

The Texas Natural Resource Conservation Commission (commission) adopts new §297.57, Subchapter E, relating to Emergency Suspension of Permit Conditions. Section 297.57 is adopted with changes to the proposed text as published in the November 8, 1996 issue of the *Texas Register* (21 TexReg 10959-10961).

EXPLANATION OF ADOPTED RULE

The purpose of the rule is to set forth the procedures and criteria to be used by the commission in its review and action on a petition by a water right holder for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an “emergency” if there are no “practicable, feasible alternatives” to the suspension, pursuant to Texas Water Code, §11.148.

New §297.57 includes the purpose for which a petition may be submitted and describes an emergency condition supporting the submission of a petition. It also establishes minimum requirements for the contents of the petition and provides that the petition must be filed with the Texas Parks and Wildlife Department at the same time it is filed with the commission.

Also, the rule requires the commission to conduct a hearing within 15 days of the date on which the order to suspend a permit condition is issued to determine if the suspension should be affirmed, modified, or set aside. If a continuation is granted, the maximum time period would be for 120 days, with a provision for a one-time 60-day extension if the commission determines emergency conditions triggering the initial suspension continue to exist.

Additionally, the new rule provides that if the water right holder has a water conservation plan and/or drought contingency plan, the suspension of permit conditions may be contingent upon the full implementation of such plans and measures corresponding to the staged reduction of releases for existing instream uses and beneficial inflows to the bays and estuaries.

The rule includes provisions for the passage of existing instream flows up to that amount necessary to maintain water quality standards for the affected stream segment.

Finally, the new rule provides that if a water right already contains provisions for the suspension or partial suspension of permit conditions for the maintenance of instream flows or freshwater inflows to the bays and estuaries, further or different relief requested in the petition may be denied unless the petitioner can show significantly changed circumstances or an emergency condition not contemplated when the water right condition was issued.

COMMENTERS

Written comments on the proposed rule were submitted by the Public Interest Counsel (PIC) of the commission and the Lone Star Chapter of the Sierra Club (Sierra Club) represented by the law office of Henry, Lowerre, Johnson, Hess & Frederick. Both sets of comments addressed specific sections of the proposed rule and neither entity spoke in opposition to the rule.

The PIC suggested the rule should further clarify emergency conditions warranting relief and measures to be taken by the petitioner to address the emergency. Additionally, the PIC suggested an emergency should be limited to situations where human health and domestic animals are at peril.

The commission agrees emergency conditions exist when there is imminent peril to human health, safety, and welfare and has revised this subsection accordingly.

The PIC recommended changes to §297.57(c) which would provide additional information requirements for the initial petition. Since the commission may initially consider the petition without a hearing, the PIC commented that the petition should be clearly required to provide the commission with sufficient data and information to make its decision.

Appropriate changes to the rule have been made to reflect the PIC's concerns.

The PIC suggested §297.57(e) be modified to allow for submission of comments by the Texas Parks and Wildlife Department, PIC, and the executive director of the commission, on the initial petition, along with a provision providing for petitioner response to the comments at the commission agenda.

The commission agrees with this comment and has modified this subsection accordingly.

The PIC recommended a sentence clarifying “affected area” to mean that area downstream of the affected water right and corresponding petitioner notice requirements be added to §297.57(f).

The commission agrees with this recommendation and has added the proposed changes.

The PIC suggested §297.57(g) should be modified to make it clear the hearing required by the statute will afford affected persons the opportunity to be heard.

The commission has amended the rules by adding new subsection (g) to provide that hearings shall be conducted in accordance with the Texas Government Code, Chapter 2001 and applicable rules of the commission.

The PIC recommended §297.57(h) be amended to include guidance for the commission when considering evidence submitted in support of the request for suspension. Since the request may constitute extraordinary relief from permit conditions, according to the PIC, the petitioner must prove by “competent evidence” the suspension is indeed necessary to protect human health, safety, and welfare.

The commission agrees that sufficient information and evidence must be submitted to support the petition and has incorporated these suggestions in the rules with the inclusion of the reference to contested case proceedings under Chapter 2001, Texas Government Code, in new subsection (g) and the additional petition content requirements provided in subsection (c).

The PIC suggested §297.57(i) should be worded to prohibit any suspension which would have the effect of impairing of water quality or result in conditions that would fail to protect significant floral or faunal species.

The section as proposed, which has been renumbered §297.57(j), provides for the protection of water quality and significant floral and faunal resources. Therefore, this subsection is adopted as originally proposed.

The Sierra Club commented on the need for time limits for the suspension of instream flows and inflows. Additionally, the Sierra Club suggested a need for the adoption of special procedural rules to ensure an expedited hearing could be held in a timely manner relative to the merits of the petition for emergency suspension of permit conditions.

The commission agrees with the comment concerning the need for a specific time limit for the suspension of permit conditions and has modified the rule accordingly to provide for a maximum initial period of 120 days, and a one-time renewal of not more than 60 days, if conditions warranting the emergency relief continue to exist. In response to the recommendation for special procedural rules for an expedited hearing, the rule and underlying statute provide that a hearing on the petition must be held within 15 days at the initial granting of any emergency relief. Additionally, current agency procedural rules provide the necessary flexibility to accomplish expedited hearings. Therefore, no additional change to the rule is made.

The Sierra Club suggested a time limit of 21 days be imposed for the initial suspension of permit conditions should the commission find that an emergency exists and cannot practically be resolved in other ways.

The commission disagrees with the comment. The statute provides that a hearing to determine whether the suspension should be continued shall be held within 15 days of the date on which the order to suspend is issued.

The Sierra Club recommended that a maximum time period should be included for the initial as well as any subsequent suspension period should the commission grant the emergency suspension.

The commission agrees with this comment and has included language in the rule to reflect this comment under new subsection (h). Additionally, if the emergency conditions persist beyond the termination of the emergency suspension order and any renewal of the order, a permittee may file a new petition under 30 TAC §297.57(c) justifying a new emergency suspension order or seek to amend the water right as provided by §297.57(k). A permittee may also file a petition to amend an emergency suspension order during the term of the order if a significant change in conditions warrants amending the emergency suspension order and further or different relief is necessary.

The Sierra Club and the PIC recommended that no suspension be approved unless the petitioner has demonstrated that all reasonable steps have been taken to avoid the need for the suspension.

The commission agrees with the comment and has further clarified the rule to provide that emergency relief may not be granted unless an emergency exists and the petitioner demonstrates that no feasible practicable alternative exists to the emergency relief.

The Sierra Club suggested that language contained in §297.57(i) was unduly narrow and the commission should expand this subsection to consider the protection of “aquatic life.”

The commission disagrees with this comment. The intent of the Water Code, §11.148 is to primarily protect human health, safety, and welfare. Furthermore, inherent in the protection of water quality standards and threatened or endangered species, is the assumption that the aquatic community will be afforded some protection. However, during emergency conditions, the protection of human life must take priority. Therefore, no change is made in response to the comment.

The Sierra Club recommended a new subsection be added stating that instream flows and inflows be suspended only to the minimum extent necessary to address the emergency.

This comment has been addressed in §§297.57(i) and (j).

The Sierra Club commented that §297.57(k) be amended to create a presumption that the petitioner must abide by the provisions contained in their water right, before granting total or partial suspension of permit conditions for circumstances not addressed under the existing right.

The commission disagrees with the comment. The subsection, as written, and now renumbered as §297.57(l), states that only new or changed circumstances or an emergency situation not considered when the water right was issued, constitutes grounds for modifying provisions for the temporary, total, or partial suspension contained in the water right. Compliance with the existing water right is implicit; therefore, no change is made to the subsection.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule pursuant to Texas Government Code Annotated, §2007.043. In its assessment, the commission finds that the primary purpose of this rule is to provide assistance to water right holders in understanding what will be required for the submission, review, and approval of a petition pursuant to Texas Water Code, §11.148. Promulgation and implementation of this rule will not affect private property which is the subject of the rule.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

This rulemaking is expressly exempt from the consistency requirements of the Coastal Management Program.

STATUTORY AUTHORITY

The rule is adopted under the Texas Water Code, §11.148, as well as §5.102, which provides the commission with general powers to carry out duties under the Texas Water Code, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provision of the Texas Water Code and the laws of the state.

**SUBCHAPTER E : ISSUANCE AND CONDITIONS OF
WATER RIGHTS OR CERTIFICATE OF ADJUDICATION**

§297.57

The rule is adopted under Texas Water Code §§5.103, 5.105, and 5.120 which provide the commission with the authority to promulgate rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state.

§297.57. Emergency Suspension of Permit Conditions.

(a) The purpose of this section is to set forth the procedures and criteria to be used by the commission in its review and action on a petition by a water right holder for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an emergency if there are no practicable, feasible alternatives to the suspension, pursuant to Texas Water Code, §11.148. The procedures and emergency relief provided by this section shall only be used when the commission finds that emergency conditions exist that present an imminent threat to the public health, safety, and welfare and that override the necessity to comply with general procedures and criteria for changing the conditions in a water right and there are no feasible, practicable alternatives to the emergency authorization.

(b) Upon petition filed by the affected water right holder in accordance with this section, the commission shall consider and may approve the temporary suspension of all or a part of conditions in a

water right relating to beneficial inflows to affected bays and estuaries and instream uses if the commission finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The burden of demonstrating that the petition should be granted in accordance with this section is on the petitioner. For purposes of this section, an emergency is a condition where water supplies available to the petitioner have been reduced or impaired to such an extent that an imminent peril to the public health, safety, or welfare exists. Such condition may include, but not be limited to: the reduction of public water supplies to critical levels as a result of a severe and sustained drought; the failure of a dam for a public water supply reservoir; the significant contamination of a public water supply; or the failure or destruction of public water supply pipelines or other distribution systems.

(c) The petition shall be filed with the chief clerk of the commission and must be sworn and contain the following information:

(1) the name, address, and telephone number of the petitioner and copies of the affected permits, certificates of adjudication, or certified filings;

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

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

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

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

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

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

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

(d) A copy of the petition must be filed by the petitioner with the Executive Director, Public Interest Counsel, and the Texas Parks and Wildlife Department (TPWD) at the same time it is filed with the chief clerk of the commission.

(e) Upon receipt of the petition, the chief clerk shall provide notice of the time and location of the commission's consideration of a petition to the TPWD, Executive Director, and Public Interest Counsel as soon as practicable after receipt of the petition, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD. The TPWD, Executive Director, and Public Interest Counsel shall be provided an opportunity to submit comments on the petition prior to commission action. The petitioner shall be afforded opportunity to respond to all comments at the time of the commission's consideration of the matter. If the commission initially grants an emergency suspension of permit conditions without a hearing, the order granting the emergency suspension shall fix a time and place for a hearing to be held before the commission to determine whether to affirm, modify, or set aside the initial granting of the emergency suspension of permit conditions. The hearing shall be held as soon after the emergency suspension is granted as is practicable but not later than 15 days after the initial emergency suspension is granted. The commission's order shall also set out the date any authorized suspension shall commence and end, the extent of any suspension, and any special condition upon which a suspension is granted. The commission's initial order may also indicate the referral of the matter to the State Office of Administrative Hearings for an expedited hearing under subsection (g) of this section.

(f) Published notice of the initial suspension of water right conditions, if granted, shall be provided and paid for by the petitioner immediately following a favorable commission initial decision on the petition by publication in a newspaper or newspapers of general circulation in the affected area. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. Such published notice must contain a

summary of the information contained in the petition as provided by subsection (c) of this section and the time and location of the subsequent commission hearing provided by subsection (g) of this section. Such publication shall occur not later than seven calendar days prior to such hearing. For the purposes of this rule, the affected area shall be each county, in whole or in part, downstream of the diversion point or impoundment authorized under the affected water right. The petitioner shall file with the chief clerk a publisher's affidavit as proof that such notice was published in accordance with this section.

(g) Within 15 days of the initial granting of the emergency suspension of permit conditions, the commission shall hold a hearing to determine whether to affirm, modify, or set aside the initial emergency suspension. The hearing shall be conducted in accordance with Government Code, Chapter 2001 and rules of the commission, and written notice of the hearing shall be provided to the Texas Parks and Wildlife Department and affected persons not later than 10 days before the hearing. For matters referred to SOAH, the Administrative Law Judge may, consistent with the requirements of Chapter 2001 of the Government Code, reduce the time periods specified in the Commission's procedural rules governing contested case hearings.

(h) An emergency authorization granted under this section may be for a period of not more than 120 days if the commission finds that emergency conditions exist that present an imminent threat to public health, safety, and welfare and that override the necessity to comply with permit conditions and there are no feasible, practicable alternatives to the emergency authorization. Such emergency authorization may be renewed once for not longer than 60 days.

(i) In determining whether feasible, practicable alternatives exist to the suspension of water right conditions, the commission shall examine the amount and purposes of use for water currently being used by the petitioner, all evidence relating to the availability of alternative, supplemental water supplies to the petitioner, and the petitioner's efforts to curtail water use not essential for the protection of the public health, safety, and welfare. If the water right holder has a water conservation plan and/or drought contingency plan, the suspension of water right conditions may be contingent upon the full implementation of such plans and measures corresponding to the staged reduction of releases for existing instream uses and beneficial inflows. If the water right holder does not have a water conservation plan and drought contingency plan in accordance with Chapter 288 of this title (relating to Water Conservation Plans, Guidelines and Requirements), the commission order granting a petition under this section shall require the permittee to develop and implement such plans within a prescribed time period as provided in the order.

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

(k) In order to assist in the preparation and planning for water management during an emergency, the commission may provide conditions in a water right necessary for relief consistent with applicable portions of this section when the water right is initially granted or subsequently amended.

These conditions may include, but shall not be limited to a staged approach to the reduction in the pass-through amounts that provide for the pass-through of water for instream uses and bays and estuaries when it is available, and allow water to be captured or diverted for the protection of the public health, safety, and welfare during an emergency, subject to the protection of stream flows necessary under subsection (j) of this section for the maintenance of water quality standards. Such conditions may also include full implementation by the water right holder of water conservation and drought contingency plans as a precondition for obtaining relief.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency authority to adopt.

Issued in Austin, Texas, on