

Complying with the New Water Conservation Plan and Drought Contingency Plan Requirements in 2009

By David J. Klein

In January 2008, the Texas Commission on Environmental Quality (“TCEQ”) amended its rule regarding the filing requirements for water conservation and drought contingency plans, Title 30 Texas Administrative Code (“TAC”) § 288.30. These changes will likely impact a significant percentage of the water providers in the State of Texas in 2009. The TCEQ’s water conservation plan (“WCP”) and drought contingency plan (“DCP”) rules, initially adopted in 1993, were recently modified to implement the changes provided by the 80th Legislature in Senate Bill (“SB”) 3 and House Bill (“HB”) 4. These recent amendments, coupled with the filing deadlines already embedded in § 288.30, will likely require these water providers to file updated DCPs with the TCEQ and revised WCPs with not only the TCEQ but also the Texas Water Development Board (“TWDB”) in 2009.

As background, the 2007 State Water Plan provides that between the years 2000 and 2060, the population in Texas is expected to increase more than two-fold, and the demand for water is expected to increase by 27 % from almost 17 million acre-feet to 21.6 million acre-feet. If new water supplies are not developed, Texas will need an additional 8.8 million acre-feet of water by 2060. To meet these future demands, the State Water Plan has set forth several recommended water management strategies. In particular, one water management strategy calls for increased water conservation measures, hypothesizing that additional municipal water conservation strategies would save a 617,000 acre-feet per year by 2060.

As enrolled in 2007, HB 3 and SB 4 focus in part on raising the public’s awareness of water conservation in general, enhancing the regulation of WCPs, and increasing the TWDB’s role as a participant in these initiatives. In short, these bills created Texas Water Code §§ 16.401 and 16.402, which require the Executive Administrator of the TWDB to “develop and implement a statewide water conservation public awareness program to educate residents of this state about water conservation” and to participate in the oversight of the content of WCPs. It is not surprising that the Legislature has made the TWDB a participant in this process, as the TWDB is charged with the responsibilities to prepare, develop, formulate, and adopt a comprehensive state water plan that shall be a guide to state water policy, and to work jointly with the State Soil and Water Conservation Board to conduct a study of the ways to improve or expand water conservation efforts and report the same to the Legislature.

To this end, the TCEQ adopted amendments to its WCP and DCP filing rule, 30 TAC § 288.30, on January 10, 2008, and this rule now not only outlines when a WCP or DCP must be

filed with the TCEQ, but also when a WCP must also be filed with the TWDB. This article will provide a summary of these requirements.

Filing Water Conservation Plans

Section 288.30 (1)–(4) of the TCEQ’s rules outlines when a wholesale or retail water provider is required to submit a water conservation plan with the Executive Director of the TCEQ, and new subsection (10) addresses when such plan shall also be filed with the Executive Administrator of the TWDB. With respect to filing a WCP with the TCEQ, § 288.30 specifically provides that the holder of a water right for the appropriation of surface water either (i) in the amount of 1,000 acre-feet or more a year for municipal, industrial, and other non-irrigation uses, or (ii) in the amount of 10,000 acre-feet or more a year for irrigation uses, must develop, submit, and implement a WCP that is in accordance with the rules. Initially, these water right holders were required to submit a WCP with the TCEQ by May 1, 2005. However, now the next revision of that WCP must be submitted with the TCEQ not later than May 1, 2009, and every five years thereafter. Additionally, revisions to the WCP are required to include “implementation reports,” which include the following:

- the list of dates and descriptions of the conservation measures implemented;
- data about whether or not targets in the plans are being met;
- the actual amount of water saved; and
- if the targets are not being met, an explanation as to why any of the targets are not being met, including any progress on that particular target.

Thus, these water rights holders are required to file updated WCPs and implementation reports with the TCEQ in 2009, unless these documents were already submitted between May 1, 2005 and May 1, 2009.

With the enactment of HB 3 and SB 4, and the TCEQ’s amendment to § 288.30 implementing these Legislative directives, the water right holders already required to submit WCPs to the TCEQ and others are also required to submit WCPs with the TWDB. In short, there are three “groups” of entities that are required under § 288.30 (10) to file their WCPs with the TWDB. First, each entity that is required to submit a WCP to the TCEQ shall also submit a copy of the plan with the TWDB not later than May 1, 2009, and every five years thereafter. Second, any retail public water suppliers providing water service to 3,300 or more connections must also develop, implement, and submit a WCP to the TWDB not later than May 1, 2009 and every five years thereafter. To this end, any revised plans must be submitted to the Executive Administrator within 90 days of adoption by the community water system. Third, any new retail public water suppliers providing water service to 3,300 or more connections shall prepare and adopt a water conservation plan within 180 days of commencement of operation, and submit the plan to the executive administrator of the TWDB within 90 days of adoption.

In addition to filing a WCP, § 288.30 (10) provides that each entity required to submit a WCP to the TWDB or TCEQ shall also file a report not later than May 1, 2010, and annually thereafter, to the Executive Administrator of the TWDB on the entity’s progress in implementing the plan. Further, the WCP and annual report of any entity that is required to submit its WCP

with the TWDB must comply with the minimum requirements established in the TWDB's rules. Otherwise, the TWDB is required to notify the TCEQ that such plan or annual report does not meet the TWDB's minimum requirements, and the TCEQ is directed to take appropriate enforcement action upon receipt of such notice from the TWDB.

Section 288.30 (10) clearly casts a wider net than subsections (1)–(4), and more water providers will be required to develop and submit WCPs with the TWDB in 2009. Further, the new rule has enforcement mechanisms in place in the event that water suppliers do not comply with this new subsection of the rule.

Filing Drought Contingency Plans

Even after the enactment of HB 3 and SB 4, and the TCEQ's rules implementing these legislative changes, DCPs are still only required to be submitted to the TCEQ, if at all. However, it is important to note that the same time deadlines for filing WCPs, looming in the second quarter of 2009, also apply to submitting DCPs.

Regardless of whether the entity is a wholesale public water supplier, a retail public water supplier serving more than 3,300 connections, or an irrigation district, the timeline for preparing, adopting, and submitting DCPs are identical. Specifically, these three sets of water suppliers were all initially required to have filed a DCP with the Executive Director of the TCEQ in accordance with the rules not later than May 1, 2005. Now, these entities are required to submit the next revision of their respective DCP with the TCEQ not later than May 1, 2009, and every five years thereafter. Any new or revised plan must be submitted to the TCEQ within 90 days of adoption by the governing body of that entity.

One additional and unique requirement regarding the filing of DCPs, however, is that these entities are also required to provide a copy of their DCP to their respective regional water planning group for each region within which the entity operates. Any new retail public water suppliers providing water service to 3,300 or more connections shall prepare and adopt a DCP within 180 days of commencement of operation, and shall submit the plan to the TCEQ within 90 days of adoption.

Consequently, these water rights holders are required to file updated WCPs and implementation reports with the TCEQ in 2009, unless these documents were already submitted between May 1, 2005 and May 1, 2009. Additionally, each retail public water supplier serving less than 3,300 connections is also required to prepare and adopt a DCP under the same timelines as the other entities above. However, these DCPs are not required to be filed with the TCEQ. Rather, these entities shall make their respective plan available for inspection by the Executive Director of the TCEQ upon request.

Ultimately, a substantial number of water providers in Texas will be required to prepare, adopt and submit WCPs with the TCEQ by May 1, 2009. Even more entities will be required to submit the same with the TWDB by May 1 as well. Nearly all water providers will also be required to prepare and adopt revised DCPs by May 1, 2009, and a significant portion of those entities will need to file their respective plan with the TCEQ. Since the requirement to file

WCPs at the TWDB is a new program for the TCEQ, the extent that the TCEQ will initiate an enforcement action for non-compliance with this requirement is unknown. The Water Practice Group at Lloyd Gosselink is knowledgeable and experienced in meeting these regulatory requirements, and we can answer any questions that you may have regarding your WCP and DCPs.

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