The TCEQ Drought Rule Caused Confusion When Used on the Brazos River and That is Just the Start

Jeremy Brown February 8, 2013

On Wednesday, the Texas House and Senate Committees on Natural Resources held a joint hearing on water issues. The hearing included testimony from a climatologist, the mayor of Abilene, and representatives from the State Water Development Board and Texas Commission on Environmental Quality (TCEQ).

The TCEQ presentation cycled through the agency's ongoing drought efforts. But lawmakers focused their questions on the new drought curtailment rule that the agency recently invoked for the first time when it suspended certain junior water rights on the Brazos River. The lawmakers seemed understandably befuddled by the rule.

At the heart of the rule is a significant inconsistency. The rule requires the TCEQ to adhere to the established priority of water appropriations even while departing from that priority to account for health and safety concerns. Which begs the question: does the rule – yes or no – follow the first in time, first in right principle of priority?

At the time TCEQ promulgated the rule, numerous water rights holders submitted comments presenting more or less this question. TCEQ responded only by repeating that same line of illogic about the rule both respecting and not respecting priority.

At the joint hearing, lawmakers pushed for clarity. They asked, for instance, if a curtailment order would apply to a junior rights holder that uses its appropriation non-consumptively and returns all water to the stream. And they hinted that TCEQ had effectively appointed itself watermaster over state waters not already under the watch of actual watermasters.

On inspection, the drought curtailment rule is indeed a doozy. Its open-ended language raises many issues, of which priority is only the most obvious, and could arguably give TCEQ sweeping new authority over Texas water. A few of the more potentially problematic issues are highlighted below. All section references are to the Texas Administrative Code.

Drought and Emergency Shortage: The rule allows TCEQ to impose a curtailment order during a "drought" or "emergency shortage." It defines both terms in ways that would cause a basin to be in a "drought" or "emergency shortage" frequently and in circumstances when actual conditions were not particularly severe. These definitions give TCEQ the authority to take the relatively drastic action of disrupting water rights even when conditions do not warrant it. In fact, TCEQ has said that an advantage the drought curtailment rule offers over an older rule that authorized the agency to mandate compensated water transfers during emergencies is that this new rule can be applied in less severe situations.

Priority Call: TCEQ issued the Brazos order after a senior appropriator made a priority call. At the joint hearing, the curtailment rule was discussed in the context of the Brazos and emphasis was placed on the priority call. But there may not have to be a priority call. The rule allows the TCEQ executive director to issue an order "during a period of drought or other emergency shortage of water." Under the definitions, a drought is in effect if at least one of three criteria is met; two of those criteria exist independently of the rights of a senior appropriator. Likewise, Section 36.5(a) empowers the executive director to issue or modify an order if "at the time of issuance of the order, all or part of the river basin is in drought, or an emergency shortage of water exists." That section presents other conditions centered on senior appropriator rights as alternative triggering conditions. (TCEQ has said that "the executive director order will most likely be initiated by a senior call." Put another way, the executive director could always institute an order for another reason.)

A slight wrinkle in this interpretation is that Section 36.3 requires that "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." This provision implies that the inability of the senior appropriator to obtain water must be a precondition to an order, regardless of whether the drought criteria have been met. That may be so, but the rule does not require that the same senior appropriator make a priority call. Instead, it leaves open the possibility that TCEQ could, on its own initiative, even absent a priority call, determine that an appropriation is not being satisfied and a curtailment order is needed.

Discretion: The drought rule invests enormous discretion in the executive director. Consider what may be the two most attention-getting provisions in the rule. Section 36.5(b)(5), lifting language from the statute that authorizes the rule, requires the executive director to ensure an order, "to the greatest extent practicable, conforms to the order of preferences established by Texas Water Code § 11.024." As the UT Law Grid has discussed before, that section sets out preferences TCEQ is to consider when choosing from among competing applications for water appropriations. How those preferences are to be reconciled with the rule – and what "the greatest extent practicable" means, when the preferences are often in direct conflict with the priority system – is left to the executive director.

Similarly, under Section 36.5(c), "the executive director may determine not to suspend a junior water right based on public health, safety, and welfare concerns." The rule does not define the term "public health, safety, and welfare concerns." It instead imparts the executive director with free-ranging authority to define and identify those concerns and to selectively shield junior appropriators from curtailment orders. And of course, what constitutes a "concern" is generally in the eye of the beholder.

In its comments on a proposed version of the regulations, the Trinity River Authority urged the TCEQ to clarify that preferred junior municipal appropriators cannot use suspended water for inessential purposes like athletic fields and golf courses. In response, TCEQ said: "For junior rights that are not cut off because they are for municipal or power generation use, the commission will look at the implementation of water conservation plans and drought contingency plans to consider whether these municipalities are using municipal water for public health and welfare purposes such as drinking water." This non-commitment leaves TCEQ with plenty of room to stretch subjective notions of what a legitimate concern is.

Equity: Reallocating water to preferred junior appropriators from more senior appropriators without compensation could amount to an unconstitutional taking. Additionally, it raises questions about equity. Water has characteristics of a public and private good. On one hand, there is a sense that all people – even all communities – are entitled to a certain amount of water. Water belongs ultimately to the state and its impounded and conveyed through infrastructure that is often paid for with taxpayer (in addition to ratepayer) funds. On the other hand, water is a commodity, and appropriators have vested ownership interests. No matter how artfully designed, water policies will implicate these interests and shift burdens and benefits.

The drought rule does little to balance competing interests. It channels benefits toward preferred appropriators, with little process and generally according to the discretion of the TCEQ executive director. In defending the rule, the TCEQ has framed its purpose as being to help cities; but in the rulemaking process, only three municipal interests – the City of Waco, Dallas Water Utilities and West Central Texas Municipal Water District – submitted comments. Instead, the rule attracted much more interest among energy generators. Generators use enormous amounts of water and were, along with municipal interests, exempted from the Brazos curtailment order. For all the emphasis on drinking water, generators may be the greatest beneficiaries of the rule.

More glaringly, the rule may have a somewhat arbitrary impact on industry. It allows the executive director to suspend junior industrial appropriators but to exempt municipal appropriators who may, in turn, sell water to industrial customers. An industrial facility that holds even a relatively senior appropriation to divert directly may be worse off than another facility that uses just as much water but that receives its water from a relatively junior municipal appropriator. During the rulemaking process, the Trinity River Authority raised this concern. The TCEQ response did not provide much reassurance: "The commission will follow the prior appropriation doctrine and will consider whether suspension of junior water rights presents a public health and welfare concern."

Geographical Scope: The executive director has broad authority to determine the territorial reach of an order. His only constraint, under Section 36.3, is that "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." The rule does not set parameters for determining the "smallest area practicable." If the Brazos order is any guide, that area may be smaller than an entire basin but longer than 400 miles.

Process/Notice: In creating the rule, the TCEQ resisted requests to incorporate greater process. It instead claimed that it needed the flexibility to respond promptly to drought conditions and to priority calls. At the joint hearing Wednesday, the TCEQ explained that in 2011 it needed more than 40 days to respond to a priority call and that its commissioners have since pushed for quicker turnaround times. This directive may explain the reasons the TCEQ included so little process in the drought rule. But considering the potential disruptiveness of curtailment orders, the amount of discretion the executive director has, and the long lead time the agency has to monitor droughts, the relatively unilateral procedures in the drought rule seem short-sighted and unnecessarily abrupt.

Section 36.8(a) expressly states that the executive director may issue an order "without notice and an opportunity for a hearing." The order may be in effect for as long as 45 days before the commission must hear it and decide whether to affirm, modify or set aside. (Note the original version of the drought rule did not require a hearing within a specified time period. Theoretically, an order could have been on the books for years before the commission considered it. The agency added the 45-day threshold only after receiving critical public comments.)

This truncated process discourages public participation. It removes a check on agency actions and risks de-legitimizing curtailment orders – and by extension the drought rule – among appropriators. And it is particularly troublesome given that the agency may be taking water rights without compensation from senior appropriators.

To rectify, the agency could require: (1) that commissioners rather than the executive director issue orders; (2) that commissioners issue these orders at public hearings subject to applicable open meetings laws; and (3) that commissioners exempt preferred junior appropriators only upon recommendations from a stakeholder committee consisting of appropriators from within affected basins. The first two fixes are standard public process measures. The third will slow agency action, as stakeholder negotiations inevitably do, but will encourage appropriators to settle upon agreeable allocations. Ideally, the stakeholder committees will also nurture markets for intrabasin transfers and promote appropriator-to-appropriator transactions that reduce the need for preference-based TCEQ dictates.

In fact, in its response to comments expressing concerns about takings, TCEQ has pointed out that "nothing in the [drought curtailment] rules precludes a water right holder from pursuing any remedy against another water right holder if the water right holder ... deems it appropriate." The TCEQ seems to be suggesting that deprived senior appropriators should seek compensation – if necessary, through litigation – from preferred junior appropriators who benefited from the curtailment order rather than from the governmental agency that actually issued the order. Such litigation seems a circuitous and inefficient means of making senior appropriators whole, particularly given the difficulty of untangling which suspended appropriators suffered losses and which preferred junior appropriators benefitted. All parties involved, other than TCEQ, would presumably prefer structures such as stakeholder committees that could provide enhanced institutional support for voluntary transfers.

Toothless Conservation: Using the curtailment rule – and scrambling water rights – comes at a cost. To offset that cost, the TCEQ would presumably want to maximize its upside by leveraging the rule to improve conservation. Pushing for conservation would bring the state closer to resource adequacy and would reduce the need for future applications of the curtailment rule. Despite these positives, the rule requires no conservation from senior appropriators and very little from the preferred junior appropriators who benefit from reallocation of water under curtailments.

Section 36.2(4), for instance, defines an "emergency shortage of water" to exist when a senior appropriator cannot divert all of its surface water rights and certain other conditions are met. But that definition does not require the senior appropriator to have attempted to implement conservation measures that, at an aggregate level, might be more reasonable and less onerous than the costs of a curtailment order. Similarly, Section 36.5(a)(3) allows the executive director to issue or modify an order if "senior water rights [holders] are unable to divert the water they need or store inflows that are authorized under a water right." The rule could have required that senior appropriators be entitled to water *and* need it.

Under Section 36.5(c)(2), the executive director "may" require preferred junior appropriators to "demonstrate to the maximum extent practicable that reasonable efforts have been made to conserve water." But the executive director does not have to require such a demonstration and, even if he does, the terms "maximum extent practicable" and "reasonable" are not defined. The executive director may interpret "maximum extent practicable" in a way that does not fully recognize the latest technologies or the pace-setting practices used in other jurisdictions. And "reasonable" is as shifty in this context as in any other.

As discussed above, the TCEQ has said it would "consider whether [preferred junior municipal appropriators] are using municipal water for public health and welfare purposes such as drinking water." But the agency has committed only to considering a type of use ("drinking water") that is supposed to be illustrative ("such as") of the uses protected through set-asides for public health and welfare. Yet drinking water is not representative at all – it is the most critical type of use. Essentially, TCEQ is citing life-and-death circumstances to justify what could be nothing more than lifestyle concerns.

The agency has acknowledged that a distinguishing feature of the drought rule is that it authorizes action in "moderate," non-emergency droughts. And such action need only protect "public health and welfare," open-ended terms that other state agencies have relied upon as grounds for all manner of fundamentally aesthetic regulations (i.e., many land use laws). That is not to say that lifestyle concerns are not valid or that the landscaping and recreation that water sustains do not represent significant economic and cultural investments. But those may not always represent the highest-value uses of water during droughts or justify the ad hoc destabilization of established water rights.

Indeed, the rule does not require preferred junior appropriators to show that they direly need suspended water. During the rulemaking process, TCEQ said: "The executive director has requested junior water rights holders for municipal use which were not curtailed due to public health and welfare concerns, in areas where there has been a senior call, to implement high levels of their drought contingency plans. This was not a direct enforcement of the user's implementation of its plans, but was a condition precedent if the junior water rights holder was to continue to take water. The commission intends for the executive director to continue this practice when he issues an adjustment or suspension of water rights when a senior needs water under its right."

The TCEQ did not, however, revise the rule to require drought contingency plans as conditions precedent to receiving suspended water. Such a requirement would help the rule to achieve its animating purpose and could improve water planning in Texas. At this point, a weak spot in planning is that conservation and reuse requirements are rarely enforceable other than between retailers and end users. The TCEQ could use suspended water as a carrot to encourage compliance. It could provide suspended water only to preferred junior appropriators who demonstrate that they have adopted and implemented water conservation and drought contingency plans. More aggressively, the agency could require preferred junior appropriators to have met certain benchmarks within those plans.

In fact, insulating appropriators from the costs of their water use only discourages conservation. It reduces the benefits that would accrue to appropriators who have invested in conservation technologies and management practices and shields profligate appropriators from the costs of their usage. To the extent that the state wants to meet its long-term water supply goals through conservation and reuse, it should avoid subsidizing usage practices that it does not wish to see perpetuated. That is particularly true of generators that ERCOT would otherwise off-line for being cost ineffective.

Transfers: This blog has posted before on the vital role that markets will have to play in allocation of water during times of escalating scarcity. The drought rule hinders marketability by muddying property rights in the very areas where there would be the greatest demand for water transfers. To complicate things further, transfers are the simplest to execute within basins, but in its definitions of "drought" and "emergency shortage," the agency uses the terms "drainage area," "watershed" and "hydraulic systems." These terms are related and, in the rule, seem like they are meant to be interchangeable, but they make the potential geographic scope of orders that much murkier. And at a more psychological level, the order fosters conflict and competition that could make appropriators less confident in state water laws and less willing to embrace water markets and voluntary transfers.

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