

Issue 2: Authority to Protect Public Health, Safety, and Welfare During Droughts and Emergency Water Shortages

A. Brief Description of Issue

TCEQ administers water rights in accordance with the prior appropriation doctrine which essentially provides that earlier water rights must be satisfied before later water rights. During times of drought, TCEQ may need to suspend junior water rights to enforce a priority call to protect senior water rights. Junior water right owners can include municipal users and power generation users. As discussed below, the courts have ruled that TCEQ does not have authority to exempt junior water rights from a priority call even if the exemption is needed to protect public health, safety, or welfare.

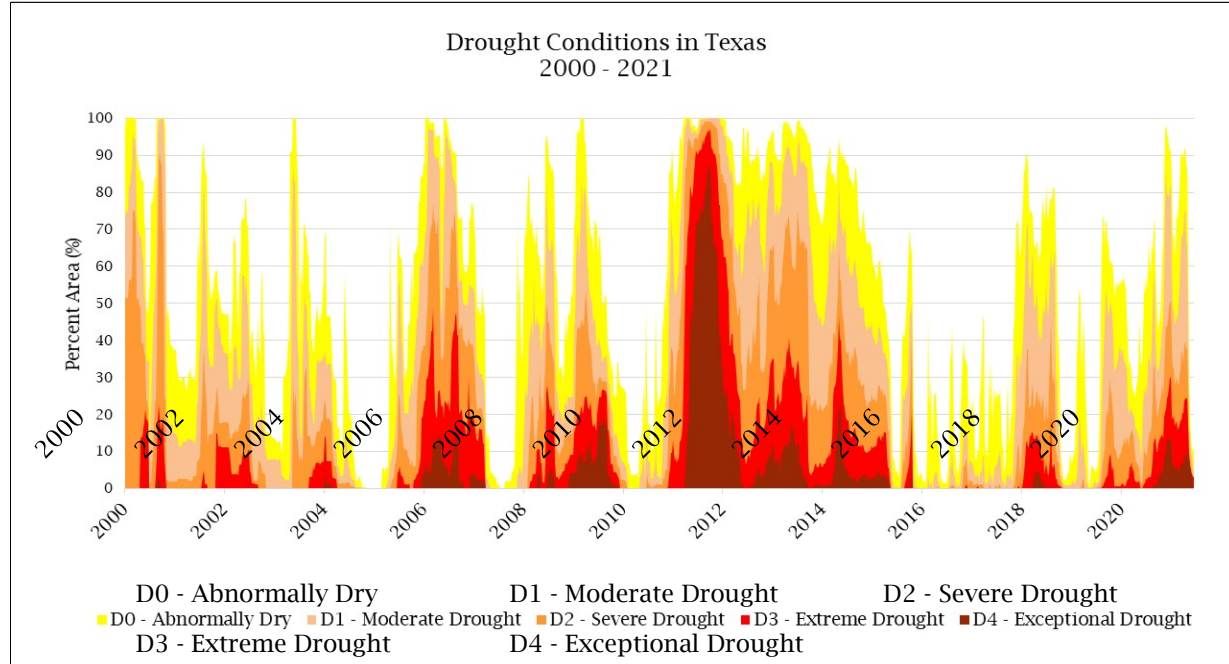
B. Discussion

In 2011, the 82nd Legislature passed House Bill (HB) 2694 relating to changes to TCEQ's statutory authority and continuation of the agency for 12 years. HB 2694 added Section 11.053 to the Texas Water Code (TWC), which states that the executive director may issue orders to temporarily suspend or adjust water rights during times of drought or other emergency shortage of water, and required TCEQ to adopt rules. TCEQ adopted rules implementing the statute, which were effective May 3, 2012.

If a senior water right holder or a domestic and livestock user is not receiving the water they are entitled to, they can make a priority call to TCEQ. TCEQ responded to 32 priority calls between 2009 and 2018. Many of the priority calls resulted in complete suspension or partial curtailment of junior water rights, however, not every priority call resulted in suspension or curtailment of water rights. For priority calls received prior to the court ruling that TCEQ may not exempt junior water rights, junior water rights for municipal or power generation uses were either not suspended or were only partially curtailed to protect the public health, safety and welfare. The priority calls after the court ruling have thus far not required TCEQ to suspend or curtail any junior municipal or power generation uses based on the circumstances; however, that may change for future priority calls made under different circumstances.

Weather patterns and demand on water supplies vary across the state. Recurring drought conditions create a high probability that TCEQ will need to respond to priority calls in the future. At any given time, all or a portion of the state can be in some level of drought condition as shown in the following chart.

Drought Conditions in Texas From 2000 to 2021



The court's ruling in *Tex. Comm'n on Environmental Quality v. Tex. Farm Bureau*, 460 S.W.3d 264 (Tex. App. – Corpus Christi 2015) (rev. denied 2016) invalidated TCEQ's rules implementing Section 11.053. The courts ruled that:

- TCEQ exceeded its statutory authority because the rules allow exemption of preferred uses from a curtailment or suspension order, and such exemptions are not in accordance with the priority of water rights established by TWC Section 11.027.
- Exemption of junior water rights from a priority call and curtailment or suspension order is not authorized under TCEQ's police powers or any general authority to protect the public health, safety, or welfare.

Some communities and power generation users that rely on surface water do not have alternate sources of water to support their uses when surface water is not available. As a result, TCEQ's ability to protect drinking water supplies and ensure adequate power generation during a priority call is severely compromised as follows:

- TCEQ will not be able to manage a response to a senior call in a manner that takes into account concerns about public health, safety, or welfare because TCEQ will not be able to exempt municipal uses or power generation if they have a junior priority date.
- Suspended or curtailed water right holders that lack sufficient alternative sources of water will have to purchase water from a supplier; apply for an emergency permit under TWC Section 11.139(a) if unappropriated water is available; or apply for an emergency transfer of a water right under TWC Section 11.139(h). An emergency transfer of a water right requires the payment of fair market value of the water transferred and payment of any damages caused by the transfer.

C. Possible Solutions and Impact

A statutory change could provide TCEQ the authority to protect public health, safety, and welfare during droughts or emergency shortages of water. This authority would enable TCEQ to consider impacts that the suspension or partial curtailment of junior water rights would have on municipal or power generation uses that have no feasible or practical alternatives to augment their surface water supply. While TWC Section 11.139 provides a process for relief from emergency conditions through TCEQ approval of an emergency water right authorization or an emergency transfer of a water right, there are locations around the state where the relief contemplated under that section would not provide available water for a suspended or partially curtailed junior municipal or power generation user due to insufficient unappropriated water available. In addition, an emergency transfer of a water right for public health and safety purposes under TWC Section 11.139(h) may only be granted to a retail or wholesale water supplier. Further, there are locations where there are no practicable alternative sources of water for these junior water right holders. A change to the statute could allow TCEQ to protect municipal drinking water supplies and ensure adequate power generation for the duration of a drought in instances of an imminent threat to the public health, safety, or welfare.