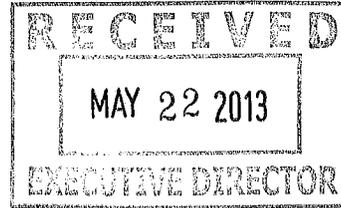


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May 21, 2013

Zak Covar  
Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087



**Petition re: Rule Suspension or Adjustment of Water Rights during Drought or  
Emergency Water Shortage. §§36.1 - 36.8**

Mr. Covar:

As per 30 Texas Administrative Code (“TAC”) § 20.15 Petition for Adoption of Rules, the University of Texas Regulatory Oversight Group (“UTROG”)<sup>1</sup> respectfully requests that the Texas Commission on Environmental Quality (“Commission”) act upon its authority under Texas Water Code §§ 5.103 and 11.053 and revise 30 TAC §§ 36.1 - 36.8 (the “Drought Curtailment Rule”).<sup>2</sup>

Ensuring water security will require creative and committed actions on the part of numerous stakeholders but cannot be achieved without the Commission’s leadership and involvement. The Drought Curtailment Rule represents a well-intentioned first effort to craft a mechanism that could balance competing interests while shepherding the state through water shortages. Recent litigation<sup>3</sup> and policy debates<sup>4</sup> have resulted in controversy about the rule and

<sup>1</sup> UTROG is comprised of graduate students from law, science, engineering and geosciences at the University of Texas at Austin who work with law professors to identify opportunities to ensure greater public engagement and participation in federal and state regulatory programs. UTROG’s goal is to provide an independent, balanced, and rigorous analysis of important regulatory issues.

<sup>2</sup> Note that, unless specified otherwise, all references to the TAC will be to title 30.

<sup>3</sup> Plaintiffs’ Original Petition and Request for Injunctive Relief, *Texas Farm Bureau v. Commission*, No. D-1-GN-12-003937 (Travis County District Court December 14, 2012).

<sup>4</sup> E.g., Asher Price, *Farmers Battle State Environmental Agency in Brazos River Basin Dispute*, AUSTIN AMERICAN-STATESMAN, Dec. 26, 2012, available at <http://www.statesman.com/news/news/state-regional/farmers-battle-state-environmental-agency-in-brazo/nTf9w/>.

its implementation. These proposed amendments are designed to clarify the circumstances under which the executive director can suspend senior water rights and incentivize conservation.

Briefly stated, UTROG proposes that TCEQ (1) adjust the definitions of the terms “drought” and “emergency shortage,” which, in their present state, are overly broad and grant the Commission too great an authority to disrupt water rights in potential non-emergency situations; (2) expand the procedural rights of appropriators affected by curtailment orders; and (3) modify the rule to encourage conservation.

This petition is divided into two parts. The first part discusses the need for revisions and the “injur[ies] or inequit[ies]”<sup>5</sup> that could flow from the Drought Curtailment Rule in its current form. The second part proposes specific revisions to the rule.

Under the Texas Administrative Procedure Act, the Commission has 60 days from the date of receiving this petition to either deny the petition in writing, stating its reasons for the denial, or initiate a rulemaking procedure.<sup>6</sup> The UTROG estimates the 60-day deadline will fall on approximately July 20, 2013.

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<sup>5</sup> 30 TAC § 20.15(a)(3)(D).

<sup>6</sup> Tex. Gov’t Code § 2001.021.

## PART I – NEED FOR A DROUGHT MANAGEMENT RULE

This section considers: (A) the vulnerability of Texas toward droughts; (B) the development of the Drought Curtailment Rule; and (C) the “injur[ies] or inequit[ies]”<sup>7</sup> that could result if the Commission continues to exercise the Drought Curtailment Rule as it currently stands.

### A. Droughts are Endemic to Texas

Droughts have been a problem in Texas throughout the State’s recorded history, to such a degree that the Texas Supreme Court has observed: “The story of water law in Texas is also the story of its droughts.”<sup>8</sup>

As the Commission knows, the current drought has exacted enormous economic,<sup>9</sup> environmental,<sup>10</sup> and cultural<sup>11</sup> tolls and is on course to become the second worst on record.<sup>12</sup> March inflows from the Lower Colorado River were 10,888 acre-feet, which is about 12 percent of March’s historical average of 91,373 acre-feet; February inflows were 8,949 acre-feet, which is about 10 percent of February’s historical average of 85,739 acre-feet; and January inflows

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<sup>7</sup> 30 TAC § 20.15(a)(3)(D).

<sup>8</sup> *In re Adjudication of Water Rights of Upper Guadalupe Segment etc.*, 642 S.W.2d 438, 441 (Tex. 1982). For an overview of the historical evolution of Texas water law, see Legislative Reference Library of Texas, Texas Water Law Timeline, <http://www.lrl.state.tx.us/legis/waterTimeLine.cfm> (last visited April 15, 2013, 1:00 pm).

<sup>9</sup> E.g., NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL DROUGHT EARLY WARNING OUTLOOK (Feb. 21, 2013) (“The 2012/2013 drought has serious implications for agriculture, navigation, recreation and municipal water supplies, costing the nation at least \$35 billion in economic losses.”), available at <http://www.drought.gov/media/eventfiles/National%20Drought%20Outlook%20Feb%202013%20FINAL.pdf>.

<sup>10</sup> E.g., *Aransas Project v. Shaw*, 2013 U.S. Dist. LEXIS 33258 (S.D. Tex. Mar. 11, 2013).

<sup>11</sup> E.g., Stephanie Strom, *A Stubborn Drought Tests Texas Ranchers*, N.Y. TIMES, April 5, 2013, [http://www.nytimes.com/2013/04/06/business/a-long-drought-tests-texas-cattle-ranchers-patience-and-creativity.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/04/06/business/a-long-drought-tests-texas-cattle-ranchers-patience-and-creativity.html?pagewanted=all&_r=0).

<sup>12</sup> Matthew Tresaugue, *Texas Drought Could Rival State's Worst Dry Years*, HOUSTON CHRON., Feb. 5, 2013, <http://www.chron.com/news/article/Texas-drought-could-rival-state-s-worst-dry-years-4253137.php>.

were 15,258 acre-feet, which is about 23 percent of January's historical average of 65,597 acre-feet.<sup>13</sup>

As painful as the recorded droughts have been, Texas could find itself confronting much worse. Scientists have found evidence of multi-decade mega-droughts in the rings of Texas trees.<sup>14</sup> Climate change could amplify droughts by making temperatures hotter and precipitation patterns more variable.<sup>15</sup> And federal environment regulations could restrict the use of surface waters, as recently occurred on the Guadalupe and San Antonio rivers.<sup>16</sup> Population and economic growth, meanwhile, are projected to drive demand.<sup>17</sup>

### **B. Drought Curtailment Rule**

Surface water is the property of the state.<sup>18</sup> With certain exceptions, a party must obtain a permit from the state to appropriate surface waters.<sup>19</sup> Permits to put surface water to beneficial use are intended to avoid the “instability and uncertainty” that plagued the state before it moved to its current system.<sup>20</sup> To perfect a water right, a permittee must put its appropriation toward the permitted beneficial use.<sup>21</sup> The doctrine of beneficial use, in turn, requires “reasonable intelligence and reasonable diligence [to be] used in applying the water to that purpose and shall

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<sup>13</sup> Lower Colorado River Authority, *Texas Drought*, available at: <http://www.lcra.org/water/drought/index.html>, accessed April 9, 2013.

<sup>14</sup> Malcolm L. Cleaveland, et al, *Extended Chronology of Drought in South Central, Southeastern and West Texas*, TEXAS WATER JOURNAL (2011).

<sup>15</sup> E.g., Letter from Tom Curtis, deputy executive director, American Water Works Association, to Rep. Henry A. Waxman and Sen. Sheldon Whitehouse, Feb. 20, 2013;

Eric Berger, *Texas Climatologist: Global temperatures “likely” to Set a New Record this Year*, HOUSTON CHRON., Mar. 20, 2013, <http://blog.chron.com/sciguy/2013/03/texas-climatologist-global-temperatures-likely-to-set-a-new-record-this-year>; DEPARTMENT OF INTERIOR, WATERSMART STRATEGIC IMPLEMENTATION PLAN (Mar. 22, 2011), [http://www.usbr.gov/WaterSMART/docs/FedRegister\\_WaterSMART\\_Implementation\\_plan\\_FINAL.PDF](http://www.usbr.gov/WaterSMART/docs/FedRegister_WaterSMART_Implementation_plan_FINAL.PDF).

<sup>16</sup> *Aransas Project v. Shaw*, 2013 U.S. Dist. LEXIS 33258 (S.D. Tex. Mar. 11, 2013).

<sup>17</sup> TEXAS WATER DEVELOPMENT BOARD, POPULATION AND WATER PROJECTS, <http://www.twdb.state.tx.us/waterplanning/data/projections> (last visited April 16, 2013, 1:00 pm).

<sup>18</sup> Texas Water Code § 11.021 (“The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.”).

<sup>19</sup> Texas Water Code §§ 11.022 and 11.121.

<sup>20</sup> *Lower Colo. River Auth. v. Tex. Dep't of Water Res.*, 683 S.W.2d 357 (Tex. 1984).

<sup>21</sup> Texas Water Code § 11.026.

include conserved water.”<sup>22</sup> Even perfected water rights remain usufructory rights, however.<sup>23</sup> Ownership of the corpus stays with the state,<sup>24</sup> “in trust for the public.”<sup>25</sup> Permits are based on seniority so that, “as between appropriators, the first in time is the first in right.”<sup>26</sup>

The Commission has general jurisdiction over water and water rights.<sup>27</sup> It thus falls to the Commission to manage water resources during droughts. Multiple statutes give the Commission the authority to reallocate water supplies in ways that could lessen the economic impacts of drought-related water shortages. Texas Water Code § 11.033 recognizes that all subdivisions of the state have the right to take water through eminent domain for domestic and municipal supply purposes, with appropriate compensation to the water right holder.. Texas Water Code § 11.139 also authorizes the Commission to reallocate water if it finds “that emergency 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.” Texas Water Code § 11.148 allows the Commission to suspend environmental inflows if “an emergency exists and cannot practically be resolved in other ways.”

Taken as a whole, this authority grants the Commission broad power. Nevertheless, certain stakeholders deemed this power inadequate and in 2011 pressed the Texas Legislature to pass the enabling legislation that has served as the basis for the Drought Curtailment Rule. This subsection reviews: (1) the origins of the authority for the rule within the Commission’s 2011

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<sup>22</sup> Texas Water Code § 11.002(4). *See also* §§ 11.025 (recognizing appropriations only for beneficial uses); and 11.026 (providing that an appropriation cannot be perfected until it has been beneficially used).

<sup>23</sup> *In re Adjudication of Water Rights of Upper Guadalupe Segment etc.*, 642 S.W.2d 438, 444 (Tex. 1982) (“A usufruct has been defined as the right to use, enjoy and receive the profits of property that belongs to another.”).

<sup>24</sup> *See, e.g., Texas Water Rights Comm’n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971).

<sup>25</sup> Texas Water Code § 11.0235(a).

<sup>26</sup> Texas Water Code § 11.027.

<sup>27</sup> Texas Water Code § 5.013(a)(1).

sunset review process; (2) the statutory basis for the rule; (3) the promulgation of the rule; and (4) the pending court challenge to the rule.

### 1. **Sunset Recommendations**

In its 2011 review of the Commission, the Sunset Advisory Commission (Sunset Commission) recommended “clarify[ing]” that the Commission’s executive director has authority to curtail water use during water shortages and droughts.<sup>28</sup> The commission further suggested that the Water Code should be amended “to ensure senior water rights are protected and adequate water supplies are available for domestic and municipal needs.”<sup>29</sup>

### 2. **H.B. 2694**

When the legislature implemented the Sunset Commission recommendations, it included a section allowing the executive director to “temporarily adjust the diversions of water by water rights holders...in accordance with the priority of water rights established by” the section of the Texas Water Code, 11.027.. The enrolled version of the bill added a statute on “Emergency Order[s] Concerning Water Rights” to the Water Code, as Section 11.053.

#### Sec.A11.053. EMERGENCY ORDER CONCERNING WATER RIGHTS. (a)

During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, in accordance with the priority of water rights established by Section 11.027:

- (1) temporarily suspend the right of any person who holds a water right to use the water;
- and
- (2) temporarily adjust the diversions of water by water rights holders.

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<sup>28</sup> Sunset Advisory Commission, Final Report: Texas Commission on Environmental Quality at 54 (July 2011), available at [http://www.sunset.state.tx.us/82ndreports/tceq/tceq\\_fr.pdf](http://www.sunset.state.tx.us/82ndreports/tceq/tceq_fr.pdf).

<sup>29</sup> *Id.* at 54.

(b) The executive director in ordering a suspension or adjustment under this section shall ensure that an action taken:

(1) maximizes the beneficial use of water;

(2) minimizes the impact on water rights holders;

(3) prevents the waste of water;

(4) takes into consideration the efforts of the affected water rights holders to develop and implement the water conservation plans and drought contingency plans required by this chapter;

(5) to the greatest extent practicable, conforms to the order of preferences established by Section 11.024.

Section 11.027, which is referenced by Section 11.053(a), establishes the first-in-time principle. Section 11.024, which is referenced by Section 11.053(b)(5), sets forth the preferences TCEQ must follow when choosing from among competing applications for appropriation permits. These preferences are: (1) domestic and municipal uses; (2) agricultural and industrial uses; (3) mining; (4) hydroelectric power; (5) navigation; (6) recreation; and (7) other beneficial uses. In 1955, a federal court rejected a contention that the predecessor of Section 11.024 entitled the city of El Paso to the first claim to Rio Grande water.<sup>30</sup> “Article 7471 simply regulates priorities prospectively in the subsequent issuance of appropriation permits, so that in acting on pending applications from time to time or in holding foresighted reserves preference will be given by this statutory guide, but said article does not manifest any intention to upset the normal time priority of then or thereafter outstanding permits once duly issued.”<sup>31</sup>

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<sup>30</sup> *El Paso County Water Improv. Dist. No. 1 v. El Paso*, 133 F. Supp. 894 (W.D. Tex. 1955).

<sup>31</sup> *Id.* at 908.

A hierarchy of preferences that applies only to future appropriations would seem to have no place in a statute like Section 11.053 that governs the management of existing appropriations. The only way to reconcile the citation to Section 11.024 with the purpose of Section 11.053 is to assume that Section 11.053 incorporates the preferences from Section 11.024 but puts them toward different ends than Section 11.024 does. Interpreted in this way, Section 11.053 could arguably empower the TCEQ executive director to suspend or adjust water rights in way that follows the priority system of Section 11.027 and, “to the greatest extent possible,” the usage preferences of Section 11.024.

Texas follows a similar model in the Rio Grande basin, where the Commission has granted a watermaster<sup>32</sup> the authority to allocate usable water in storage only after setting aside 225,000 acre-feet to maintain a “reserve for municipal, domestic, and industrial uses.”<sup>33</sup> This requirement effectively prioritizes municipal and other privileged uses above non-privileged uses like agriculture. Section 11.053, by contrast, does not clearly and unambiguously grant the Commission the authority to deviate from the existing seniority-based appropriations system and orient the system around usage preferences during droughts.

This legislative session, three bills have been proposed that would require the Commission to revisit the Drought Curtailment Rule, two of which are discussed in greater detail below. The third bill, H.B. 2720, from state Rep. Allan Ritter, would modify Section 11.053 to allow the Commission to issue a curtailment order only “to address an imminent hazard to the health, safety, or welfare of the public.”<sup>34</sup> If interpreted according to their plain meaning, these terms would prohibit the Commission from curtailing water rights unless a “hazard” (a danger posing a greater risk than discomfort or inconvenience) is “imminent” (on the cusp of occurring).

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<sup>34</sup> *Id.* at Section 2.

The Ritter bill amendments would thus circumscribe the conditions under which the Commission could exercise the drought curtailment rule. Water shortages would have to pose genuine peril and amount to more than routine constraints on supply.

### **3. Promulgation of Drought Curtailment Rule**

The Commission released a proposed draft of the Drought Curtailment Rule in November 2011.<sup>35</sup> The Commission received thirty comments in total, from a a diverse range of stakeholders. The most contentious aspects of the rule were that it allowed the Commission to exempt certain junior appropriators from curtailment orders for “public health, safety, and welfare concerns” and that it did not require that suspended senior appropriators be compensated for water that was effectively reallocated to unsuspended junior appropriators.

Commentators requested that the Commission clarify the relationship between the new Drought Curtailment Rule and existing emergency authority under Texas Water Code § 11.139,<sup>36</sup> which allows the Commission to temporarily reallocate water if “emergency conditions” present “an imminent threat to the public health and safety.” Section 11.139(j) mandates that “the person granted an emergency authorization ... is liable to the owner and the owner’s agent or lessee from whom the use is transferred for the fair market value<sup>37</sup> of the water transferred as well as for any damage caused by the transfer of use.” In April 2012, the Commission promulgated the final version of the Drought Curtailment Rule.<sup>38</sup>

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### **4. Texas Farm Bureau Challenge**

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<sup>35</sup> Commission, Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage, 36 Tex. Reg. 7463, Nov. 4, 2011.

<sup>36</sup> To carry out Section 11.139, the Commission has promulgated 30 TAC § 297.17.

<sup>37</sup> “Whenever the law requires the payment of fair market value for a water right, 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.” Texas Water Code § 11.0275.

<sup>38</sup> Commission, Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage, 37 Texas Register 3096 (April 27, 2012).

The Commission has exercised its power under the Drought Curtailment Rule only once – on the Brazos River, in November 2012, in response to a priority call from Dow Chemical Company (Dow).<sup>39</sup> The Texas Farm Bureau and several agricultural interests (collectively, Farm Bureau) brought suit in Travis County District Court, seeking declaratory judgment that the Drought Curtailment Rule and the Brazos River order were invalid.<sup>40</sup> On January 23, 2013, Dow rescinded its call and the Commission terminated its curtailment order.<sup>41</sup>

The Farm Bureau argued that the Drought Curtailment Rule is facially invalid because it exceeds the statutory authority granted under Section 11.053 by disregarding seniority and effectively requiring senior water right holders to provide water rights to preferred junior uses.<sup>42</sup> The Commission countered that Section 11.053 requires it to consider factors that together mandate that decisions as to the scope of curtailment orders “be made on factors other than strict time priority alone.”<sup>43</sup> The Commission further argued that the Texas Constitution’s conservation amendment<sup>44</sup> and several sections of the Texas Water Code<sup>45</sup> give rise to a general “duty to consider and act in the public interest and/or public welfare.”<sup>46</sup> The Travis County District Court is scheduled to hold a summary judgment hearing May 23, 2012.

### **C. Injuries and Inequities that Would Result from Exercise of Drought Curtailment Rule**

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<sup>39</sup> Executive Order Suspending Water Rights on the Brazos River (November 19, 2012); An Order Affirming and Modifying the Executive Director’s Order Suspending Water Rights in the Brazos River Basin, TCEQ Docket No. 2012-2421-WR (Dec. 12, 2012).

<sup>40</sup> Plaintiffs’ Original Petition and Request for Injunctive Relief, Texas Farm Bureau v. Commission, No. D-1-GN-12-003937 (Travis County District Court December 14, 2012).

<sup>41</sup> Letter from Commission Executive Director Zak Covar to water right holders, re: Priority Call Rescinded in the Brazos River Basin, dated Jan. 24, 2013.

In its current form, the Drought Curtailment Rule would result in four principal types of injuries and inequity: (1) it would reallocate water from unpreferred to preferred appropriators without providing compensation; (2) it would create inequities between companies that receive water through their own appropriations and those that receive it through municipal suppliers; (3) it would cast doubt over the scope and security of existing water rights; and (4) it would, by reallocating water to preferred appropriators for essentially no cost, bury price signals that would otherwise encourage conservation.

### **1. Uncompensated Reallocations**

Once perfected, usufructory water rights are constitutionally protected property rights,<sup>47</sup> subject to beneficial use and other statutorily mandated requirements. In promulgating the final Drought Curtailment Rule, the Commission put forward several arguments as to why it believed that exercising the rule would not result in a taking. The Commission claimed, for instance, that it was acting according to its police power and that a curtailment order does not affect the existing seniority of appropriations.

But taking property through the exercise of its police powers does not free a government agency from its duty to pay for taken property (subject to individual circumstances).<sup>48</sup> Indeed, the Commission did not explain the reasons that reallocating water through the Drought Curtailment Rule would not require compensation while reallocating it through other mechanisms (such as eminent domain or Section 11.139 transfers) would.

Also, the Drought Curtailment Rule does affect established seniority. If a senior appropriation is suspended while a junior appropriation is not, the senior appropriation effectively becomes more junior; it may maintain its seniority on paper, but in practice, its

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<sup>47</sup> Tex. Const. Art. I, § 17. *See also* Texas Gov. Code § 2007.003(b)(13); *Texas Water Rights Comm'n v. Wright*, 267 S.W.2d 641 (Tex. 1971).

<sup>48</sup> *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980).

appropriation will not be as valuable or as reliable. If the Commission extends the geographical scope of a curtailment order further upriver than would be necessary if it had not exempted preferred junior appropriators, then the agency has reallocated water from the upriver appropriators to the downstream preferred junior appropriators.<sup>49</sup>

## **2. Equity within Industries**

The Drought Curtailment Rule allows the Commission to suspend junior industrial appropriators but to exempt municipal appropriators who may, in turn, sell water to industrial customers. An industrial facility that holds even a relatively senior appropriation to divert directly may be worse off than another facility that uses just as much water but that receives its water from a relatively junior municipal appropriator. This lack of fairness presents a problem, in that it arbitrarily benefits companies that receive water from municipal suppliers as compared to similarly situated companies that receive water under their own, more senior appropriations.

## **3. Undermined Property Rights**

Water markets can play a vital role in addressing scarcity by allocating water to its highest-value uses and incentivizing conservation.<sup>50</sup> Texas has adopted statutes intended to facilitate markets and voluntary water transfers.<sup>51</sup> The Western Governors Association (WGA) – of which Governor Rick Perry is a member – has adopted as a matter of policy that “states should identify and promote innovative ways to allow water transfers from agricultural to other

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<sup>49</sup> The Texas Water Code once included a section under which “an appropriation ... for any purpose other than domestic or municipal use is subject to the right of any city or town to make further appropriations of the water for domestic or municipal use without paying for the water.” Arguably, this section could have authorized the sort of uncompensated reallocations that result when the Commission exempts preferred appropriators from curtailment orders. But the legislature repealed the section in 1997 and replaced it with the current Section 11.139, which authorizes the Commission to mandate transfers during droughts but requires that injured appropriators be compensated. Robert E. Beck, *Use Preferences for Water*, 76 N. DAK. L. REV. 753, 775 (2000).

<sup>50</sup> E.g., Ronald A. Kaiser, Texas Public Policy Foundation, Solving the Texas Water Puzzle: Market-Based Allocation of Water (March 2005), available at [http://texaswater.tamu.edu/resources/solving\\_the\\_texas\\_water\\_puzzle.pdf](http://texaswater.tamu.edu/resources/solving_the_texas_water_puzzle.pdf); Ronald A. Kaiser, *Texas Water Marketing in The Next Millennium: A Conceptual and Legal Analysis*, 27 TEX. TECH. L. REV. 181 (1996).

<sup>51</sup> E.g., Texas Water Code §§ 11.0275 and 11.055.

uses (including urban, energy and environmental) while avoiding or mitigating damages to agricultural economies and communities.”<sup>52</sup> Water transfers have soared in recent years due to the drought. In Texas, “more than 1.7 million AF were transferred in 2011,” according to the WGA, “as compared to an average of 150 thousand AF between 2007 and 2009.”<sup>53</sup>

But the Drought Curtailment Rule chills markets in four ways. First, by reallocating water to preferred appropriators, it cuts into the demand for voluntary transfers. A preferred appropriator who can expect to receive a cost-free allocation from the Commission has reduced incentive to seek out market-rate transactions. Second, markets depend on firm and fixed property rights,<sup>54</sup> but the rule muddies property rights by confusing seniority and injecting arbitrariness into curtailment orders. Third, curtailment orders could encourage conflict and competition among the appropriators who have reason to show that the orders should not apply to themselves. Finally, by dampening transfers, the Drought Curtailment Rule could prevent water market institutions from maturing and developing in efficiency and scale.

#### **4. Conservation Price Signals**

Article XVI, Section 59, of the Texas Constitution provides that the “preservation and conservation” of water are “public rights and duties.”<sup>55</sup> In interpreting this provision, the Texas Supreme Court has opined: “The Conservation Amendment recognizes that preserving and conserving natural resources are public rights and duties ... Conservation of water has always been a paramount concern in Texas, especially in times, like today, of devastating drought.”<sup>56</sup>

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<sup>52</sup> WESTERN GOVERNORS ASSOCIATION AND WESTERN STATES WATER COUNCIL, *WATER TRANSFERS IN THE WEST: PROJECTS, TRENDS, AND LEADING PRACTICES IN VOLUNTARY WATER TRADING*, vi (December 2012).

<sup>53</sup> *Id.* at viii.

<sup>54</sup> Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 TEX. L. REV. 1873, 1888 (2005).

<sup>55</sup> Tex. Const. art. XVI § 59.

<sup>56</sup> *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 626, 633 (Tex. 1996).

The Texas Legislature and the Commission have developed numerous policies intended to address this concern.<sup>57</sup>

In the Drought Curtailment Rule, the Commission fails to follow through on its conservation duties. As discussed in Sections I.B.1, I.B.2 and I.B.3 above, the rule scrambles existing water rights and results in several injustices and inequities. The Commission could have drafted the Drought Curtailment Rule so that it used curtailments to leverage greater conservation. Despite these positives, the rule requires no conservation from senior appropriators and very little from the preferred junior appropriators who benefit from reallocation of water under curtailments.

TAC § 36.2(4), for instance, defines an “emergency shortage of water” to exist when a senior appropriator cannot divert all of its surface water rights and certain other conditions are met. But that definition does not require the senior appropriator to have attempted to implement conservation measures that, at an aggregate level, might be more reasonable and less onerous than the costs of a curtailment order. Aside from a general directive to the agency to “maximize[] the beneficial use of water”<sup>58</sup> in suspension orders, the rule does not recognize that, inherent within water appropriations, is the requirement that appropriators must beneficially use<sup>59</sup> and reasonably conserve water.<sup>60</sup> Similarly, TAC § 36.5(a)(3) allows the executive director to issue or modify an order if “senior water rights [holders] are unable to divert the water

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<sup>57</sup> E.g., Texas Water Code §§ 16.401 and 16.402.

<sup>58</sup> 30 TAC § 36.5(b)(1).

<sup>59</sup> Tex. Water Code § 11.025 (“A right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also *to the amount which is being or can be beneficially used for the purposes specified in the appropriation, and all water not so used is considered not appropriate.*”) (Emphasis added).

<sup>60</sup> Tex. Water Code § 11.002(4) (defining beneficial use to mean “the use of the amount of water that is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose.”); *Texas Water Rights Com. v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971) (“Inherently attached to a permit to appropriate waters, therefore, is the duty that the appropriator will beneficially use the water. The State, in administering its water resources, is under a constitutional duty to conserve water as a precious resource and that duty is also inherent in the grant of a water permit.”).

they need or store inflows that are authorized under a water right.” The rule could have required that senior appropriators be entitled to water *and* have demonstrated that the water will be beneficially used.

TAC § 36.5(c)(2), the executive director “may” require preferred junior appropriators to “demonstrate to the maximum extent practicable that reasonable efforts have been made to conserve water.” But the executive director does not have to require such a demonstration and, even if he does, the terms “maximum extent practicable” and “reasonable” are not defined. The executive director may interpret “maximum extent practicable” in a way that does not fully recognize the latest technologies or the pace-setting practices used in other jurisdictions. And “reasonable” is as subjective in this context as in any other.

The rule does not require preferred junior appropriators to show that they direly need suspended water. During the rulemaking process, the Commission said: “The executive director has requested junior water rights holders for municipal use which were not curtailed due to public health and welfare concerns, in areas where there has been a senior call, to implement high levels of their drought contingency plans. This was not a direct enforcement of the user’s implementation of its plans, but was a condition precedent if the junior water rights holder was to continue to take water. The commission intends for the executive director to continue this practice when he issues an adjustment or suspension of water rights when a senior needs water under its right.”<sup>61</sup>

The Commission did not, however, revise the rule to require drought contingency plans as conditions precedent to receiving suspended water. Such a requirement would help the rule to achieve its animating purpose and could improve water planning in Texas. At this point, a weak spot in planning is that conservation and reuse requirements are rarely enforceable other than

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<sup>61</sup> 37 Tex. Reg. at 3120.

between retailers and end users. To encourage greater compliance, the rule could exempt from suspension only preferred junior appropriators who have demonstrated that they have adopted and implemented water conservation and drought contingency plans. More aggressively, the agency could require preferred junior appropriators to have met certain benchmarks within those plans.

In fact, insulating appropriators from the costs of their water use only discourages conservation. It reduces the benefits that would accrue to appropriators who have invested in conservation technologies and management practices and shields profligate appropriators from the costs of their usage. To the extent that the state wants to meet its long-term water supply goals through conservation and reuse, it should avoid subsidizing usage practices that it does not wish to see perpetuated, while also incentivizing conservation practices.

## **PART II – PROPOSED REVISIONS TO RULE**

Failure to revise this rule can, and likely will, lead to a highly problematic situation. The rule represents a large departure from Texas' established prior appropriations system, around which water rights holders have made investments and formed expectations. Furthermore, it is possible that the definitions of the rule, if improperly interpreted, could give rise to curtailment orders that are administratively, economically and ecologically disruptive but far from necessary for public welfare.

UTROG urges the Commission to revise four aspects of the Drought Curtailment Rule: (A) its definitions of “drought” and “emergency shortage,” which establish the circumstances under which the Commission may exercise the rule; (B) the process through which the Commission may exercise the rule; and (C) the conservation measures required under the rule.

### **A. Circumstances under which the Commission May Exercise the Rule**

TAC § 36.3 allows the Commission's executive director to suspend or curtail water rights during a “drought” or other “emergency shortage of water.” The governing statute, Texas Water Code § 11.053, expressly directs the TCEQ to define those terms. In TAC § 36.2, the Commission has promulgated definitions that are, in the opinion of UTROG, too broad and could have widespread adverse consequences.

UTROG believes that tighter definitions will be more beneficial for minimizing the negative effects of the drought with less intrusion on water rights. To that end, UTROG offers the following clarification and amendments to help guide the commission toward a rule that may be more workable for the State.

#### **1. Definition “Drought”**

Under the current definition, a “drought” could be in effect even when hydrological conditions are relatively normal and pose little risk. Specifically, the definition provides that a “drought” occurs when at least one of three criteria is met. This, combined with the emergency powers granted to the Commission during such a period, creates uncertainty and large implications for rights holders in the area.

The first criterion provides: “drought conditions in the watershed or the part of the watershed subject to the executive director's Suspension or Adjustment Order are classified as at least moderate by the National Drought Mitigation Center.”<sup>62</sup> The use of “moderate” drought conditions under the NDMA does not necessarily demand the rather harsh action of a curtailment order. In fact, under this criterion, the Dallas-Fort Worth metropolitan area would have been in a state of “drought” for more than 50 percent of the months since 2005.<sup>63</sup>

The second criterion provides: “lows at United States Geological Survey gaging stations in the drainage area are below the 33rd percentile of the period of record available for the impacted watershed.”<sup>64</sup> Streamflows below that level are common and predictable in August in much of central, southern, and western Texas, however.

The third criterion provides: “below normal precipitation in the watershed or part of the watershed subject to the Executive Director's Order, for the preceding three-month period, as reported in the Texas Climatic Bulletin (Office of the Texas State Climatologist), a senior call is made, and the demand for surface water exceeds the available supply as evidenced by a senior water right holder making a senior call.” While this criterion requires that precipitation be “below normal,” “below normal” conditions may not be particularly severe. And in the future,

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<sup>62</sup> 30 TAC 36.2(3)(A).

<sup>63</sup> Denis Qualls, *Comment on TCEQ rule adoption*, City of Dallas, Dec. 5, 2011.

<sup>64</sup> 30 TAC 36.2(3)(B).

“below normal” conditions may become increasingly “normal” as baseline aridity increases due to climate change.<sup>65</sup>

The definition of “drought” attracted attention during the rulemaking process and has again during the current legislative session, with state Rep. Matt Schaefer introducing H.B. 1776, which would amend Texas Water Code § 11.053 to impose a stricter definition on the Drought Curtailment Rule. It would eliminate the second and third criterion and replace the first criterion with the following: “For the purposes of this section, ‘drought’ means a drought classified as ‘exceptional’ or ‘D4’ by the National Drought Mitigation Center in accordance with the center’s Drought Severity Classification scheme.”

UTROG supports Rep. Schaefer’s proposal in part. UTROG would modify the definition by: (1) eliminating the second two criteria, as H.B. 1776 would; (2) requiring that droughts be “severe” (a less extreme classification than the “exceptional” droughts required under H.B. 1776 but more extreme than the “moderate” droughts currently required); and (3) placing a limitation on the time that a “drought” can last in the state. Since drought conditions could persist for extended periods, the threat of curtailment orders could last for just as long and create regulatory risk. UTROG therefore further recommends, as shown in the markup below, that the Drought Curtailment Rule require a finding by agency commissioners that a drought is in effect.

**Proposed Revision: 30 TAC § 36.2(3)**

*(3) Drought --A drought occurs when, for at least 30 days preceding a suspension or adjustment order, the counties in the river basin subject to the suspension or adjustment order must have been*

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<sup>65</sup> E.g., Peter Folger, et al, Congressional Research Service, Drought in the United States: Causes and Issues for Congress (Apr. 2013), *available at* <https://www.fas.org/sgp/crs/misc/RL34580.pdf>.

~~classified by the National Drought Mitigation Center as being in a severe drought; at least one of the following criteria are met:~~

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

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

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

**30 TAC § 36.5(a)(7)**

(7) The drought must have been in effect for no more than 30 days or, after the first 30 days of drought, the commissioners must have made a finding that conditions warrant empowering the executive director to issue an order; provided further, that a finding will expire after six months unless renewed by the commissioners

## 2. Definition of “Emergency Shortage”

The reasons that the Commission has made the Drought Curtailment Rule applicable during both “droughts” and “emergency shortages of water” are unclear. “Emergency shortages” are presumably meant to encompass situations other than droughts – such as shortages that result from sudden natural disasters (hurricanes, wildfires, tornadoes) or man-made disasters (terrorist attacks, infrastructure failures, and toxic spills). But the definition of “emergency shortage” is vague enough as to raise doubts about exactly when an “emergency shortage” would be in effect. Under the definition, an “emergency shortage of water” is in effect if one of two criteria is met.

The first criterion provides: “The inability of a senior water right holder to take surface water under its water right during: (A) emergency periods posing a hazard to public health or safety.” This definition borders on the circular: an “emergency shortage” exists during “emergency periods.” The Drought Curtailment Rule does not define “emergency periods.” It is unclear whether the term is meant to apply only to severe hazards – such as terrorist attacks or hurricanes – or whether it is meant to encompass more mundane hazards that happen to coincide with reduced water levels. Indeed, the criterion is so porous that a drought that does not qualify under the definition of “drought” could nonetheless be found to trigger an emergency shortage of water.

The second criteria provides: “The inability of a senior water right holder to take surface water under its water right during: (B) conditions affecting hydraulic systems which impair or interfere with conveyance or delivery of water for authorized users.” The definition seems aimed at satisfying senior appropriations in the event natural or built infrastructure fails but does not explain the sorts of “conditions” that must be “affecting hydraulic systems” or the types of “affect[.]” they must have.

To improve the existing definition of “emergency shortage of water,” UTROG recommends that the Commission revise the Drought Curtailment Rule so that it requires, as a precondition, that the Commission itself and senior appropriators must undertake certain reasonable mitigation efforts before a an “emergency shortage of water” will be considered to be in effect. The beneficial use requirement in Texas water law requires that the state itself and that individual appropriators exercise “reasonable intelligence” and “reasonable diligence” to conserve water. Reasonable “intelligence” and “diligence” would presumably include drought mitigation efforts such as lawn watering restrictions and tiered water-usage pricing can help guide water consumers toward a more conservative usage of the resource and, if done on a large scale and adequately enforced, can help to reduce the harsh effects of an extended drought situation.<sup>66</sup>

UTROG proposes that the Commission replace the existing 30 TAC § 36.2(4) with the following language:

**Proposed Revision: 30 TAC § 36.2(4)**

*(4) Emergency Shortage of Water -- The inability of a senior water right holder, even after exercising reasonable intelligence and reasonable diligence to conserve water ~~to take surface water under its water right during~~, to obtain surface water, which the senior right holder can demonstrate it will put to beneficial use, during the conditions in subpart (A) or (B) below;*

*(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.*

**B. Procedural Defects**

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<sup>66</sup> *E.g., Texas Water Rights Com. v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971) (“Inherently attached to a permit to appropriate waters, therefore, is the duty that the appropriator will beneficially use the water. The State, in administering its water resources, is under a constitutional duty to conserve water as a precious resource and that duty is also inherent in the grant of a water permit.”).

The Drought Curtailment Rule also suffers from some procedural issues. Notably, Section 36.8(a) expressly states that the executive director may issue an order “without notice and an opportunity for a hearing.” The order may be in effect for as long as forty-five days before the commission must hear it and decide whether to affirm, modify or set aside. This truncated process discourages public participation. It removes a check on agency action and risks de-legitimizing curtailment orders – and by extension the Drought Curtailment Rule – among appropriators. And it is particularly troublesome given that the agency may be taking water rights without compensation from senior appropriators.

UTROG is not the only stakeholder to take issue with the lack of process in the Drought Curtailment Rule. During the rulemaking, the Commission received numerous comments on the subject; to its credit, the Commission significantly improved the process provisions in the final version of the rule.

This legislative session, state Rep. Matt Schaefer has introduced H.B. 1780, which would amend Texas Water Code § 11.053 to impose additional procedural constraints on the Drought Curtailment Rule. Specifically, the bill would require the Commission to provide affected appropriators with at least notice at least 30 days before a curtailment is to take effect. If an appropriator requests that the Commission hold a hearing to approve, deny or modify the proposed curtailment order, the Commission must hold that hearing before the order takes effect.

UTROG proposes the Commission implement these changes, regardless of the ultimate fate of H.B. 1780. UTROG believes these suggestions will help to legitimize the process in a way that is fair and equitable, yet functional to serve the needs of the state at large. Note that UTROG has created an exemption to the proposed changes for sudden and unpredictable

emergencies, such as an oil spill or a strong hurricane that has the potential to devastate water infrastructure.

### **Proposed Revision: 30 TAC § 36.7**

(a) An order under this chapter may only be issued by the executive director with notice and an opportunity for hearing, except as provided in subsection (d).

(1) The executive director shall notify the water rights holders who may be affected by an order proposed to be issued under this section of the proposed order not later than the 30th day before the date the proposed order takes effect.

(2) Not later than the 14th day after the date a person receives the notice, the person may request that the commission hold a hearing to affirm, modify, or set aside the proposed order.

(3) If the commission receives a request under subsection (a)(2), the commission shall hold a hearing on the proposed order before the date the proposed order takes effect. At or following the hearing, but not later than the date the proposed order takes effect, the commission shall affirm, modify, or set aside the proposed order.

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

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

(d) The executive director may issue an order under this chapter, without providing notice or a hearing prior to that order taking effect, if a sudden and unexpected emergency requires.

### **C. Conservation**

One of UTROG's biggest concerns with the current Drought Curtailment Rule is that it fails to consider a strong conservation effort, and when it does, it is done in such a manner that

undermines incentives for conservation or even discussion of conservation of resources. Water problems will always be present in the state of Texas, being a semi-arid subtropical climate with a large population that continues to grow at an incredible rate.<sup>67</sup> With this in mind, the long-term solution to water problems will require greater conservation.<sup>68</sup>

UTROG believes the Executive Director ought to be compelled to require the implementation of water conservation plans and drought contingency plans in advance of any curtailment order, which is not required under the current rule. Alternatively, the ED could be required to show they are implementing conservation practices pursuant to Section 11.025 and 11.053 (b)(1), (4). With conservation plans and drought contingency models in place, troubled communities may have a chance to ameliorate the effects of the drought in advance of the more extreme action, and if diligently applied, these plans may allow for rights holders to avoid more serious problems down the road. Accordingly, UTROG suggests the following amendatory language to encourage conservation, to 30 TAC §§ 36.5(c)-(d) and 36.7.

**Proposed Revision: 30 TAC 36.5(C)-(d)**

(c) The executive director may determine not to suspend a junior water right based on public health, safety, and welfare concerns if the junior water right holder requests and demonstrates the need for an exemption from the suspension. If the executive director decides not to suspend a junior water right based on public health, safety, and welfare concerns, the executive director ~~may~~ shall:

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

(2) require that the junior water right holder demonstrate to the maximum extent practicable that all reasonable efforts have been made to conserve

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<sup>67</sup> Office of Texas Comptroller of Public Accounts, *Texas in Focus: a Statewide View of Opportunities: Demographics*, available at: <http://www.window.state.tx.us/specialrpt/tif/population.html>, accessed April 9, 2013.

<sup>68</sup> The Texas Water Development Board has called for the state to meet 34 percent of the increase in water demand between now and 2060 through conservation and reuse. Texas Water Development Board, *Water for Texas: 2012 State Water Plan* (January 2012).

water by providing its water use data and a report on implementation of water conservation and drought contingency practices to the executive director every 14 days. The water use data shall indicate the amount of and place of use of the water used by the water right holder on a daily basis and be sufficient to provide a historical context for the water right holder's use of surface water; and

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

~~(d) If the executive director decides to require the information in subsection (e)(1) —(3) of this section, and the junior water right holder does not provide the information required the under subsection (c)(1),(2) and (3) of this section by the applicable deadline, or the executive director finds that the information provided does not demonstrate reasonable efforts to comply to the maximum extent practicable with subsection (c)(1), (2), and (3) of this section, the executive director shall revise the suspension or adjustment order to include the junior water right holder until such time as the junior water right holder satisfactorily complies with subsections (c)(1), (2), and (3). ~~may use existing regulatory authority to ensure the junior water right holder's efforts to secure alternative sources of water and conserve water, including, but not limited to, adjusting the diversion rate downward or ordering a full suspension.~~~~

#### **Proposed Revision: 30 TAC 36.7**

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

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

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

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

## Conclusion

Again, we empathize with the plight of many Texans. The state is in desperate need of water, and there isn't much falling. The TCEQ is acting upon direction from the legislature, but changes should be made to make it compliant with statutory intent, reduce the arbitrary nature of the rule, and focus the rule to encourage conservation. We sincerely hope that the suggestions laid out in this petition will help guide the Commission to find the best answer to this ever-present problem. If you have questions regarding this petition, please contact Jeremy Brown at 512-232-1408 or [jeremybrown@law.utexas.edu](mailto:jeremybrown@law.utexas.edu).

Respectfully,

Henry Joel Simmons

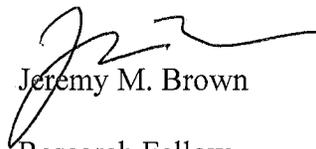
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