

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: December 5, 2012

DATE OF REQUEST: November 16, 2012

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Bruce McAnally, (512) 239-2141

CAPTION: Docket No. 2012-0610-RUL. Consideration of the adoption of amendments to 30 TAC Chapter 30, Occupational Licenses and Registrations, Subchapter K, Section 30.387, Definitions and Section 30.402, Exemptions.

The adopted rulemaking amends 30 TAC Chapter 30 by adding a new definition for a Military Operator-in-Training and clarifying the existing definition of an Operator-in-Training.

Additionally, the rulemaking amends 30 TAC Section 30.402 to allow active duty military personnel who have successfully completed the Bioenvironmental Engineering Apprentice (BEA) or equivalent military training, as determined by the executive director, to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems, without holding a TCEQ issued public water system operator license. The proposed rules were published in the July 13, 2012, issue of the Texas Register (37 TexReg 5194). (Terry Thompson, Jessica Rogers) (Rule Project No. 2012-024-030-WS)

Brent Wade

Deputy Director

Lynne Haase

Division Director

Bruce McAnally

Agenda Coordinator

Copy to CCC Secretary? NO

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: November 16, 2012

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Brent Wade, Deputy Director
Office of Waste

Docket No.: 2012-0610-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 30, Occupational Licenses and Registrations
Military Personnel Licensing Requirements
Rule Project No. 2012-024-030-WS

Background and reason(s) for the rulemaking:

As a result of a Public Water System comprehensive compliance investigation, Sheppard Air Force Base (SAFB) submitted a request to the TCEQ Public Drinking Water Program requesting an exception to the commission's rule requirement that all individuals who perform process control duties in the distribution of drinking water be licensed. Specifically, SAFB requested that individuals who have successfully completed the Bioenvironmental Engineering Apprentice (BEA) training be allowed to perform microbiological sampling and determine disinfection residuals within the military facility's water distribution system, without holding a public water system operator license issued by the executive director.

SAFB contends that active duty military personnel that have successfully completed the BEA training are certified by the military to perform various duties relating to the drinking water distribution system. These duties include collecting microbiological samples and determining disinfection residuals in the military facility's water distribution system. Therefore, the time and expense that would be incurred by the military to have active duty military personnel take the additional training and exams needed to obtain a license issued from the executive director does not add to the protection of the environment or public health.

Due to legislative interest, the executive director's staff from the Field Operations Support Division, the Water Supply Division (Public Drinking Water Section), and the Permitting and Registration Support Division (Occupational Licensing Section) met and developed guidance to address SAFB's issue on an interim basis until rulemaking could be initiated.

The executive director's staff evaluated the BEA course, exam categories, and questions and concluded that active duty military personnel, who have successfully completed the BEA or equivalent military training, as determined by the executive director, are qualified to collect microbiological samples and determine disinfection residuals within military facilities' water distribution systems.

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The executive director's staff also recognizes that, while the exception request came from SAFB, the majority of Texas military facilities utilize active duty military personnel to collect microbiological samples and determine disinfection residuals and would benefit from the exception.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

- Amend 30 TAC Chapter 30 by adding a provision that would create a Military Operator-in-Training and allow active duty military personnel who have successfully completed the BEA or equivalent military training to collect microbiological samples and determine disinfection residuals within military facilities' water distribution system, without holding a public water system operator license issued by the executive director; and
- Clarify the existing definition of Operator-in-Training

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, concerning the General Jurisdiction of the Commission, which establishes the general jurisdiction of the commission; TWC §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC §5.105, which provides the commission with the authority to establish and approve all general policies of the commission by rule; TWC §37.002, concerning Rules, which provides the commission with the authority to adopt rules for various occupational licenses; TWC §37.003, concerning License or Registration Required, which provides that persons engaged in certain occupations must be licensed by the commission; TWC §37.008, concerning Training; Continuing Education, which provides the commission with the authority to approve training; Texas Health and Safety Code (THSC) §341.033, concerning protection of public water supplies; THSC §341.034 concerning licensing and registration of persons who perform duties relating to public water supplies; and THSC §341.0315 which requires public water systems to comply with commission rules and was adopted to ensure the safe supply of drinking water.

Effect on the:

A.) Regulated community: The only effect to the regulated community would be to active duty military personnel who have successfully completed the BEA or equivalent military training. The rulemaking would allow these individuals to collect microbiological

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samples and determine disinfection residuals within military facilities' distribution systems without holding a public water system operator licenses issued by the executive director.

B.) Public: There is no anticipated effect to the public.

C.) Agency programs: There is no anticipated effect to the commission's programs.

The rulemaking would not create a group of affected persons who were not affected previously. There will be no fiscal impacts to the regulated community, public, or the commission.

Stakeholder meetings:

A stakeholder meeting was held on April 23, 2012. No one from the public or regulated community attended this meeting.

Public comment:

The commission received one written comment from the Department of Defense (DOD). The DOD supported adoption of the rules as proposed. In particular, the DOD supported the amendments to 30 TAC Subchapter K, Section 30.402, which exempts a military operator-in training from certain public water system licensing requirements.

Significant changes from proposal:

There were no substantive changes from proposal.

Potential controversial concerns and legislative interest:

Due to legislative interest, a permanent solution to the problem is being sought through rulemaking.

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

This rulemaking will not affect any current policies or require development of new policies.

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

The commission could elect not to update the rules and continue to address the issue through the interim guidance developed to address the issue.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: July 13, 2012

Anticipated Texas Register publication date: December 21, 2012

Anticipated effective date: December 27, 2012

Six-month Texas Register filing deadline: January 13, 2013

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Agency contacts:

Terry Thompson, Rule Project Manager, 239-6095, Permitting and Registration Support
Division

Jessica Rogers, Staff Attorney, 239-0627

Bruce McAnally, Texas Register Coordinator, 239-2141

Attachments

None

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Tucker Royall
Office of General Counsel
Terry Thompson
Bruce McAnally

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendments to §30.387 and §30.402.

The amendments to §30.387 and §30.402, as published in the July 13, 2012, issue of the *Texas Register* (37 TexReg 5194) are adopted *without changes* to the proposed text and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The agency's Public Drinking Water Program received a request from Sheppard Air Force Base (SAFB) requesting an exception to the existing rules requiring that all individuals who collect microbiological samples and determine disinfection residuals within its drinking water distribution system be licensed in accordance with Chapter 30 and 30 TAC Chapter 290. Specifically, SAFB requested that active duty military personnel who have completed the Bioenvironmental Engineering Apprentice (BEA) training, be allowed to collect microbiological samples and determine disinfection residuals within its drinking water distribution system without holding a public water system operator license issued by the executive director.

According to §30.381(b), public water system operators who perform process control duties in the production or distribution of drinking water as defined in Chapter 290 must be licensed.

Section 290.38(63) defines process control duties as "...Activities that directly affect the potability of public drinking water, including: making decisions regarding the day-to-day operations and maintenance of public water system production and distribution; maintaining system pressures; determining the adequacy of disinfection and disinfection procedures; taking routine microbiological samples; taking chlorine residuals and microbiological samples after repairs or installation of lines or appurtenances; and operating chemical feed systems, filtration, disinfection, or pressure maintenance equipment; or performing other duties approved by the executive director."

The BEA course reviewed by the executive director's staff includes training on: laboratory safety; the Hazardous Communications Act; chlorine safety; characteristics of various water sources, waterborne diseases, and the hydrologic cycle; monitoring plans and sampling requirements for public water systems; basic chemistry and math related to water treatment, distribution, and dosage calculations; cross-connection control and backflow prevention basics in a distribution system; and disinfection concepts and types used in public water systems. The executive director's staff evaluated the BEA course, exam categories, and questions and determined that the BEA course is comparable, but not identical, to the agency's occupational licensing section's basic public drinking water system training.

Once an individual has successfully completed the BEA training and passed the applicable exam, they are certified by the military to perform various duties relating to the drinking water distribution system. SAFB contends that active duty military personnel that have completed the BEA training possess sufficient knowledge and skill to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems and that the time and expense incurred by the military to have active duty military personnel take the additional training and exam to obtain a license issued by the executive director does not add to the protection of the environment or public health.

The executive director's staff also concludes that active duty military personnel who have successfully completed the BEA or equivalent military training, as determined by the executive director, are qualified to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. The executive director's staff also recognizes that, while the exception request came from SAFB, the majority of Texas military facilities use active duty military personnel to collect microbiological samples and determine disinfection residuals and would benefit from the exception.

The rulemaking will amend Chapter 30 by adding a provision that defines a military

operator-in-training and a provision that will allow individuals who have successfully completed the BEA, or equivalent military training, as determined by the executive director, to collect microbiological samples and determine disinfection residuals at military facilities, without holding a public water system operator license issued by the executive director. Additionally, the rulemaking will clarify the existing definition of operator-in-training.

Section by Section Discussion

Subchapter K, Public Water System Operators and Operations Companies

The adopted amendment to §30.387, Definitions, will add a definition for military operator-in-training. The adopted change is necessary to identify active duty military personnel who collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. Additionally, the adopted amendment to §30.387 will clarify the existing definition of operator-in-training. This adopted change is necessary to clarify and improve the readability of the rule.

The adopted amendment to §30.402, Exemptions, will allow active duty military personnel who do not hold a public water system operator license issued by the executive director, but have successfully completed the BEA or equivalent military training, as determined by the executive director, to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. The

adopted change is necessary to save the military the time and expense that is incurred by having active duty military personnel take the additional training and exam to obtain the license issued by the executive director.

Final Regulatory Impact Determination

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the adopted rules are not subject to that statute. Texas Government Code, §2001.0225 applies only to rules that are specifically intended to protect the environment or reduce risks to human health from environmental exposure. The intent of the adopted rules is to provide an exception for active duty military personnel who have successfully completed the BEA, or equivalent military training, to collect microbiological samples and determine disinfection residuals without obtaining a public water system operator license issued by the executive director. Additionally, the adopted rules will clarify the existing definition of operator-in-training. The adopted rules are not specifically intended to protect the environment or reduce risk to human health from environmental exposure, but rather to provide an exception for active duty military personnel from obtaining a license issued by the executive director, provided that they have sufficient training. The adopted rules will also provide clarification for the existing definition of operator-in-training. The adopted rules will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the

environment, or the public health and safety of the state or a sector of the state. Thus, the adopted rules do not meet the definition of "a major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3), and thus, do not require a full regulatory impact analysis.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) is adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards regulating occupational licensing. These rules do not exceed state law requirements, and state law requires their implementation, not federal law. There are no delegation agreements or contracts between the State of Texas and an agency or representative of the federal government to implement a state and federal program regarding occupational licensing. And finally, these rules are being adopted under specific state laws, in addition to the general powers of the agency.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. There were no public comments received regarding the draft regulatory impact analysis determination during the public comment period.

Takings Impact Assessment

The commission evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of the adopted rules is to provide an exception for active duty military personnel who have successfully completed the BEA, or equivalent military training, to collect microbiological samples and determine disinfection residuals without obtaining a public water system operator license issued by the executive director. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking will neither restrict nor limit the owner's right to property nor reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These adopted rules are specific to certain functions within water distribution systems at military facilities and do not affect private real property.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. There were no public comments received regarding the consistency with the coastal management program during the public comment period.

Public Comment

The commission held a public hearing on July 26, 2012. The comment period closed on August 13, 2012. The commission received one written comment from the Department of Defense (DOD). The DOD supported adoption of the rules as proposed.

Response to Comments

Comments to Subchapter K: Public Water System Operators and Operation Companies

Comment

In regards to the proposed revisions to Subchapter K, the DOD commented that it supported the commission's full adoption of the rules as published in the *Texas Register* on July 13, 2012. In particular, the amendment to §30.402, that exempts a military operator-in training from certain public water system licensing requirements.

Response

The commission acknowledges support of the rules by the DOD. The commission made no changes to the rules in response to this comment.

**SUBCHAPTER K: PUBLIC WATER SYSTEM OPERATORS AND
OPERATIONS COMPANIES**

§30.387 and §30.402

Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.013, concerning the General Jurisdiction of the Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, which provides the commission with the authority to establish and approve all general policies of the commission by rule; TWC, §37.002, concerning Rules, which provides the commission with the authority to adopt rules for various occupational licenses; TWC, §37.003, concerning License or Registration Required, which provides that persons engaged in certain occupations must be licensed by the commission; TWC, §37.008, concerning Training; Continuing Education, which provides the commission with the authority to approve training; Texas Health and Safety Code (THSC) §341.033, concerning protection of public water supplies; THSC §341.034 concerning licensing and registration of persons who perform duties relating to public water supplies; and THSC §341.0315 which requires public water systems to comply with commission rules and was adopted to ensure the safe supply of drinking

water.

These adopted amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 37.002, 37.003, and 37.008, and THSC, §§341.033, 341.034, and 341.0315.

§30.387. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Chief operator--An individual who has overall responsibility for the operation of a public water system.

(2) Honorary license--License converted from a perpetual license that has been discontinued by the commission. This honorary license does not award the licensee the authority to perform process control duties in production or distribution of drinking water for public water systems.

(3) Military operator-in-training--An individual who is an active duty member of the military of the United States and has successfully completed the Bioenvironmental

Engineering Apprentice (BEA) or equivalent military training, as determined by the executive director, and collects microbiological samples and determines disinfection residuals for military facilities' water distribution systems. This individual may not perform any other process control duties in the water distribution or treatment facilities of a military installation.

(4) [(3)] Operator-in-charge--An individual who has overall responsibility for the operation of a public water system in the absence of the chief operator.

(5) [(4)] Operator-in-training--An unlicensed individual entering the field of public water system operation for the first time who has less than one year of experience and is in training to perform process control duties in production or distribution of public drinking water.

(6) [(5)] Public water system operations company--A person or other nongovernmental entity that provides operations services to one or more public water systems on a contractual basis.

(7) [(6)] Public water system operator--Licensed operator who performs process

control duties in production or distribution of drinking water.

(8) [(7)] Work experience--The actual performance of job tasks in a public water supply system, that are considered essential for the treatment or distribution of drinking water.

§30.402. Exemptions.

(a) An individual who performs process control duties in production or distribution of drinking water for a transient non-community [noncommunity] water system as defined in §290.38(77) [§290.38(46)] of this title (relating to Definitions), is exempt from the licensing requirements of this subchapter, if the source water for the water system is purchased treated water or groundwater that is not under the direct influence of surface water.

(b) An operator-in-training under the direct supervision of a licensed public water system operator is exempt from the licensing requirements of this subchapter.

(c) A military operator-in-training under the direct supervision of a licensed public

water system operator is exempt from the licensing requirements of this subchapter for the purpose of collecting microbiological samples or determining disinfection residuals at military facilities' water distribution systems. The military operator-in-training is not exempt from the licensing requirements of this subchapter for the purpose of performing any other process control duties in the distribution or treatment facilities of a public water system.

(d) [(c)] An individual who holds a groundwater or surface water license may perform duties relating to the operation and maintenance of drinking water production, purchased water, and water distribution systems and is not required to hold a distribution license.

Texas Commission on Environmental Quality



ORDER ADOPTING AMENDED RULES

Docket No. 2012-0610-RUL

On December 5, 2012, the Texas Commission on Environmental Quality (Commission) adopted amended rules in 30 TAC Chapter 30, concerning Occupational Licenses and Registrations. The adopted rules will add a provision that defines a military operator-in-training, and clarifies the existing definition of operator-in-training. The proposed rules were published for comment in the July 13, 2012, issue of the *Texas Register* (37 TexReg 5194).

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended rules are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rules necessary to comply with Texas Register requirements. The adopted rules and the preamble to the adopted rules are incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Government Code, § 2001.033.

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Issued date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman

statute imposed a requirement on engineers and, presumably, intended that the statute nevertheless be implemented.

The second alternative is delayed implementation of the requirement. The department has determined that this alternative is neither practical nor reasonable because it also prevents the implementation of the legislative requirement. The department has considered the timely and orderly implementation of the roster requirement in this proposal.

A third alternative is for the department to confirm with the TBPE which engineers are on the roster. The department has determined that this alternative is neither practical nor reasonable because engineers have the greatest interest in ensuring that they are on the roster. An engineer who acts as an appointed engineer without being on the roster could lose his or her engineering license or appointment. The department does not know which engineers will seek to be on the roster and the TBPE is under no obligation to provide roster information updates on a regular basis. If a dispute or question as to placement on the roster arises, it is a matter between the engineer and the TBPE. For appointed engineers, submitting Form ENG-2 is essentially an application requirement to continue an appointment. Continuing an appointment as a qualified inspector is a business decision of each appointed engineer. The engineers are in the best position to determine that they are on the roster and make the submission.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To have your comments considered, you must submit written comments on the proposal no later than 5:00 p.m. on August 13, 2012 to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Alexis Dick-Paclik, Director of the Inspections Office in the Property and Casualty Section, Mail Code 105-5G, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If the department holds a hearing, it will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. New §5.4608 is proposed under Insurance Code §§2210.008, 2210.254, and 36.001.

Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210. Section 2210.254(a)(2) states that a qualified inspector includes a licensed professional engineer who is on the roster described by Occupations Code §1001.652 and authorizes the commissioner to adopt rules specifying the requirements for appointment to conduct windstorm inspections.

Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of the state.

CROSS REFERENCE TO STATUTE. The following statutes are related to this proposal: Occupations Code §1001.652 and Insurance Code §2210.254.

§5.4608. Texas Board of Professional Engineers Roster.

(a) The requirements in this section are in addition to the appointment requirements set forth in §5.4604 of this title (relating to Appointment of Engineers as Qualified Inspectors). This section shall control over any conflicting provision in §5.4604 of this title.

(b) Each engineer appointed as a qualified inspector must be on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652. An engineer who is not on the roster may not act as an appointed engineer on or after January 1, 2013.

(c) To continue an existing appointment after December 31, 2012, each appointed engineer must, no later than December 31, 2012, submit to the department Form ENG-2, affirming that the engineer is on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652. The department will cancel the appointment of each appointed engineer who does not submit the Form ENG-2 on or before December 31, 2012. An engineer whose appointment is canceled under this section may reapply for appointment as a qualified inspector.

(d) Each engineer applying for appointment as a qualified inspector must submit to the department Form ENG-2, affirming that the engineer is on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652.

(e) After December 31, 2012, the department will not accept windstorm applications, certifications, or verifications from engineers who are not on the roster maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652.

(f) Form ENG-2 is adopted by reference. The form may be obtained at www.tdi.texas.gov/forms/form13windstorm.html.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 2, 2012.

TRD-201203455

Sara Waitt

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: August 12, 2012

For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 30. OCCUPATIONAL LICENSES AND REGISTRATIONS

SUBCHAPTER K. PUBLIC WATER SYSTEM OPERATORS AND OPERATIONS COMPANIES

30 TAC §30.387, §30.402

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §30.387 and §30.402.

Background and Summary of the Factual Basis for the Proposed Rules

The agency's Public Drinking Water Program received a request from Sheppard Air Force Base (SAFB) requesting an exception to the existing rules requiring that all individuals who collect microbiological samples and determine disinfection residuals within its drinking water distribution system be licensed in accordance with 30 TAC Chapters 30 and 290. Specifically, SAFB requested that active duty military personnel, who have completed the Bioenvironmental Engineering Apprentice (BEA) training, be allowed to collect microbiological samples and determine disinfection residuals within its drinking water distribution system without holding a public water system operator license issued by the executive director.

According to §30.381(b), public water system operators who perform process control duties in the production or distribution of drinking water, as defined in Chapter 290, must be licensed.

Section 290.38(63) defines process control duties as "Activities that directly affect the potability of public drinking water, including: making decisions regarding the day-to-day operations and maintenance of public water system production and distribution; maintaining system pressures; determining the adequacy of disinfection and disinfection procedures; taking routine microbiological samples; taking chlorine residuals and microbiological samples after repairs or installation of lines or appurtenances; and operating chemical feed systems, filtration, disinfection, or pressure maintenance equipment; or performing other duties approved by the executive director."

The BEA course reviewed by the executive director's staff includes training on: laboratory safety; the Hazardous Communications Act; chlorine safety; characteristics of various water sources, waterborne diseases, and the hydrologic cycle; monitoring plans and sampling requirements for public water systems; basic chemistry and math related to water treatment, distribution, and dosage calculations; cross-connection control and backflow prevention basics in a distribution system; and disinfection concepts and types used in public water systems. The executive director's staff evaluated the BEA course, exam categories and questions and determined that the BEA course is comparable, but not identical, to the agency's occupational licensing section's basic public drinking water system training.

Once an individual has successfully completed the BEA training, and passed the applicable exam, they are certified by the military to perform various duties relating to the drinking water distribution system. SAFB contends that active duty military personnel that have completed the BEA training possess sufficient knowledge and skill to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems and that the time and expense incurred by the military to have active duty military personnel take the additional training and exam to obtain a license issued from the executive director, does not add to the protection of the environment or public health.

The executive director's staff concurs with SAFB that requiring active duty military personnel to take the additional training and exam to obtain a license issued by the executive director does not add to the protection of the environment or public health. The executive director's staff also concludes that active duty military

personnel who have successfully completed the BEA or equivalent military training, as determined by the executive director are qualified to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. The executive director's staff also recognizes that, while the exception request came from SAFB, the majority of Texas military facilities uses active duty military personnel to collect microbiological samples and determine disinfection residuals and would benefit from the exception.

The rulemaking would amend Chapter 30 by adding a provision that defines a military operator-in-training and a provision that would allow individuals who have successfully completed the BEA, or equivalent military training, as determined by the executive director, to collect microbiological samples and determine disinfection residuals at military facilities, without holding a public water system operator license issued by the executive director. Additionally, the rulemaking would clarify the existing definition of operator-in-training.

Section by Section Discussion

Subchapter K, Public Water System Operators and Operations Companies

The proposed amendment to §30.387, Definitions, would add a definition for military operator-in-training. The proposed change is necessary to identify active duty military personnel who collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. Additionally, the proposed amendment to §30.387 would clarify the existing definition of operator-in-training. This proposed change is necessary to add clarity and improve the readability of the rule.

The proposed amendment to §30.402, Exemptions, would allow active duty military personnel who do not hold a public water system operator license issued by the executive director, but have successfully completed the BEA or equivalent military training, as determined by the executive director, to collect microbiological samples and determine disinfection residuals at military facilities' water distribution systems. The proposed change is necessary to save the military the time and expense that is incurred by having active duty military personnel take the additional training and exam to obtain the license issued by the TCEQ.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules would not have any fiscal impact on other units of state or local government.

The proposed rules would apply only to active military personnel at military facilities who have completed the BEA or equivalent military training (as determined by the executive director). The proposed rules would allow active duty military personnel to collect microbiological samples and determine the level of disinfection residuals in drinking water at military facilities' water distribution systems without holding a license issued by the executive director for a public water system operator as required by Chapters 30 and 290. The agency has analyzed the BEA course, exam categories, and exam questions and has determined that active duty military personnel that have completed the BEA training possess the basic knowledge and skill to perform these specific tasks.

The proposed rules would save the military the time and expense of having active military personnel take additional training and exams without compromising the protection of the environment or public health, since agency rules would still require the public drinking water system of a military facility to be under the supervision of a licensed public water system operator. The proposed exemption of active duty military personnel from public water system operator licensing requirements is limited in scope and would only allow active duty military personnel to collect microbiological samples and determine the levels of disinfection residuals at military facilities' water distribution systems. Currently, there are 11 major military facilities in Texas. Cost savings resulting from the proposed license exemption for the military are not expected to be significant, but the proposed rules are expected to save the military the time and expense of having their personnel study for a license and taking the required examination. Cost savings for the military would include, per individual, \$250 for the basic water operator training course, an estimated \$400 for 30 hours of continuing education, \$111 to take the test to obtain an initial three-year license, and \$111 every three years afterward for the renewal of the license.

The agency would not experience a significant decrease in revenue (Account 468 - Occupational Licensing Account) as a result of the proposed rules, and there would be no fiscal impact on other state agencies or units of local government.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be continued protection of the environment and public health coupled with efficient use of military resources.

The proposed rules would not have a fiscal impact on individuals. The proposed rules would allow military facilities in Texas to save the cost associated with requiring active duty military personnel who have completed the BEA or equivalent military training to obtain a public water system operator license issued by the executive director.

The proposed rules are not expected to have a fiscal impact on large businesses. The proposed rules would only apply to active duty military personnel on military facilities in Texas, and the proposed exemption is limited in scope to collecting microbiological samples and determining levels of disinfection residuals at military facilities' water distribution systems, without obtaining a public water system operator license issued by the executive director.

Small Business and Micro-Business Assessment

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules are not subject to that statute. Texas Government Code, §2001.0225 applies only to rules that are specifically intended to protect the environment or reduce risks to human health from environmental exposure. The intent of the proposed rules is to provide an exception for active duty military personnel who have successfully completed the BEA, or equivalent military training to collect, microbiological samples and determine disinfection residuals without obtaining a public water system operator license issued by the executive director. Additionally, the proposed rules will clarify the existing definition of operator-in-training. The proposed rules are not specifically intended to protect the environment or reduce risk to human health from environmental exposure, but rather to provide an exception for active duty military personnel from obtaining a license issued by the executive director, provided that they have sufficient training. The proposed rules will also provide clarification for the existing definition of operator-in-training. The proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Thus, the proposed rules do not meet the definition of "a major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3), and thus, do not require a full regulatory impact analysis.

Furthermore, the proposed rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) is adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards regulating occupational licensing. These rules do not exceed state law requirements, and state law requires their implementation, not federal law. There are no delegation agreements or contracts between the State of Texas and an agency or representative of the federal government to implement a state and federal program regarding occupational licensing. And finally, these rules are being proposed under specific state laws, in addition to the general powers of the agency.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of the proposed rules is to provide an exception for active duty military personnel, who have successfully completed the BEA,

or equivalent military training, to collect microbiological samples and determine disinfection residuals without obtaining a public water system operator license issued by the executive director. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rule-making will neither restrict or limit the owner's right to property nor reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These proposed rules are specific to certain functions within water distribution systems at military facilities and do not affect private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on July 26, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-024-030-WS. The comment period closes August 13, 2012. Copies of the proposed rule-making can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Terry Thompson, Occupational Licensing Section, (512) 239-6095.

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning the General Jurisdiction of the Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, which provides the commission with the authority to establish and approve all general policies of the commission by rule; TWC, §37.002,

concerning Rules, which provides the commission with the authority to adopt rules for various occupational licenses; TWC, §37.003, concerning License or Registration Required, which provides that persons engaged in certain occupations must be licensed by the commission; TWC, §37.008, concerning Training; Continuing Education, which provides the commission with the authority to approve training; Texas Health and Safety Code (THSC), §341.033, concerning protection of public water supplies; THSC, §341.034 concerning licensing and registration of persons who perform duties relating to public water supplies; and THSC, §341.0315 which requires public water systems to comply with commission rules and adopted to ensure the safe supply of drinking water.

These proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 37.002, 37.003, and 37.008, and THSC, §§341.033, 341.034, and 341.0315.

§30.387. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Chief operator--An individual who has overall responsibility for the operation of a public water system.

(2) Honorary license--License converted from a perpetual license that has been discontinued by the commission. This honorary license does not award the licensee the authority to perform process control duties in production or distribution of drinking water for public water systems.

(3) Military operator-in-training--An individual who is an active duty member of the military of the United States and has successfully completed the Bioenvironmental Engineering Apprentice (BEA) or equivalent military training, as determined by the executive director, and collects microbiological samples and determines disinfection residuals for military facilities' water distribution systems. This individual may not perform any other process control duties in the water distribution or treatment facilities of a military installation.

(4) [(3)] Operator-in-charge--An individual who has overall responsibility for the operation of a public water system in the absence of the chief operator.

(5) [(4)] Operator-in-training--An unlicensed individual entering the field of public water system operation for the first time who has less than one year of experience and is in training to perform process control duties in production or distribution of public drinking water.

(6) [(5)] Public water system operations company--A person or other nongovernmental entity that provides operations services to one or more public water systems on a contractual basis.

(7) [(6)] Public water system operator--Licensed operator who performs process control duties in production or distribution of drinking water.

(8) [(7)] Work experience--The actual performance of job tasks in a public water supply system, that are considered essential for the treatment or distribution of drinking water.

§30.402. Exemptions.

(a) An individual who performs process control duties in production or distribution of drinking water for a transient non-community [noncommunity] water system as defined in §290.38(77) [§290.38(46)] of this title (relating to Definitions), is exempt from the licensing requirements of this subchapter, if the source water for the water system

is purchased treated water or groundwater that is not under the direct influence of surface water.

(b) An operator-in-training under the direct supervision of a licensed public water system operator is exempt from the licensing requirements of this subchapter.

(c) A military operator-in-training under the direct supervision of a licensed public water system operator is exempt from the licensing requirements of this subchapter for the purpose of collecting microbiological samples or determining disinfection residuals at military facilities' water distribution systems. The military operator-in-training is not exempt from the licensing requirements of this subchapter for the purpose of performing any other process control duties in the distribution or treatment facilities of a public water system.

(d) [(e)] An individual who holds a groundwater or surface water license may perform duties relating to the operation and maintenance of drinking water production, purchased water, and water distribution systems and is not required to hold a distribution license.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 29, 2012.

TRD-201203427

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: August 12, 2012

For further information, please call: (512) 239-2141



CHAPTER 285. ON-SITE SEWAGE FACILITIES

The Texas Commission on Environmental Quality (commission) proposes amendments to §§285.3 - 285.6, 285.32 - 285.36, 285.90, and 285.91.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed rulemaking would update the rule requirements. The proposed rules would remove setbacks between on-site sewage facility (OSSF) components and drainage easements; clarify that a permit and an approved plan are required to construct, alter, repair, extend or operate an OSSF; and exempt subdivisions from submitting planning materials when a tract is divided into two five-acre or larger tracts. The proposed rules would allow the repair or alteration of existing cluster systems. The proposed rules would update sizing formulas for leaching chambers. The proposed rulemaking would require new or replacement disinfection devices to be certified by a third party. The proposed rules would add the option to reduce the size of aerobic treatment units when using an equalization tank; establish guidelines for the installation of new equalization tanks; and clarify what constitutes an emergency repair. The proposed rules would increase the cleanout spacing to 100 feet for consistency with the Uniform Plumbing Code; would add language that applies to pipes crossing drainage easements; and would clarify that once tanks are no longer used to hold sewage must be abandoned. The proposed rules would allow another option for sewage pipes installed under a driveway or sidewalk and update figures and tables to be consistent with the changes discussed previously.

Section by Section Discussion

§285.3, General Requirements

The proposal would amend §285.3(a) to clarify that an approved plan is necessary in addition to a permit to construct, alter, repair, extend or operate an OSSF. The proposed amendment would clarify requirements for the public and incorporate statutory language to be consistent with the Texas Health and Safety Code (THSC), §366.051(a).

§285.4, Facility Planning

The proposal would add §285.4(a)(1)(C), which would not require the submittal of planning materials if a platted or unplatted subdivision tract is divided into two tracts with five or more acres for family transfers. The proposed amendment would not have a negative impact on water quality because lots that are five or more acres can support an OSSF. The proposal would also change "public water supply" to "public water system" in §285.4(a)(1) to provide consistency with the Public Water Supply Rules (30 TAC Chapter 290).

§285.5, Submittal Requirements for Planning Materials

The proposed rulemaking would include §285.5(a)(2)(E), which would require that all applications for new OSSF construction within the Edwards Aquifer Recharge Zone require a professional design.

§285.6, Cluster Systems

Proposed §285.6(a) and (b) would be changed to state that new cluster systems are not authorized under Chapter 285, but existing cluster systems may be repaired or altered if there is no increase in the volume of the permitted flow or change in the nature of the permitted flow. Most cluster systems that are failing are currently required to obtain a permit under 30 TAC Chapter 309, Subchapter C, but it is difficult for existing cluster systems to qualify for this permit. This proposed amendment would allow cluster system owners to repair or alter the system instead of replacing the system or operating a system that does not meet the permit requirements.

§285.32, Criteria for Sewage Treatment Systems

Proposed §285.32(a)(8) would be added that would provide guidance for a pipe that crosses a drainage easement. The proposed rule would also increase the cleanout spacing to 100 feet for consistency with the Uniform Plumbing Code. Proposed §285.32(c)(1) would provide an option to reduce the size of aerobic treatment units through the installation of an equalization tank. The proposed rulemaking would also amend §285.32(b)(1)(C) to match the figure contained in §285.90(7). The proposed rule would modify §285.32(d) to clarify when an OSSF must be designed by a professional engineer or a professional sanitarian.

§285.33, Criteria for Effluent Disposal Systems

The proposed rulemaking would outline the requirements for pipe that crosses a drainage easement. The proposed rulemaking also updates the formulas to use to determine the appropriate length of leaching chambers. It would also clarify the allowable gravel content for soils beneath low pressure dosing and drip irrigation systems. The proposed rule would require that all new disinfection devices used at OSSFs be listed as an American National Standard Institute (ANSI)/National Science Foundation (NSF) Standard 46 approved dispenser or disinfection device for wastewater treatment systems. The