

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** July 18, 2014

**Thru:** Bridget C. Bohac, Chief Clerk  
Richard A. Hyde, P.E., Executive Director

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

**Docket No.:** 2013-1383-RUL

**Subject:** Commission Approval for Rulemaking Adoption  
Chapter 290, Public Drinking Water  
Chapter 291, Utility Regulations  
HB 1814, §2 (2011) and HB 252, HB 1973, and SB 1086, §1 and §2 (2013):  
Water Shortage Reporting and Fire Flow  
Rule Project No. 2013-047-290-OW

### **Background and reason(s) for the rulemaking:**

The adopted rulemaking would implement House Bill (HB) 252, relating to amendments to the Texas Water Code (TWC), §13.148, requiring retail public utilities and the system(s) that provides the utility's wholesale water service to provide the commission a report on the status of their water supply once the supply is less than 180 days. This adopted rulemaking would also implement amendments to the Texas Health and Safety Code (THSC), §341.0358 and §341.0359, as amended by HB 1814, §2, 82nd Legislature, 2011, and HB 1973 and Senate Bill (SB) 1086, §1 and §2, 83rd Legislature, 2013, regarding the development of standards for municipalities to require a utility to maintain a sufficient water flow and pressure to fire hydrants located in the municipality or the municipality's extraterritorial jurisdiction (ETJ) for purposes of emergency fire suppression.

### **Scope of the rulemaking:**

#### **A.) Summary of what the rulemaking will do:**

The adopted rulemaking would amend Chapters 290 and 291 to develop provisions for requiring retail public utilities and the entities that provide the utility's wholesale water service to report to the commission on the status of their water supply once the supply is less than 180 days.

The adopted rulemaking would also amend Chapter 290 to:

- expand the applicability of requirements establishing standards for sufficient fire flow and the installation of fire hydrants to:
  - a municipality with a population of more than 36,000 and less than 41,000 located in two counties, one of which is a county with a population of more than 1.8 million (Cities of Burleson, Coppell, and Lancaster). The applicability requirement listed above was added as §2, of HB 1814 during 82nd Legislature (2011), after the agency reviewed two previous versions of the bill that did not contain these provisions;
  - a municipality or the municipality's ETJ including any industrial district within the municipality or its ETJ with a population of more than 7,000 and less than 30,000

Re: Docket No. 2013-1383-RUL

- located in a county with a population of more than 155,000 and less than 180,000 (Cities of Buda and Kyle); or
- a municipality or the municipality's ETJ including any industrial district within the municipality or its ETJ with a population of more than 11,000 and less than 18,000 located in a county with a population of more than 125,000 and less than 230,000 (Cities of Cibolo, Crowley and Glenn Heights); and
  - establish a minimum standard that a municipality may adopt, requiring a utility within its jurisdictional boundary to maintain a minimum sufficient water flow and pressure to fire hydrants in residential areas. A municipality with a population of less than 1.9 million that, adopts a minimum standard in accordance with the requirements contained in this rule package or seeks to use a utility's water for fire suppression, is required to enter into a written memorandum of understanding with the utility to provide for the necessary testing of fire hydrants and other relevant issues pertaining to the use of water and maintenance of the fire hydrants to ensure compliance with the standards established in accordance with this rule package. The adopted rule would allow a municipality to notify the commission of a utility's failure to comply with an adopted standard, and the commission would be charged with enforcing the violation of the standard.

**B.) Scope required by federal regulations or state statutes:**

There are no federal changes. The adopted rulemaking implements HB 1814, §2, 82nd Legislature, 2011, and HB 252, HB 1973, and SB 1086, §1 and §2, 83rd Legislature, 2013.

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

The executive director's staff adopts §290.45 and its subdivisions to clarify that the commission will require additional capacity if a system is unable to meet the capacity requirements of sufficient water flow and pressure found in THSC, §341.0358 and §341.0359, as amended by HB 1814, §2 (2011) and HB 1973 (2013).

**Statutory authority:**

TWC, §§5.102, 5.103, 5.105 and 13.148; and THSC, §341.0358 and §341.0359.

**Effect on the:**

**A.) Regulated community:**

HB 252 (2013)

The adopted rulemaking impacts all retail public utilities and their wholesale water service providers. Retail public utilities and their wholesale water service providers have been self-reporting on a voluntary basis. The adopted rule requires mandatory reporting on the status of their water supply once the supply is less than 180 days.

HB 1814, §2 (2011) and HB 1973 and SB 1086, §1 and §2 (2013)

Public utilities in certain parts of the State have been required to adhere to requirements set by the municipality to provide sufficient water flow and pressure for the purposes of

Re: Docket No. 2013-1383-RUL

emergency fire suppression and the installation of fire hydrants. The adopted rule expands the requirement to additional specific areas of the State and gives all municipalities in the State the option to use the minimum flow and pressure standards developed by the commission. The adopted rule also requires water supply corporations to adhere to the commission's water flow and pressure standards.

**B.) Public:**

Water utility customers may see their water rates increase to fund additional equipment, contract services, or staff to determine the available water supply remaining. Water utility customers may also see a water rate increase to fund the construction of additional water pressure, production and storage facilities or the purchase of additional water capacity to meet the water flow and pressure requirements for providing emergency fire suppression.

The Chapter 290 and 291 rule adoption, as it relates to HB 252, provides some public benefit by providing retail water utilities across the State assistance in water supply planning to address future water supply needs.

The adopted Chapter 290 rule, as it relates to HB 1814, §2, and HB 1973 and SB 1086, §1 and §2, provide the potential for increased public safety protection with increased availability of capacity to provide sufficient water supply and fire hydrants to meet the fire flow demands.

**C.) Agency programs:**

The adopted Chapter 290 and 291 rulemakings do not impact agency programs. However, the Office of Compliance and Enforcement may experience an increase in complaints regarding public utilities and water supply corporation compliance with the requirements for providing sufficient water flow and pressure for the purposes of emergency fire suppression and the installation of fire hydrants.

**Stakeholder meetings:**

A stakeholder meeting was held on September 18, 2013, to discuss the potential impact of HB 1814, §2 (2011) and HB 252, HB 1973, and SB 1086 (2013). The main stakeholder feedback was concerned with how the requirements of the fire flow bills would be implemented, including discussion on HB 1973 regarding:

- the definition of "residential area" as stakeholders expressed the concern that a clear legislative definition was important because densities of service connections are taken into account when setting a fire flow standard,
- what qualifies as "new construction," which would exempt utilities from retrofitting existing infrastructure, and
- the role of fire departments in the practical application of the bill.

**Public comment:**

The comment period began on March 14, 2014 and closed on April 14, 2014. A public hearing was held on April 8, 2014, in Austin, Texas. While no comments were received on

Re: Docket No. 2013-1383-RUL

the water shortage reporting requirements, the commission did receive comments on the fire flow standards.

Comments were received from Representative Eddie Lucio, III, Cash Special Utility District, East Rio Hondo Water Supply Corporation, Independent Water and Sewer Companies of Texas, Markout Water Supply, Texas Rural Water Association, and The Terrill Firm, P.C., on behalf of Aqua Texas, Inc., Aqua Utilities, Inc., and Aqua Development, Inc. The commenters were generally supportive of the fire flow rules; however, they suggested changes on the implementation of a uniform fire flow standard by the commission.

The comments are summarized in the Response to Comments section of the preamble.

**Significant changes from proposal:**

After careful consideration of submitted comments, the executive director's staff revised §290.46(y)(2) by removing the phrase "with a population of less than 1.9 million" to clarify that the option to adopt a fire flow standard applies to all municipalities under the statute.

In response to comments, the executive director's staff revised §290.46(y)(4) to include the conditions that a fire flow standard adopted by a municipality must be based upon to more closely track the language of HB 1973 (2013).

In response to comment from Representative Lucio, III, and the other commenters, the executive director's staff modified §290.46(y)(6) to clarify that a municipality that does not own a municipal utility may not require a utility located in the municipality or municipality's ETJ to provide a minimum sufficient water flow and pressure greater than the standard established under subdivision (1) of HB 1973.

After careful consideration of submitted comments, including necessary rule changes in response to those comments, the executive director's staff revised §290.46(y)(8) to more accurately reflect the provisions in HB 1973 by clarifying that the population bracket of "less than 1.9 million" applies solely to the requirement for a municipality to enter into a memorandum of understanding with a utility in its jurisdiction to determine the requirements for complying with §290.46(y)(2) and (4).

**Potential controversial concerns and legislative interest:**

Because the Texas drought is of concern to many including media, the mandatory water shortage reporting to the commission could become controversial as more and more utilities are impacted by the drought. In addition, the stakeholders expressed concern with municipalities issuing different standards for the amount of flow required and the municipalities interpretation of a residential area as defined by HB 1973 compared to the definition of a residential area in existing §290.46(x)(1)(C).

Re: Docket No. 2013-1383-RUL

Representative Lucio, III, commented that HB 1973, which he authored, was the product of an exhaustive stakeholder process focused on uniformity of the fire flow standard amongst the water utility community. Representative Lucio, III, requested clarification regarding the proposed rules and stressed that "*cities that have their own utility may not require a standard greater than that which the city can provide, meaning that if they cannot meet their own adopted standard, they cannot require that of utilities serving in their city or ETJ.*" Representative Lucio, III, also stated that "*(g)iven the intent to be uniform in the methodology, comparing measurements at the point of delivery was contemplated as the most reasonable,*" the Representative requested "*TCEQ provide clarity on this issue, which will assist with TCEQ's enforcement of the new law.*" The executive director's staff responded that TCEQ will investigate any complaints regarding a utility or a municipality not meeting the fire flow standard. The investigation will be based upon the municipality's ordinance and a review of the required memorandum of understanding between the municipality and the utility.

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

The adopted Chapter 290 rule will require revisions to the evaluation and investigation of utilities required to comply with an ordinance passed as specified in HB 1973 and SB 1086, §1 and §2.

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

Without approval, Chapters 290 and 291 will be inconsistent with existing state statutes. There are no alternatives to this rulemaking.

**Key points in the adoption rulemaking schedule:**

<b><i>Texas Register</i> proposal publication date:</b>	March 14, 2014
<b>Anticipated <i>Texas Register</i> adoption publication date:</b>	August 22, 2014
<b>Anticipated effective date:</b>	August 28, 2014
<b>Six-month <i>Texas Register</i> filing deadline:</b>	September 14, 2014

**Agency contacts:**

Cindy Haynie, Rule Project Manager, (512) 239-3465, Water Supply Division

Ron Olson, Staff Attorney, (512) 239-0608

Derek Baxter, Texas Register Coordinator, (512) 239-2613

**Attachments**

HB 1814, §2, 82nd Legislature, 2011

HB 252, HB 1973, and SB 1086, §1 and §2, 83rd Legislature, 2013

Commissioners

Page 6

July 18, 2014

Re: Docket No. 2013-1383-RUL

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Marshall Coover  
Tucker Royall  
Pattie Burnett  
Office of General Counsel  
Cindy Haynie  
Derek Baxter