

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: June 7, 2013

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Caroline Sweeney, Deputy Director
Office of Legal Services

Subject: Consideration of a Petition for Rulemaking

Docket No.: 2013-1045-RUL

Project No.: 2013-034-PET-NR

Who Submitted the Petition

On May 22, 2013, the Texas Commission on Environmental Quality received a petition for rulemaking from the University of Texas Regulatory Oversight Group (petitioner). The petition is attached as Exhibit A.

What the Petitioner Requests

The petitioner requests that 30 Texas Administrative Code (TAC) Chapter 36 be amended to "clarify the circumstances under which the executive director can suspend senior water rights and incentivize conservation." The petitioner also requests that the TCEQ: redefine "drought" and "emergency shortage of water;" require that the drought be in effect for no more than 30 days at the time of issuance of an executive director (ED) order unless the commissioners have made a finding that the conditions warrant empowering the ED to issue an order, limit this finding to six months unless renewed by the commissioners; require 30 days notice and allow requests for a hearing before the ED issues an order; require that junior water rights holders who are not suspended must provide water use and alternative information and must go to more restrictive levels in their drought contingency and water conservation plans.

Specifically, petitioner requests that:

Section 36.2(3) be amended to redefine "drought" as follows (requested new language is underlined):

"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

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must have been classified by the national Drought Mitigation Center as being in a severe drought.”

Delete the rest of the drought definition.

Section 36.2(4), the definition of "emergency shortage of water," be amended as follows (requested new language is underlined):

“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.”

Section 36.5(a)(5) be added as follows (petitioner refers to § 36.5(a)(7) but it is assumed that § 36.5(a)(5) was intended since (a) currently contains subsections (1) - (4)):

“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 the order; provided further, that a finding will expire after six months unless renewed by the commissioners.”

Section 36.5(c) be amended to:

require the junior water right holder that is not suspended to request and demonstrate the need for an exemption from the suspension; and

provide that the ED "shall" instead of "may" require water use and additional/alternative source information in §36.5(c)(1) - (3).

Section 36.5(d) be amended to:

provide that if the junior does not provide the information required in §36.5(c) the ED “shall revise the suspension or adjustment order to include the junior water

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right holder until such time as the junior water right holder satisfactorily complies with subsections (d)(1) - (3);” and

delete the language wherein the ED “may use existing regulatory authority to ensure junior water right holder's efforts to secure alternative sources of water and conserve water, with these provisions including, but not limited to, adjusting the diversion rate downward or ordering a full provision.”

Section 36.7(a) be amended to:

provide that 30 days notice of the ED's order must be sent to affected water right holders, and that 14 days after receiving notice, a "person" may request a hearing to affirm, modify, or set aside the proposed order, and if there is a request, the commission shall hold the hearing before the proposed order takes effect.

Section 36.7(d) be amended to:

provide that the ED may issue an order without providing notice or hearing prior to the effective date of the order, if "a sudden and unexpected emergency requires."

Section 36.7(b) be amended to:

provide that the ED "shall" instead of "may" require that junior water right holders that are not suspended implement water conservation plans and drought contingency plans at more restrictive levels at the time of issuance of the order.

Recommended Action and Justification

Summary: The ED recommends denial of the petition because: 1) the requests relating to notice and hearing and definition of drought are impractical due to the need for timely regulatory action; 2) many of the suggested changes would deny the ED and the commission needed flexibility to address health, safety and welfare concerns; 3) some of the requested rule changes are already allowed under existing rules; and 4) as the commissioners have stated in public meetings, the commission will continue to refine implementation of these rules.

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DISCUSSION OF PETITION

General Comments: The petitioner argues that Chapter 36 incorrectly interprets Texas Water Code, §11.053, gives the ED and commission too much flexibility, reallocates water from unpreferred to preferred appropriators without providing compensation, creates inequities between companies that have their own water rights and those who receive water from municipal suppliers, casts doubt on the scope and security of existing water rights, and buries price signals that would otherwise encourage conservation.

Petitioner refers to three bills introduced in the 83rd legislative session. Petitioner states that House Bill (HB) 2720 would have allowed the commission to issue a curtailment order only "to address an imminent hazard to the health, safety, or welfare of the public." The bill did not pass, but the last version of the bill (engrossed) would not have limited the ED's suspension or adjustment powers, but would have added that the ED could "temporarily require a water right holder to implement mandatory drought contingency measures to mitigate an imminent hazard to the health, safety, or welfare of the public." HB 1780 would have required 30 days notice to affected appropriators before the ED could issue an order, and the ability to request a hearing within that 30 days. HB 1776 would have redefined "drought" to mean only an "exceptional" drought under the National Drought Mitigation Center. Neither of these bills made it out of the assigned House committee. These requested changes are discussed further below.

Concerning petitioner's arguments that the rules cause inequities and uncertainties, as well as constitute a disincentive to conservation, the ED disagrees. Petitioner argues that the rules are inequitable because a senior water right holder for industrial water will be cut off, while an industrial facility that does not have a water right will be able to buy water from a municipality, which will not be cut off. The alleged inequities to a senior industrial water right holder will not occur under the petitioner's scenario because municipalities cannot use or sell permitted water for municipal purposes for anything but uses relating to public health and safety purposes. The ED sent letters to all suspended municipalities for the Dow senior call, informing them that their municipal water rights were not suspended at that time, but only municipal water use for public health and safety purposes such as drinking water were allowed. An example of this letter is included as Exhibit B.

Concerning the allegation that the current rules cause uncertainty, these orders are temporary and will be modified as necessary to reflect information related to the non-suspended water right holders' use of their water. The ED will not risk causing a public health and welfare crisis by totally suspending a municipality or power generator's water

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right in the first order addressing a senior call. However, the ED will require information from the senior water right holder, as well as non-suspended junior water right holders, and will review any relevant data to determine whether the junior municipal and power generation rights should remain unsuspended. Under the commission's direction and guidance, the ED will modify these orders to suspend or adjust these water rights if the information indicates there will not be a health, safety or welfare concern. The ED exercised this type of flexibility in response to the senior call from Dow Chemical, the only time the ED has issued an order under Chapter 36. The ED issued a modified suspension and adjustment order for the Dow call in late 2012 when continued in effect through early 2013. The ED suspended or adjusted several non-suspended water rights based on information the water right holders provided and other data available to the ED. More adjustments could have occurred; however, Dow rescinded its call in mid-January.

Concerning the petitioner's argument that the rules are a disincentive to conservation, the basis for the argument is that the rule gives the ED too much flexibility, that the rule doesn't require beneficial use on the part of the senior caller, and that the rule does not require implementation of high levels of the drought contingency or water conservation plan from the senior caller. These arguments are either incorrect or beyond the ED's authority, as discussed further below.

Definitions: Concerning petitioner's proposed definition of drought, the commission chose "moderate drought" and the other factors listed in the definition precisely because the definition needed to be flexible. As stated in the commission's preamble to the adopted rules, the ED and commission must be able to protect senior water rights when a call is made, and valid senior calls may be made in times of low flow or moderate drought (see the April 27, 2013, issue of the *Texas Register* at 37 TexReg 3105). In the preamble, the commission did not agree that Texas Water Code, Section 11.053 was enacted to limit the commission's authority, but believes that it was enacted to clarify how the commission should address senior calls (see the April 27, 2012, issue of the *Texas Register* at 37 TexReg 3106). The petitioner also requests that the rules include a requirement that drought conditions must have existed for no more than 30 days, or that the commissioners must have made a finding (subject to a six-month expiration date unless renewed) that conditions warrant empowering the ED to issue the order, and that conditions warrant the ED order. This change is unnecessary because the commission's existing rule in Section 36.5 requires that the ED find that a drought, as defined in the rules, has occurred, and the commission must affirm this determination.

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Concerning the petitioner's proposed definition of "emergency shortage of water," petitioner states that the commission and senior water rights must undertake certain reasonable mitigation efforts before an "emergency shortage of water" is in effect, including conservation and beneficial use. As stated in the commission's preamble to the adopted rules, the commission does not believe that it has the authority to require a water right holder to implement certain conservation levels prior to making a senior call (see the April 27, 2012, issue of the *Texas Register* at 37 TexReg 3112). However, the rules do require a finding that the senior water right holder can "beneficially use" the water that could be made available for the ED to issue an order (Section 36.5(a)(3) and (4)).

Procedures: The ED does not agree that a 30-day notice and a right to a hearing prior to issuance of the ED's Order is workable or reasonable for issuing suspension and adjustment orders for a senior call. The commission recognized the need to address senior calls immediately, because of the serious drought conditions in the state, in the preamble to the adopted rules and at two commission open meetings (see the April 27, 2012, issue of the *Texas Register* at 37 TexReg 3117) and webcasts of the commission's December 5, 2012, and January 30, 2013, meetings at www.tceq.texas.gov). Additionally, persons can request to address the commission at the hearing to affirm, modify, or set aside the ED order, which is required to be held within 45 days of the issuance of the order.

Adding a provision to §36.7 to allow the ED to issue an order without notice and an opportunity for hearing if a "sudden and unexpected emergency requires" is inconsistent with Section 11.053 if the order is based on a senior call during a drought. If a senior water right holder in a part of a river basin that is in a drought cannot obtain the surface water he is entitled to under the Texas prior appropriation doctrine, and the other provisions of the Chapter 36 rules are met, the senior water right holder has a right to that water. No "sudden and unexpected emergency finding" is required by Section 11.053 or Chapter 36.

Conservation: In terms of requiring water use and additional/alternative source information, as well as implementation of higher levels of water conservation and drought contingency plans from non-suspended junior water rights, the ED may require that information under current rules. Indeed, the ED did require the water use and additional/alternative source information through a letter at the time the Dow order was issued by the ED (an example is attached in Exhibit C), and the commission modified the ED's order to specifically include this requirement in the order. Also, shortly after the Dow ED order was issued, non-suspended water right holders were directed to implement more restrictive levels in their water conservation plans and drought contingency plans (as

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referenced previously, an example is attached as Exhibit B). This is allowed order under existing rules.

Since these actions are allowed under existing rules, the ED does not recommend amending Chapter 36 solely for this purpose.

Non-suspension of Junior Water Right Holders: Petitioner requests that in order to not be suspended, a water right holder must request non-suspension and demonstrate the need for an exemption from the suspension. Because these water right holders will not know whether they are suspended until they receive the order, this rule change is not practicable or workable. However, under the current rule and commission guidance, the ED can request this information in his order to determine whether the water right holder should be suspended or adjusted. Thus, no rule change is necessary.

Petitioner also requests the rule be changed to state that if the junior water right holder does not provide the information or it is not sufficient, the junior water right shall be suspended until the water right holder satisfactorily complies with subsection (c)(1) - (3). As the rule is currently worded, this option is already available to the ED. The ED "may use existing regulatory authority . . . including but not limited to, adjusting the diversion rate downward or ordering a full suspension." Thus, no rule change is necessary.

Applicable Law

- Texas Government Code, Section 2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule;
- 30 TAC Section 20.15, which provides such procedures specific to the commission; and
- Texas Water Code, Section 11.053, which governs ED suspension or adjustment orders during drought or emergency shortage of water.

Agency Contacts

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James Aldredge, Attorney, Environmental Law Division, 239-2496

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Charlotte Horn, Texas Register Coordinator, General Law Division, 239-0779

Attachments

Petition

Letter dated December 14, 2012

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Re: Docket No. 2013-1045-RUL

Letter dated November 19, 2012

cc: Chief Clerk, 2 copies
Executive Director's Office
Anne Idsal
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Exhibit A

Exhibit B

Exhibit C