

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** September 22, 2022

**DATE OF REQUEST:** September 2, 2022

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Cecelia Mena, Agenda Coordinator, (512) 239-6098

**CAPTION: Docket No. 2022-0629-RUL.** Consideration for publication of, and hearing on, proposed repeal of 30 TAC Chapter 36, Suspension or Adjustment of Water Rights During Drought or Emergency Water Shortage.

The proposed rulemaking would repeal Chapter 36 in its entirety. (Harrison Cole Malley; Rule Project No. 2021-034-036-LS)

Erin Chancellor  
**Director**

Charmaine Backens  
**Division Deputy Director**

Cecilia Mena  
**Agenda Coordinator**

Copy to CCC Secretary? NO  YES

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** September 2, 2022

**Thru:** Laurie Gharis, Chief Clerk  
Toby Baker, Executive Director

**Thru:** Erin E. Chancellor, Director  
Office of Legal Services

**From:** Charmaine Backens, Deputy Director  
Environmental Law Division

**Docket No.:** 2022-0629-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 36, Suspension or Adjustment of Water Rights During Drought or  
Emergency Water Shortage  
Rule Project No. 2021-034-036-LS

**Background and reason(s) for the rulemaking:**

During severe drought in 2013, The Dow Chemical Company (TDCC), as a senior water right holder, made a priority call in the Brazos River Basin. In response to the call, the executive director (ED) issued orders suspending junior water rights. The ED, however, chose to suspend only specific rights, which was allowed under 30 TAC, §36.5(c). Texas Farm Bureau was among those with rights junior to TDCC's that were suspended under the ED's orders; and in response, Texas Farm Bureau, and other individual plaintiffs, filed a lawsuit against the Texas Commission on Environmental Quality (TCEQ or commission) challenging the validity of TCEQ's drought rules found in 30 TAC Chapter 36. The 53rd District Court, Travis County, declared the drought rules invalid. TCEQ appealed; and the 13th Court of Appeals, Corpus Christi, affirmed the District Court's decision. As these rules are no longer valid, 30 TAC Chapter 36 should be repealed. This repeal will also improve the overall organization of TCEQ rules related to the Water Rights Program.

**Scope of the rulemaking:**

**A.) Summary of what the rulemaking would do:**

This rulemaking would repeal 30 TAC Chapter 36 in its entirety.

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

None.

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

None.

**Statutory authority:**

- Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state;
- TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction;
- TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; and

Re: Docket No. 2022-0629-RUL

- TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state.

**Effect on the:**

**A.) Regulated community:** None.

**B.) Public:** None.

**C.) Agency programs:** None.

**Stakeholder meetings:**

No stakeholder meetings were held.

**Potential controversial concerns and legislative interest:**

There is no known controversial concern or legislative interest at this time.

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

No.

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

If 30 TAC Chapter 36 is not repealed, these invalid rules could cause confusion in the public or regulated community regarding the extent of the ED's authority in times of drought.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** September 22, 2022

**Anticipated *Texas Register* publication date:** October 7, 2022

**Anticipated public hearing date:** November 10, 2022

**Anticipated public comment period:** October 7, 2022 - November 10, 2022

**Anticipated adoption date:** March 2, 2023

**Agency contacts:**

Cole Malley, Rule Project Manager, Environmental Law Division, (512) 239-1439

Cecilia Mena, Texas Register Rule/Agenda Coordinator, (512) 239-6098

**Attachments:**

None.

cc: Chief Clerk, 2 copies  
Office of the Executive Director  
Jim Rizk  
Morgan Johnson  
Krista Kyle  
Office of General Counsel  
Harrison Cole Malley  
Cecilia Mena

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the repeal of 30 Texas Administrative Code (TAC) Chapter 36, §§36.1 - 36.8.

### **Background and Summary of the Factual Basis for the Proposed Rules**

During severe drought in 2013, The Dow Chemical Company (TDCC), as a senior water right holder, made a priority call in the Brazos River Basin. In response to the call, the executive director (ED) issued orders suspending junior water rights. The ED, however, chose to suspend only specific rights, which he was allowed to do under 30 TAC §36.5(c). Texas Farm Bureau was among those with rights junior to TDCC's that were suspended under the ED's orders; and in response, Texas Farm Bureau, and other individual plaintiffs, filed a lawsuit against the TCEQ challenging the validity of TCEQ's drought rules found in 30 TAC Chapter 36. The 53rd District Court, Travis County, declared the drought rules invalid. TCEQ appealed; and the 13th Court of Appeals, Corpus Christi, affirmed the District Court's decision. As these rules are no longer valid, 30 TAC Chapter 36 should be repealed. This repeal will also improve the overall organization of TCEQ rules related to the Water Rights Program.

### **Section by Section Discussion**

This rulemaking would repeal 30 TAC Chapter 36 in its entirety.

### **Fiscal Note: Costs to State and Local Government**

Jené Bearse, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed repeals are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed repeal.

### **Public Benefits and Costs**

Ms. Bearse determined that for each year of the first five years the proposed repeal is in effect, the public benefit anticipated will be compliance with the ruling of the 53rd District Court, Travis County, affirmed by the 13th Court of Appeals, Corpus Christi, which repealed drought rules found in the 30 TAC Chapter 36. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

### **Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed repeal is in effect.

### **Rural Communities Impact Assessment**

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed repeal is in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed repeal for the first five-year period the proposed repeal is in effect.

### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business

Regulatory Flexibility Analysis is not required because the proposed repeal does not adversely affect a small or micro-business in a material way for the first five years the proposed repeal is in effect.

### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, or require an increase or decrease in fees paid to the agency. The proposed rulemaking repeals an existing regulation; however, the proposed rulemaking does not increase or decrease the number of individuals subject to its applicability because the rules were previously ruled invalid by a court. During the first five years, the proposed repeal should not impact positively or negatively the state's economy.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225. Texas Government Code, §2001.0225 applies to a "Major environmental rule," which is defined in Texas Government Code, §2001.0225(g)(3) as a rule with a specific intent "to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state."

First, the proposed rulemaking does not meet the statutory definition of a “Major environmental rule” because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The purpose of this rulemaking is to repeal 30 TAC Chapter 36 in its entirety because the chapter was declared void in a lawsuit challenging the validity of the rules.

Second, the proposed rulemaking does not meet the statutory definition of a “Major environmental rule” because the proposed repeal would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the proposed repeal will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed repeal will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Finally, the proposed rulemaking does not meet any of the four applicability requirements for a “Major environmental rule” listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This proposed rulemaking does not meet any of the four preceding applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for the regulation of water rights; 2) does not exceed any express requirements of

state law related to the regulation of water rights; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) is not proposed solely under the general powers of the agency as the commission adopts the rulemaking action under Texas Water Code, §§5.013, 5.102, 5.103, 5.105, and 5.120. Therefore, the commission does not adopt this rulemaking action solely under the commission's general powers.

Since this proposed rulemaking does not meet the statutory definition of a “Major environmental rule” and does not meet any of the four applicability requirements for a “Major environmental rule,” this rulemaking is not subject to Texas Government Code, §2001.0225.

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated this rulemaking and performed an analysis of whether the proposed repeal would constitute a taking. Texas Government Code, §2007.002(5), defines a taking as either: 1) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Sections 17 or 19, Article I, Texas Constitution; or 2) a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that



restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The commission determined that the proposed repeal would not constitute a taking as that term is defined under Texas Government Code, §2007.002(5). Specifically, the proposed repeal would not affect any landowner's rights in private real property, and there are no burdens that would be imposed on private real property by the proposed repeal; the proposed repeal is solely procedural and does not impact real property.

#### **Consistency with the Coastal Management Program**

The commission reviewed the proposed repeal and found that it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed repeal is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking with the Texas Coastal Management Program may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### **Announcement of Hearing**

The commission will hold a hybrid virtual and in-person public hearing on this proposal in Austin on November 10, at 10:00 a.m. in Building E, Room 201S, at the commission's central

office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by November 8, 2022. To register for the hearing, please email [Rules@tceq.texas.gov](mailto:Rules@tceq.texas.gov) and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on November 9, 2022, to those who register for the hearing.

Persons who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

[https://teams.microsoft.com/l/meetup-join/19%3ameeting\\_YzIzYzdiMmEtZTJhMy00YTY5LThjYjUtNjBkY2E3MDc0Mjhhk%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3a%22true%7d](https://teams.microsoft.com/l/meetup-join/19%3ameeting_YzIzYzdiMmEtZTJhMy00YTY5LThjYjUtNjBkY2E3MDc0Mjhhk%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3a%22true%7d)

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Cecilia Mena, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. Electronic comments may be submitted at:

*<https://www6.tceq.texas.gov/rules/ecomments/>*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2021-034-036-LS. The comment period closes on November 10, 2022. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at *[https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html)*. For further information, please contact Harrison Cole Malley, Environmental Law Division, at (512) 239-1439.

**§§36.1 – 36.8**

**Statutory Authority**

Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state, including water rights; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; and TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state.

No other statutes, articles, or codes are affected by the proposal.

**[§36.1. Applicability.]**

[(a) Except as otherwise provided by this section, this chapter applies to water rights in the state.]

[(b) This chapter does not apply to any water rights in a watermaster area created in or under Texas Water Code, Chapter 11.]

[(c) This chapter does not apply to a water user that is exempt from permitting under Texas Water Code, §§11.142(b) - 11.1422.]

**[§36.2. Definitions.]**

[The following words or terms, as used in this chapter, shall have the following meaning, and these definitions do not apply to any other chapter of this title or in any context other than this chapter:]

[ (1) Adjustment--The partial curtailment of one or more water rights, or a modification to the timing or rates of diversion under one or more water rights.]

[ (2) Affected water right holder--Those water right holders that are affected by the executive director's Suspension or Adjustment Order.]

[ (3) Drought--A drought occurs when at least one of the following criteria are met:]

[ (A) drought conditions in the watershed or the part of the watershed subject to the executive director's Suspension or Adjustment Order are classified as at least moderate by the National Drought Mitigation Center;]

[ (B) streamflows at United States Geological Survey gaging stations in the drainage area are below the 33rd percentile of the period of record available for the impacted watershed; or]

[(C) below normal precipitation in the watershed or part of the watershed subject to the Executive Director's Order, for the preceding three-month period, as reported in the Texas Climatic Bulletin (Office of the Texas State Climatologist), a senior call is made, and the demand for surface water exceeds the available supply as evidenced by a senior water right holder making a senior call.]

[(4) Emergency Shortage of Water--The inability of a senior water right holder to take surface water under its water right during:]

[(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.]

[(5) Senior water right--A water right that has a priority date that is earlier than another water right holder, or a superior right under Texas Water Code, §11.001(a) and common law and §11.142(a).]

[(6) Suspension or Adjustment Order, or Order--An order issued by the executive director to suspend or adjust water rights under this chapter. The order may be in the form of a letter signed by the executive director or the executive director's designee.]

[(7) Suspension--The complete curtailment of either the entire water right or the right to use water for a certain type of use or based on a certain priority date in the water rights.]

[(8) Water right--A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water. This term includes water users for purposes that are superior or exempt from permitting under Texas Water Code, §11.001(a) and common law and §11.142(a), but only to the extent that such a water right may be benefitted by a Suspension or Adjustment Order issued under this chapter. The term includes holders of the water rights where the context requires.]

**[§36.3. Executive Director Action.]**

[(a) During a period of drought or other emergency shortage of water, the executive director may, in accordance with the priority doctrine in Texas Water Code, §11.027:]

[(1) temporarily adjust the diversion of water by water right holders; and]

[(2) temporarily suspend the right of any person who holds a water right to use the water.]

[(b) The temporary suspensions or adjustments must be made on water rights in the smallest area practicable that is necessary to allow the senior water right holder to obtain water.]

**[§36.4. Suspension or Adjustment Order. ]**

[The executive director's temporary suspension or adjustment under §36.3 of this title (relating to Executive Director Action) must be made by a Suspension or Adjustment Order, as defined in §36.2(6) of this title (relating to Definitions).]

**[§36.5. Conditions for Issuance of Suspension or Adjustment Order. ]**

[(a) The executive director may issue a Suspension or Adjustment Order or modify or extend an existing order under §36.4 of this title (relating to Suspension or Adjustment Order) if the following conditions have been met:]

[(1) at the time of issuance of the order, all or part of the river basin is in a drought, or an emergency shortage of water exists;]

[(2) senior water rights are unable to divert the water they need or store inflows that are authorized under a water right;]

[(3) one or more senior water right holders who will benefit from the order can beneficially use, as defined in Texas Water Code, §11.002(4), the water they will be able to divert or use under the order; and]

[(4) suspending or adjusting junior water rights would result in conditions under which the senior water right holder may divert water or impound inflows under its water right for a beneficial use.]



[(b) The executive director shall ensure that the order:]

[(1) maximizes the beneficial use of water;]

[(2) minimizes the impact on water rights holders;]

[(3) prevents the waste of water;]

[(4) considers the efforts of the affected water right holders to develop and implement the water conservation plans and drought contingency plans required by Texas Water Code, Chapter 11;]

[(5) to the greatest extent practicable, conforms to the order of preferences established by Texas Water Code, §11.024; and]

[(6) does not require the release of water that, at the time the order is issued, is lawfully stored in a reservoir under water rights associated with that reservoir.]

[(c) The executive director may determine not to suspend a junior water right based on public health, safety, and welfare concerns. If the executive director decides not to suspend a junior water right based on public health, safety, and welfare concerns, the executive director may:]

[(1) require that the junior water right holder provide to the executive director, within 14 days of the issuance of the executive director's order, information demonstrating that it has made reasonable efforts to obtain alternative water sources;]

[(2) require that the junior water right holder demonstrate to the maximum extent practicable that reasonable efforts have been made to conserve water by providing its water use data to the executive director every 14 days. The water use data shall indicate the amount of and place of use of the water used by the water right holder on a daily basis and be sufficient to provide a historical context for the water right holder's use of surface water; and]

[(3) require that the junior water right holder provide information on what it has done to identify long-term additional or alternative water sources within 30 days of the issuance of the executive director's order.]

[(d) If the executive director decides to require the information in subsection (c)(1) - (3) of this section, and the junior water right holder does not provide the information by the applicable deadline, or the executive director finds that the information provided does not demonstrate reasonable efforts to comply to the maximum extent practicable with subsection (c)(1), (2), or (3) of this section, the executive director may use existing regulatory authority to ensure the junior water right holder's efforts to secure alternative sources of water and conserve water, including, but not limited to, adjusting the diversion rate downward or ordering a full suspension.]

**[§36.6. Contents of a Suspension or Adjustment Order.]**

[A Suspension or Adjustment Order issued under §36.4 of this title (relating to Suspension or Adjustment Order) must contain:]

[(1) the specific water rights subject to the order, and the location, including the river basin and county, of the suspension or adjustment;]

[(2) an explanation of the reasons for the suspension or adjustment; and]

[(3) the duration of the suspension or adjustment.]

[(A) The duration of a Suspension or Adjustment Order may not be longer than 180 days.]

[(B) A Suspension or Adjustment Order may be extended once for up to 90 days.]

[(C) A Suspension or Adjustment Order may be modified by the executive director based on changed conditions and the requirements of this chapter.]

**[§36.7. Implementation of Water Conservation Plans and Drought Contingency Plans.]**

[(a) The efforts of affected water right holders to develop and implement water conservation plans and drought contingency plans that the executive director will consider when deciding whether to issue an order under §36.4 of this title (relating to Suspension or Adjustment Order) include but are not limited to:]

[(1) the water right holders' compliance with commission regulations in Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements) and approval of the plans by the commission and Texas Water Development Board; and]

[(2) the water right holders' implementation and enforcement of the plans.]

[(b) If the executive director decides not to suspend or adjust a junior water right based on public welfare concerns, the executive director may require the implementation of water conservation plans and drought contingency plans at more restrictive levels than required by the junior water right's water conservation and drought contingency plans at the time of issuance of the order.]

**[§36.8. Notice of and Opportunity for Hearing on the Issuance of a Suspension or Adjustment Order.]**

[(a) An order under this chapter may be issued by the executive director without notice and an opportunity for hearing.]

[(b) If an order is issued under this chapter without notice or a hearing, the order shall set a time and place for a hearing before the commission to affirm, modify, or set aside the order to be held as soon as practicable after the order is issued by the executive director, but not more than 45 days after the order is issued. Notice of this hearing shall be at least ten days prior to the hearing.]

[(c) Notice of the hearing at which the commission determines whether to affirm, modify or set aside the Suspension or Adjustment Order is not subject to the requirements of Texas Water Code, §11.132, but notice shall be given to all holders of water rights that were suspended adjusted under the order.]