

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§36.1 - 36.8.

Background and Summary of the Factual Basis for the Proposed Rules

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

Section by Section Discussion

The commission proposes new §36.1, Applicability, to explain the scope of the rulemaking. Subsection (a) provides that the chapter applies to water rights except as provided in subsections (b) and (c). Subsection (b) provides that the rulemaking is not intended to apply to a watermaster area, and subsection (c) provides that it is not

intended to require suspension or adjustment of a domestic and livestock use right or an exempt right under TWC, §§11.142(b) - 11.1422. The watermaster areas are not included under the applicability of this rule because the watermaster's authority is set out elsewhere in TWC, Chapter 11. The rights in subsection (c) are exempt from permitting but are not superior riparian rights under TWC, Chapter 11, and are therefore not covered by the rule. Domestic and livestock rights that are superior riparian rights under TWC, §11.303(l) or §11.142(a) cannot be curtailed or suspended under this rulemaking, but may be protected (See the definition of "senior water right" under §36.2(4)).

Section 36.2, Definitions, defines eight terms as used in Chapter 36. Paragraph (1) states that an "adjustment" is a partial curtailment of one or more water rights or an adjustment in the timing of diversions under a water right. The executive director may issue an order for adjustment, which would be partial curtailment, under the statute. There will be instances when a water right does not need to be completely suspended, and timing the diversions has been a useful tool in water right management during low flows.

Paragraph (2) is the definition of "drought." There are over 150 different definitions of drought used by academics and water management professionals. For a "drought" under this chapter, the commission proposes to use the measure of moderate drought

intensity developed by the National Drought Mitigation Center; streamflows at United States Geological Survey gaging stations that are below the 33rd percentile of the period of record; or demand for surface water exceeds the available supply. The last definition relates to the effects of low precipitation on water supply (<http://drought.unl.edu/DroughtBasics/TypesofDrought.aspx>). The intent is to have a "bright line" test that indicates when a shortage of precipitation has resulted in a shortage of water available for all existing water rights. A definition of "drought" is required by TWC, §11.053. This definition 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, and conditions affecting hydraulic systems which impair or interfere with conveyance or delivery of water for authorized purposes. A definition of "emergency shortage of water" is required by TWC, §11.053. The commission believes the definition of "emergency shortage of water" was intended to be different than the definition of "drought" and intends to include emergency conditions that are not necessarily the result of drought.

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.

Paragraph (5) defines a "Suspension or Adjustment Order," or order, that is issued by the executive director under this chapter. This definition is necessary to provide a reference to the order for clarity.

Paragraph (6) provides that "suspension" means the complete curtailment of either the entire water right or the right to use water of a certain type of use or based on a certain priority date in the water rights. This definition is necessary to indicate what an order under this chapter may require.

Paragraph (7) provides a definition of "water right" to clarify that only permits, certificates of adjudication, and riparian domestic and livestock users are included in the term. The term will also mean "water right holder" where the context requires. This definition is necessary to clarify what is included in the chapter.

Section 36.3, Executive Director Action, specifies the action that the executive director may take during droughts or other emergency shortages of water, and that it must be made "in accordance with the priority doctrine in the Texas Water Code" for both

drought and emergency shortage of water. It also provides the scope of the impact of the order. As previously stated, the priority doctrine is still the governing principle in TWC, §11.053.

Section 36.4, Suspension or Adjustment Order, provides that the executive director may act under §36.3 by issuing a Suspension or Adjustment Order. This section states the language in TWC, §11.053.

Section 36.5, Conditions for Issuance of Suspension or Adjustment Order, provides what conditions must be met for the executive director to issue an order, and what the executive director shall consider in deciding which water rights the order will protect, suspend, or adjust. The executive director must consider certain factors in determining whether to issue an order in times of drought and in times of emergency shortage of water. These factors include need for the water, ability to beneficially use any water that can be obtained from a suspension or adjustment, and whether a suspension or adjustment would result in any relief. Additionally, the considerations specified in TWC, §11.053(b) are set out. This section is required by TWC, §11.053 and provides the basis for a Suspension or Adjustment Order.

Section 36.6, Contents of a Suspension or Adjustment Order, requires the order to contain the specific water rights subject to the Suspension or Adjustment Order, the

location of the suspension or adjustment, an explanation of the reasons for the suspension or adjustment, and the duration of the Suspension or Adjustment Order.

The executive director recognizes the possible need for several extensions of the Suspension or Adjustment Order during extended times of low flows. The section also allows the executive director to modify the order based on changed conditions and the requirements of the chapter. This section is required by TWC, §11.053.

Section 36.7, Implementation of Water Conservation Plans and Drought Contingency Plans, describes what actions the executive director may take when considering the efforts of the affected water rights holders to develop and implement the water conservation plans and drought contingency plans established by TWC, Chapter 11, as required in §36.5(c)(4). The executive director shall consider whether the plans were approved by the TCEQ and the Texas Water Development Board, and whether they were implemented, and if the executive director does not adjust or suspend a junior water right for public welfare reasons he may require implementation of higher levels of the plans if required to maximize beneficial use, avoid waste, and minimize impacts. This section is necessary to provide how the executive director will consider this factor required by TWC, §11.053.

Section 36.8, Notice of and Opportunity for Hearing on the Issuance of a Suspension or Adjustment Order, provides procedures for notice, hearing, and appeal of an order to

the commission under this chapter. This procedure follows the procedure for other emergency orders issued by the commission. The order may be issued by the executive director without notice, but there must be a hearing to affirm, modify, or set aside the order before the commission. Notice of the hearing shall be given to all water rights that were suspended or adjusted under the order. This section is required by TWC, §11.053.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are anticipated for other units of state or local government as a result of administration or enforcement of the proposed rules.

HB 2694 provides that the executive director may temporarily suspend or adjust water rights during times of drought or other emergency shortages of water. The commission is required to adopt rules to implement this provision, define a drought or other emergency shortage of water, and specify the conditions under which the executive director may issue such an order under, including the maximum duration of a temporary suspension or adjustment. The rules must also set out procedures for notice, opportunity for a hearing, and the appeal to the commission of an order issued under this section.

No significant fiscal implications are anticipated for the commission to implement and administer these new requirements of HB 2694. The adoption of rules, the issuance of any orders, and any work related to appeals to the commission would be absorbed by water rights and enforcement staff using existing agency resources.

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. 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. The commission would be able to consider other factors, such as preferences of use if it is "practicable," but this action would likely 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 for drinking water. Some junior water rights may be impacted by these actions, but the commission is not able to determine whether water would have been available to the junior water right holder even if the right had not been suspended.

Units of local government who are junior water right holders may be affected by the provisions in the proposed rule relating to the potential suspension or curtailment of

water rights during a drought or emergency shortage of water. However, 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 rule is 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.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and specification of the conditions that would be considered when water right suspensions and adjustments are ordered and the appeal process for those orders.

The proposed rulemaking may have fiscal implications for individuals or businesses. Some junior water rights may be impacted by these actions, but the commission is not able to determine whether water would have been available to the junior water right holder even if the right had not been suspended. The proposed rulemaking does not affect or change the law of "first in time, first in right," otherwise known as the priority

doctrine. The proposed rulemaking implements sections of HB 2694 and provides specification of the conditions that would be considered when water right suspensions and adjustments are ordered and the appeal process for those orders.

Businesses and individuals who are junior water right holders may be affected by the provisions in the proposed rules relating to the potential suspension or curtailment of water rights during a drought or emergency shortage of water. However, 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 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.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. A small business is expected to experience the same fiscal impact as that experienced by individuals or large business under the proposed rules.

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 rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission evaluated these proposed new rules and performed an analysis of whether these proposed rules require a regulatory impact analysis under Texas Government Code, §2001.0225. This rulemaking is specifically required by TWC, §11.053. The specific intent of these rules is to establish criteria, procedures, and definitions for executive director action to temporarily suspend or adjust water rights in times of drought or emergency shortage of water. This new chapter is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment, and it is not for the purpose

of reducing risks to human health from environmental exposure. These rules do not relate to impacts from any type of pollution. Even if the rules were a major environmental rule, a regulatory impact analysis is not required because the proposed rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government to implement a state and federal program, or adopt rules solely under the general powers of the agency instead of specific state law. Therefore the rulemaking does not come under the Texas Government Code, §2001.0225 and no regulatory impact analysis is required under for this rulemaking.

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 these proposed rules and performed an analysis of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these rules is to establish criteria, procedures, and definitions for the executive director's temporary suspension or adjustment of surface water rights during times of drought and other emergency shortage of water. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional

taking of private real property.

Specifically, the authority granted to the executive director to suspend water rights based on the priority doctrine already exists under TWC, §5.013(a)(1) and §11.027, and this statute was meant to clarify and further define this authority. While some water rights may be suspended or adjusted under these rules, other water rights will be able to divert water that they otherwise could not have diverted without issuance of an order under these rules. 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, this rulemaking does not burden nor restrict or limit the owner's right to existing property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations.

The same reasoning applies to a temporary suspension or adjustment based on emergency shortage of water because the executive director action will be based on the rights of a senior or superior water right holder. The decision to suspend or adjust must be based on the priority doctrine, and several other factors will be used in making the adjustment or suspension. The agency must enact rules to define "other emergency

shortage of water," specifying the conditions under which an order may be issued and terms and duration of the order, and providing for notice and an opportunity for a hearing and appeal to the commission. While the rules provide some flexibility in responding to the protection of senior water rights, the commission does not believe that this rulemaking would give rise to a measurable impact on other water rights. The impact to water rights is caused by the drought or emergency shortage of water. The purpose of this rulemaking is to mitigate that impact, based on the priority doctrine. 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.

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.

Therefore, this rulemaking is either not covered by or is exempt from the coverage of Texas Government Code, §2007.003(b)(13).

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: (1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; and (2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the proposed rules include those contained in 31 TAC §501.33.

The proposed rules implement TWC, §11.053, which provides that the executive director may temporarily suspend or adjust water rights during a drought or "other emergency shortage of water." Any impact to coastal natural resources is caused by the drought or other emergency shortage of water. This rulemaking should not result in less water flowing to coastal areas than would occur absent this rule under full exercise of all water rights. Ensuring that senior water rights are able to divert under their water rights allows for economic development by allowing the senior water rights to use the water to accomplish their municipal, industrial, agricultural, or other beneficial uses. The curtailment or suspension of water rights based on "other emergency shortage of water" sections of this rulemaking are actions that are taken in response to a real and substantial threat to public health and safety, and are designed to significantly advance the public health and safety purpose, which allows for continuing multiple human uses of the coastal zone. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these 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 1, 2011 at 2:00 p.m. at in Building E, Room 201-S, Austin, Texas, 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 Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Michael Parrish, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-033-036-LS. The comment period closes December 5, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information,
please contact Robin Smith, Environmental Law Division, (512) 239-0463.

§§36.1 - 36.8

Statutory Authority

The new sections are proposed under Texas Water Code, §5.013, providing the commission's authority over water rights permitting and enforcement; §5.102, providing the commission's general powers to perform acts authorized or implied by law; §5.103, providing the commission's authority to adopt rules; and §11.053, providing requirements for executive director suspension or adjustment of water rights during drought or emergency shortage of water.

The proposed new sections implement Texas Water Code, §11.053.

§36.1. Applicability.

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

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

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

§36.2. Definitions.

The following words or terms, as used in this chapter, shall have the following meaning:

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

(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.

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

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

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

(4) Senior water right -- A water right that has a priority date that is earlier than another water right holder, or a superior right under Texas Water Code, §11.142(a) or §11.303(l).

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

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

(7) Water right -- A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water. This term includes water users for purposes that are superior or exempt from permitting under Texas Water Code, §11.142(a) or §11.303(l), but only to the extent that such a water right may be benefitted by a Suspension or Adjustment Order issued under this chapter. The term includes holders of the water rights where the context requires.

§36.3. Executive Director Action.

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

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

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

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

holder to obtain water.

§36.4. Suspension or Adjustment Order.

The executive director's temporary suspension or adjustment under §36.3 of this title (relating to Executive Director Action) must be made by a Suspension or Adjustment Order, as defined in §36.2(5) of this title (relating to Definitions).

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

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

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

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

(3) senior water rights can beneficially use water as defined in Texas Water Code, §11.002(4); and

(4) suspending or adjusting junior water rights would result in conditions under which the senior water right holder 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;

(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.

§36.6. Contents of a Suspension or Order.

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

(1) the specific water rights subject to the order, and the location, including the river basin and county, of the suspension or adjustment;

(2) an explanation of the reasons for the suspension or adjustment; and

(3) the duration of the suspension or adjustment.

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

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

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

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

(1) the water right 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 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.

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

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

(b) If an order is issued under this chapter without notice or a hearing, the order shall set a time and place for a hearing before the commission to affirm, modify, or set aside the order to be held as soon as practicable after the order is issued.

(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.