

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 As these rules are no longer valid, 30 TAC Chapter 36 should be repealed.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

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- 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
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