather than through a process initiated by third parties.

Thank you for the opportunity to provide input on this effort. If it would be helpful, LCRA would be more than willing to discuss these comments further at your convenience. Please feel free to contact me at (512) 473-3378 if such a meeting is desired, or any further clarification of these comments is needed.

Regards,



Lyn Clancy
Managing Associate General Counsel



December 5, 2011

Mr. Michael Parrish
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

VIA ELECTRONIC TRANSMISSION

Re: **Rule Project No. 2011-033-036-LS**
Comments Relating to Proposed New 30 TAC Chapter 36, Suspension or
Adjustment of Water Rights During Water Shortage

Dear Mr. Parrish:

This letter is submitted by Lloyd Gosselink Rochelle & Townsend, P.C., on behalf of a number of its water supply and water rights clients, in response to the proposed new 30 TAC Chapter 36 relating to Suspension or Adjustment of Water Rights During Water Shortage, as published in the November 4, 2011 *Texas Register* (the "Proposed Rules").¹ Lloyd Gosselink's clients are made up of cities, regional water districts, and river authorities across Texas. Our clients recognize that significant time and effort has been invested by TCEQ Commissioners and agency staff in the development of the Proposed Rules, and we appreciate the opportunity to provide these comments.

In response to TCEQ's solicitation of comments regarding the Proposed Rules, we have prepared the following comments for the agency's consideration as it develops protocol for the suspension or adjustment of water rights during droughts or other emergency water shortages. Specifically, we offer the following comments for TCEQ's consideration:

1. In regards to proposed Section 36.1(7), defining "water right," this definition should mirror the definition for "water right" currently established in Water Code § 11.002(5). This subsection of the Code defines a "water right" as "a right acquired under the laws of this state to impound, divert, or use state water."² Defining "water right" in the same way as the term is currently defined in Chapter 11 of the Code will help ensure clarity and eliminate confusion as to the meaning of the term.
2. TCEQ should define what is meant by the term "affected water right holders" as such term is referenced in proposed Sections 36.5(b)(4) and 36.7(a). It is unclear whether the

¹ See 36 Tex. Reg. 7463 (2011) (to be codified at 30 Tex. Admin. Code §§ 36.1-36.8 (proposed November 4, 2008) (Tex. Comm'n on Env. Quality).

² Tex. Water Code § 11.002(5).

term “affected water right holders” is meant to include junior water right holders, senior water right holders, or both groups.

3. Given the uncertainty as to what is meant by the term “affected water right holders,” TCEQ should clarify what is meant by the directive found in proposed Section 36.5(b)(4) that the executive director “consider the efforts of the ‘affected water rights holders’ to develop and implement the water conservation plans and drought contingency plans required by Water Code, Chapter 11.” Specifically, the agency should clarify whether this section requires a senior water right holder to demonstrate any level of water conservation implementation before it may benefit from a suspension or adjustment order. All water right holders, including both junior rights and senior rights, should be required to take whatever steps are available to them in order to minimize their diversions of water during drought or other emergency conditions, so that the impacts of such conditions are minimized for all.
4. With regard to proposed Section 36.5, clarification is needed as to the degree of discretion the executive director will employ in determining whether a water right holder has sufficiently developed and implemented its water conservation and drought contingency plans.
5. The duration of a suspension or adjustment order prescribed in proposed Section 36.6(3)(A) should be for a maximum of sixty (60) days. The 180-day duration included in the Proposed Rules is simply too long. An order with a sixty day duration is sufficient to allow for protection of senior rights while precluding the possibility of burdensome restrictions being placed on junior water right holders for too long a period. Because the Proposed Rules allow for such orders to be extended, there is little risk that an order issued with a maximum sixty day duration will be inadequate to protect senior rights. Further, because the issuance of a suspension or adjustment order may not afford junior water right holders an opportunity for contested case hearings, a 180-duration for such orders is simply inappropriate. Additionally, these orders should only be extended by up to thirty (30) days, per extension, in lieu of the ninety (90) day extension contemplated in proposed Section 36.6(3)(B).
6. We request that TCEQ strike the final phrase from the proposed Section 36. 6(3)(A) ,that the suspension or adjustment order has a 180 day duration “unless otherwise specified in a Suspension or Adjustment Order.” In order to give water right holders some degree of certainty as to their ability to make beneficial use of their water rights, we believe it is important that the Proposed Rules expressly provide for the maximum duration of a suspension or adjustment order and not allow for custom fitting of such orders. Again, we believe a suspension or adjustment order with a maximum duration of 60 days, with 30 day extensions, is adequate.
7. TCEQ should provide clarification in proposed Section 36.8 as to the timeline and procedural protocol under which the Commission will hold a hearing to determine whether to affirm, modify, or set aside a suspension or adjustment order. Setting such a timeline and prescribing the procedural protocol under which TCEQ Commissioners will


hold a hearing to affirm, modify, or set aside such orders will provide greater certainty and assurance for affected water right holders in their ability to participate, when necessary, in the determination of the appropriateness of the suspension or adjustment of their water rights. The lack of specificity in the Proposed Rules as to the procedural protocol relating to issuance of suspension and adjustment orders presents due process concerns for water right holders that the Legislature clearly did not intend in its passage of H.B. 2694.

Water rights in Texas represent real property interests to the holders of those rights. They often represent significant investments made by water right holders over long periods of time. Specifying the procedural protocol, and thereby the due process, that will be afforded to water right holders during times of drought or emergency water shortage is absolutely critical in affording water right holders the due process to which they are entitled in order to protect their real property interests. A lack of sufficient procedural due process in the Proposed Rules could render the TCEQ's suspension or adjustment of water rights unconstitutional.

The TCEQ should consider instituting, as part of the Chapter 36 rules, a portion of the procedural protocol established in Section 11.139 of the Water Code, related to hearings following the agency's issuance of emergency authorizations (which also occur without prior notice or the opportunity for contested case hearing). To that end, a suspension or adjustment order should contain a statement fixing a time and place for a hearing to be held before the Commissioners to affirm, modify, or set aside the order. The time for the hearing should be as soon after the suspension or adjustment order is issued as is practicable but not later than 20 days after order is issued. At the hearing, the Commissioners should affirm, modify, or set aside the suspension or adjustment order. Such notice of a hearing on a suspension or adjustment order should be provided, at a minimum, to all affected water right holders.

Lloyd Gosselink Rochelle & Townsend, P.C. and its clients appreciate the opportunity to provide these comments and we look forward to working with TCEQ staff to assist in the implementation of the Proposed Rules. Should you have any questions regarding these comments, please feel free to call me at the above-referenced number at your convenience.

Sincerely,


Martin C. Rochelle

MCR:mab
1416486_2



LOWER NECHES VALLEY AUTHORITY

MUNICIPAL • INDUSTRIAL • AGRICULTURAL WATER

5 December 2011

Michael Parrish
Office of Legal Services
Texas Commission on Environmental Quality
MC-205
Post Office Box 13087
Austin, Texas 78711

RE: Proposed 30 TAC Chapter 36, new §§36.1 - 36.8
Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage
Rule Project No. 2011-033-036-LS.

Dear Mr. Parrish,

Thank you for the opportunity to comment on the proposed rules for suspension and adjustment of water rights during times of drought or emergency water shortage. As a water rights holder who serves municipal, industrial, and irrigation interests in southeast Texas, the Lower Neches Valley Authority (LNVA) has a deeply vested interest in the development of this proposed rule and offers the following comments:

§36.2 (2)(B). *“A drought occurs when... streamflows at United States Geological Survey gaging stations in the drainage area are below the 33rd percentile of the period of record;”* should be eliminated as a definition of drought as it would place a particular basin or segment of a basin in “drought” status 1/3 of the time, or on average 4 months of every year. This definition also fails to acknowledge that flows in any given stream segment vary seasonally or allow for a naturally varying seasonal condition. Maintaining this definition could place an overly burdensome management task on the Commission due to the frequency of “drought” as hereby defined.

§36.2 (2)(C). *“A drought occurs when... demand for surface water exceeds the available supply;”* should be eliminated as a definition of “drought” and applied as a definition of “emergency water shortage”. Any time at which demand exceeds availability certainly defines a condition of water shortage; however, since a “drought” is a result of an extended period of dry weather, the definition of a drought should not be tied to water availability. Considering the over appropriation of surface water in various basins across Texas, it should not be unexpected to see a growing water shortage, when demand exceeds supply, occurring irrespective of rainfall patterns as the State continues to grow.

§36.2 (3). As stated above, when “*The inability of a senior water right holder to take surface water under their water right during... times at which demand for surface water exceeds the available supply;*” should be added as a definition of “emergency water shortage”.

§36.3. Executive Director Action. As proposed, the actions of the Executive Director are tied to “a period of drought or other emergency shortage of water” but there is no proposed method for an affected or potentially affected water rights holder to invoke action on the part of the Commission. Water rights holders should be able to initiate an evaluation of water availability and potential curtailment through the placement of a “senior call” if the water rights holder experiences shortages. A “senior call” should require evaluation and, if found valid due to a lack a sufficient flows, a response by the Executive Director should be made to protect senior water rights through adjustments, curtailments, or compensation to a senior water rights holder who may be effectively curtailed through the non-application of curtailment on a junior water rights holder.

Recognizing that any suspension or adjustment as proposed under §36.3 of this title may negatively impact public health, safety or welfare, a non-curtailment or suspension of particular junior rights may be a reasonable approach; however, by not enforcing protection of a senior water right, the senior right holder will be effectively curtailed and should be entitled to compensation. If a “senior call” is proven valid but left unprotected by suspension or adjustment orders, junior water rights holders receiving benefit should be required to compensate the senior water rights holder by order of the Executive Director. Indeed, allowing a junior water right holder to take water at the expense of a senior right holder is a taking of the senior property rights by state action; thus the very definition of Eminent Domain and entitled to compensation.

§36.5 (b)(4). “*The executive director shall ensure that the order... 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.*” While the proposed rule explicitly requires the consideration of water conservation and drought contingency plans of affected water rights holders, it is silent with respect to the plans and implementation thereof by unaffected water rights holders, or those who are not curtailed or suspended as a consideration of public welfare. If a junior water rights holder is not subject to curtailment or suspension by virtue of preference of use, its water conservation and drought contingency plans should be the most highly scrutinized and most stringently enforced.

General Comments.

Overall, this rule, as proposed, does not provide adequate protection to senior water rights holders. Understanding public welfare concerns and the need to provide municipal water, even to junior water rights holders ahead of other senior needs, if a curtailment or suspension order is issued based on a senior call and insufficient flows, a non-adjusted or suspended junior diverter should, at a minimum, be required to provide compensation to the senior water rights holder.

Additionally, permitting municipal water suppliers with junior rights to maintain fully unaffected diversions during times of insufficient flows to meet senior demands perpetuates future problems by failing to encourage proper planning among municipalities, while effectively encouraging reliance on simply being a municipal supplier for protection of their water supply. Furthermore, failing to impose any restriction on municipal suppliers allows for their continued and unfettered diversions for other uses such as water for industrial customers while a more senior industrial water right holder may experience insufficient flows to meet their demands.

Non-application of a curtailment or suspension based on preference of use, per Texas Water Code §11.024, should require that the benefitting party has pursued the acquisition of needed water by lease or purchase and is unable to do so, does not have available groundwater supply, and has enacted and is fully enforcing all water conservation measures available to him without jeopardizing public health, safety and welfare. Finally, any rule for suspension and/or curtailment of water rights which does not strictly enforce the priority system should provide a mechanism for compensation to senior water rights holders which are negatively affected by non-application of suspension or curtailment on junior water rights holders.

The Lower Neches Valley Authority values the opportunity to comment on the proposed rules for suspension and adjustment of water rights during times of drought or emergency water shortage. The Authority deeply appreciates the work of the TCEQ and its staff in managing the water supply through the current drought. The LNVA is confident that the Commission will develop a rule which is in the best interest of the citizens of the State of Texas and protective of water rights holders in accordance with the State's prior appropriation doctrine.

Thank you for your consideration of LNVA's comments, and please do not hesitate to contact me at (409) 892-4011 or dawnp@LNVA.dst.tx.us if you have any questions or need additional information.

Sincerely,

Dawn Pilcher, P.E.
Manager of Engineering



NATIONAL WILDLIFE FEDERATION

SOUTH CENTRAL REGIONAL CENTER
44 East Avenue, Suite 200
Austin, Texas 78701

512.476.9805
FAX 512.476.9810
www.nwf.org

December 5, 2011

Mr. Michael Parrish
MC 205, Office of Legal Services,
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Rule Project Number 2011-033-036-LS; Chapter 36 Suspension or Adjustment of
Water Rights During Drought or Emergency Water Shortage

Dear Mr. Parrish:

On behalf of the National Wildlife Federation, I appreciate the opportunity to provide the following comments on the proposed rules, referenced above.

Comments on Proposed Section 36.2. Definitions.

- (1) Adjustment: The reference to “timing of diversions under a water right” is unclear as currently drafted. Based on the preamble language, it appears likely that the intent is to provide that an adjustment may include a restriction on the timing of diversions under a water right. However, that is not clear from the proposed text.

The commission should consider revising the text to read substantially as follows:

“The partial curtailment of one or more water rights, or a limitation on the timing of diversions under one or more water rights.”

- (2) Drought: The proposed definition appears to be internally inconsistent because the introductory clause (“when the following criteria are met”) is stated in terms of requiring multiple criteria to be met. However, the criteria are actually stated in the alternative as though only one criterion is required to be met.

In addition, “moderate” drought conditions under the National Drought Mitigation Center, particularly if they are short-term conditions, would not appear to justify the use of the authority provided by the new Section 11.053 of the Water Code. Section 11.053 refers to a period of drought or “other emergency shortage of water.” That indicates that this grant of authority is intended to address emergency shortages of water, whether drought-induced or otherwise. Accordingly, the severity of drought that triggers the authority should reflect

serious conditions. Also the term “drought” should not be used as an operative term in the definition of “drought.”

The National Drought Mitigation Center (NDMC) website indicates that in addition to characterizing four levels of drought intensity, with moderate being the least intense, it also recognizes drought impacts as being short-term, reflecting agricultural or grassland impacts, or as long-term, reflecting hydrological or ecological impacts. Accordingly, it appears highly unlikely that a moderate drought that is classified as exhibiting only short-term impacts, which are described as including impacts other than hydrological or ecological, would result in an emergency shortage of water. Short-term moderate droughts are likely to be common occurrences and this authority should not be triggered on a routine basis.

Accordingly, the definition of period of drought, as it relates to a NDMC classification, should be revised to provide that it involves a drought condition classification of at least either a moderate drought with long-term impacts or of a severe drought.

Similarly, the drought classification based on USGS gaging stations should not be triggered one-third of the time, as would seem to be indicated by the proposed rule. The mere occurrence of flows below the 33rd percentile will not be a particularly unusual event. In addition, the duration of low flows is a critical consideration in determining if emergency conditions exist. As drafted in the proposal, it appears that even an instantaneous occurrence of flows below the 33rd percentile would trigger the drought definition. Use of a reasonable averaging period sufficient to reflect actual drought conditions seems more appropriate. Finally, the proposed rule is unclear in its reference to “gaging stations in the drainage area.” Must all gaging stations in the drainage area be below the 33rd percentile to qualify or just some gaging stations? Also, what is the definition of a drainage area? For consistency across the definition, the term “watershed” seems preferable.

Finally, the third criterion seems to represent a fall-back provision that could be relied upon even if neither of the other criteria is met. The existence of such a fall-back provision also counsels against making the other criteria too easy to meet. As currently drafted, the determination of when “demand for surface water exceeds the available supply” is quite vague. Demand should be measured taking into account reasonable implementation of water conservation and drought contingency measures. Also, this criterion seems unduly broad because water might not be “available” as a result of any number of causes other than one related to drought. As a result, any shortage of supply, even one caused by equipment breakage, would appear to have the potential to satisfy the proposed definition of drought. That result is not a reasonable interpretation of the statutory language. The “other emergency shortage” language is designed to address such situations.

The commission should consider revising the text to read substantially as follows:

(2)Drought – A drought occurs when at least one of the following criteria is met:

(A) hydrological conditions in the watershed or the part of the watershed subject to the executive director’s Suspension or Adjustment Order are classified as “moderate” with long-term impacts or as at least “severe” by the National Drought Mitigation Center;

(B) streamflows at the United States Geological Survey gaging stations in the watershed or the part of the watershed subject to the executive director’s Suspension or Adjustment Order are below the 20th percentile of the period of record, when assessed on a 90-day running average basis; or

(C) demand for surface water, after taking into account reasonable implementation of water conservation and drought contingency measures, exceeds the available supply as a result of hydrological conditions.

Emergency Shortage of Water: NWF agrees that the legislation seems to contemplate this additional category of conditions that would trigger the Executive Director’s authority. However, this term should not be defined in such broad terms. Rather than triggering on the inability of senior water right to “take” surface water, we suggest the rule language address the inability to “obtain” surface water because of the unavailability of water for diversion at the authorized diversion point. That is the only kind of situation that could be addressed through the mechanisms set out in these rules so it is the type of situation that should be used in the definition. The use of the undefined term “emergency periods” in the definition of emergency shortage adds inappropriate ambiguity. Similarly, the use of the undefined term “hydraulic systems” introduces further ambiguity. Either another term should be substituted or that term should be defined.

The commission should consider revising the text to read substantially as follows:

- (3) *Emergency Shortage of Water – The inability of a senior water right holder, even after implementing reasonable alternatives including aggressive water conservation and drought contingency measures, to obtain surface water because of conditions that can reasonably be addressed by a Suspension or Adjustment Order applicable to water rights with a more junior priority during:*
- (A) short-term periods posing a hazard to public health or safety; or*
 - (B) short-term conditions affecting water delivery systems which impair or interfere with the conveyance or delivery of water for authorized users.*

Comments on Proposed Section 36.5. Conditions for Issuance of Suspension or Adjustment Order.

Section 36.5 (a)(2): This provision should include an explicit tie of the inability to divert water to the drought or other emergency shortage of water.

The commission should consider revising the text to read substantially as follows:

(2) because of the drought or emergency shortage of water, a senior water right is unable to divert the water they need that is authorized under a water right;

Section 36.5 (a)(3): Before rights are suspended or adjusted, the senior water right holder that would be benefited should be required to demonstrate that all reasonable efforts have been made to limit water use through water conservation measures and, if drought conditions are occurring, through drought contingency measures. That is consistent with the Legislature’s directives and would provide clear direction for how water conservation and drought contingency actions by the senior water rights holder would be considered. NWF also suggests that the actual statutory term “beneficial use” be used.

The commission should consider rephrasing to read substantially as follows:

(3) senior rights benefited by entry of the order can be expected to put the water that would be made available to beneficial use, as defined in Texas Water Code, §11.002(4), the evaluation of which must include appropriate consideration of the extent of implementation of water conservation plans and, when addressing drought conditions, drought contingency plans; and

Section 36.5 (b)(4): This broad reference to water conservation and drought contingency provides little clarity about how this consideration will be factored into the executive director’s decisions. The implementation of water conservation and drought contingency measures by all affected water rights, both junior and senior, should be considered. As noted above, additional direction about consideration of these measures should be added to the rules.

The commission should consider rephrasing to read substantially as follows:

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

Section 36.6 (a)(3)(A): The legislation expressly indicates that the rules must establish the maximum duration of a temporary suspension or adjustment. The proposed rule, by including language purporting to allow an order to specify a longer duration than that specified in the rules, fails to comply with that requirement. The rules should simply provide for a maximum duration of 180 days. When addressing an emergency shortage of water not associated with a drought, a shorter duration may be appropriate.

The commission should consider rephrasing to read substantially as follows:

(3)(A) The duration of a Suspension or Adjustment Order may not be longer than 180 days. The actual duration of the Order shall not be longer than is justified by the conditions being addressed.

Section 36.6 (a)(3)(B): Again, because the legislation expressly indicates that the rules must establish the maximum duration of a temporary suspension or adjustment, this provision

purporting to allow for an apparently unlimited number of extensions is contrary to legislative requirements. If an extension is provided for in the rules, the extension must have a fixed duration, be limited to a one-time action, and the conditions under which such an extension may be granted must be specified.

The commission should consider rephrasing to read substantially as follows:

(3)(B) A Suspension or Adjustment Order may be extended once for up to 90 days upon issuance by the executive director of a written determination that the conditions justifying the initial issuance of the Order continue to be met.

Comments on Proposed Section 36.7. Implementation of Water Conservation Plans and Drought Contingency Plans.

NWF supports the inclusion of this clarification about consideration of water conservation plans and drought contingency plans.

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

Section 11.053 (c)(2)(C) of the Water Code, as added by H.B. No. 2694, expressly calls for “procedures for notice of, an opportunity for a hearing on, and the appeal to the commission of an order.” That language does not appear to support the issuance of an order without any type of notice. NWF recommends that this section be redrafted to provide for an initial written notice to the holders of all water rights that would be directly affected by the proposed order (the holders of the rights being suspended or adjusted as well as the senior rights the order is intended to benefit) along with the Texas Water Development Board and the Texas Parks and Wildlife Department. Because there may be broader public interest issues at play, those state agencies should have the opportunity to provide input. That notice should provide a brief opportunity for the submission of written comments to the Executive Director.

NWF acknowledges that, particularly when addressing emergency conditions, the Executive Director may need to act quickly. However, at minimum there should be an opportunity for the submission of comments. The opportunity for the submission of comments would be expected to result in better informed initial decisions.

The rules should set a maximum amount of time that can be allowed to pass between the time when an order is issued and when a hearing is held.

The commission should consider rephrasing to read substantially as follows:

Section 36.8 (a):

(a) An order, including a modification or extension, under this chapter may be issued by the executive director without providing a hearing if, prior to taking the action, the executive director provides:

- (i) a written notice, which may be provided via email or facsimile transmission if the executive director maintains a list of current addresses, to the holder of each water right directly affected by the proposed order and to the Executive Administrator of*

the Texas Water Development Board and the Executive Director of the Texas Parks and Wildlife Department; and

(ii) the recipients of the notice at least two working days to submit written comments for consideration by the executive director.

(b) If an order, including a modification or extension, is issued without providing a hearing, the order shall set a time and place for a hearing before the commission to affirm, modify, or set aside the order. Such a hearing shall be held as soon as practicable, and not later than 30 days, after the order is issued.

(c) Notice of the hearing at which the commission determines whether to affirm, modify, or set aside the Suspension or Adjustment Order, including a modification or extension, is not subject to the requirements of Texas Water Code, §11.132, but written notice shall be given, at least two weeks prior to the hearing date, to all holders of water rights that were suspended or adjusted under the order, to all holders of senior rights the order was intended to benefit, to the Executive Administrator of the Texas Water Development Board and to the Executive Director of the Texas Parks and Wildlife Department. In addition, notice shall be posted on the commission's website.

The commission's consideration of these comments is greatly appreciated. Please contact me if you have questions.

Sincerely,

A handwritten signature in black ink that reads "Myron J. Hess". The signature is written in a cursive style with a large, stylized initial "M".

Myron J. Hess
Manager, Texas Water Programs; Counsel
hess@nwf.org
Ofc: 512-610-7754

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 5, 2011

Michael Parrish
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087, MC 205
Austin, TX 78711-3087
(512) 239-4808 FAX

Re: Rule Project Number 2011-033-036-LS

Dear Mr. Parrish,

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission) submits the following comments on proposed new Chapter 36 of the Texas Administrative Code (TAC). OPIC recognizes the significant challenges and controversies posed by the current drought, and appreciates the hard work of agency staff preparing the proposal. OPIC's comments focus on three areas: 1) the duration of a suspension or adjustment order in proposed section 36.06(3), 2) the notice, hearing, and appeal procedures in proposed section 36.08, and 3) the revision to proposed section 36.02(3) suggested by Commissioner Rubinstein at the October 18, 2011 agenda meeting.

Duration of Order

Section 5.03 of House Bill (HB) 2694, 82nd Legislature, 2011, Regular Session, adds new section 11.053(c)(2)(B) of the Texas Water Code (TWC), which requires the Commission to adopt rules on the "terms of an order issued under this section, including the maximum duration of a temporary suspension or adjustment under this section." The proposal creates new section 36.06(3) to establish the duration of the suspension or adjustment order.

The proposal creates a 180-day duration "unless otherwise specified" in the order, with an unlimited number of 90-day extensions. The ED may also modify the order based on changed conditions.

OPIC recommends the Commission modify the duration of the order to reflect the provisions related to emergency authorizations in TWC § 11.139 and to emergency suspension of environmental special conditions and environmental flows set asides in TWC § 11.148. These sections provide an initial 120-day term, with only one extension of 60 days. OPIC thinks a shorter duration than proposed is appropriate for the following reasons.

First, drought conditions generally are evaluated on a seasonal basis, and 180 days appears longer than the duration of a typical drought condition. Although the effects of the current, prolonged drought must influence this rule, the duration of this drought may be unusually long and should not be the only scenario that decides this proposal. Similarly, most emergency shortages of water justifying suspension would likely be resolved in a period shorter than 180 days.

Second, consistency among similar authorizations reduces the potential for confusion among affected water rights holders. The 120-day period for emergency authorizations in TWC § 11.139 and emergency suspension of environmental special conditions or environmental flows set asides in TWC § 11.148 appear adequate to deal with drought or an emergency shortage of water. There is little benefit in having separate durations for emergency water rights orders unless significant reasons justify the departure.

Given the long-term potential of drought conditions, however, OPIC thinks one 60-day extension, as provided in TWC §§ 11.139 and 11.148, may be inadequate for drought conditions. As a result, OPIC recommends an unlimited number of 60-day extensions. This extension authority provides the Executive Director (ED) the flexibility to deal with persistent conditions while also ensuring continued, periodic review of the environmental conditions underlying the suspension. Unless the authority to review based on changed conditions in proposed section 36.08(C) is subject to periodic review at the time of extension, OPIC is concerned rights could be suspended longer than necessary.

Finally, OPIC is concerned with the phrasing of section 36.06(3)(A). The inclusion of “unless otherwise specified in the Suspension or Adjustment Order” eliminates the certainty provided by a specific duration. When contemplating the potential for suspension or adjustment, both affected senior and junior rights holders should know the initial duration of a suspension or adjustment order to allow for better planning and response.

Notice, Hearing, and Appeal Procedures

Section 5.03 of HB 2694 adds new section 11.053(c)(2)(C) of the TWC, which requires the Commission to adopt rules on the “procedures for notice of, an opportunity for a hearing on, and the appeal to the commission of an order issued under this section.” The proposal creates new section 36.08 to establish those procedures.

The proposal provides a post-order hearing “as soon as practicable” if the ED issues an order without notice and an opportunity for a hearing. The proposal also requires notice “to all holders of water rights that were suspended or adjusted under the order.”

OPIC recommends the Commission modify the procedural provisions to reflect those for emergency authorizations in TWC § 11.139 and 30 TAC §§ 295.156 and 297.17. Under those provisions, if emergency conditions exist, the ED may act without a hearing so long as notice is provided to the governor. A post-authorization hearing to affirm, modify, or set aside the authorization must be conducted within 20 days and in accordance with the Chapter 2001 of the Government Code.

The preamble to the Chapter 36 proposal states that it “follows the procedure for other emergency orders issued by the commission.” To OPIC’s knowledge, all of the emergency procedures related to water rights include a specific time period for conducting a post-order hearing to affirm, modify, or set aside the order. Accordingly, OPIC recommends the following revision to proposed section 36.08 in line with 30 TAC §§ 295.156 and 297.17.

- (a) An order under this chapter may be issued by the executive director without notice and an opportunity for hearing, except notice shall be provided to the governor prior to issuance.
- (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 but not later than twenty (20) days after the order is issued.
- (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 or adjusted under the order. Any hearing on an order shall be conducted in

accordance with Chapter 2001, Government Code, and the rules of the commission.

Proposed Revision to Section 36.02(3)

OPIC approves of the proposed revision to the definition of the term “emergency shortage of water” in section 36.02(3) suggested by Commissioner Rubinstein at the October 18, 2011 agenda meeting. The revised language more clearly specifies the circumstances under which an emergency shortage exists, and eliminates the difficulties associated with determining what constitutes a hazard to economic welfare.

Finally, OPIC recommends renumbering proposed sections 36.02 and 36.06 to conform to the sequence in the remainder of proposed Chapter 36. OPIC appreciates the opportunity to comment on this rule proposal, and submits these comments for your consideration.

Sincerely,

Blas J. Coy, Jr.
Public Interest Counsel

By: _____
James B. Murphy
Assistant Public Interest Counsel
State Bar No. 24067785
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4014 Phone
(512) 239-6377 Fax

From: <trevor.lovell@gmail.com>
To: <trevor.lovell@gmail.com>
Date: 12/5/2011 06:39 PM
Subject: 2011-033-036-LS
Attachments: Testimony.doc

12/05/2011 06:39 PM

This email is a confirmation of the comment that was submitted for the referenced rulemaking.

First Name: Trevor
Last Name: Lovell
Company/Organization: Public Citizen
E-mail Address: trevor.lovell@gmail.com
Street Address: 1303 San Antonio St.
City: Austin
State: TX
Zip Code: 78701
Phone Number: 512 470 6572
Fax Number:

Rule: 2011-033-036-LS

Comments:

PROJECT NO. 2011-033-036-LS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

RULEMAKING RELATING TO WATER CURTAILMENT

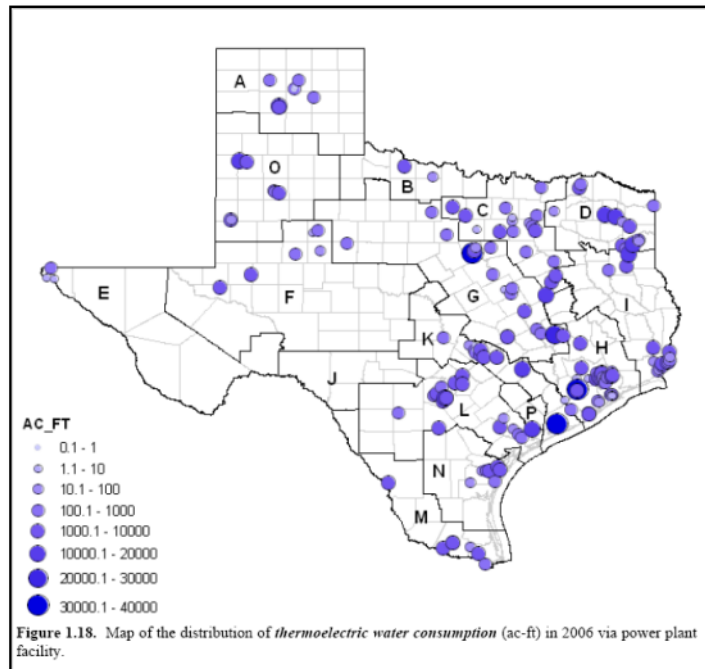
COMMENTS OF PUBLIC CITIZEN

These comments pertain to the proposed water curtailment rules related to HB 2694 now under consideration. The undersigned organizations recommend that the proposed rules include in the preamble some questions and discussion regarding the valuation of different power plants which may be subject to water curtailment as described below.

When there is adequate water for all uses in a region, electric dispatch decisions are made based primarily on which power stations can generate energy at the cheapest rate, and this rapid and pragmatic assessment helps keep our energy prices low. However, during times of extreme drought, it becomes imperative to dispatch electricity based on which generation resources are most efficient with their water withdrawal and consumption, in order to assure the conservation and protection of the resource.

TCEQ is not responsible for the actual dispatch of electricity, but if the executive director is compelled to curtail water use thermo-electric power plants may play an important role due to their substantial water usage. According to reports by the U.S. Geological Survey (USGS), of the roughly 27,000 acre-feet of water withdrawn in Texas in 2005, about 12,000 acre-feet were for hydroelectric purposes. Hence, around 45% of all water withdrawn in Texas in 2005 could have been attributed to energy generation by power plants.

Power plants generally consume huge quantities of water, yet it is important to note that some plants are more efficient users of water than others, that some stations can generate more electricity per acre-foot withdrawn or consumed. To give you a sense of the variability at right is a figure illustrating the different water needs of plants throughout Texas.



www.twdb.state.tx.us/wrpi/data/socio/est/final_pwr.pdf

Furthermore, it is critical to look at cumulative impacts on water resources for all regions of Texas. Some regions of Texas have multiple projects proposed and the cumulative impact of all those projects on the region's water supply must be considered. Take, for instance, the Colorado River. The combined withdrawal - in acre-feet - of the proposed STP nuclear reactor units (approximately 41,983 acre-feet), and the White Stallion coal plant (19,356), adds up to 61,639 acre-feet in total. Withdrawing so much additional water from the Colorado River would pose a huge ecological threat, a problem which is exacerbated in times of drought (such as the current drought Texas is undergoing – the most severe since thermal records have been kept) as it puts a massive strain on a scarce water resource. As a result, the LCRA has so far denied water for the White Stallion plant and has warned existing customers that a 20% cutback may be required next summer.

Given the differences in water consumption of various power stations, we suggest that, in times of water scarcity or insecurity, the TCEQ curtail water to power plants based on the ratio of energy produced to water consumed so that ERCOT may continue to dispatch plants based on their cost effectiveness.

We affirm the importance of maximizing the amount of energy produced given available water levels, because of the huge implications of reduced power availability for the productivity of our state economy and the health and safety of our communities. The revisions to the water curtailment rules proposed are under no circumstances intended to reduce energy production, which would in turn hamper the productivity of countless households and businesses. Our comments simply seek to continue the provision of much needed energy, but to assure the preservation of another equally essential resource: water. Were these revisions to be enacted, the sole difference regarding the provision of electricity would be that, in times of need, energy would come from sources that are more efficient and preserve water while meeting energy demands.

To a large extent, fuel type determines water use. Nuclear power plants require tens-of-thousands of acre-feet of water for energy production, coal plants require thousands of acre-feet, and gas plants use a widely varying amount depending on the technology used. The Texas Water Development Board has projections of water use for different power plants in Texas, but these are based on the projected need of the specific technology which does not necessarily demonstrate real world consumption. Below is a figure illustrating the differences in consumption and withdrawal rates for different fuel sources.

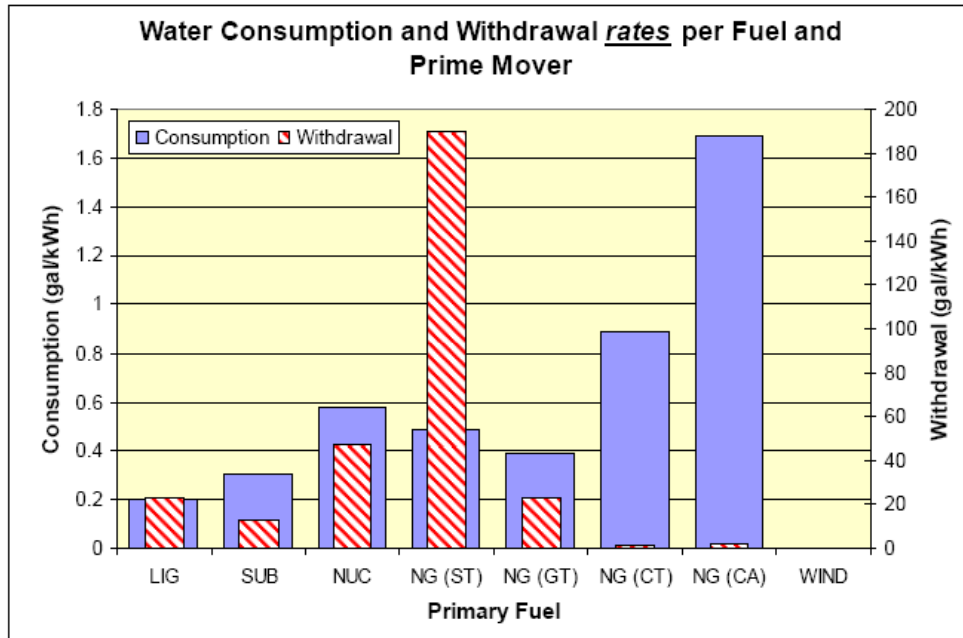


Figure 1.14. Trends of water consumption and withdrawal rates by fuel source for various fuel sources used in Texas [EIA, 2005]. ST = steam turbine, GT = gas turbine not in combined cycle, CT = combustion turbine of combined cycle, CA = steam section of combined cycle.

www.twdb.state.tx.us/wrpi/data/socio/est/final_pwr.pdf

In closing, we believe these rules should specifically give the executive director authority and direction to base water curtailment decisions for power plants first and foremost on how efficiently they use water. The TCEQ should also partner with the Texas Water Development Board to obtain information on water withdrawal and water consumption from all major thermo-electric power generating resources in the state. Information on generating capacity under various water curtailment scenarios should be developed so that the executive director has all the necessary information at hand should curtailment decisions become necessary.

The Texas electric grid is clearly fundamental to the functioning of our state at all levels, giving us reason to believe that its chief priority is to meet energy demands in the state while assuring the integrity of our fragile water sources.

Thank you,

Tom "Smitty" Smith
 Texas Director
 Public Citizen, Texas Office
 1303 San Antonio St.
 Austin, TX, 78701



**SIERRA
CLUB**
FOUNDED 1892

Lone Star Chapter

December 5, 2011

Mr. Michael Parrish
MC 205, Office of Legal Services
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, TX 78711-3087

RE: Rule Project Number 2011-033-036-LS; Chapter 36 Suspension or Adjustment of Water Rights during Drought or Emergency Water Shortage

Dear Mr. Parrish:

Please accept these comments on behalf of the Lone Star Chapter of the Sierra Club regarding the proposed rules to implement those provisions of HB 2694 that address the issues associated with curtailment of water rights during drought or emergency shortages of water. The Lone Star Chapter of the Sierra Club has a long history of work on water management issues in Texas, and we consider the proposed rules to be important in addressing drought and emergency water shortages, especially as drought may become more common as a result of climate change.

Proposed Section 36.2 – Definitions:

“Adjustment” – The definition should be clarified to indicate that the term applies to “changes to” or “modifications to” to “the timing of diversions under a water right.”

“Drought” – The current proposed language is confusing in that one reading would indicate that all three criteria need to be met in order for there to be a determination that “drought” exists whereas another reading is that each of the three criteria are stand-alone evidence that a “drought” exists. At a minimum that point of confusion needs to be addressed. But if the agency determines to use the classification of droughts developed by the National Drought Mitigation Center (and we believe that is a reasonable source for determining the existence of a drought) then the Sierra Club believes that the agency should use the category of a “severe” or more intense drought category (“extreme” and “exceptional”) as the threshold for its declaration of a drought for the purposes of these rules. The category of “moderate” drought allows too much latitude for the agency in taking actions that might adjust or curtail certain water rights when such action is not necessary during a limited period of dry conditions.

PO Box 1931, Austin, TX 78767 tel: (512) 477-1729 fax: (512) 477-8526 lonestar.chapter@sierraclub.org



Mixed Sources
Product group from well-managed
forests and other controlled sources
www.fsc.org Ecol. No. SA-COC-01230
© 1996 Forest Stewardship Council

vegetable inks

The Sierra Club believes that being able to declare that a drought exists when streamflows at USGS gaging stations in the area are below the 33rd percentile of the period also gives the agency too much latitude. Streamflows below that level are not necessarily rare occurrences in parts of the state in certain times of the year, and thus the threshold for drought determination based on flows should be set for less common occurrence, probably in the range of the 10th to 20th percentile. The rules need to clarify what is meant by "gaging stations in the drainage area" in reference to the level of streamflows – are these all the gaging stations or a certain majority percentage of gaging stations? Does drainage area refer to a "watershed" or how is it delineated?

We are troubled by the potential use of the vague criterion of "demand for surface water exceeds the available supply" as a way to determine the existence of a "drought" for purposes of this rule. Demand for water is something that can be managed. In fact demand management ought to play a much greater role in our water planning and management in this state. Demand for surface water exceeding supply is not something that necessarily is caused by or tied to drought, and we believe that this criterion should be dropped from the proposed rules.

Proposed Section 36.7 – Implementation of Water Conservation Plans & Drought Contingency Plans

The Sierra Club supports authorization to the Executive Director to require the implementation of water conservation and drought contingency plans at more than required by the junior water rights' water conservation and drought contingency plans at the time of issuance of the order. We believe that the agency needs to expand its overview of water conservation and drought contingency plans in general to be able to make the most effective use of such an authorization. This may argue for more specific agency guidance to those entities required to develop and implement such plans that would enhance the development of more effective plans.

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

While we understand the rationale for limiting notice of a hearing to holders of water rights that were suspended or adjusted, the Sierra Club believes that the public interest in appropriate management of the state's surface water supplies is best served by the use of full public notice provisions for such a hearing and the ability of the public to make comments at such a hearing.

Thank you for the opportunity to submit these comments.



Ken Kramer, Director, Lone Star Chapter



TEXAS CHEMICAL COUNCIL

1402 Nueces Street • Austin, Texas 78701-1586 • (512) 646-6400 • Fax (512) 646-6420

December 2, 2011

Michael Parrish
Office of Legal Services
Texas Commission on Environmental Quality
MC-205
Post Office Box 13087
Austin, Texas 78711

RE: **TCC Comments on Rule Project No. 2011-033-036-LS**
Chapter 36, Suspension or Adjustment of Water Rights During Drought or Emergency
Shortage of Water

Dear Mr. Parrish:

On behalf of the Texas Chemical Council (TCC), thank you for the opportunity to submit comments to the Texas Commission on Environmental Quality (TCEQ) on its implementation of HB 2694 as it relates to the ability of the Executive Director (ED) to suspend or adjust water rights during a time of drought or emergency shortage of water.

TCC is a statewide trade association representing over 70 chemical manufacturers with more than 200 Texas facilities. The Texas chemical industry has invested more than \$50 billion in physical assets in the state, pays over \$1 billion annually in state and local taxes and over \$20 billion in federal income taxes. TCC's members provide approximately 70,000 direct jobs and over 400,000 indirect jobs to Texans across the state. TCC member companies manufacture products that improve the quality of life for all Americans and millions of people around the world.

TCC appreciates the robust public participation process that the agency employed in the development and execution of this rulemaking. TCC participated in the public meetings held on August 11 and December 1, 2011, and submitted comments to the agency on this proposal on August 26, 2011, prior to the rule being drafted.

TCC compliments and supports the agency's work on the proposal, particularly in light of the controversial nature of water rights in Texas in this time of extreme drought. The Council especially appreciates the language in proposed 30 TAC §36.3(a), which explicitly states that any adjustments made by the ED will be in accordance with the priority doctrine as outlined in Water Code §11.027. TCC also supports the proposed 30 TAC §36.7 and the manner in which the implementation of water conservation plans and drought contingency plans will be considered in the final rule.

Going forward, TCC offers its resources and expertise to the agency as the state manages the drought in Texas and ensures that the water needs of all the state's citizens are met. As you know, water is an indispensable resource to the chemical operations of Texas, and TCC commits to assisting the TCEQ in finding solutions and new opportunities to address the state's water needs.

Again, TCC appreciates the opportunity to submit comments to the TCEQ on this proposed rule. Thank you in advance for your consideration of TCC's comments, and please do not hesitate to contact me at (512) 646-6403 or wisdom@txchemcouncil.org if you have any questions or need additional information.

Yours respectfully,

A handwritten signature in black ink that reads "Christina T. Wisdom". The signature is written in a cursive style with a large initial "C" and "W".

Christina T. Wisdom
Vice President & General Counsel



MCPHERSON LAW FIRM, PC

6300 Bank of America Plaza
901 Main Street
Dallas, Texas 75202

214-722-7096
Telephone

214-540-9866
Facsimile

Monday, December 5, 2011

Facsimile Transmission Cover Page

To: TCEQ

Facsimile No.: 512-239-4908

To: _____

Facsimile No.: _____

Re: _____

No. of Pages Sent (incl. this transmittal page): 11

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS CONFIDENTIAL INFORMATION INTENDED ONLY FOR USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO

**MCPHERSON
LAWFIRM, PC**

6300 BANK OF AMERICA PLAZA
901 MAIN STREET
DALLAS, TX 75202
214-722-7096
FACSIMILE 214-540-9866

Mark McPherson, Esq.
mark@texasenvironmentallaw.com
@enviropinions

December 5, 2011

**VIA FACSIMILE: 512-239-4808
AND VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED,
#7008 3230 0002 4891 8342**

Mr. Michael Parrish
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
MC 205
Austin, TX 78711-3087

Re: Comments to Proposed Rule
Chapter 36, Suspension or Adjustment of Water Rights During Drought or
Emergency Water Shortage
Rule Project No. 2011-033-036-LS

Dear Mr. Parrish:

I am submitting these comments pertaining to the above-captioned rulemaking on behalf of Titanium Environmental Services, LLC. Titanium Environmental Services provides environmental and engineering services to the oil and gas industry across Texas, primarily in areas in and around the Haynesville Shale play in East Texas. Its energy industry clients hold surface water rights and are reasonably expected to acquire future additional water rights in the ordinary and normal course of their business. Titanium Environmental appreciates the opportunity to comment on these proposed rules.

Our modern civilization cannot exist without water and energy. There is an interdependence between water and energy, because water is often used to produce energy, and energy is used to produce water. Mining oil and gas energy is critical to supporting and maintaining the protection of the public health, safety and welfare of the citizens of Texas. Energy is also critical to homeland security. Certainty of supply, whether pursuant to a water right unaffected by these rules, or a reduced supply, or a completely interrupted supply, due to these rules, is critical for planning purposes. These proposed rules could seriously restrict the ability to produce oil and gas energy in Texas, and so their effect on this industry must be carefully considered and understood.

There are primarily two particular operations of oil and gas exploration and production that require water resources given current technology: (1) drilling and completing a well; and (2) injecting water into shale and other tight formations at high pressure to stimulate oil and gas

**MCPHERSON
LAWFIRM, PC**

6300 BANK OF AMERICA PLAZA
901 MAIN STREET
DALLAS, TX 75202
214-722-7096
FACSIMILE 214-540-9866

Mark McPherson, Esq.
mark@texasenvironmentallaw.com
[@enviropinions](http://twitter.com/enviropinions)

December 5, 2011

**VIA FACSIMILE: 512-239-4808
AND VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED,
#7008 3230 0002 4891 8342**

Mr. Michael Parrish
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
MC 205
Austin, TX 78711-3087

Re: Comments to Proposed Rule
Chapter 36, Suspension or Adjustment of Water Rights During Drought or
Emergency Water Shortage
Rule Project No. 2011-033-036-LS

Dear Mr. Parrish:

I am submitting these comments pertaining to the above-captioned rulemaking on behalf of Titanium Environmental Services, LLC. Titanium Environmental Services provides environmental and engineering services to the oil and gas industry across Texas, primarily in areas in and around the Haynesville Shale play in East Texas. Its energy industry clients hold surface water rights and are reasonably expected to acquire future additional water rights in the ordinary and normal course of their business. Titanium Environmental appreciates the opportunity to comment on these proposed rules.

Our modern civilization cannot exist without water and energy. There is an interdependence between water and energy, because water is often used to produce energy, and energy is used to produce water. Mining oil and gas energy is critical to supporting and maintaining the protection of the public health, safety and welfare of the citizens of Texas. Energy is also critical to homeland security. Certainty of supply, whether pursuant to a water right unaffected by these rules, or a reduced supply, or a completely interrupted supply, due to these rules, is critical for planning purposes. These proposed rules could seriously restrict the ability to produce oil and gas energy in Texas, and so their effect on this industry must be carefully considered and understood.

There are primarily two particular operations of oil and gas exploration and production that require water resources given current technology: (1) drilling and completing a well; and (2) injecting water into shale and other tight formations at high pressure to stimulate oil and gas

Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 2

production (this operation is generally referred to as hydraulic fracturing or "fracing" a well¹). Drilling fluids circulate cuttings (rock chips created as the drill bit advances through the rock) to the surface to clear the borehole. They also lubricate and cool the drilling bit, and they stabilize the wellbore, preventing cave-in. Drilling fluids are also used to control downhole fluid pressure. Pursuant to Texas Water Code § 26.131 (Vernon 2009) (Water Code), the Texas Railroad Commission (RRC) regulates drilling fluids.

Hydraulic fracturing of shale to recover natural gas is not a new technology. The Stanolind Oil Company developed and patented this technique, and on March 17, 1949, a team from Stanolind Oil Company and Halliburton first used this technique to stimulate an oil well site approximately 12 miles East of Duncan, Oklahoma. Hydraulic fracture technology continues to change due to technological advances, but in essence a gas well is drilled vertically down into the shale, then horizontally through the shale formation, to expose a large part of the wellbore to the shale formation. After drilling the gas well, the producer pumps hydraulic fracturing fluids into the well. These fracturing fluids consist predominantly of fresh water. There are scientific and financial reasons for using fresh water, although potable water is not necessary. Various other materials, generally termed "proppants" are added to the water before being pumped into the well.

Producers fracture horizontal oil or gas wells in stages. The current practice is to apply a sequence of frac fluid pumping events in which fluids are pumped in a carefully engineered, controlled and monitored manner into the wellbore above fracture pressure. When the fluids are released from the wellbore into the shale formation, the pressure causes the shale to break apart (fracture), releasing the gas contained in the shale. Pressure is increased by pumping additional fluids into the well, increasing the size of the fractures (and recovery of gas). Frac technology has progressed in sophistication to the point where a series of different volumes of fracture fluids, with specific additives and proppant concentrations, can be injected sequentially so that operators may apply unique volumes of fluid and thus pressure to each stage. These amounts are designed to optimize fracture patterns in the shale being impacted by each separate stage.

State law directs mineral producers to maximize the total ultimate recovery of oil or gas. Texas Natural Resources Code § 85.046(a)(6) (Vernon 2009) (Natural Resources Code) and Natural Resources Code § 86.012(a)(5), both define "waste" (which is prohibited by Texas Natural Resources Code §§ 85.045 and 86.011) as including "physical waste or loss incident to or resulting from so drilling, equipping, or operating a well or wells as to reduce or tend to reduce the ultimate recovery of gas from any pool". The Legislature also directed the RRC to limit the volume produced from any well or pool to market demand. See, e.g., Natural Resources Code §§ 85.055 and 86.085. Based on current market demand, the RRC has set the limit at "absolute open flow." In practice this means that operators are to produce as much gas as possible from each well.

Before drilling any oil or gas well, the operator invests many millions of dollars to acquire

¹There seems to be some confusion as to the correct spelling of the word "frac" when that word is used as an abbreviation of "fracture" or "fracturing". I have seen it spelled "frack" as well as "frac." The spelling "frack" is more phonetic, apparently designed to help the reader correct pronounce the word. Nevertheless, since the term is short for "fracture", it should be spelled "frac" and is so spelled in the energy industry.

Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 3

the mineral lease, engineer and design the well, obtain a firm water supply, and construct the pad site, among other activities. It must contract for the multitude of supplies and arrange for the manpower required in the activity. Producers begin making these plans many months, and in some instances years, in advance of commencing drilling activities on any given pad site. All of these activities must come together in a particular order at particular times for the well to be financially successful.

The amount of pressure applied to fracture the shale is a highly engineered, heavily analyzed, and carefully monitored activity. Too much pressure can ruin the well, and too little pressure will leave too much gas in the shale. Suspending or adjusting a water supply being used for energy drilling and production activities would consequentially cause the loss of millions of dollars of investment per affected well. The amount of loss would depend in part on the particular time during the production process the water supply was suspended or adjusted. Losing a water supply obtained for energy drilling and production at the wrong time could also cause the operator to leave too much gas in the shale, risking the "waste" of natural gas as defined in the Texas Natural Resources Code.

Texas is the country's largest producer of oil and gas, accounting for twenty percent of oil and thirty-three percent of natural gas extraction in the United States. Of the state's 254 counties, 223 are active in oil and gas production. More than 200,000 people work in exploration, production, and oil services statewide.² Severance taxes from natural gas reached \$2.7 billion in 2008.³ The tax on natural gas has been 7.5% of market value at the wellhead since 1969; the rate on oil and condensate has been 4.6% since 1952.

The Texas Commission on Environmental Quality (TCEQ) asserts that these proposed rules do not change the priority doctrine that governs the relative priority of surface water rights. Surface water rights are determined by basin, and within each basin by a combination of the type of right and its priority date. While these proposed rules arguably do not seek to change the *substance* of water rights, they do propose to change the *process* of asserting priority water rights, and so these proposed rules can fairly be characterized as new procedural rules that will be triggered in cases of drought or emergency shortages of water. Additional processes should be incorporated into these proposed rules in order to more efficiently and effectively accomplish their stated purpose. Additional procedural protections should also be incorporated into these proposed rules to properly notify and protect those facing the prospect of having their water rights suspended or adjusted.

House Bill 2694 (82 R. S. Leg. 2011) directs the TCEQ to implement Texas Water Code Section 11.053, which states that the executive director may temporarily suspend or adjust water rights during times of drought or other emergency shortage of water. The TCEQ must adopt rules to implement this Section which, among other things, must:

1. Specify the conditions under which the executive director may issue an order under this section;

²*Southwest Economy*, First Quarter 2011, p. 10 (Federal Reserve Bank of Dallas)

³*Southwest Economy* at p. 12

Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 4

2. Set out procedures for notice of, and opportunity for hearing on, and the appeal to the commission of an order issued under this section.

These comments focus primarily on these two significant issues.

It is important to all who have water rights to be able to plan for suspensions and adjustments. As currently drafted these rules in practice would result in a situation where one day there were no suspensions or adjustments of water rights, and the next day there were. But droughts do not occur overnight. They take time to develop, by definition. They are studied and predicted. The suspension or adjustment of water rights should likewise be studied and predicted. Due process rights should be recognized, and process provided, well before the issuance of a Suspension or Adjustment Order. This is practicably possible by adding certain thresholds, determinations and actions prior to the issuance of a Suspension or Adjustment Order.

One challenge of these rules is to ensure that all rights junior to the senior right at issue be treated equally. This concern is best illustrated with an example. If a water right with a priority date of 1930 makes a call on its right, with the possible effect cutting off all appropriated rights junior to this right, the issue of drought contingency plans and implementation of other conservation measures for all potentially affected rights, including the 1930 right making the call, quickly devolves into whether all or only some of the junior rights are enforcing water use restrictions.

It is fundamentally unfair to penalize water rights holders who are maximizing their drought contingency plans and other conservation methods by taking water from them in order to provide water to holders who are not enforcing their most restrictive drought contingency plans and other conservation measures. It is equally unfair to all potentially affected parties for a Suspension or Adjustment Order to be issued when the water right holder making the call could receive sufficient water if all junior water rights holders implemented their most severe drought contingency plan and other conservation restrictions. Not only is it unfair, this situation would also undermine Texas' extensive state water planning efforts. Many other commenters have raised this legitimate concern.

To address this issue, these rules should require that the water rights holder requesting the Suspension or Adjustment Order and all respective junior water rights holders first implement the most severe drought contingency plan or other conservation methods. It is practically not possible for one water rights holder to require other water rights holders to enforce a specific drought contingency plan or other conservation measures. But the TCEQ is in position to do so, and it also has the means and experience to assess and collect fines for violating a TCEQ order.

To the extent environmental flow requirements have been adopted for the affected surface water resource, these rules should authorize the TCEQ to also suspend or adjust environmental flows in an affected river basin. Drought should not be borne solely by appropriated water rights holders while environmental flows are maintained at 100%. The TCEQ Office of the Public Interest Counsel could be delegated the responsibility to represent environmental flows in these instances.

These proposed rules should include the following new additional provisions:

Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 5

1. A. A Suspension or Adjustment Order should only be issued upon the request of one or more specific water rights holders. The rules should prohibit the TCEQ from issuing an order on its own initiative, which would effectively keep the TCEQ out of the position of having to guess or assume the existence of a drought or emergency condition of sufficient severity to invoke this draconian remedy. This will save agency resources and help narrow the focus once a request has been made, and provide a more clear criterion against which to measure the proposed and, if applicable, issued order, including its termination.
1. B. These rules should include provisions authorizing a water rights holder to apply for, and the TCEQ to issue, an order requiring the requesting water rights holder and all junior water rights holders to immediately enforce their most severe drought contingency plans and other conservation measures. This could be defined as a "Maximum Conservation Order" (MCO). Prior to issuing a Suspension or Adjustment Order, the senior rights holder should be required to apply for and obtain an MCO to equalize the effects of drought contingency plans across all affected water rights. Some period of time should pass between the issuance of an MCO and a Suspension or Adjustment Order to allow affected parties to measure the effect of those conservation efforts on the water rights holder making the call.
1. C. To address due process and equal protection concerns, the rules should require certain information from the requesting water rights holder in its application for a Suspension or Adjustment Order, a *prima facie* case of sorts. This information should include at a minimum:
 - i. Identification of the senior water right, and its owner, requesting relief;
 - ii. A certification that the senior water right holder applied for and obtained an MCO, and that a certain number of days have expired since the issuance of the MCO (for example 30, 60 or 90 days);
 - iii. A discussion of the measured effect of the MCO on flows to the senior water right;
 - iv. A discussion of all efforts by the senior water rights holder to mitigate the drought or emergency condition;
 - v. A statement of the volume of water required to meet actual (not permitted) unmet needs of the senior rights holder and the specific proposed use of the requested volume of water;
 - vi. Notice of the application for a Suspension or Adjustment Order to all affected junior rights holders and general notice by publication in the *Texas Register*;
 - vii. Notice of the hearing and an opportunity to appear and be heard on the

Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 6

Suspension or Adjustment Order application. Droughts are foreseeable events; draconian orders such as these which may interfere with property rights should never be issued without notice and an opportunity for hearing.

Comments to the particular rules proposed are as follows:

§36.1(a): this chapter should apply only to surface water rights in the state. Groundwater and diffused surface water should be clearly removed from the scope of these rules.

§36.2(2)(A). A "moderate" drought classification by the NDMC should not be used as a threshold for a remedy as draconian as a Suspension or Adjustment Order. Parts of Texas are often in moderate drought according to this classification system. The drought that prompted this rule project has been extreme or exceptional for much of Texas over several seasons. The drought should be classified as "extreme" or "exceptional" to justify possibly issuing a Suspension or Adjustment Order due to drought conditions.

The most recent drought monitor and seasonal drought outlook maps published by the NDMC are attached hereto as Exhibits A and B for the reader's convenience.

§36.2(2)(C). A water supply shortage determination must be an actual, not projected, situation, must have occurred over an extended period, and must be predicted to continue for another season based on weather forecasts.

According to the state water planning coordinated by the Texas Water Development Board, Texas has 6.3 million acre-feet of annual surface water supplies in non-drought years. However, it has permitted approximately 20 million acre-feet of surface water supplies. This is a 13.7 acre-foot *annual* shortfall, without taking into account exempt uses or the effects of a drought. Surface water demands to appropriated "paper" water permit limits would result in a continual uninterrupted shortage of "wet" water. An actual shortage or drought must occur to trigger resort to these rules.

§36.2(6): The definition of "suspension" should not provide for the complete curtailment of the right to use water "of a certain type or use." To allow this could change the priority doctrine that governs the relative priority of surface water rights. Suspension should only be of rights by priority.

§36.3(a): This section should be substantially revised as discussed above in Sections 1.A-1.C.

§36.3(b): This section should be revised to specify that the holder of a water right seeking the Suspension or Adjustment Order bears the burden of proof regarding the issue of "smallest area practicable that is necessary to allow the senior or superior water right holder to obtain water." The Executive Director's role at this point of the process should be to determine whether or not the burden has been met. The Executive Director's decision should be appealable to the Commission.

This section should clearly prohibit a Suspension or Adjustment Order from effecting an interbasin transfer of water.

Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 7

§36.5: This section should make clear that all of subsections (a)(1) -(4) must be met as conditions for issuance of a Suspension or Adjustment Order. Subsection (a)(2) should again reference "actual" needs to clearly differentiate between actual needs and appropriated amounts.

Subsection (a)(3) should be modified as follows (additional text underlined): "senior water rights can beneficially use the additional volume of water which will result from the curtailment or adjustment, as defined in Texas Water Code §11.002(4); and"

Subsection (b)(1) should be modified as follows (additional text underlined): "maximizes the beneficial use of water without considering the particular type(s) of use,"

Subsection (b)(4) should be revised as discussed above to require implementation of all water conservation plans and all drought contingency plans of the water right holder making the call and all affected junior water rights, with the expiration of sufficient time thereafter to determine the actual effect of those measures, prior to the issuance of a Suspension or Adjustment Order.

§36.6(3). A Suspension or Adjustment Order should not be effective for longer than one season, i.e. 90 days. It should be reconsidered in a public hearing at no greater than 90 day increments until it expires. The water rights holders benefitting from the Suspension or Adjustment Order should bear the burden of proof for its continuance, and the burden should be the same as for its original issuance. There should be no automatic extensions without prior notice and hearing. If the burden of proof is not met, the rules should specifically direct the Executive Director to terminate the Suspension or Adjustment Order without discretion. This level of due process should be practically easy to provide at this point in this proposed process.

§36.6(3)(C). This subsection should be deleted entirely. A Suspension or Adjustment Order should only be modified after notice and hearing, and with the parties who would benefit from the order bearing and meeting a specific burden of proof.

§36.7. This should be more than mere "consideration" of water conservation and drought contingency plans. As detailed in this letter above, the senior rights which would benefit from the proposed Suspension or Adjustment Order, and all affected junior rights holders, must first implement the most severe water conservation and drought contingency plans. A period of time must then elapse to determine the actual effect of these measures before any party should be entitled to obtain a Suspension or Adjustment Order.

Added to this rule should be the Executive Director's ability to monitor implementation of water conservation and drought contingency plans, with the power to levy fines for non-compliance.

§36.8. As explained above, droughts do not develop overnight unexpectedly. They are studied and predicted, very foreseeable. Instead of adopting a Suspension or Adjustment Order, which would in almost if not every case deprive someone of property rights, without notice or an opportunity for hearing, these rules should provide for one if not more preliminary steps to reduce water use prior to imposing the draconian remedy of suspension or adjustment.

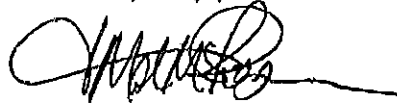
Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 8

To provide sufficient time for junior water right holders to implement contingent water sourcing plans, including a current assessment of alternative sources and delivery mechanisms, orders should be implemented with advance notice and in increments unless an unforeseeable emergency shortage exists. The more severe the order, in terms of the percent and duration of curtailment or adjustment, the more time is necessary for water users to implement contingent operating plans. Literally billions of dollars may be at risk with these proposed orders, across all rights holders, water users and types of use. Prior notice and an opportunity for hearing, a clear burden of proof and allocation of that burden of proof should always be required.

Conclusion

Titanium Environmental Services appreciates the opportunity to comment on these proposed rules. It respectfully reserves a further opportunity to comment on the rulemaking if the opportunity is available and it is appropriate to do so. If you have any questions or comments, please do not hesitate to contact me. With best regards, I remain

Very truly yours,



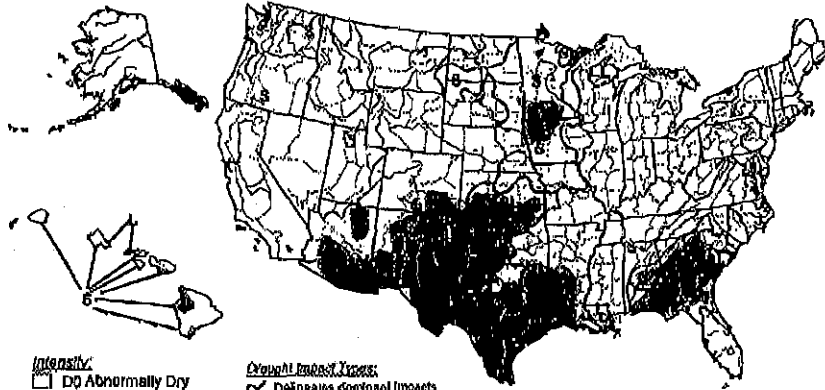
Mark McPherson

cc: Titanium Environmental Services, LLC

Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 9

Exhibit A

U.S. Drought Monitor November 29, 2011
Valid 7 a.m. EST



Intensity

- D0 Abnormally Dry
- D1 Drought - Moderate
- D2 Drought - Severe
- D3 Drought - Extreme
- D4 Drought - Exceptional

Drought Impact Types

- Delineates potential impacts
- S** = Short-Term, typically <6 months (e.g., agriculture, grasslands)
- L** = Long-Term, typically >6 months (e.g., hydrology, ecology)

The Drought Monitor focuses on broad-scale conditions. Local conditions may vary. See accompanying text summary for forecast statements.

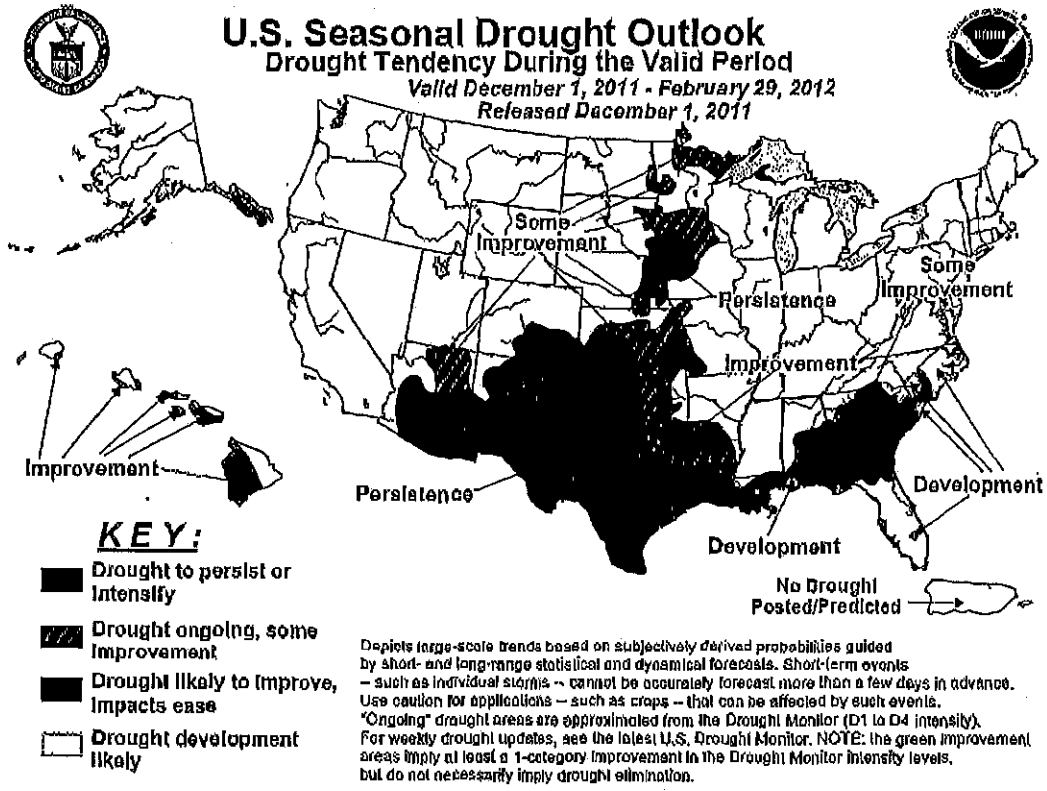
<http://droughtmonitor.unl.edu/>



Released Thursday, December 1, 2011
Author: David Mikus, NOAA/NWS/NCEP/OPC

Rule Project No. 2011-033-036-LS
Water Curtailment/Adjustment
Page 10

Exhibit B





OFFICERS

KENNETH DIERSCHKE
President

DEWEY HUKILL
Vice President

BILLY B. BROWN
Secretary-Treasurer

BOARD OF DIRECTORS

BILLY B. BROWN
Panhandle

DEWEY HUKILL
Olton

LARRY PRATT
Eliasville

CHARLES RAY HUDDLESTON
Celina

DAN E. SHELTON
DeKalb

DAVID STUBBLEFIELD
Colorado City

DAVE EDMISTON
Brady

RICHARD CORTESE
Little River

JAY V. SNOOK, JR.
Livingston

RAYMOND M. MEYER
Pleasanton

TOM PABEN
Waller

RUSSELL BOENING
Poth

DALE MURDEN
Monte Alto

P.O. Box 2689 • Waco, Texas 76702-2689 • 254-772-3030

November 30, 2011

Michael Parrish
Office of Legal Service, MC 205
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78710-3087

RE: Rule Project No. 2011-033-036-LS:

Comments on the Chapter 36 – Suspension or Adjustment of Water Rights during Drought or Emergency Water Shortage

Dear Mr. Parrish:

Texas Farm Bureau (TFB) appreciates the opportunity to comment on “Chapter 36 –Suspension or Adjustment of Water Rights during Drought or Emergency Water Shortage”, Rule Project No. 2011-033-036-LS. TFB is a membership organization comprised of approximately 470,000 member families that strives to benefit all Texans through the promotion of a prosperous agricultural sector for a viable, long term domestic source of food, fiber and fuel and the protection of private property rights, including water rights.

TFB believes that water for agriculture is both a beneficial and essential use of water. As such, our members strongly oppose any action that would unfairly transfer water rights away from agricultural use. Our policy acknowledges that there may be circumstances that present an imminent threat to public health and safety where water may need to be temporarily reallocated in order to sustain life; however, our members feel that the beneficiary of reallocated water should be required to fairly compensate senior water right holders whose rights have been curtailed to meet the emergency need.

Background

The allocation of the state’s surface water rights is based on TWC 11.024 (*preference of use*). Once the allocated water right is perfected, TWC 11.027 (*priority doctrine*) is applied and the *preference of use* becomes irrelevant.

Senate Bill 2694 amended the Texas Water Code (TWC) to add §11.053 – Emergency Order Concerning Water Rights. The legislative intent of TWC 11.053 was to:

- a) Clearly define drought and emergency shortage of water in statute;
- b) Authorize the Texas Commission on Environmental Quality (TCEQ) to suspend or adjust water rights during times of drought or emergency shortages of water in order to protect senior water rights;
- c) Ensure that conservation plans and drought contingency plans are being implemented during droughts to prevent the waste of water and to minimize the impacts on all water right holders; and
- d) Protects proactive water planning and storage infrastructure.

TWC 11.053(a) grants the TCEQ’s Executive Director (ED) the authority to temporarily suspend or adjust water rights during times of drought or emergency shortages of water, as defined by rule and “in accordance with the priority of water rights established by [TWC] Section 11.027.” TWC 11.053(b) sets the conditions by which the authority can be granted, and TWC 11.053(c) requires the TCEQ to write rules to define drought and emergency shortage of water and determine when and how the TCEQ can issue emergency orders.

Comment 1 – The TCEQ seems to have interpreted TWC 11.053(b)(5) to mean that they have the authority to curtail (or not to curtail) water rights based on *preference of use* and not the *priority doctrine*. The sole purpose for having the *priority doctrine* is to settle disputes during times of drought or shortages of water. If during these same conditions, the *preference of use* is used to determine who has a right to water in lieu of the *priority doctrine*, as proposed, water law has effectively been changed. **The intent of HB 2694 was not to circumvent the priority doctrine.**

There are provisions in TWC 11.139 - Emergency Authorizations that authorize the TCEQ to temporarily reallocate water when, “conditions exist which present an imminent threat to the public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible practicable alternatives to the emergency authorization.” The rules for TWC 11.139 are written in Texas Administrative Code (TAC) 297.17 – Emergency Authorizations.

Under the provision of TAC 297.17, if a curtailment were issued any junior water right holder with an “imminent threat to the public health and safety” would have to apply to the TCEQ for an emergency authorization to continue to take water. The applicant would then be responsible for compensating the senior water right holder(s) impacted by the emergency authorization. **The TCEQ has chosen not to implement TAC 297.17 in conjunction with its recent water right curtailments which has resulted in confusion.**

The state’s water law on drought or water shortage is clear - “first in time, first in right.” **The intent of TWC 11.053(b)(5) is to ensure that *preference of use* is used when temporarily reallocating water for emergency authorizations as provided in TWC 11.139.**

Comment 2 – The intent of the legislation was to create an easily discernable definition for “drought” that can be utilized to trigger TCEQ’s authority under this section, as well as to aid in implementation of water conservation planning and Drought Contingency Plans.

TFB likes the TCEQ’s approach of using the National Drought Mitigation Center and U.S. Drought Monitor as a means of tracking drought conditions; however, the definition, as proposed, is too indeterminate - primarily because of the inclusion of stream flow and demand for surface water which are not reliable indicators of drought.

In addition, TWC 11.1272 established the need for Drought Contingency Plans (DCPs) which requires wholesale and retail public water suppliers and irrigation districts to develop plans consistent with the appropriate approved regional water plan which would to be implemented during periods of water shortages **and drought**. Since the definition of drought has never before been codified in statute or rule, DCPs have generally only been implemented during times of water shortage and not drought.

As such, the definition of Drought should be amended to read:

(2) Drought - A drought occurs when drought conditions in the watershed or part of the watershed are classified as at least moderate by the National Drought Mitigation Center.

This definition more closely meets the intent of the legislation and does not limit the definition simply to Chapter 36 rules.

Comment 3 – The discussion paper states that the proposed rule will not “significantly affect current practices with regards to water rights” (discussion paper, page 9) which is factually true; but only because the TCEQ has been interpreting the law incorrectly and not enforcing TAC 297.17. Any deviation from strict enforcement of the *priority doctrine* especially during drought conditions is a substantial change in water policy.

Comment 4 – The draft rule gives municipalities the ability to continue to use water even after more senior water rights have been curtailed; however, the “use” within the municipality is unaddressed in the rule. As such, agricultural and industrial water right holders will be fiscally impacted more than industries that rely solely on or have access to municipal water because there is no mechanism in place to curtail these industries. The Small Business and Micro-Business Assessment and Small Business Regulatory Flexibility Analysis should be re-evaluated taking this into consideration.

Comment 5 – The assertion that a Takings Impact Assessment is unnecessary is based entirely on the presumption that TCEQ has the authority to not curtail municipal water rights because of public health concerns. They do not have that authority. If during a curtailment, a junior water right holder is allowed to continue to exercise their water right while a more senior water right holder is curtailed, the junior water right holder has effectively “taken” water from the curtailed senior water right holder under TWC 11.027.

Also, because of the *priority doctrine*, the value of water rights is based on priority date. The application of *preference of use* during droughts or shortages devalues senior water rights with lesser preference of use. Unless the rule is amended, a Takings Impact Assessment is necessary with these factors taken into account.

Comment 6 – The definition of **suspension** exceeds TCEQ’s authority under TWC 11.053. The TCEQ does not have the authority to suspend or adjust water rights based on a “certain type of use”. Suspensions or adjustments must be based solely on priority dates in order to be done in accordance with the priority doctrine.

Comment 7 – §36.5(b), (1) through (3) should be much more specific. The rule is written so loosely that it is impossible to tell what “beneficial use” and “waste” of water actually mean. Possibly, a representative stakeholder group consisting of water rights holders in all affected areas of the state should be formed to help draft rules specific to this section.

Comment 8 – The TFB supports §36.7(a) as it provides the TCEQ a way of ensuring that those seeking curtailments are implementing conservation plans or Drought Contingency Plans during times of drought.

Comment 9 – §36.7(b) indicates that the ED would have the ability to “decide not to suspend or adjust a junior water right based on public welfare concerns”; this authority was **not** granted under 11.053.

Entities that experience public health and safety concerns as a result of a water rights suspension, such as municipalities and power plants, would need to seek an emergency authorization under TWC 11.139 to continue to divert water.

Comment 10 – In order to clarify the statutory authority of TWC 11.053 and TWC 11.139, the following Section should be added to the Chapter 36 Rules.

§36.9 Emergency Conditions Resulting from a Suspension or Adjustment Order.

(a) Any junior water rights holder that can demonstrate that the issuance of an order under this section causes emergency conditions which present an imminent threat to public health and safety must seek an Emergency Authorization as required by TWC 11.139.

(b) To the greatest extent practicable, the Emergency Authorization issued under TAC 297.17 shall conform to the order of preferences establish in TWC 11.024.

Conclusion

The intent of the HB 2694 was not to rewrite Texas water law by giving the TCEQ authorization to suspend or adjust some water rights during drought or emergency shortages and not others based on preference of use. Had this been the intent, the priority doctrine would have been repealed.

TWC 11.139 affords municipal water rights holders and power generators a means to continue to divert water when water is unavailable, as is the case during water right curtailments. TWC 11.139 also includes a means to fairly compensate water rights holders that sacrifice water for public benefit. The current policy of exempting junior municipalities and power plants from water right curtailments does not adhere to TWC and inadvertently results in a taking of water.

The inclusion of “36.9 - Emergency Conditions Resulting from a Suspension or Adjustment Order,” as written in Comments 10 above, and implementation of TWC 11.139 is needed to eliminate any further confusion regarding the difference between Suspension and Adjustment Orders and Emergency Authorizations.

The proposed rule, as written, unfairly impacts agricultural water rights and could have a ripple effect throughout rural communities as time progresses and the stress on water resources increase. In order to prevent legal challenges the TCEQ must take responsibly steps to fully implement Texas water law as written.

Once again, Texas Farm Bureau appreciates the opportunity to comment on this important piece of rulemaking. If you have any questions regarding these comments, please contact Jay Bragg at (254) 751-2234 or jbragg@txfb.org.

Sincerely,

A handwritten signature in cursive script that reads "Jay Bragg".

Jay Bragg, Associate Director
Commodity and Regulatory Activities

JB:dp

Law Offices

of

GLENN JARVIS

Telephone (956) 682-2660

Telefax (956) 618-2660

Inter National Bank Building
1801 South Second Street, Suite 550
McAllen, Texas 78503
www.GlennJarvis.com

December 5, 2011

Michael Parrish, MC-205
Office of Legal Services
TEXAS COMM. ON ENVIRONMENTAL QUAL.
P.O. Box 13087
Austin, TX 78711-3087

**Via Electronic Transmission
And
Via Facsimile Transmission
(512) 239-4808**

RE: Rulemaking on Texas Water Code § 11.053 Concerning Suspension or Adjustment of Water Rights During Drought or Times of Emergency Shortage of Water (30 TAC §§ 36.1 - 36.8)

Dear Mr. Parrish:

I am submitting these comments pertaining to the above-captioned rulemaking on behalf of the Texas Irrigation Council ("TIC"). The TIC is an association of water districts, river authorities, and private irrigation companies holding irrigation use and other water rights whose purpose is to protect their water rights in streams in Texas and has interest in associated issues involving water rights administration and legislation in the State. The TIC appreciates the opportunity to comment on this rulemaking.

1. Brief Related Background:

Section 11.053, Texas Water Code, was added to the Code by the TCEQ Sunset Bill, HB 2694 (82nd Regular Session) and is effective September 1, 2011.

Some background is helpful to implementation of § 11.053.¹ The Legislature in the late 19th century dealt with drought management of surface waters by adoption and implementation of the appropriation doctrine in the State, *e.g.*, § 11.027. The essence and design of the appropriation doctrine in Texas is to administer water rights during periods of shortages by the recognition of the priority system -first in time, is first in right. The foundation of prior appropriation law is drought management and is intended to give security to water rights holders as to their rights to water during water shortages. This is evidenced by the 1889 Irrigation Act and later legislative revisions through the 1913 and 1917 Acts, and in various revisions since that time. Because of the adoption of the common law system in 1840 in Texas, the Legislature also recognized riparian water rights and

¹All reference to Sections are to the Texas Water Code unless otherwise stated.

rights of domestic and livestock users. True domestic and livestock rights have roots in both legal regimes. This created a dual system of water rights in the State which led to complications in the administration of water rights (property rights) for a long time. These complications included the Wagstaff Act enacted in the 1930's which gave a preference to municipal use rights, in the issuance of permits after its enactment.

The dual system of water rights was addressed and clarified by the Water Rights Adjudication Act of 1967 ("Adjudication Act") which essentially merged riparian water rights for irrigation use with appropriative rights but excluded the determination of domestic and livestock use rights. The State has now been fully adjudicated, and water rights are now identified and quantified with priority dates established except for domestic and livestock rights § 11.303(l), which are involved in this rulemaking and will be further discussed below.

Early legislation also provided for preferences in use in the issuance of new water rights or permits which is now contained in § 11.024, but these preferences have always been held to apply to the issuance of new water rights and not in the administration and enforcement of existing water rights.

It was not until 1977 that the Legislature significantly further addressed administration of water rights during emergencies in water shortage periods in what is now § 11.139, dealing with emergency authorizations. These provisions provided a process by which emergency temporary authorizations could be obtained during water shortage periods.

Senate Bill 1 in 1997 addressed many water rights issues of the day following and during a drought in most parts of the State. It repealed the Wagstaff Act, re-wrote and strengthened the provisions of the emergency authorizations in § 11.139 by requiring a process through which water rights holders would be compensated for water needed in emergency situations in an emergency authorization. It also changed water planning in Texas from a top down to a bottom up process. The water planning provisions involve planning for adequate water supply in a drought of record. This is consistent with the provisions strengthening the emergency authorization provisions by requiring compensation to affected water rights holders who provided water rights for the water authorized in an emergency authorization.

The Rules (30 TAC §§ 36.1 - 36.8) promulgated pursuant to § 11.053 must reconcile with § 11.139, and have as their foundation prior appropriation law and priority of water rights. Otherwise, the integrity of vested property rights will be infringed upon and the statutory requirements for water conservation and drought management plans and consistency with the State Water Plan will be undermined.

2. Recognition of Priority Rights

Section 11.053(a) provides that the Executive Director ("ED") may **"in accordance with the priority of water rights established by § 11.027"** temporarily suspend the right of a water right

holder or adjust diversions of water by a water right holder by order during a drought or other emergency shortage of water.

It is significant that this language requires that the ED's Order be done in accordance with § 11.027, which, consistent with earlier statutes, established the appropriation doctrine in Texas of first in time, is first in right. In other words, the ED's Order is based upon enforcement of rights between water rights holder during a drought or other emergency shortage of water as required by the appropriation law of first in time is first in right. Any emergency order issued pursuant to § 11.053 must rest upon enforcement of priority rights between water rights holders. The proposed Rules appear consistent with the Appropriation Doctrine in respect to recognized appropriative water rights.

This has been the law in Texas, and when coupled with existing enforcement provisions in the Water Code is existing law. The purpose of § 11.053 and the Rules is to better define the process by which existing law of appropriation will be enforced during droughts and water shortage periods.

3. Watermaster Areas, Exemptions, and Established Water Entities

Areas having existing Watermaster Programs are exempt under the proposed Rules, 30 TAC § 36.1(b).

However, in both, the Rio Grande Watermaster and South Texas Watermaster Programs, the ED and Commission should provide support, guidance, and the proper tools needed (such as gages, meters, and measuring devices) for proper water rights management at all times, including droughts and water shortage periods.

In other areas of the State and within Watermaster areas are river authorities and water districts who have been established for many years for the purpose of water management on parts of or entire river basins and watersheds. These river authorities and water districts are integral parts of water management in the State and must play a significant role in enforcement and management of water rights during droughts or water shortage periods. They can play a significant role in resolving needed measures during droughts and water shortage periods including enforcement of the prior appropriation law.

4. Impounded water

Section 11.053(b)(6) and § 36.5(b)(6) of the proposed Rules provide that the ED in ordering suspension of water rights or an adjustment in the diversions of water by a water right holder shall ensure that the Order:

“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.”

This provision requires that the ED review and evaluate the water rights associated with a reservoir so as to determine and **find** that all of the water within the reservoir at the time is “lawfully stored” in the reservoir taking into account the amount of water authorized to be diverted. This entails an analysis and review of prior existing management of the reservoir with respect to whether the water impounded at the time, has been impounded in accordance with the water right associated with the reservoir. The legal foundation for dams and reservoirs is to conserve water for later use, which would not have been available during droughts and water shortage periods. A feature of an order issued pursuant to § 11.053 could be the use of water in storage which could be found to be available under proper guidelines and by agreement with compensation for lawfully stored water consistent with prior appropriation law.

5. Order of Preferences - Section 11.024

Section 11.053(b)(5) requires the ED, to the greatest extent practicable, to ensure that an action taken “conforms to the order of preferences established by §11.024.” Accordingly, §36.5(b)(5) provides that the ED shall ensure that the Order “. . . to the greatest extent practicable, conforms to the Order of preferences established by Texas Water Code, § 11.024.” As previously noted § 11.024 only applies with reference to preferences given in the issuance of new water rights.

The apparent intent and purpose of this provision is that in issuance of an order, the “need for water” will be considered in accordance with the preferences set out in § 11.024 to the “greatest extent practicable.”

This is a challenging issue in that the ED and Commission are placed in a position to determine “need” on the basis of drinking water (domestic and livestock uses) versus the needs of municipal (other than for drinking), agriculture (food), industrial (goods) hydropower (energy), and other uses. Adherence to this provision will have to be addressed on a case to case basis depending upon the facts and circumstances involved, but can not be inconsistent with the Appropriation Doctrine.

6. Domestic and Livestock Rights

A difficulty encountered in determining the needs of domestic and livestock use arises from the fact that this use was excluded from the Adjudication Act § 11.303(l). This use has not been adjudicated, identified, and quantified over the State.

In the “Background and Summary of the Factual Basis for the Proposed Rules” with reference to § 36.1 of the Rules states that domestic and livestock rights are superior rights under § 11.303(l) or § 11.142(a). Neither § 11.303(l) nor § 11.142(a) provide that the domestic and livestock use rights are “superior rights”. Section 11.303(l) is the Water Rights Adjudication Act provision which states that the filing of claims under the Adjudication Act does not apply to the use of water for domestic or livestock purposes. Section 11.142(a) is the permit exemption allowing a person to construct on

a person's own property a dam or reservoir of not more than 200 acre feet for domestic and livestock purposes. Neither of these provisions provide that domestic and livestock rights are superior riparian rights. There is no provision in §11.053 that they can not be curtailed or suspended.

The discussion also refers to the definition of "senior water right" under § 36.2(4) of the proposed Rules. This section defines a "senior water right" correctly that it is a water right that has a priority date that is earlier than another water right holder. The definition is an error however, in defining a senior water right as including a domestic and livestock use as a "superior right" under Texas Water Code, Section 11.142(a) or §11.303(l) because as noted, neither of these two Water Code sections provides that a domestic and livestock use is a "superior right".

Domestic and livestock use is a developing and increasing use of water in the State, and is no longer *di minimis* as previously considered. There may be existing data in Watermaster areas and other managed streams or watersheds identifying the user and quantifying this use. These circumstances present challenges and requires a definition of the domestic and livestock use in relation to senior water rights and development of data, identification, and quantification of these uses. This is necessary in the determination of "need" by the Commission in order to ensure the other elements required in § 11.053(b) of maximizing the beneficial use of water, minimizing the impact on water right holders and the prevention of waste of water. All consistent with prior appropriation law. This should be a priority activity and policy of the Commission to clarify the nature of and existing extent of the domestic and livestock use.

7. What Conditions Should be Considered for Issuance of an Order?

The provisions of § 11.139 should apply as a condition and be reconciled with implementation of § 11.053, see also 30 TAC § 295.91, *et seq.*, pertaining to § 11.139.

Conditions should require adherence to the prior appropriation priority system and in the event of any "adjustment" of the priority system, should impose compensation to water rights holders whose rights are adversely affected by any "adjustment" in water rights or curtailment.

There should be an evaluation and finding that the water rights holder in need has pursued the acquisition of water by lease or purchase and is unable to do so, does not have available groundwater supply and other conditions discussed in these comments.

If the ED has suspended all other junior water right holders upstream and downstream of the water right holder in need, and water is unavailable without curtailment of senior water rights holders upstream or downstream of the water rights holder in need in accordance with the priority of water rights as required by § 11.053 and all water rights have been curtailed, a water supply may be available through other means *e.g.*, under the terms of § 11.139.

8. ED Should Consider State and Regional Water Plans

The State Water Plan and regional plans should be considered with respect to consistency and good faith adherence to the water management strategies identified in the Plan and proper planning has been pursued by the beneficiary of an order. Otherwise, the State policy of water planning will be undermined. See 30 TAC § 295.91(4), which requires consistency with applicable regional water plan under § 11.139.

An evaluation is required that the efforts of the affected water rights holders who are beneficiaries of an order have developed and implemented strategies recommended by the Texas Water Plan and applicable regional water plan, have reasonably pursued consistent with the plans to meet its or their needs, and that there are reasonable reasons why the current need could not have been planned for and provided for at the pertinent time.

9. Futile Call

At various times in water management activities, especially during drought or emergency water shortage periods, the concept of “futile call” comes into play. This concept arises when there is a question as to whether water can physically reach a senior water right holders’ diversion point or place of use.

Section 11.053 and § 36.5(a) of the proposed Rules requires that the ED can only issue an Order when senior water right holders are unable “to divert” the water they need that is authorized under their water right and that they can make a beneficial use of that water.

Section 36.5(b) requires that ED ensure that the Order maximizes beneficial use of water and prevents the waste of water.

Under these conditions, a “futile call” can not be considered a “waste of water” because the necessary push water in the stream to make water available at a senior water right holders point of diversion or place of use is a beneficial use of water and is not a waste of water because it is essential to the beneficial use of water by the senior water rights holder. Necessary push water for the exercise of a water right is a beneficial use of water under the Appropriation Doctrine. A “futile call” can not be a consideration in the implementation of § 11.053 and in this respect, § 36.5 of the proposed Rules.

10. Conclusion

The above represents the current comments of the TIC on this rulemaking. It is evident that there are challenges in implementing the provisions of § 11.053. Water rights management is difficult and challenging during drought or water shortage periods. The prior appropriation law provides the

principles and foundation of enforcement of water rights which currently exist under law. Cooperation between water rights holders in such periods is required. Practical agreements between those holding water rights to meet such needs are preferable. More tools are needed in various watersheds to provide sufficient data in dealing with periods of drought or water shortages. This data includes proper measuring devices at proper locations on a stream. The legal status, identification, and quantification of needs for domestic and livestock uses must be further developed.

The TIC appreciates the opportunity ED to comment on this rulemaking. It would respectfully reserve a further opportunity to comment on the rulemaking if the opportunity is available and it is appropriate to do so.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Glenn Jarvis", written over a horizontal line.

Glenn Jarvis
Attorney for Texas Irrigation Council

BAKER BOTTS LLP

98 SAN JACINTO BLVD.
SUITE 1500
AUSTIN, TEXAS
78701-4078

TEL +1 512.322.2500
FAX +1 512.322.2501
www.bakerbotts.com

ABU DHABI
AUSTIN
BEIJING
DALLAS
DUBAI
HONG KONG
HOUSTON
LONDON
MOSCOW
NEW YORK
PALO ALTO
RIYADH
WASHINGTON

December 5, 2011

BY ELECTRONIC FILING
www5.tceq.texas.gov/rules/ecomments

Mr. Michael Parrish
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087 MC-205
Austin, Texas 78711-3087

Sara M. Burgin
TEL +1 512.322.2649
FAX +1 512.322.8357
sara.burgin@bakerbotts.com

Re: Rule Project Number 2011-033-036-LS
Chapter 36, Suspension or Adjustment of Water Rights During Times of Drought
or Emergency Shortage of Water

Dear Mr. Parrish:

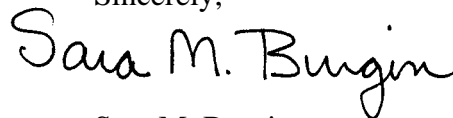
Texas Industry Project¹ (“TIP”) appreciates the opportunity to submit comments to the Texas Commission on Environmental Quality (“TCEQ”) on its proposed rules to implement HB 2694 relating to water rights during times of drought or emergency water shortage.

TIP appreciates the stakeholder process implemented by the TCEQ that encouraged early public participation in the rulemaking process.

TIP supports final promulgation of 30 TAC Sections 36.1 through 36.8 as proposed. TIP particularly supports the language of Section 36.3(a) that states that the Executive Director’s actions will be in accordance with the priority doctrine of the Texas Water Code at Section 11.027. TIP also supports that the Executive Director’s decisions will take into account a water right holder’s compliance with TCEQ regulations relating to Water Conservation Plans and Drought Contingency Plans. To clarify regulatory intent, TIP requests that the TCEQ state in the preamble to the final rule that the phrase “affected water rights holders” as used in Section 36.5(b)(4) and Section 36.7(a) is intended to include all junior water rights holders within an area for which the Executive Director is issuing an order regardless of the order of preferences.

Thank you again for the opportunity to submit these comments. If you have any comments, please do not hesitate to contact me.

Sincerely,



Sara M. Burgin

SMB:ms

¹ The Texas Industry Project is an unincorporated association of companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility, and transportation industries with operations in Texas.



December 5, 2011

Life's better outside.®

Dr. Bryan Shaw, Chair and Commissioner
Mr. Buddy Garcia, Commissioner
Mr. Carlos Rubenstein, Commissioner
Mr. Michael Parrish
MC 205, Office of Legal Services,
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Commissioners

T. Dan Friedkin
Chairman
Houston

Ralph H. Duggins
Vice-Chairman
Fort Worth

Antonio Falcon, M.D.
Rio Grande City

Karen J. Hixon
San Antonio

Dan Allen Hughes, Jr.
Beeville

Bill Jones
Austin

Margaret Martin
Boerne

S. Reed Morian
Houston

Dick Scott
Wimberley

Lee M. Bass
Chairman-Emeritus
Fort Worth

Re: Rule Project Number 2011-033-036-LS; Chapter 36
Suspension or Adjustment of Water Rights During Drought or
Emergency Water Shortage

Dear Commissioners Shaw, Garcia, and Rubenstein, and Mr. Parrish:

Texas Parks and Wildlife Department (TPWD) respectfully requests you consider the following comments and amend the proposed rules in a manner consistent with the comments.

1. §36.02 Definitions.

§36.02(1) definition of Adjustment. For clarity regarding the timing of diversions, TPWD suggests the rule be modified to read, *“Adjustment- the partial curtailment of one or more water rights or the modification of the timing of diversions under a water right.”*

§36.02(2)(C) definition of Drought. TPWD suggests adding a definition of the term “demand” or modifying the use of the term within the existing drought definition to characterize the demand after taking into account water conservation and drought contingency measures. §36.02(2)(C) defines a drought condition as a time when “demand for surface water exceeds the available supply.” During dry periods, the TCEQ should consider whether meeting full demand is appropriate. Many water suppliers require mandatory conservation from customers to reduce demand during drought conditions. It is appropriate to address both demand and supply issues during drought; however, the rules are mostly silent on how demand may influence, positively or negatively, the potential for water shortages. In some instances, a reduced demand may avoid water shortages, and conversely, greater demands may create a water shortage. This

Carter P. Smith
Executive Director

relationship should be addressed so as to avoid suspension of a junior right to meet the full demands of a senior, when the senior and/or the junior has the ability to reduce demand and avoid a water shortage.

Defining drought and identifying the onset of drought is difficult. However, the criteria proposed by TCEQ to define a drought as described in §36.02(2) do not appear to be stringent enough to identify a drought that would warrant the triggering of emergency action. It is not clear what analyses were conducted by TCEQ to identify how often a portion of the state would be considered in a drought using the proposed criteria. However, moderate conditions as identified by the National Drought Mitigation Center (NDMC) and streamflows less than the 33rd percentile often occur in Texas. The National Drought Mitigation Center offers a suite of tools to determine drought conditions, many of which they use to prepare the U.S. Drought Monitor map. The U.S. Drought Monitor map provides a summary of drought conditions across the United States and Puerto Rico and can be described as a blend of art and science. The map is updated weekly by combining a variety of data-based drought indices and indicators and local expert input into a single composite drought indicator. The map denotes four levels of drought intensity and one level of "abnormal dryness." A level of moderate drought is the first level of drought and is a precursor to severe, extreme, and exceptional drought. As identified by the NDMC, possible impacts of a moderate drought are some damage to crops and pastures; streams, reservoirs, or wells low; some water shortages developing or imminent; and voluntary water-use restrictions requested. The degree of the possible impacts is not specified by the NDMC. In Texas, moderate droughts are not unusual.

Streamflows in the state are often less than the 33rd percentile for the period of record by definition. In addition, streamflows can be affected by conditions other than drought such as diversions, return flows, and impoundment. Flow is measured at an instantaneous rate – instantaneous flows are important for fish and wildlife resources – and can be reported as an instantaneous, daily, or monthly value. It is not clear how this metric would be employed by the TCEQ in defining a drought, but the 33rd percentile appears to be too high for defining drought conditions in Texas.

The third criterion proposed for use by TCEQ to define a drought is a demand for surface water in excess of the available supply. One again it is not clear how this metric would be used by TCEQ. Several stream segments in the state are currently over-appropriated. It would seem that these segments would be perpetually in a condition of

drought, giving the Executive Director perpetual authority to suspend or curtail water rights. In addition, it is not clear if the demand is a real time demand for essential uses once conservation and drought measures have been implemented, or is a paper demand based upon meeting full exercise of the four corners of the applicable water rights. This criterion, as well as the others, needs additional study and detail. A time step should be a part of the criteria as the Drought Monitor is issued weekly, streamflows are measured instantaneously, and real-time water demands are variable and dependent on the actual needs that are being met.

Additionally, the introductory language in §36.02(2)(C) reads that “the following criteria are met:” yet the conjunction used in the following list of criteria is “or” rather than “and.” Consistency with the introductory language appears to require the use of “and” instead of “or” at the end of §36.02(2)(B).

TPWD suggests an alternate definition of drought:

(2)Drought – A drought occurs when the following criteria are met:

(A) 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 “severe” by the National Drought Mitigation Center for a period of at least one month;

(B) monthly streamflows at United States Geological Survey gaging stations in the watershed or the part of the watershed subject to the executive director’s Suspension or Adjustment Order are below the 10th percentile of the period of record; and

(C) demand for surface water, after taking into account reasonable implementation of water conservation and drought contingency measures, exceeds the available supply as a result of hydrological conditions.

§36.02(3) definition of an Emergency Shortage of Water. TPWD notes that a shortage of water may not be unique to a senior water right holder; it may be universal to all water right holders in an affected watershed. It is not clear what type of assessment is required, and by whom, to determine if public health, safety, the environment, or economic welfare are endangered by the inability of a water right holder to take surface water. Specific criteria identifying the types of information, data, and studies required to show the need for emergency action should be outlined in the rules. It is unclear what actually triggers a finding that a hazard is present. Additionally, the term “economic welfare” is undefined, and its meaning is ambiguous in this context. It’s not clear if the economic welfare is of the public interest and/or a private interest.

§36.02(6) definition of Suspension. This term encompasses the concept of suspending a right based upon either the priority of the water right or by the type of use. The Texas Water Code does not contain guidance on how particular uses are to be prioritized in relation to permit suspension during drought. This is a new concept. The enabling legislation, HB 2694, amends Texas Water Code by adding §11.053 to provide that “the executive director by order may temporarily suspend water rights, in accordance with the priority of water rights established by Section 11.027...” The executive director must then ensure that the suspension “to the greatest extent practicable, conforms to the order of preferences established by Section 11.024.” §11.024 refers to preferences of the state for appropriating water, and it does not address suspension preferences during drought. TPWD believes the clear language of the legislature was to give authority to the Executive Director to suspend rights pursuant to priority. It is unclear how the Executive Director is to conform to the order of preferences in relation to priority dates. Rather than couch the definition as a choice of the Executive Director to suspend or adjust rights based upon priority or preference, it should be clear that priority is the controlling criterion. Suspension can be defined as “*the curtailment of a water right for a temporary period as authorized by Texas Water Code §11.053.*” This would be consistent with the statute and with the language in §36.03 that requires the Executive Director to act “in accordance with the priority doctrine in Texas Water Code §11.027.”

The rules memo (p. 14) states “the commission would be able to consider preferences of use if it is ‘practicable,’ but this consideration of preferences would generally be to allow some water rights, such as municipalities, to continue to take water under their water rights as needed for human health and safety concerns such as drinking water, or similar actions.” The statute does not explicitly provide that authorization, nor do the rules express the consideration described in the rules memo. Texas Water Code §11.053 only provides that in suspending a right in accordance with the priority doctrine, the Executive Director should conform to the order of preferences to the greatest extent practicable. TPWD understands that emergency situations affecting human health, safety, and the environment may present a basis for which the Executive Director would consider suspending a right in a manner inconsistent with priority. Water rights are valued by seniority and the expectation that senior rights will be protected in times of drought. Only extraordinary emergency conditions should allow a departure from that expected legal protection. TPWD suggests that §36.03 be revised to reflect the conditions under which priority may be bypassed in the suspension of

water rights. The current rules are unclear, and the insertion of language in the definition of suspension that suggests the Executive Director has a simple choice to bypass priority is misplaced.

2. §36.05 Conditions for Issuance of Suspension or Adjustment Order. TPWD suggests that the TCEQ add a rule requiring the Executive Director to provide public notice of the declaration of drought or emergency water shortage. The declaration of drought or emergency shortage appears to be a prerequisite before a suspension or adjustment order may be issued, but the rules lack a mechanism to document the declaration. Notice may be accomplished by use of the TCEQ website. Public notice is appropriate to inform people of hazard situations affecting public health, safety, the environment or economic welfare under §§36.02(2) and (3). TPWD also suggests that this notice be published, if practicable, at least ten days before the TCEQ Executive Director issues a suspension or adjustment order, and at a minimum, concurrently with the issuance order.
3. §36.07 Implementation of Water Conservation Plans and Drought Contingency Plans. The rules should be clarified to explain how conservation and drought contingency plans are considered by Executive Director for sufficiency and compliance as factors influencing whether a suspension or adjustment order will be issued.
4. §36.06 Contents of Suspension Orders. The language in §36.06(1) is unclear as to whether the order identifies only the suspended or adjusted rights or whether it identifies all rights that were considered in the Executive Director's decision. TPWD believes the order should identify all the rights and provide an explanation for suspension of the rights and, if applicable, an explanation of the decision not to suspend certain rights. Additionally, TPWD suggests that the order contain an explanation of how the Executive Director satisfied all the necessary elements required by Texas Water Code §11.053(b). The order may be the only record of decision in the matter. Additionally, the order appears to be the logical document to note, if applicable, any decision by the Executive Director, pursuant to §36.07(b), to require the implementation of water conservation and drought contingency plans at more restrictive levels than required by the junior water right at the time of issuance of the order.

To be consistent with Texas Water Code §11.053(c)(2)(c), the maximum duration of an order under the new rules is 180 days, and §36.06(1)(A) should be revised accordingly. The statute does not allow discretion for the Executive Director to issue orders for periods longer than 180 days or to extend an authorization for 90 days. A new

suspension order is required after the expiration of the statutory maximum term.

5. §36.08 Notice of and Opportunity for Hearing on the Issuance of a Suspension or Adjustment Order. TPWD notes that Texas Water Code §11.053(c)(2)(c) directs TCEQ to specify procedures for “notice of, an opportunity for a hearing on, and the appeal to the commission of an order.” This rule does not provide any prior notice or opportunity for hearing. The legislation clearly calls for procedures for three separate administrative actions: notice of, opportunity for a hearing, and appeal of an order. TPWD understands that emergency situations may merit immediate action, and believes it is appropriate for the Executive Director to have the ability to act without notice when necessary, and act in a manner substantially similar to the proposed rule. Barring an emergency situation requiring immediate action, however, notice should be provided to affected water right holders and the public. Drought, for instance, is usually foreseeable condition and allows for a period of notice. Because there may be water supply, environmental, and health issues affected, TPWD also suggests that notice be provided to TPWD, the Texas Water Development Board, and the Texas Department of State Health Services. Public notice should also be provided via the TCEQ website. Public notice is appropriate to inform people of drought and hazardous situations affecting public health, safety, the environment, or economic welfare.

An opportunity for hearing should also be offered to affected parties and the TCEQ has rules in place to govern those hearings or guide limited, expedited hearings. The word “appeal” does not appear in §36.08, and the rule should be revised to clarify the appeal process. It is unclear whether the commission hearing described in the rule is intended to be the appeal referenced in the statute.

Finally, the fiscal note discussion in the rules memo (p. 7) provides that there will be no fiscal implications to units of state or local government as a result of administration or enforcement of the rules. TPWD disagrees. TPWD holds several water rights for a variety of purposes including municipal, industrial, agricultural, and instream uses that help the agency operate state parks, wildlife management areas (WMA), and fish hatcheries throughout the state. Suspension of water rights for TPWD facilities has the potential to impact park visitation and TPWD’s ability to meet the needs of visitors to parks and WMAs; these impacts may result in reduced income to the agency. Limits on ability to divert water associated with hatcheries will also affect the agency’s operations. While TPWD understands that its water rights were subject to calls from senior rights, these rules may allow

December 5, 2011

Page 7

suspension of TPWD water rights on the basis of preference. This is a new impact to TPWD and all other units of state and local governments that hold state water rights, and the fiscal consequences have not been evaluated.

Texas Parks and Wildlife Department appreciates your consideration of these comments. Should you have any questions regarding TPWD's comments, please contact me at 512 389 8899.

Sincerely,

A handwritten signature in blue ink that reads "Colette Barron Bradsby". The signature is written in a cursive style with a large, stylized initial 'C'.

Colette Barron Bradsby
Attorney, Texas Parks and Wildlife Department

L A W O F F I C E S O F
BOOTH, AHRENS & WERKENTHIN, P.C.

A PROFESSIONAL CORPORATION
515 CONGRESS AVENUE, SUITE 1515
AUSTIN, TEXAS 78701-3503
512/472-3263 • 512/473-2609

MICHAEL J. BOOTH
FRED B. WERKENTHIN, JR.
WIL GALLOWAY
TREY NESLONEY

CAROLYN AHRENS
OF COUNSEL

JOSEPH S. BABB
OF COUNSEL

December 5, 2011

Mr. Michael Parrish
MC 205, Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Via Fax: (512) 239-4808
and electronically to:
<http://www5.tceq.texas.gov/rules/ecomments/>

**RE: Texas Commission on Environmental Quality
Rule Project Number 2011-033-036-LS
Chapter 36, Suspension or Adjustment of Water Rights During Drought or
other Emergency Water Shortage under HB 2694 (Texas Water Code § 5.03)
Comments to Proposed Rules**

Dear Mr. Parrish:

Booth, Ahrens, and Werkenthin, P.C., on behalf of the Trinity River Authority of Texas (“TRA”), files these comments to the proposed rules published in the above-referenced rulemaking. Staff correctly observed that this rulemaking would “be very controversial on all issues.” It is TRA’s hope that these comments will assist the agency in navigating those issues in the formulation of final rules.

TRA is a holder of major water rights and provides water to municipalities, power suppliers, industry, and agriculture. In some circumstances, TRA would benefit from the proposed rules and in others they would be detrimental to TRA’s activities. TRA encourages the Commission to carefully consider this rulemaking that in its present form could threaten the rule of priority. TRA appreciates the time pressure the Commission is under. These rules, however, require more consideration and more input from stakeholders in the process to achieve the legislative intent of protecting the priorities of water rights in suspending or adjusting water rights and avoid the damage that will likely be caused to holders of vested property rights and to the state’s water planning.

At least since the passage of the 1913 Irrigation Act, the Legislature has attempted to provide certainty and stability to Texas water resource development. *See LCRA v. TDWR*, 689 S.W. 2d 873, 877 (Tex. 1984). Unquestionably, the language of Water Code Section 11.053 is not a model of specificity and clarity. The TCEQ’s rulemaking under that section should provide sufficient details to enable the regulated community to understand how the rules will be

implemented. Those details should be consistent and in harmony with existing water law and regulation. The current regulatory effort does neither and “could return water rights to the state of chaos” that the Texas Supreme Court was concerned about when it reversed the Court of Appeals and the TCEQ predecessor’s interpretation of what constituted “unappropriated water.” *Id.* at 882.

In summary, TRA believes the proposed rules fall short of what is required to properly implement the statute and provide certainty to water rights owners. At the same time, the proposed rules go far beyond the Commission’s existing authority by positioning it to summarily abrogate vested property rights on an ad-hoc basis, potentially in non-emergency situations. The proposed rules should be set aside, and an advisory committee should be appointed pursuant to Texas Government Code Section 2001.031 to provide opinions and advice to the Commission regarding the contemplated rulemaking.

The Proposed Rules Exceed Commission Authority

The proposed rules purport to be authorized by Texas Water Code Sections 5.013, 5.102, and 5.103 (all following statutory references are to the Texas Water Code unless specified otherwise). These sections establish the Commission’s general jurisdiction and rulemaking powers but neither these sections, nor Section 11.053, support promulgation of rules that abrogate the first in time, first in right principles of Section 11.027. Water rights held by senior and junior right holders used for beneficial and non-wasteful purposes are vested private property rights. *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971). The Commission is not authorized to affect those vested rights except under its authority to adjudicate or cancel them. Section 11.001(a) (“Nothing in this code affects vested private rights to the use of water, except to the extent that provisions of Subchapter G [Water Rights Adjudication Act] of this chapter might affect these rights”). The proposed rules, as drafted, do not protect those rights and exceed the Commission’s authority.

The staff’s regulatory analysis specifically cites Section 5.013(a)(1), which grants the Commission general jurisdiction over water and water rights, as blanket authority for the Commission to suspend water rights. When applied to senior water rights holders, this mischaracterizes the authority granted by Section 5.013(a)(1). The only authority of the Commission to diminish the rights of senior water right holders without compensation is in the context of adjudication or cancellation of water rights. It may temporarily suspend water rights under emergency conditions pursuant to the new Section 11.053; however, this must be done according to priority as mandated in Section 11.053. (It is instructive to note that the consideration of “preferences” under Section 11.053(b)(5) is conditioned upon “practicability,” while the requirement to preserve the priority of water rights is absolute under Section 11.053(a)). That section must also be read together with other statutes addressing imminent threats to public health and safety such as Sections 11.039 and 11.139. The proposed rules do not appear consistent with those sections, and fail to limit their scope to emergencies.

The Proposed Rules Exceed Legislative Intent

The legislative intent of the rules, as reflected in Section 11.053, was to address emergencies, not periodic droughts or shortages caused by inadequate planning. By their definitions, the proposed rules make it clear that they are intended to apply not only in emergency situations, but could be invoked in a drought or water shortage as defined in the rules, including any time “demand for surface water exceeds supply.” Section 11.053, however, states that curtailment can occur only “[d]uring a period of drought or other emergency shortage of water.” The proposed rules fail to appropriately limit their scope to emergencies.

As noted in the staff’s discussion of the proposed rules, the definition of drought “includes times of drought that are not as extreme, but are still causing shortages that could adversely impact senior water rights.” This is clearly not the same as an emergency as contemplated by Section 11.053 and results in a much broader potential application of the statute than was intended or is warranted.

It is noteworthy that “other” was left out both in the title and in the discussions of affected water rights, and the whole fabric of the proposed rules clearly suggests that they are intended to apply in a drought or in an emergency. If the proposed rules are adopted and applied, water rights holders must expect claims on their rights in non-emergency situations as Texas cycles in and out of droughts of varying degrees, or any time the “demand for surface water exceeds the available supply.” This is clearly not what the Legislature intended.

The Proposed Rules Ignore or Discount Existing Texas Law

The proposed rules ignore or discount existing Texas law in several ways, some of which are described below.

Significant Effect on Vested Property Rights

The regulatory analysis of the proposed rules makes broad, inaccurate, and sometimes incoherent statements regarding their effect on rights-holders, concluding that there is no effect on them. For instance:

“The proposed rulemaking does not affect or change the law of ‘first in time, first in right,’ otherwise known as the priority doctrine.” (36 TEX. REG. 3465)

and

“Since the TCEQ is presently protecting senior water rights, the proposed rules are not expected to affect current practices with regard to water rights. Likewise, individuals or businesses who are senior water right holders are not expected to be affected by provisions in the proposed rules which would allow them to receive water that they

potentially would not have received without the executive director suspension or adjustment.” *Id.*

This statement that the proposed rules do not impair vested rights or conflict with the Water Code ignores the language of the rules being proposed. Section 36.07(b), for example, indicates that the executive director may ignore priority in enforcing water rights by allowing the continued diversion of a junior water right holder to the detriment of a senior water right holder in ill-defined circumstances.

The definition of drought, standing alone, is not objectionable, but the definition, however, is contrary to the express purpose of the statute, and will effectively result in invoking the statute in situations which are clearly not an emergency and invite applications for imposition of the rules when they are not needed or appropriate.

The proposed rules, could substantially affect all water rights holders potentially even in situations beyond what is reasonable in making emergency curtailments of water. The vagueness on when such curtailments will occur and under what circumstances must not be left to implementation. In short, the rules should be reflective of rule of law rather than a system based more on the “rule of man” where the Commission decides on an ongoing basis what constitutes an emergency. If the rules are only going to be applied in true emergencies, they need to say so.

Failure to Reconcile Application of Proposed Rules with Other Laws

It must be presumed the Legislature intended Section 11.053 to be harmonized with the existing provisions of the Water Code. TCEQ must, therefore, reconcile and harmonize existing authority with the new law. As was noted by several commentators prior to publication of the proposed rules, there are already laws on the books which address allocation of water in emergency situations, and the new statute and proposed rules cannot be viewed in a vacuum. The new statute should be implemented through the rules in conjunction with those other laws. Because the Commission will continue to function under pre-existing statutory authority on the same subjects, the rules should address the interplay of new and old authority. In particular, the rules should address the following:

1. Sections 11.039 and 11.139 both address how to deal with water shortages and have their own rules, which apply in much the same situations as the proposed rules. However, neither the regulatory analysis nor the proposed rules address how these different statutes and rules might be harmonized and applied by the Commission. How will the Commission reconcile these authorities?
2. There may be circumstances where it would make more sense to appoint a watermaster under Section 11.326 to address issues of water shortages as related to vested water rights. Traditionally, issues like these are handled by a watermaster, who

has powers at law and in equity. The watermaster may be appointed by the Commission on its own motion and perhaps even more significantly has independent funding sources as provided by law. *See* TEXAS WATER CODE § 11.3291.

3. Section 11.148 provides for the emergency suspension of environmental permit conditions and environmental set-asides when emergency conditions exist. These rules must acknowledge that TCEQ action under Section 11.039 will only occur after TCEQ action occurs pursuant to Section 11.148.

4. How will the preferences of Section 11.024 be implemented? The proposed rules provide little guidance. If “need for water” is the criteria, how will the Commission weigh the various needs to be considered. What criteria will they follow? Should a semiconductor manufacturer be allowed to take municipal water from a junior water right holder that came from the curtailment of a chemical plant holding a senior water right? Again, the proposed rules are not sufficiently descriptive.

These are not academic issues. Water rights holders make plans, issue bonds, and spend millions of dollars based upon their expectation that their rights will be enforced and would only be suspended in the most extreme emergencies, if at all. Companies locate, expand, or keep plants in certain places in Texas because of water availability. TRA believes that Section 11.053 and the rules implementing the statute should be used only as a last resort, i.e. in an emergency after all negotiations have failed and the other, less disruptive, statutory provisions such as Sections 11.039 and 11.139 have failed to achieve a result which safeguards health and safety and then only if there is compensation to the water right holder. Safeguards need to be imposed in the rules to ensure they are only applied in a true emergency with no other solution under the current law. The Commission must make it clear that a municipal user cannot use Section 11.053 to have senior irrigation rights curtailed when it continues to allow watering of its customers athletic fields or golf courses, among other things. Furthermore, this remedy should not be available to entities that have not planned for their needs as identified in the State Water Plan and should not continue to be made available once exercised if adequate time has passed to develop additional supplies or conservation measures.

Is the Commission Resurrecting the Wagstaff Act?

The Wagstaff Act was repealed by Senate Bill 1 in 1997. The Wagstaff Act gave preferences to municipal users of water for permits issued after its enactment in 1931. Specifically, it provided that all appropriations following its effective date for any purpose other than municipal or domestic uses were subject to subsequent “...further appropriation...” for municipal or domestic uses without condemnation or compensation. This met constitutional muster because it only applied prospectively and did not affect holders of vested water rights acquired prior to 1931.

Under these proposed rules, Texas could easily have a *de facto* return of the Wagstaff Act, except its application would be against all preexisting water rights. This could not have been the intent of the Legislature and we urge the Commission to decline to follow this course of action.

Who is Getting the Water?

The regulatory analysis by staff makes several references to protecting senior water rights holders and generally indicates that it will be senior water rights holders benefitting from these rules. Why do senior water rights holders need more protections in addition to enforcement of the priority system? Specifically, how do the proposed “protections” do anything but lessen the protections afforded senior rights and add a great uncertainty to water rights administration? The following TCEQ comments raise more questions than they answer:

“This definition [of drought] is based on scientific data but also includes times of drought that are not as extreme, but are still causing shortages that could adversely impact senior water rights.”

“Paragraph (3) is a definition of ‘emergency shortage of water.’ This is defined as the inability of a senior water right to take surface water under circumstances posing a hazard to public health, public safety, the environment, or economic welfare.”

“Paragraph (4) defines ‘senior water right’ to include senior priority permits and certificates of adjudication, and superior domestic and livestock riparian rights. This paragraph is necessary to describe what water rights the executive director's order will protect.”

“Under current law, senior water rights may make calls on water rights junior to them if they cannot get all the water that they need under an authorized water right. Since the TCEQ is presently protecting senior water rights, the proposed rules are not expected to significantly affect current practices with regard to water rights.”

“Likewise, local governments who are senior water right holders may be affected by provisions in the proposed rule which would allow them to receive water that they potentially would not have received without the executive director suspension or adjustment.”

“Likewise, individuals or businesses who are senior water right holders are not expected to be affected by provisions in the proposed rules which would allow

them to receive water that they potentially would not have received without the executive director suspension or adjustment.”

“Additionally, water rights are granted with express conditions that they are junior to and subject to a senior water rights ability to take their authorized water. Thus, if a senior water right is not able to use the water that it is authorized to under the law, and needs that water, the junior water right holder does not have a right to that water and it is not a statutory or constitutional taking.”

“Thus, the ‘other emergency shortage of water’ sections of this rulemaking are actions that are not takings because junior water rights take water under their water rights subject to senior rights, or are taken in response to a real and substantial threat to public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose. When persons or entities cannot obtain water, particularly for domestic or municipal needs, due to some emergency circumstance, their need for water can be a significant health and safety concern and may be immediate. This rulemaking would help provide water to senior water right holders that may have an emergency need for the water.”

These statements conflict or potentially conflict with the language of the proposed rules. When applied, the rules lessen protections afforded senior rights holders because it is in fact their water which is taken to help junior rights holders. Because senior water rights are currently protected, TRA believes that the primary purpose of the proposed law is to take water from senior rights holders in true emergency situations. This is why the staff discussion concerns TRA, since none of it appears to be supportive of the real purpose of these rules. Rather, the discussion at best seems to be an attempt to ward off close review until some future time when senior water rights are curtailed for some ad-hoc reason.

To take one example, suppose an upstream city is desperate for water, and despite all of their best water planning efforts they reach a period of critical shortage during a drought. Further assume they have water rights junior to those of a downstream industrial user. Under the proposed rules, the city could ask for some of the industrial user’s water. Since the proposed rules do not address application of 11.139, it is unclear whether the industrial user would be compensated for the water taken from them. Perhaps even more critical, and a chilling thought for senior water right holders, such a request could be made any time there is a drought, or even when the “demand for surface water exceeds supply.” The exception could very well end up swallowing the law and senior water rights could end up meaning very little except in times of plenty. These concerns need to be addressed in this rulemaking.

The Takings Analysis is Incorrect

The analysis by staff concludes that no taking of vested property rights could or would occur under these rules. This conclusion would be correct if the rules required curtailments to be done according to priority. They do not. The Commission, by implementing the statute and following the proposed rules, could order that water be taken from vested water rights holders and given to junior rights holders for the purposes cited in the statute. Why shouldn't the junior rights holders be ordered to pay for it? The staff's analysis indicates there is no intention of even considering compensation. By failing to address compensation, the proposed rules indicate that no compensation will be awarded, leaving open a direct challenge to the constitutionality of the rules, and by extension, the statute. Furthermore, if the Commission in effect orders the relief that might be obtained under the same facts pursuant to Section 11.139, but fails to order compensation for the fair market value of the water taken, they invite further litigation for not applying the statutory directive for compensation in Section 11.139(j).

Other Issues

There are other important unanswered questions about the proposed rules. Some of these are:

(1) Water availability modeling is based upon strict enforcement of prior appropriation laws. If the Commission is moving away from strict enforcement, as it appears, they are under the proposed rules, what effect will that have on such modeling and the water rights and investments based upon such modeling? Certainly, these impacts must be addressed in the rules, or preamble.

(2) What happens if the water right authorized by the TCEQ for out-of-priority use of water is downstream from the senior water right? Does the TCEQ propose that these rules give it the authority to prohibit an upstream senior water right from diverting water in that situation?

(3) What if the senior water right that TCEQ wishes to curtail under these rules is a municipal water right?

(4) How are water right holders to determine the reliability of their water right if the water rights are granted on a priority basis, but not enforced strictly according to priority? Note that in Senate Bill 1, the legislature tasked TCEQ with creating water availability models for each river basin. Section 16.012. These models were developed with the assumption that strict prior appropriation would be implemented during droughts. As required by Section 16.012(i), TCEQ provided each water right holder a report on the amount of water available to the water right holder during a repeat of the drought of record. This projection was obviously based on enforcing prior appropriation during a drought and may not be accurate if water is allocated on a basis other than priority.

Mr. Michael Parrish
December 5, 2011
Page 9

(5) Would the public welfare under Section 11.053 be invoked to allow a holder of a municipal or power generation water right to fill its storage, or can the public welfare concept only be used to benefit run-of-the-river water rights?

(6) How would the change in enforcement be taken into account in evaluating applications for new water rights?

(7) How would the loss of water taken by a junior water right holder be allocated when multiple senior water right holders are impacted?

Any rules promulgated under the authority of Section 11.053 have the potential to significantly undermine the current system of administering surface water rights in Texas and the water supply planning process as represented in the State Water Plan. The current proposed rules provide little guidance to junior or senior water rights holders, or for that matter, anyone else that relies upon or is interested in surface water in Texas. TRA believes that before final adoption of these rules it would be prudent to formally establish pursuant to the TEXAS GOVERNMENT CODE § 2001.031 an advisory committee of stakeholders including water managers, water conservation experts, hydrologists, environmentalists, and attorneys to work with staff to develop rules which address the issues raised by the new law, while taking into consideration existing law and the vested water rights they affect. The TRA looks forward to working with the TCEQ and others in the development of this very important rulemaking.

Please do not hesitate to contact us should you have any questions.

Very truly yours,



Michael J. Booth

MJB/rd

cc: Mr. Kevin Ward
Mr. Howard Slobodin

TEXAS DEPARTMENT OF AGRICULTURE

TODD STAPLES
COMMISSIONER



December 5, 2011

Ms. Robin Smith
Texas Commission on Environmental Quality
P.O. Box 13087, MC 173
Austin, Texas 78711-3087

RE: TCEQ's Development of a Rule Implementing New §11.053 of the Texas Water Code (Concerning Water Rights During Drought or Emergency Water Shortages)

Dear Ms. Smith:

Thank you for the opportunity to submit comments on the Texas Commission on Environmental Quality's (TCEQ) proposed rule relating to the implementation of the drought provisions of H.B. 2694, 82nd Leg., R.S. The Texas Department of Agriculture (TDA) appreciates TCEQ's efforts to consult with stakeholders throughout this rulemaking process and looks forward to a continued partnership with TCEQ.

The following recommendations will help improve the proposed rules and move toward a beneficial and efficient water management system. First, before adopting the proposed rule, TCEQ should review existing regulations to determine if they are being fully implemented. Some stakeholders believe TCEQ, through existing water master program rules if fully operational, has sufficient latitude to accomplish the goals and intent of H.B. 2694 as they relate to drought.

Next, TCEQ should consider the harm created when a curtailment occurs. A very important provision that is missing in the proposed rule language is a provision for just compensation for curtailed water right holders. TDA recommends this language be developed to be included in the rule, or the rule should be amended to reference 30 T.A.C. § 297.17(1), which states the following:

The person granted an emergency transfer authorization under this section is liable to the affected water right holder and the holder's agent or lessee from whom the use is transferred for the fair market value of the water transferred as



well as for any damages caused by the transfer of use. If within 60 days of the termination of the authorization, the parties do not agree on the amount due, or if full payment is not made, either party may file a complaint with the commission to determine the amount due. The commission shall use dispute resolution procedures provided under Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure) for a complaint filed under this subsection. Fair market value shall be determined by the amount of money that a willing buyer would pay a willing seller, neither of which is under any compulsion to buy or sell, for the water in an arms-length transaction and shall not be limited to the amount of money that the owner of the water right has paid or is paying for the water.

In addition to these recommendations, TCEQ specifically requested comments on the following issues:

1. How should “drought” and “emergency shortage of water” be defined?

The most commonly used and accepted determination for drought and its severity is the U.S. Drought Monitor. The U.S. Drought Monitor uses multiple drought indices such as soil and crop moisture, and available water supply, to determine drought severity. The use of these indices provides a comprehensive and accurate picture of drought conditions.

2. How should development and implementation of conservation plans be considered?

Water conservation should be pursued at all times. However, during periods of emergency shortages, effective drought contingency plans (DCPs) should be implemented by municipalities and industry prior to curtailment of agricultural water rights. Municipal and industrial DCPs should include a requirement to develop additional supplies of water to avoid the use of an order as a management strategy.

3. What conditions should be required for issuance of an order?

Chapter 11.139(a) of the *Texas Water Code* and Chapter 297.17(b) of the *Texas Administrative Code* grant TCEQ emergency authorization when conditions that present an imminent threat to the public and override the necessity to comply with procedures,

Ms. Robin Smith
December 5, 2011
Page 3

and to which there are **no feasible, practical alternatives** to the emergency authorization exist. Prior to an order being issued, the beneficiary should be required to demonstrate in their Application for Emergency Water that they have exhausted all feasible, practical alternatives as defined in 30 T.A.C. § 297.17. TCEQ should only issue an order as a last resort and not as a reward for poor conservation planning.

4. What should be the duration of the temporary order?

Tex. Water Code § 11.139(a) and 30 T.A.C. § 297.17(b) both state that:

An emergency authorization provides for the use of state water for an initial period of not more than 120 days if the commission finds emergency conditions to exist which present an imminent threat to the public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible, practicable alternatives to the emergency authorization. Such emergency action may be renewed once for not longer than 60 days.”

No order should be issued for longer than 30 days at a time. The order should be renewable every 30 days if the applicant can demonstrate that reasonable steps have been taken to acquire additional water sources and that an effective and enforceable DCP has been implemented. The maximum duration of the order should not exceed 120 days.

5. What type of notice, opportunity for hearing and appeal is required after this order is issued?

TCEQ should follow the notice and hearing procedures for issuing emergency authorizations found in Tex. Water Code § 11.139.

Thank you for the opportunity to submit comments on the implementation of H.B. 2694.

Sincerely yours,

Richard Eyster

RE/lp



TEXAS OIL & GAS ASSOCIATION

December 5, 2011

L. Roe Buckley
CHAIRMAN

Robert L. Looney, Austin
PRESIDENT

William L. Emms, Austin
VICE-PRESIDENT FOR MEMBER
AND MEDIA RELATIONS

Debbie Mamula Hastings, Austin
VICE-PRESIDENT FOR
ENVIRONMENTAL AFFAIRS

Benjamin W. Setree, Austin
VICE-PRESIDENT FOR
GOVERNMENTAL AFFAIRS

Jim Sierra, Austin
VICE-PRESIDENT FOR FINANCE

District Vice-Presidents

David W. Killam, Laredo
SOUTHWEST TEXAS

Harold D. Conrson, Amarillo
THE PANHANDLE

Lance R. Byrd, Dallas
NORTH CENTRAL TEXAS

Dan Allen Hughes, Jr., Beeville
THE LOWER GULF COAST

Allan D. Frizzell, Abilene
WEST CENTRAL TEXAS

Curtis W. Mewbourne, Tyler
EAST TEXAS

Alan L. Smith, Houston
THE UPPER GULF COAST

Grant A. Billingsley, Midland
THE FERTILE BASE

W.M. Thacker, Jr., Wichita Falls
NORTH TEXAS

Mr. Michael Parrish
MC 205
Office of Legal Services
Texas Commission on Environmental Quality
Post Office Box 13087
Austin, Texas 78711-3087

Submitted electronically at <http://www5.tceq.state.tx.us/rules/ecomments/>

Re: Proposed Chapter 36 – Suspension or Adjustment of Water Rights During
Drought or Emergency Rule Project No. 2012011-033-036-LS

Dear Mr. Parrish:

The Texas Oil and Gas Association (TxOGA) is the largest and oldest petroleum organization in Texas, representing over 4,500 members. The membership of TxOGA produces in excess of 90 percent of Texas' crude oil and natural gas, operates 100 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. According to the most recent data, the oil and gas industry employs 315,000 Texans, providing payroll and benefits of over \$30 billion in Texas alone. In addition, large associated capital investments by the oil and gas industry generate significant secondary economic benefits for Texas. We are a strong proponent of full-implementation of the State Water Plan to help avoid shortages in the future and establish long-term water supplies for Texas continued growth and prosperity.

TxOGA commends the Texas Commission on Environmental Quality (TCEQ) in handling recent water shortages and recognizes the tremendous challenge the agency faces if the current drought persists. Our member companies recognize that traditionally when drought conditions begin to emerge within a particular region or watershed, the TCEQ facilitates discussions among water right holders toward cooperative arrangements to mitigate drought impacts while preserving the integrity of the prior appropriation system. TxOGA applauds this approach and we suggest that it be a precursor to any emergency order by TCEQ under Section 36.5 of the proposed rules.

We appreciate the opportunity to submit comments on the proposed new Chapter 36 relating to the Suspension or Adjustment of Water Rights during Drought or Emergency. Production and refining of oil and natural gas require reliable water supply, therefore, water regulations have the potential to impact the industry's ability

to develop these natural resources that are so important to the Texas economy and our national security.

Under HB 2694, 82nd Legislature, the Commission is to adopt rules allowing the executive director to temporarily suspend or adjust water rights during times of drought or other emergency shortages of water. Our primary concern is that the proposed rule is much broader than the statute contemplates especially regarding the definition of drought and the duration of an order as detailed below:

§36.2(2)(A). *“A drought occurs when... drought conditions in the watershed or part of the watershed... are classified as at least moderate by the National Drought Mitigation Center.*

Some areas of Texas would more often than not be classified in at least a “moderate” drought under this definition and could be constantly subject to curtailment “temporary” orders, therefore, suggest that “moderate” be changed to “severe”.

§36.2(2)(B). *“A drought occurs when... streamflows at United States Geological Survey gaging stations in the drainage area are below the 33rd percentile of the period of record;”* should be eliminated as a definition of “drought”. In some basins, highly variable streamflows and naturally varying seasonal conditions could inappropriately prompt “drought” status under this definition.

§36.2(2)(C). *“A drought occurs when... demand for surface water exceeds the available supply;”* should be eliminated as a definition of “drought”. A demand for surface water may exceed the available supply, but this situation should not constitute a drought. In fact, this situation currently exists for water rights holders that have monthly or seasonal diversion limitations and almost always exists in over-appropriated basins. It may be more appropriate to apply this proposed definition as a definition of “emergency water shortage”. Further, if this definition is to be included in the rules, it should quantify the amount by which demand must exceed availability.

§36.5(b)(4). *“The executive director shall ensure that the order... 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.”* As a point of clarification, it is suggested that this language be broadened to include **ALL** water rights holders. While the proposed rule explicitly requires the consideration of water conservation and drought contingency plans of “affected” water rights holders, it is silent with respect to the plans and implementation thereof by “unaffected” water rights holders, or those who are not curtailed or suspended as a consideration of public welfare. Junior water rights holders not subject to curtailment or suspension by virtue of preference of use should likewise have their water conservation and drought contingency plans scrutinized and stringently enforced.

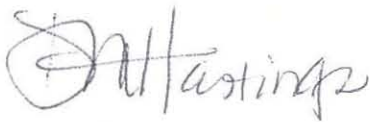
§36.5(b)(5). *“The executive director shall ensure that the order... to the greatest extent practicable, conforms to the order of preferences established by Texas Water Code, §11.024.”* , HB 2694, 82nd Legislature requires the TCEQ to consider Texas Water Code, §11.024 in setting priority of use during drought to the greatest extent practicable, however, it should also be recognized that the §11.024 relates specifically to only the initial appropriation of a new water right.

§36.6 (3). “... the duration of the suspension or adjustment...may not be longer than 180 days unless otherwise specified... may be extended for up to 90 days for each extension... may be modified by the executive director based on changed conditions...” With the exceptions and qualifications provided in this section, the duration of an order is potentially indefinite. Due to the nature of this issue as an “emergency” and the potential impact of suspended or adjusted water rights, it would seem that the order should be very restrictive in terms of duration and be frequently revisited. Additionally, the rule should provide for the revocation of an order should changed conditions warrant.

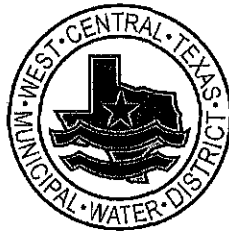
Our member companies have identified one additional factor that should be considered before issuing a suspension or adjustment order – the impact of the curtailment on infrastructure critical to homeland security. "Critical infrastructure" is defined by federal law as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." TxOGA suggest that the impact of water restrictions on critical infrastructure be a consideration in the process and we strongly encourage the Commission to implement curtailment to such facilities in only the most extreme circumstances.

We appreciate your consideration of our comments, should you have any questions please contact dhastings@txoga.org or 512/478-6631.

Sincerely,

A handwritten signature in black ink, appearing to read "Deb Hastings". The signature is stylized and cursive.

Deb Hastings
Vice President Environmental Affairs
Texas Oil and Gas Association



WEST-CENTRAL-TEXAS-MUNICIPAL-WATER-DISTRICT

410 Hickory Street, Abilene, TX 79601, Phone 325-673-8254, Fax 325-673-8272, www.wctmwd.org

November 21, 2011

Mr. Michael Parrish, MC 205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Rule Project No. 2011-033-036-LS

Dear Mr. Parrish:

Recently the District had the opportunity to review the Commission's proposed changes to 30 TAC §36 regarding the SUSPENSION OR ADJUSTMENT OF WATER RIGHTS DURING DROUGHT OR EMERGENCY WATER SHORTAGE. Overall it appears the proposed rules will do a good job of defining how and when a suspension or adjustment of water rights will occur.

The District had a few notes or comments for your consideration regarding the exact text of the proposed rules:

- §36.2(2)(A) A drought occurs when the following criteria are met:

drought conditions in the watershed or 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.

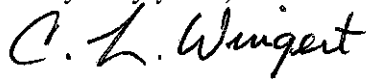
First, the language as written appears somewhat confusing. For example, it appears the term "part of the watershed subject to the executive director's Suspension or Adjustment" could be taken to mean any part of the entire watershed that happens to have another separate part of the same watershed that is subject to a suspension or adjustment. A simple way to correct this might be to add the word "the" indicating that specific watershed section as follows: *drought conditions in the watershed or the part of the watershed subject...*

Second, the "moderate" condition by the NDMC seems to be a fairly low criterion. That may trigger the opportunity for suspension or adjustment when the need is not there.

- §36.2(2)(B) The USGS web page uses a table that lists the 25th and 75th percentile flows based on the period of record. Using the 25th percentile flow may be easier for water rights holders to understand and monitor, while achieving roughly the same triggering criteria as the 33rd percentile listed in the proposed rule.

Thank you for providing this opportunity to comment on this proposed rule. Please contact me at (325) 673-8254 should you have questions.

Very truly yours,



C. L. Wingert, P.E.
General Manager

WEBB & WEBB
ATTORNEYS AT LAW

712 SOUTHWEST TOWER, 211 EAST SEVENTH STREET
AUSTIN, TEXAS 78701

STEPHEN P. WEBB
GWENDOLYN HILL WEBB

TELEPHONE: 512/472-9990
FACSIMILE: 512/472-3183

Mr. Michael Parrish, MC 205
Office of Legal Services
Texas Commission on Environmental Quality
P.O. Box 13087, MC 173,
Austin, Texas 78711-3087

Re: Chapter 36, Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage, Implementation of HB 2694 (Section 5.03): Water Curtailment

Rule Project No. 2011-033-036-LS.

Dear Mr. Parrish:

The purpose of these comments is to follow up and supplement the comments I provided on the record at the December 1, 2011 public hearing regarding the above referenced Rule Project regarding Proposed 30 Tex. Admin. Code, Chapter 36, *Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage*.

In addition to the comments provided at the public hearing, I would like to state my general concerns regarding the lack of any kind of technical standards regarding the determinations of drought and emergency water shortage under proposed §36.2 and proposed §36.4. In general, there is no statement of how the data will be used to make the determinations that drought or emergency water shortage conditions exist or how the Executive Director will determine that the conditions exist justifying a Suspension or Adjustment Order. More importantly, the rules do not state or even imply that other responses will be solicited or tried before the Executive Director issues a Suspension or Adjustment Order. Finally, there is no specific standard under which affected parties will be entitled to a hearing, only that the Executive Director's Suspension or Adjustment Order, if issued without a hearing, will provide for a hearing "as soon as practicable."

Lack of Technical Standards

Proposed Section 32.2 defines drought in three different and separate ways. In the first definition (§36.2(2)(A)), the definition is related to a classification of moderate drought conditions by the National Drought Mitigation Center. This standard may be too low a threshold for a typically dry state such as Texas. If the issuance of a Suspension or Adjustment Order is

meant to be an extraordinary response to extraordinary drought conditions, then it seems that conditions should be classified as “Severe Drought” for at least 30 days before the Executive Director considers acting to abate the prior appropriation system.

Then proposed Section (§36.2(2)(B)) states that gaged streamflows in the drainage area must be below the 33rd percentile of the period of record. There is no definition of the period of record. Is this the period of record of the WAM, or the period of record of the gage, or some other, unspecified period of record? And, how was it determined that gaged flows below the 33rd percentile would constitute a drought? Has this amount of streamflow been shown to be present when the Executive Director has issued curtailment orders? I think that gaged flows below the 33rd percentile occur often enough that use of this drought definition does not provide for a Suspension or Adjustment Order to be an extraordinary measure, but just another authorized drought response.

More importantly, there is no information whatsoever on what data or standards the Executive Director will use under proposed Section 36.5, Conditions for Issuance of Suspension or Adjustment Order. The lack of transparency in this decision making by the Executive Director could be alarming, especially given the fact that no opportunity for public input is provided for before the Executive Director issues an order.

Proposed Section 32.2 and proposed Section 36.5 should be amended to allow for more transparency by specifically allowing an opportunity for public participation and specifying which data the Executive Director will use to ensure that the definitional requirements are met and that the conditions for issuance of an order are met.

Opportunity for Public Participation

This year, to my knowledge, the Executive Director provided no opportunity for public participation as it issued numerous curtailment orders throughout the State of Texas. This lack of public participation should be the exception, rather than the rule.

Suspension or Adjustment Orders issued by the Executive Director should only follow stakeholder involvement, and should be followed promptly (within 10 days of issuance of the Order) by hearing before the Commission. It stands to reason that, given the severe economic impact of suspensions and adjustments, the Executive Director’s actions should be subject to the most open communications and opportunities for public comments.

Other Standards for Use of Suspension or Curtailment Orders

As mentioned above, the definitions and criteria for suspension or adjustment orders are very vague and unclear. Additionally, there is no requirement that the Executive Director try any other means of lawfully administering water rights under drought or emergency conditions before resorting to the issuance of a Suspension or Adjustment Order. There should be some requirement that issuance of a Suspension or Adjustment Order is an option that can only be employed after other methods have been tried and found not to succeed in providing water needed for holders of senior and superior water rights. After all, the Commission is already

empowered to respond to the needs of water rights holders through emergency and other temporary orders. These options are preferable to the TCEQ issuance of a Suspension or Adjustment Order as envisioned by the proposed Chapter 36 rules.

I look forward to working with TCEQ staff to resolve these concerns and develop a meaningful, enforceable tool to address drought and emergency water shortage conditions.

Sincerely,

A handwritten signature in black ink, appearing to read "Gwendolyn Hill Webb". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Gwendolyn Hill Webb

TEXAS DEPARTMENT OF AGRICULTURE

TODD STAPLES
COMMISSIONER

December 5, 2011

Dr. Bryan Shaw
Chairman
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

RECEIVED
TRACKING # 17740
ASSIGNED TO: OLS, OW

RECEIVED

DEC 08 2011

Texas Commission on Environmental Quality
Commissioners' Offices

DUE DATE: FYI

Dear Chairman Shaw:

Thank you for your service to the people of Texas. I appreciate the opportunity to work with you to protect our state's great natural resources, and to provide comment on TCEQ's efforts to implement the drought provisions of House Bill 2694 (82R).

The recent drought has proven a catalyst for our state, increasing the public's awareness of the importance of water planning and management. As surface water rights have been curtailed, groundwater resources depressed and conservation measures instituted, we all have a better understanding of the impact water scarcity can have on our families and businesses. The agriculture industry has already realized a loss of \$5.2 billion in the current drought. This loss not only impacts the livelihoods of farmers, ranchers and rural communities, but it will also likely affect all Texans, as decreased supplies of agricultural products often result in consumers paying increased prices for basic food and clothing needs.

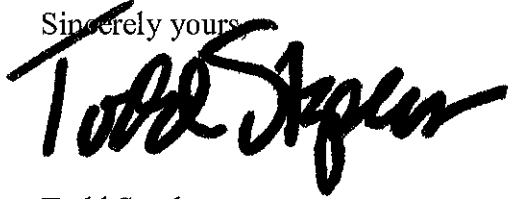
The Texas Department of Agriculture has submitted technical comments to the proposed rules. These comments were developed in consultation with many in the agriculture industry, and a copy is attached for your consideration. Generally, the comments speak to the need for preserving our domestic food and fiber production by fully utilizing existing resources to ensure Texas' surface water systems operate efficiently; establishing policies and procedures that encourage water management tools, like conservation, as a method to mitigate the need for curtailment; and encouraging policies that will minimize harm created by necessary curtailments.



Dr. Bryan Shaw
December 5, 2011
Page 2

Thank you again for the opportunity to comment. I appreciate your commitment to developing and implementing policies that recognize the many interests and stakeholders affected by these rules.

Sincerely yours

A handwritten signature in black ink that reads "Todd Staples". The signature is written in a cursive, slightly slanted style.

Todd Staples

TS/KF/kf

Enclosure

cc: Mr. Buddy Garcia
Mr. Carlos Rubinstein

TEXAS DEPARTMENT OF AGRICULTURE

TODD STAPLES
COMMISSIONER



December 5, 2011

Ms. Robin Smith
Texas Commission on Environmental Quality
P.O. Box 13087, MC 173
Austin, Texas 78711-3087

RE: TCEQ's Development of a Rule Implementing New §11.053 of the Texas Water Code (Concerning Water Rights During Drought or Emergency Water Shortages)

Dear Ms. Smith:

Thank you for the opportunity to submit comments on the Texas Commission on Environmental Quality's (TCEQ) proposed rule relating to the implementation of the drought provisions of H.B. 2694, 82nd Leg., R.S. The Texas Department of Agriculture (TDA) appreciates TCEQ's efforts to consult with stakeholders throughout this rulemaking process and looks forward to a continued partnership with TCEQ.

The following recommendations will help improve the proposed rules and move toward a beneficial and efficient water management system. First, before adopting the proposed rule, TCEQ should review existing regulations to determine if they are being fully implemented. Some stakeholders believe TCEQ, through existing water master program rules if fully operational, has sufficient latitude to accomplish the goals and intent of H.B. 2694 as they relate to drought.

Next, TCEQ should consider the harm created when a curtailment occurs. A very important provision that is missing in the proposed rule language is a provision for just compensation for curtailed water right holders. TDA recommends this language be developed to be included in the rule, or the rule should be amended to reference 30 T.A.C. § 297.17(1), which states the following:

The person granted an emergency transfer authorization under this section is liable to the affected water right holder and the holder's agent or lessee from whom the use is transferred for the fair market value of the water transferred as



well as for any damages caused by the transfer of use. If within 60 days of the termination of the authorization, the parties do not agree on the amount due, or if full payment is not made, either party may file a complaint with the commission to determine the amount due. The commission shall use dispute resolution procedures provided under Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure) for a complaint filed under this subsection. Fair market value shall be determined by the amount of money that a willing buyer would pay a willing seller, neither of which is under any compulsion to buy or sell, for the water in an arms-length transaction and shall not be limited to the amount of money that the owner of the water right has paid or is paying for the water.

In addition to these recommendations, TCEQ specifically requested comments on the following issues:

1. How should “drought” and “emergency shortage of water” be defined?

The most commonly used and accepted determination for drought and its severity is the U.S. Drought Monitor. The U.S. Drought Monitor uses multiple drought indices such as soil and crop moisture, and available water supply, to determine drought severity. The use of these indices provides a comprehensive and accurate picture of drought conditions.

2. How should development and implementation of conservation plans be considered?

Water conservation should be pursued at all times. However, during periods of emergency shortages, effective drought contingency plans (DCPs) should be implemented by municipalities and industry prior to curtailment of agricultural water rights. Municipal and industrial DCPs should include a requirement to develop additional supplies of water to avoid the use of an order as a management strategy.

3. What conditions should be required for issuance of an order?

Chapter 11.139(a) of the *Texas Water Code* and Chapter 297.17(b) of the *Texas Administrative Code* grant TCEQ emergency authorization when conditions that present an imminent threat to the public and override the necessity to comply with procedures,

Ms. Robin Smith
December 5, 2011
Page 3

and to which there are **no feasible, practical alternatives** to the emergency authorization exist. Prior to an order being issued, the beneficiary should be required to demonstrate in their Application for Emergency Water that they have exhausted all feasible, practical alternatives as defined in 30 T.A.C. § 297.17. TCEQ should only issue an order as a last resort and not as a reward for poor conservation planning.

4. What should be the duration of the temporary order?

Tex. Water Code § 11.139(a) and 30 T.A.C. § 297.17(b) both state that:

An emergency authorization provides for the use of state water for an initial period of not more than 120 days if the commission finds emergency conditions to exist which present an imminent threat to the public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible, practicable alternatives to the emergency authorization. Such emergency action may be renewed once for not longer than 60 days.”

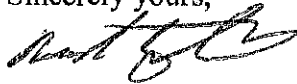
No order should be issued for longer than 30 days at a time. The order should be renewable every 30 days if the applicant can demonstrate that reasonable steps have been taken to acquire additional water sources and that an effective and enforceable DCP has been implemented. The maximum duration of the order should not exceed 120 days.

5. What type of notice, opportunity for hearing and appeal is required after this order is issued?

TCEQ should follow the notice and hearing procedures for issuing emergency authorizations found in Tex. Water Code § 11.139.

Thank you for the opportunity to submit comments on the implementation of H.B. 2694.

Sincerely yours,



Richard Eyster, P.G.
Department Hydrologist

RE/lp