

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** April 1, 2011

Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G. Executive Director

From: L'Oreal W. Stepney, Deputy Director
Office of Water

Docket No.: 2007-0999-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 35, Emergency and Temporary Orders and Permits; Temporary
Suspension or Amendment of Permit Conditions
Chapter 298, Environmental Flow Standards for Surface Water
HB 3/SB 3: Environmental Flow Standards
Rule Project No. 2007-049-298-OW

Background and reason(s) for the rulemaking:

House Bill 3 and Senate Bill 3 (HB 3/SB 3), 80th Legislature, 2007, Regular Session, created the environmental flows process and established the Environmental Flows Advisory Group (Advisory Group) to oversee its implementation. HB 3/SB 3 also established the Environmental Flows Science Advisory Committee, local bay and basin area stakeholder committees (BBASC), and local bay and basin expert science teams (BBEST). A BBEST develops environmental flow analyses and recommends an environmental flow regime, based solely on the best science available, to their basin's BBASC. A BBASC, while considering the BBEST's recommendations and other factors, develops recommendations regarding environmental flow standards and strategies to meet the environmental flow standards and submits those recommendations to the Advisory Group and to the commission for rulemaking. HB 3 was authored by Representative Robert Puente and Representative Harvey Hilderbran. SB 3 was authored by Senator Kip Averitt.

Article 1, HB 3 and Article 1, SB 3 amended Texas Water Code (TWC), §§5.506, 11.002, 11.023, 11.0235, 11.0841, 11.134, 11.147, 11.1471, 11.148, and 11.1491. HB 3/SB 3 added TWC, §§11.0236, 11.02361, 11.02362, 11.0237, and 15.4063. These HB 3/SB 3 amendments to the TWC codified the environmental flows process and its implementation. The amendment to TWC, §11.1471 specifically instructed the commission to adopt environmental flow standards by rule. The amendments to TWC, §5.506 and §11.148 make water set aside for beneficial inflows to affected bays and estuaries and instream uses available during emergency conditions.

This rulemaking implements TWC, §11.1471(a), through new 30 TAC Chapter 298, by adopting appropriate environmental flow standards for the river and bay systems consisting of the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San

Commissioners

Page 2

April 1, 2011

Re: Docket No. 2007-0999-RUL

Jacinto Rivers and Galveston Bay, and establishing procedures for implementing an adjustment of conditions if included in a permit or amended water right in those river and bay systems.

The rulemaking implements changes to TWC, §5.506 and §11.148 by amending 30 TAC Chapter 35, to add emergency authority to temporarily make water set aside for beneficial inflows to affected bays and estuaries and instream uses available during emergency conditions.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The scope of the adopted rulemaking is to implement the directive in TWC, §11.1471 for the two river basin and bay systems consisting of the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay. The rulemaking adopts environmental flow standards and adopts procedures for implementing an adjustment of conditions if included in permits and amended water rights for those river and bay systems.

The rulemaking also implements changes to TWC, §5.506 and §11.148 by amending §35.101, to add emergency authority to temporarily make water set aside for beneficial inflows to affected bays and estuaries and instream uses available during emergency conditions.

B.) Scope required by federal regulations or state statutes:

TWC, §11.1471(a) states that the commission by rule shall adopt environmental flow standards for each river basin in the state; establish an amount of unappropriated water, if available, to be set aside to satisfy environmental flow standards; and establish procedures for implementing an adjustment of conditions included in a permit or amended water right.

C.) Additional staff recommendations that are not required by federal rule or state statute:

No federal law applies. HB 3/SB 3 does not specifically require rulemaking for staff's adopted amendments to Chapter 35, Subchapter D; however, these are being adopted to implement the changes to TWC, §5.506 and §11.148.

Statutory authority:

TWC, §§5.506, 11.002, 11.023, 11.0235, 11.0236, 11.02361, 11.02362, 11.0237, 11.0841, 11.134, 11.147, 11.1471, 11.148, 11.1491, and 15.4063.

Effect on the:

A.) Regulated community:

Members of the regulated community who apply for a new appropriation of state water will be affected by the environmental flow standard recommended by this adopted rulemaking.

Re: Docket No. 2007-0999-RUL

An application for a new appropriation of state water will be recommended for issuance only if there is water available after the environmental flow standard has been met. The result will be that there could be less state water available for appropriation. However, because the adopted standards are expected to function similarly to current stream-flow restrictions for applications, the adopted standards are not expected to have significant fiscal implications for the regulated community.

B.) Public:

The adopted rules may affect applicants for new appropriations and amendments that increase the amount of water to be taken, stored, or diverted which could result in an applicant having to secure an additional source of water. However, because stream-flow restrictions are currently applied to new appropriations of water under existing practice and the adopted standards are expected to function similarly to current stream-flow restrictions for applications, the adopted standards are not expected to have significant fiscal implications for the public.

C.) Agency programs:

The adopted rulemaking would have little impact on agency programs. The Water Supply Division will implement the rule when processing applications for new appropriations in the affected river basins. Currently, program staff uses a desktop methodology to determine instream flow requirements. Assigning a flow requirement by rule will have little or no impact on processing times or workloads. The impact on the Office of Compliance and Enforcement will likewise be insignificant. Presently, enforceable instream flow requirements are placed in water use permits. After the adopted rulemaking is effective, those flow requirements will come from a different source (the adopted rule), but will not be enforced any differently by the Office of Compliance and Enforcement.

Stakeholder meetings:

A stakeholder meeting was held on August 12, 2010 in Austin, Texas. TCEQ staff presented a general approach to the rulemaking and asked the stakeholders for feedback on some key issues. The meeting was attended by 44 stakeholders representing a broad spectrum of interests in the basins affected by this rulemaking and across the state. Twenty-one comment letters were received from stakeholders and their feedback was considered during staff's development of the adopted rules. Additionally, the TCEQ held a public rule hearing during the comment period.

Public comment:

Staff received over 2,000 comment letters on the proposed rule package. Among the comments received were two alternative recommendations. As directed by the commission at the November 3, 2010, proposal agenda staff posted the alternative recommendations on the TCEQ's Environmental Flows Rulemaking Web page to make them available for public comment throughout the rule comment period.

Re: Docket No. 2007-0999-RUL

In Subchapter B, relating to the Trinity and San Jacinto Rivers and Galveston Bay, some commenters also provided alternative recommendations for substantive changes to the proposed flow standards. The majority of the commenters did not provide specific changes; however, many expressed support for more stringent standards.

Also in Subchapter B, many commenters stated that staff's proposed rule was not sufficiently protective of Galveston Bay. Some expressed concerns about the lack of a seasonal component in the proposed rule. These commenters also assert that TCEQ's proposed rule does not protect the bay during drought times. An alternative recommendation for environmental flow standards to protect bay and estuary inflows was submitted to the commission at the proposal agenda and another was presented during the rule comment period.

In Subchapter C, relating to the Sabine and Neches Rivers and Sabine Lake Bay, some commenters provided an alternative recommendation for substantive changes to the proposed flow standards. The majority of the commenters did not provide specific changes; however, some expressed support for more lenient standards, and some proposed more stringent standards for subsistence flow.

Some commenters question why neither Subchapter B or Subchapter C includes a set aside of unappropriated water. These commenters suggest that there is sufficient unappropriated water, particularly in the Sabine and Neches basins, for TCEQ to recommend a set aside in the rule. Neither of the bay and basin stakeholder groups recommended a set aside of unappropriated water.

Significant changes from proposal:

In Subchapter B, relating to the Trinity and San Jacinto Rivers and Galveston Bay, some of the numerical values for subsistence, base, and pulse flows were modified to be consistent with comments submitted by the National Wildlife Federation's South Central Regional Center on behalf of the National Wildlife Federation, Lone Star Chapter of the Sierra Club, Environment Texas, Galveston Bay Conservation and Preservation Association, Houston Audubon, Big Thicket Association, Environmental Stewardship, and the law firm of Blackburn and Carter. In addition, based on direction received from the commission, the base flow values in the San Jacinto River Basin were increased.

Also in Subchapter B, in response to numerous comments from groups and individuals regarding the need to better protect Galveston Bay, the inflow requirement for Galveston Bay was modified to incorporate a seasonal component.

In Subchapter C, relating to the Sabine and Neches Rivers and Sabine Lake Bay, the adopted rule was modified in response to the alternative recommendation submitted by the Sabine River Authority of Texas on behalf of the Sabine-Neches Bay and Basin Area Stakeholder Committee. The adopted rule removes the hydrologic conditions and incorporates some of the numeric values from the above-referenced comment but with a

Commissioners

Page 5

April 1, 2011

Re: Docket No. 2007-0999-RUL

modification to include more frequent pulse flow requirements. In addition, based on direction received from the commission, the base flow values in the Sabine and Neches River Basins were increased.

Potential controversial concerns and legislative interest:

HB 3/SB 3 has legislative interest. The Advisory Group consists of nine members, appointed by the Governor, Lieutenant Governor, and Speaker of the House of Representatives. Six of those members are legislators, including the chairs of the Senate and House Natural Resource Committees.

Sabine and Neches Rivers and Sabine Lake Bay:

A potential controversial concern in the adopted rulemaking related to the Sabine and Neches Rivers and Sabine Lake Bay lies in the fact that the BBASC's recommendations were not submitted according to the HB 3/SB 3 schedule. Members of the Sabine BBASC, joined by other groups, submitted an alternative recommendation to the commission's proposed rules during the comment period. Commission staff considered the alternative recommendation as a comment as directed by the commission and made changes based on some, but not all of its recommendations.

Trinity and San Jacinto Rivers and Galveston Bay:

A potential controversial concern related to the adopted rulemaking related to the Trinity and San Jacinto Rivers and Galveston Bay is the adopted inflow requirements for Galveston Bay. Numerous comments were received from groups and individuals regarding the need to better protect Galveston Bay. The adopted inflow requirement for Galveston Bay incorporates a seasonal component, which should increase protection for the bay.

Another potential controversial concern related to the adopted rulemaking for both basin and bay systems is that neither Subchapter B or Subchapter C included a set aside of unappropriated water. Some commenters suggested that there is sufficient unappropriated water, particularly in the Sabine and Neches basins, for TCEQ to recommend a set aside in the rule. Due to water availability issues in these basins, special conditions placed in a permit may be a more effective method to protect flows in the stream when new appropriations of water are granted. This is because if special conditions are used there are other sources of water in a stream that could be used to meet environmental flow requirements in a permit; for example water appropriated to downstream water right holders, water appropriated to another but not used, or return flows. Additionally, although stakeholder groups could make recommendations regarding set-asides, neither of the stakeholder groups in these basins recommended an amount of water to be set aside.

Does this rulemaking affect any current policies or require development of new policies?

Commissioners

Page 6

April 1, 2011

Re: Docket No. 2007-0999-RUL

HB 3/SB 3 established a new policy for application of instream flow requirements in applications for new appropriations of state water. This adoption implements that policy and replaces existing TCEQ practices for the affected river basins.

Commissioners

Page 7

April 1, 2011

Re: Docket No. 2007-0999-RUL

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

TWC, §11.1471 directs the commission to adopt a rule by June 1, 2011. This rulemaking complies with the statute and keeps the environmental flows process on schedule. Any alternative course of action would not be in compliance with the timetables established by HB 3/SB 3, as amended by the Advisory Group.

The adopted rule amendment that reflects changes to TWC, §5.506 and §11.148 is not mandated by statute. However, if this portion of the rulemaking does not go forward, the existing §35.101, would not be consistent with TWC, §5.506 and §11.148. An alternative is the commission may take emergency action under the statutes.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: November 19, 2010

Anticipated Texas Register publication date: May 6, 2011

Anticipated effective date: May 12, 2011

Six-month Texas Register filing deadline: May 19, 2011

Agency contacts:

Ron Ellis, Rule Project Manager, 239-1282, Water Supply Division

Robin Smith, Staff Attorney, 239-0463

Charlotte Horn, Texas Register Coordinator, 239-0779

Attachments

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Ron Ellis
Charlotte Horn