

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: August 16, 2013

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

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

Docket No.: 2012-2484-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 298, Environmental Flow Standards for Surface Water
Environmental Flow Standards 3: Brazos, Nueces, and Rio Grande Basins
Rule Project No. 2013-009-298-OW

Background and reason(s) for the rulemaking:

House Bill 3 and Senate Bill 3 (HB 3/SB 3), 80th Legislature, 2007, 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. The BBASCs also developed a work plan for adaptive management which includes a schedule for review and potential revision of the standards and strategies and submits the work plan to the Advisory Group for approval. 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), §§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 amendment to TWC, §11.1471 and §11.02362, provided for adaptive management and codified a process for revision to the standards if the BBASC's recommended a schedule other than every ten years.

This rulemaking implements TWC, §11.1471(a), through 30 Texas Administrative Code, Chapter 298, by proposing appropriate environmental flow standards for the Brazos, Nueces, and Rio Grande Basins.

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Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The scope of the proposed rulemaking is to implement the directive in TWC, §11.1471 for the river basin and bay systems consisting of the Nueces River and Corpus Christi and Baffin Bays; the Rio Grande, Rio Grande estuary, and Lower Laguna Madre; and the Brazos River and its associated bay and estuary system. The rulemaking will propose appropriate environmental flow standards.

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

TWC, §11.1471(a), states that the commission by rule shall adopt appropriate 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.

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

None.

Statutory authority:

Texas Water Code (TWC), §§5.102, 5.103, 5.105 11.0235, 11.147, 11.1471

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 proposed rulemaking. 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 proposed standards are expected to function similarly to current streamflow restrictions for applications, the proposed standards are not expected to have significant fiscal implications for the regulated community.

B.) Public:

The proposed 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 proposed standards are expected to function similarly to current streamflow restrictions for applications, the proposed standards are not expected to have significant fiscal implications for the public.

C.) Agency programs:

The proposed rulemaking would have little impact on agency programs. The Water Availability Division will implement the rules when processing applications for new appropriations in the affected river basins. Currently, program staff uses a desktop

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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 proposed 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 December 6, 2012, in Austin, Texas. TCEQ staff presented general information about the proposed rulemaking and asked the stakeholders for feedback on the issue of balancing human and other competing needs for water. The meeting was attended by 18 stakeholders representing a broad spectrum of interests in the basins affected by this rulemaking and across the state. The commission received comment letters from stakeholders and their feedback has been considered in development of the proposed rules.

Additionally, the TCEQ will hold a public hearing during the comment period.

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.

Brazos River Basin

A potentially controversial concern in the proposed rulemaking related to the Brazos River Basin is that a minority group of stakeholders submitted a separate recommendation for three upper basin gages.

Nueces River Basin

The stakeholders submitted a consensus recommendation. TCEQ staff is unaware of any potential controversial concerns at this time, although staff notes that the stakeholders found that a portion of the basin is not a sound ecological environment.

Rio Grande Basin

A potentially controversial concern in the proposed rulemaking related to the Rio Grande Basin is that the stakeholders did not submit a recommendation. TCEQ staff is proposing rules based on information in the science team reports and other information within the statutory scope of HB3/SB3.

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

HB 3/SB 3 established a new policy for application of instream flow requirements in applications for new appropriations of state water. This rulemaking proposes to implement that policy and replace existing TCEQ practices for the affected river basins.

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 September 1, 2012. In January 2013, the Environmental Flows Advisory Committee amended the timeline for the environmental flows rulemaking by changing the due date to March 1, 2014. 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.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: September 4, 2013

Anticipated *Texas Register* publication date: September 20, 2013

Anticipated public hearing date (if any): October 15, 2013

Anticipated public comment period: September 20, 2013 - October 21, 2013

Anticipated adoption date: February 12, 2014

Agency contacts:

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Attachments

SB 3, 80th Legislative Session

HB 3, 80th Legislative Session

cc: Chief Clerk, 2 copies
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