CHAPTER 35 - EMERGENCY AND TEMPORARY ORDERS AND PERMITS; TEMPORARY SUSPENSION OR AMENDMENT OF PERMIT CONDITIONS

SUBCHAPTER D: EMERGENCY SUSPENSION OF BENEFICIAL INFLOWS

§35.101
Effective May 15, 2011

§35.101. Emergency Suspension of Permit Conditions Relating to, and Emergency Authority to Make Available Water Set Aside for, Beneficial Inflows to Affected Bays and Estuaries and Instream Uses.

(a) The purpose of this section is to set forth the procedures and criteria to be used by the commission or the executive director in its review and action on an application by a water right holder either for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an emergency, or to make state water temporarily available that is set aside by the commission to meet the needs for freshwater inflows to affected bays and estuaries and instream uses, under Texas Water Code, §5.506 and §11.148. The emergency relief provided by this section shall only be used when the commission or executive director finds that:

(1) emergency conditions exist that present an imminent threat to the public health, safety, and welfare and that:

   (A) override the necessity to comply with general procedures and criteria for changing the conditions in a water right; or

   (B) override the need to maintain the balance between protecting environmental flow needs and other public interests and relevant factors; and

(2) there are no feasible, practicable alternatives to the emergency authorization.

(b) The commission or executive director may approve an application filed by the affected water right holder for 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, or to make state water temporarily available that is set aside by the commission to meet the needs for freshwater inflows to affected bays and estuaries and instream uses, if the commission or executive director finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The burden of demonstrating that the application should be granted in accordance with this section is on the applicant. For purposes of this section, an emergency is a condition where water supplies available to the applicant have been reduced or impaired to such an extent that an imminent peril to the public health, safety, or welfare exists. This condition may include, but not be limited to:
(1) the reduction of public water supplies to critical levels as a result of a severe and sustained drought;

(2) the failure of a dam for a public water supply reservoir;

(3) the significant contamination of a public water supply; or

(4) the failure or destruction of public water supply pipelines or other distribution systems.

(c) The application shall be filed in accordance with and must contain the information required by §35.24 of this title (relating to Application for Emergency or Temporary Order), and the following:

(1) copies of the affected permits, certificates of adjudication, or certified filings;

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

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

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

(5) the amount of water over and above available supplies that is 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 application must be filed by the applicant with the Texas Parks and Wildlife Department (TPWD) at the same time it is filed with the chief clerk.
(e) For applications considered by the commission, upon receipt of the application, the chief clerk shall provide notice of the time and location of the commission's consideration of the application to the TPWD, executive director, and public interest counsel as soon as practicable after receipt of the application, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD. For applications considered by the executive director, upon receipt of the application, the chief clerk shall provide notice of the date of the executive director's consideration to the TPWD and public interest counsel as soon as practicable after receipt of the application, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD.

(f) The TPWD, executive director, and public interest counsel shall be provided an opportunity to submit comments on the application before the commission action. The applicant shall be afforded opportunity to respond to all comments at the time of the commission's or executive director's consideration of the matter.

(g) The commission's or executive director's order shall set out the extent of any suspension, any special condition upon which a suspension is granted, or the amount of any set aside made temporarily available. The commission's initial order may also indicate the referral of the matter to State Office of Administrative Hearings for an expedited hearing under subsection (i) of this section.

(h) Published notice of the initial action, if granted, shall be provided and paid for by the applicant immediately following a favorable commission or executive director initial decision 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 application as provided by subsection (c) of this section and the time and location of the subsequent commission hearing provided by subsection (i) of this section. Such publication shall occur not later than seven calendar days before this 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 applicant shall file with the chief clerk a publisher's affidavit as proof that such notice was published in accordance with this subsection.

(i) If the commission or executive director initially grants an emergency suspension of permit conditions, or a temporary authorization, without a hearing, the commission shall hold the hearing required by §35.25 of this title (relating to Notice and Opportunity for Hearing) as soon as practicable, but in no event later than 15 days after the initial emergency suspension is granted to determine whether to affirm, modify, or
set aside the initial emergency action. Written notice of the hearing shall be provided to the TPWD and affected persons not later than ten days before the hearing.

   (j) An emergency order, or temporary 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. This emergency authorization may be renewed once for not longer than 60 days.

   (k) In determining whether feasible, practicable alternatives exist to the suspension of water right conditions, the commission or executive director shall examine:

   (1) the amount and purposes of use for water currently being used by the applicant;

   (2) all evidence relating to the availability of alternative, supplemental water supplies to the applicant; and

   (3) the applicant’s efforts to curtail water use not essential for the protection of the public health, safety, and welfare.

   (l) If the water right holder has a water conservation plan and/or drought contingency plan, the suspension of water right conditions, or a temporary authorization, may be contingent upon the full implementation of those 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, Drought Contingency Plans, Guidelines and Requirements), the order granting an application under this section shall require the permittee to develop and implement those plans within a prescribed time period as provided in the order.

   (m) In granting an application, 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.
(n) In order to assist in the preparation and planning for water management during an emergency, the commission or executive director 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 (m) of this section for the maintenance of water quality standards. These conditions may also include full implementation by the water right holder of water conservation and drought contingency plans as a precondition for obtaining relief.

(o) If the applicant'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 an application submitted under this section generally will be denied unless the applicant can show new or changed circumstances or an emergency condition not contemplated when the water right condition was issued.

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