

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

Repealed §§36.1 – 36.8 are adopted *without changes* to the proposed text as published in the October 7, 2022, issue of the *Texas Register* (47 TexReg 6559), and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted 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). Members of the Texas Farm Bureau were 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 As these rules are no longer valid, 30 TAC Chapter 36 is repealed. This repeal will also improve the overall organization of TCEQ rules related to the Water Rights Program.

Section by Section Discussion

This rulemaking adoption repeals 30 TAC Chapter 36 in its entirety.

Final Regulatory Impact Analysis

The commission reviewed the rulemaking adoption 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 rulemaking adoption 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 rulemaking adoption does not meet the statutory definition of a “Major environmental rule” because the adoption 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 adoption will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the repeal will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Finally, the rulemaking adoption 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 rulemaking adoption 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 adopted 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 rulemaking adoption 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 invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received.

Takings Impact Assessment

The commission evaluated this rulemaking and performed an analysis of whether the adopted 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 adopted repeal would not constitute a taking as that term is defined under Texas Government Code, §2007.002(5). Specifically, the adopted 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 adopted repeal; the adopted repeal is solely procedural and does not impact real property.

Consistency with the Coastal Management Program

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

The commission invited public comment regarding the consistency with the coastal

management program during the public comment period. No comments were received.

Public Comment

The commission offered a public hearing on November 10, 2022. The comment period closed on November 10, 2022. One comment was received.

Response to Comments

An individual expressed appreciation for the work of TCEQ’s water rights staff. The commenter stated they understood the need to repeal the current rules; however, the commenter indicated that stakeholders had questions about TCEQ’s next steps once the rules are repealed since the Chapter 36 rules are the only rules that implement TWC, Section 11.053. The commenter noted that TWC, Section 11.053(c) requires the TCEQ to adopt rules to implement that section and indicated that stakeholders would be interested in working with TCEQ staff after the current legislative session on any potential future rulemaking.

Response

The Commission appreciates the comment. Public participation is an integral part of the rulemaking process and the Commission encourages interested stakeholders to participate in any future rulemakings that could be initiated after the current Chapter 36 rules are repealed.

§§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 adoption.

[§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.]