

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** February 17, 2023

Thru: Laurie Gharis, Chief Clerk
Erin E. Chancellor, Interim Executive Director

From: Charmaine Backens, Acting Director
Office of Legal Services

Docket No.: 2022-0629-RUL

Subject: Commission Approval for Rulemaking Adoption
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 Texas Administrative Code (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 As these rules are no longer valid, 30 TAC Chapter 36 is repealed. This repeal also improves the overall organization of TCEQ rules related to the Water Rights Program.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

This rulemaking repeals 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
- 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.

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Effect on the:

A.) Regulated community:
None.

B.) Public:
None.

C.) Agency programs:
None.

Stakeholder meetings:
No stakeholder meetings were held.

Public Involvement Plan
None.

Alternative Language Requirements
None.

Public comment:
The commission offered a public hearing on November 10, 2022. The comment period closed on November 10, 2022. One public comment was received from Brian Sledge. Mr. Sledge stated he represents water rights holders who are concerned with what the Commission will do in future droughts once these rules have been repealed and he asked how the Commission will comply with TWC, §11.053 after Chapter 36 is repealed.

Significant changes from proposal:
None

Potential controversial concerns and legislative interest:
There is no known controversial concern or legislative interest at this time.

Will 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 adoption rulemaking schedule:
Texas Register proposal publication date: October 7, 2022
Anticipated *Texas Register* adoption publication date: March 24, 2023
Anticipated effective date: April 1, 2023
Six-month *Texas Register* filing deadline: April 7, 2023

Agency contacts:
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Attachments:
None

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