

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to amend §35.101.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

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

The prior version of TWC, §5.506 and §11.148 already provided that the commission could suspend a water right permit condition relating to beneficial inflows to affected bays and estuaries and instream uses in an emergency where the situation could not practically be resolved in another way. The statute set out certain notice and procedural requirements. The commission had implemented the prior statute by adopting §35.101.

The purpose of this proposed amendment is to implement §§1.01, 1.02, 1.15, and 1.16 of HB 3/SB 3, relating to emergency authority to make available water set aside for beneficial inflows to affected bays and estuaries and instream uses and to provide the rules and procedures for the temporary authorization to use the set aside water and to allow the executive director to make an initial action on an emergency suspension of permit conditions or to make set aside water

temporarily available without a hearing. The commission would still have to hold the subsequent hearing or refer the matter to the State Office of Administrative Hearings.

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

SECTION DISCUSSION

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

The commission proposes to amend §35.101 to include emergency authorizations to temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards. The commission also proposes minor changes to make it clear that temporary authorizations to use set-asides were covered by this rule as well as the suspension of those permit conditions. Subsection (a) allows either the commission or the executive director to review or take action on an application in specific circumstances. To ensure consistency throughout §35.101 and make clear that either the commission or executive director can take the actions allowed by this section, the commission proposes to add "executive director" to the last sentence in subsection (a) and to subsections (b), (f) - (i), (k), and (n). Additionally, in subsection (e), the commission is proposing new rule language to clarify that for applications considered by the executive director the Chief Clerk will provide notice to the Texas Parks and Wildlife Department and the TCEQ's Public Interest Council. Further, in subsection

(l), the name of Chapter 288 is corrected to add the words "Drought Contingency Plans." This proposed amendment implements HB 3/SB 3, §1.01, §1.02, §1.15, and §1.16.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or any other unit of state or local government as a result of administration or enforcement of the proposed rule.

The purpose of the proposed rule is to implement certain provisions of HB 3/SB 3 related to agency authority in emergency situations to make water available that has been previously set aside for beneficial inflows.

Provisions in HB 3/SB 3 provide that the commission may, in an emergency, temporarily make state water available that had previously been set aside from permitting in the environmental flows process and standards setting. Prior to the passage of HB 3/SB 3, the commission already had the authority to suspend a water right permit condition relating to beneficial inflows to affected bays and estuaries and in-stream uses in an emergency where the situation could not practically be resolved in another way. The prior statute set out certain notice and procedural requirements. The purpose of this proposed amendment is to provide the rules and procedure for the temporary authorization to use the set aside water. The proposed amendment to §35.101 expands its scope to include emergency authorizations to temporarily make state water available that could be set aside under TWC, §11.1471(a)(2) and proposed Chapter 298. The notice and

procedural requirements are unchanged. No fiscal implications are anticipated for the agency or any other unit of state or local government.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be to allow state water set aside from permitting in the environmental flows process and standards to be temporarily authorized for other essential beneficial uses in emergency circumstances. Public benefits could include water for human consumption, agricultural use, or any other beneficial use under TWC, §11.023.

Individuals and businesses are not expected to experience fiscal impacts as a result of the proposed rule. The proposed rule expands current agency authority by providing emergency authority that will only be utilized during extremely rare circumstances. Individuals and businesses may experience benefits by having access to water that would otherwise be unavailable. However, due to the very low number of instances in which the emergency authority is likely to be invoked, no fiscal implications are anticipated.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or implementation of the proposed rule. The proposed rule will allow state water set aside from permitting in the environmental flows process and standards to be temporarily authorized for other essential beneficial uses in emergency circumstances. Public benefits could

include water for human consumption, agricultural use, or any other beneficial use under TWC, §11.023.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is not expected to adversely affect small or micro-businesses for the first five years that it is in effect, the rule is necessary to protect public health and safety, and because the rule is required to implement state law.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

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

A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a

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

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

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

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

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed amendment does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The amendment provides standards and procedures regarding the commission's emergency authority. These standards and procedures do not burden, restrict, or limit an owner's right to property, or reduce its value. Therefore, the rule will not constitute a taking under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

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

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on December 16, 2010, at 10:00 a.m. in Building E, Room 201 S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Natalia Henricksen, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:

<http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-049-298-OW. The comment period closes December 20, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Ronald L. Ellis, Water Supply Division, (512) 239-1282.

SUBCHAPTER D: EMERGENCY SUSPENSION OF BENEFICIAL INFLOWS

§35.101

STATUTORY AUTHORITY

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

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

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

(a) The purpose of this section is to set forth the procedures and criteria to be used by the commission or the executive director in its review and action on an application by a water right holder either for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an emergency, or to make state water temporarily available that is set aside by the commission to meet the needs for freshwater inflows to affected bays and estuaries and instream uses, under Texas Water Code, §5.506 and

§11.148. The emergency relief provided by this section shall only be used when the commission or executive director finds that:

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

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

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

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

(b) The commission or executive director may approve an application filed by the affected water right holder for the temporary suspension of all or a part of conditions in a water right relating to beneficial inflows to affected bays and estuaries and instream uses, or to make state water temporarily available that is set aside by the commission to meet the needs for freshwater inflows to affected bays and estuaries and instream uses, if the commission or executive director finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The burden of demonstrating that the application should be granted in accordance with this section is on the applicant. For purposes of this section, an emergency is a

condition where water supplies available to the applicant have been reduced or impaired to such an extent that an imminent peril to the public health, safety, or welfare exists. This condition may include, but not be limited to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) Published notice of the initial action [suspension of water right conditions], if granted, shall be provided and paid for by the applicant immediately following a favorable

commission or executive director initial decision by publication in a newspaper or newspapers of general circulation in the affected area. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. Such published notice must contain a summary of the information contained in the application as provided by subsection (c) of this section and the time and location of the subsequent commission hearing provided by subsection (i) of this section. Such publication shall occur not later than seven calendar days before this hearing. For the purposes of this rule, the affected area shall be each county, in whole or in part, downstream of the diversion point or impoundment authorized under the affected water right. The applicant shall file with the chief clerk a publisher's affidavit as proof that such notice was published in accordance with this subsection.

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

(j) An emergency order, or temporary authorization, granted under this section may be for a period of not more than 120 days if the commission finds that emergency conditions exist that present an imminent threat to public health, safety, and welfare and that override the

necessity to comply with permit conditions and there are no feasible, practicable alternatives to the emergency authorization. This emergency authorization may be renewed once for not longer than 60 days.

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

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

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

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

(l) If the water right holder has a water conservation plan and/or drought contingency plan, the suspension of water right conditions, or a temporary authorization, may be contingent upon the full implementation of those plans and measures corresponding to the staged reduction of releases for existing instream uses and beneficial inflows. If the water right holder does not have a water conservation plan and drought contingency plan in accordance with Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements), the order granting an application under this section shall require

the permittee to develop and implement those plans within a prescribed time period as provided in the order.

(m) In granting an application, all existing instream flows shall be passed up to that amount necessary to maintain water quality standards for the affected stream. Additional flows necessary to protect a species in accordance with the federal Endangered Species Act or other species that are considered to be of "high interest" (self-sustaining wild populations that are endemic to the affected stream, have significant scientific value, or commercial value) may also be required.

(n) In order to assist in the preparation and planning for water management during an emergency, the commission or executive director may provide conditions in a water right necessary for relief consistent with applicable portions of this section when the water right is initially granted or subsequently amended. These conditions may include, but shall not be limited to, a staged approach to the reduction in the pass-through amounts that provide for the pass-through of water for instream uses and bays and estuaries when it is available, and allow water to be captured or diverted for the protection of the public health, safety, and welfare during an emergency, subject to the protection of stream flows necessary under subsection (m) of this section for the maintenance of water quality standards. These conditions may also include full implementation by the water right holder of water conservation and drought contingency plans as a precondition for obtaining relief.

(o) If the applicant's water right already contains provisions for the temporary, total, or partial suspension of permit conditions for the maintenance of instream flows or freshwater inflows to bays and estuaries, further or different relief requested in an application submitted under this section generally will be denied unless the applicant can show new or changed circumstances or an emergency condition not contemplated when the water right condition was issued.