

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** October 15, 2010

Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

Docket No.: 2007-0999-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 35, Emergency and Temporary Orders and Permits; Temporary
Suspension or Amendment of Permit Conditions
Chapter 298, Environmental Flow Standards for Surface Water
HB 3/SB 3: Environmental Flow Standards
Rule Project No. 2007-049-298-OW

Background and reason(s) for the rulemaking:

House Bill 3 and Senate Bill 3 (HB 3/SB 3), 80th Legislature, 2007, Regular Session, created the environmental flows process and established the Environmental Flows Advisory Group (Advisory Group) to oversee its implementation. HB 3/SB 3 also established the Environmental Flows Science Advisory Committee, local bay and basin area stakeholder committees (BBASC), and local bay and basin expert science teams (BBEST). A BBEST develops environmental flow analyses and recommends an environmental flow regime, based solely on the best science available, to their basin's BBASC. A BBASC, while considering the BBEST's recommendations and other factors, develops recommendations regarding environmental flow standards and strategies to meet the environmental flow standards and submits those recommendations to the Advisory Group and to the commission for rulemaking. HB 3 was authored by Representative Robert Puente and Representative Harvey Hilderbran. SB 3 was authored by Senator Kip Averitt.

Article 1, HB 3 and Article 1, SB 3 amended Texas Water Code (TWC), §§5.506, 11.002, 11.023, 11.0235, 11.0841, 11.134, 11.147, 11.1471, 11.148, and 11.1491. HB 3/SB 3 added TWC, §§11.0236, 11.02361, 11.02362, 11.0237, and 15.4063. These HB 3/SB 3 amendments to the TWC codified the environmental flows process and its implementation. The amendment to TWC, §11.1471 specifically instructed the commission to adopt environmental flow standards by rule. The amendments to TWC, §5.506 and §11.148 make water set aside for beneficial inflows to affected bays and estuaries and instream uses available during emergency conditions.

This rulemaking implements TWC, §11.1471(a), through new 30 Texas Administrative Code (TAC) Chapter 298, by proposing appropriate environmental flow standards for the river and bay systems consisting of the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay, and establishing procedures for implementing an adjustment of conditions if included in a permit or amended water right in those river and bay systems.

The rulemaking implements changes to TWC, §5.506 and §11.148 by amending 30 TAC Chapter 35, to add emergency authority to temporarily make water set aside for beneficial inflows to affected bays and estuaries and instream uses available during emergency conditions.

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Scope of the proposed rulemaking:

A) Summary of what the rulemaking will do:

The scope of the proposed rulemaking is to implement the directive in TWC, §11.1471 for the two river basin and bay systems consisting of the Sabine and Neches Rivers and Sabine Lake Bay, and the Trinity and San Jacinto Rivers and Galveston Bay. The rulemaking will propose appropriate environmental flow standards and establish procedures for implementing an adjustment of conditions if included in permits and amended water rights for those river and bay systems.

The rulemaking also implements changes to TWC, §5.506 and §11.148 by amending §35.101, to add emergency authority to temporarily make water set aside for beneficial inflows to affected bays and estuaries and instream uses available during emergency conditions.

B) Scope required by federal regulations or state statutes:

TWC, §11.1471(a) states that the commission by rule shall adopt appropriate environmental flow standards for each river basin in the state; establish an amount of unappropriated water, if available, to be set aside to satisfy environmental flow standards; and establish procedures for implementing an adjustment of conditions included in a permit or amended water right.

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

Staff's proposed amendments to Chapter 35, Subchapter D, are not required by federal rule or state statute, but are being proposed to strictly reflect changes to TWC, §5.506 and §11.148.

Statutory authority:

TWC, §§5.506, 11.002, 11.023, 11.0235, 11.0236, 11.02361, 11.02362, 11.0237, 11.0841, 11.134, 11.147, 11.1471, 11.148, 11.1491, and 15.4063.

Effect on the:

A) Regulated community:

Members of the regulated community who apply for a new appropriation of state water will be affected by the environmental flow standard recommended by this proposed rulemaking. An application for a new appropriation of state water will be recommended for issuance only if there is water available after the environmental flow standard has been met. The result will be that there could be less state water available for appropriation. However, because the proposed standards are expected to function similarly to current stream-flow restrictions for applications, the proposed standards are not expected to have significant fiscal implications for the regulated community.

B) Public:

The proposed rules may affect applicants for new appropriations and amendments that increase the amount of water to be taken, stored, or diverted which could result in an applicant having to secure an additional source of water. However, because stream-flow restrictions are currently applied to new appropriations of water under existing practice and the proposed standards are expected to function similarly to current stream-flow restrictions for applications, the proposed standards are not expected to have significant fiscal implications for the public.

C) Agency programs:

The proposed rulemaking would have little impact on agency programs. The Water Supply Division will implement the rule when processing applications for new appropriations in the

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affected river basins. Currently, program staff uses a desktop methodology to determine instream flow requirements. Assigning a flow requirement by rule will have little or no impact on processing times or workloads. The impact on the Office of Compliance and Enforcement will likewise be insignificant. Presently, enforceable instream flow requirements are placed in water use permits. After the proposed rulemaking is effective, those flow requirements will come from a different source (the adopted rule), but will not be enforced any differently by the Office of Compliance and Enforcement.

Stakeholder meetings:

A stakeholder meeting was held on August 12, 2010 in Austin, Texas. TCEQ staff presented a general approach to the proposed rulemaking and asked the stakeholders for feedback on some key issues. The meeting was attended by 44 stakeholders representing a broad spectrum of interests in the basins affected by this rulemaking and across the state. Twenty-one comment letters were received from stakeholders and their feedback has been considered in development of the proposed rules. Additionally, the TCEQ will hold a public rule hearing during the comment period.

Potential controversial concerns and legislative interest:

HB 3/SB 3 has legislative interest. The Advisory Group consists of nine members, appointed by the Governor, Lieutenant Governor, and Speaker of the House of Representatives. Six of those members are legislators, including the chairs of the Senate and House Natural Resource Committees.

The TCEQ is undergoing Sunset Review, and two members of the Sunset Commission, Senator Glenn Hegar, Jr. (Chair), and Senator Joan Huffman, also serve on the Advisory Group.

Sabine and Neches Rivers and Sabine Lake Bay:

A potential controversial concern in the proposed rulemaking related to the Sabine and Neches Rivers and Sabine Lake Bay lies in the fact that the BBASC's adopted recommendation did not include environmental flow standards or environmental flow set asides. The basin's BBASC recommended that more time be taken to gather more information to determine the amount of water needed to support a sound environment. Members of the BBASC, as required by statute, represent the diverse interests of industry, agriculture, municipalities, river authorities, environmental groups, and others.

Trinity and San Jacinto Rivers and Galveston Bay:

A potential controversial concern related to the proposed rulemaking lies in the fact that neither the Trinity and San Jacinto Rivers and Galveston Bay BBASC or BBEST reached consensus regarding their recommendations.

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

HB 3/SB 3 established a new policy for application of instream flow requirements in applications for new appropriations of state water. This rulemaking proposes to implement that policy and replace existing TCEQ practices for the affected river basins.

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

TWC, §11.1471 directs the commission to adopt a rule by June 1, 2011. This rulemaking complies with the statute and keeps the environmental flows process on schedule. Any alternative course of action would not be in compliance with the timetables established by HB 3/SB 3, as amended by the Advisory Group.

The proposed rule amendment that reflects changes to TWC, §5.506 and §11.148 is not mandated by statute. However, if this portion of the rulemaking does not go forward, the existing §35.101, would not be consistent with TWC, §5.506 and §11.148. An alternative is the commission may take emergency action under the statutes.

Key dates in the proposed rulemaking schedule:

Anticipated proposal date: November 3, 2010
Anticipated *Texas Register* publication date: November 19, 2010
Public hearing date: December 16, 2010
Public comment period: November 19, 2010 through December 20, 2010
Anticipated adoption date: April 20, 2011
Deadline for adoption: June 1, 2011 (*as amended by the Advisory Group*)

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Attachments

Article 1, HB 3
Article 1, SB 3

cc: Chief Clerk, 2 copies
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