

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** September 28, 2012

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

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

Docket No.: 2011-1225-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 291, Utility Regulations
Chapter 293, Water Districts
HB 679, HB 1901, SB 18, SB 512, SB 573, SB 914 and SB 1234: Utilities and Districts
Rule Project No. 2011-055-293-OW

Background and reason(s) for the rulemaking:

In 2011, the 82nd Legislature passed: House Bill (HB) 679, filed by Representative Angie Chen Button; HB 1901, filed by Representative James L. "Jim" Keffer; Senate Bill (SB) 18, co-authored by Senator Craig Estes; SB 512, filed by Senator Glenn Hegar; SB 573, co-authored by Senator Robert Nichols; SB 914, filed by Senator Jeff Wentworth; and SB 1234, filed by Senator Royce West.

HB 679 amended Texas Water Code (TWC), §49.273 to allow a district's board to grant a contract manager authority to approve change orders that increase or decrease the contract amount by \$50,000 or less.

HB 1901 amended TWC, §49.181(a) and (h), §49.052(f), and §49.183(d) by providing an exemption from the executive director's approval for bonds issued by a public utility agency.

SB 18 amended TWC, §54.209 to further limit the eminent domain power of a municipal utility district (MUD) outside of its boundary.

SB 512 amended TWC, §53.063, redefining the qualifications of supervisors of a fresh water supply district (FWSD).

SB 573 amended existing law on granting certificates of public convenience and necessity (CCNs) for retail utility water or sewer service. SB 573 amended TWC, §13.245, to denote that the TCEQ may grant a CCN to a retail public utility within the corporate limits of the municipality or its extraterritorial jurisdiction (ETJ) without the municipality's consent under certain conditions if the municipality does not consent to the inclusion of the CCN before the 180th day after a landowner or retail public utility has formally requested service from the municipality. SB 573 also provided additional criteria which the TCEQ shall consider before granting the CCN to the retail public utility. If the CCN is granted,

Re: Docket No. 2011-1225-RUL

the TCEQ must include a condition that facilities will be designed and constructed according to the municipality's standards. SB 573 added provisions to the existing TWC, §13.2452(c-4) and (c-5) to specify the counties in which the provisions of the amended TWC, §13.254 do not apply. SB 573 also amended TWC, §13.2451 to specify that the TCEQ may not extend a municipality's CCN beyond its ETJ if a landowner elects to opt-out of a CCN and to specify the counties in which the opt-out provision does not apply. In addition to these amendments, SB 573 amended TWC, §13.246 to stipulate that a CCN applicant that has land removed from the requested area because a landowner elected to opt-out may not be required to provide service to the removed land for any reason. Lastly, TWC, §13.254 was amended by SB 573 to: change the requirements for when the TCEQ may revoke a CCN; shorten the review period for certain types of expedited revocation requests filed under TWC, §13.254(a-1) from 90 to 60 days; and create a process allowing a landowner owning at least a 25-acre tract to request an expedited release from a CCN in certain counties. Additional provisions were also added to TWC, §13.254, establishing the criteria for requesting an expedited release of a CCN under this provision, to specify the counties in which it applies, and to add requirements for notice of utility rate changes.

SB 914 amended TWC, §49.181 to allow an exemption from executive director approval for bonds issued by a conservation and reclamation district located in at least three counties that has the rights, powers, privileges, and functions applicable to a river authority.

SB 1234 amended Local Government Code, §375.022 to allow a municipal management district (MMD) to include within its creation petition a descriptive name followed by the phrase "improvement district" and verifiable landmarks in its boundary description.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

This rulemaking proposes to implement HB 679, HB 1901, SB 18, SB 512, SB 573, SB 914, and SB 1234. No additional actions are proposed beyond administrative changes.

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

Not required by federal regulations. This rulemaking is required to implement HB 679, HB 1901, SB 18, SB 512, SB 573, SB 914, and SB 1234.

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

Administrative changes are proposed to conform with *Texas Register* requirements.

Statutory authority:

TWC, §5.103

Effect on the:

A.) Regulated community:

Re: Docket No. 2011-1225-RUL

Utility districts are affected by legislation enacted in HB 679, HB 1901, SB 18, SB 512, SB 914 and SB 1234. HB 679 allows a district's board to grant a contract manager authority to approve change orders that increase or decrease the contract amount by \$50,000 or less. HB 1901 provides an exemption from executive director approval for bonds issued by a public utility agency. SB 18 affects MUDs by setting further limitations on eminent domain powers outside of a MUD's boundaries. SB 512 affects FWSDs by redefining the qualifications of its governing board of supervisors. SB 914 provides an exemption from executive director approval for bonds issued by a conservation and reclamation district located in at least three counties that has the rights, powers, privileges, and functions applicable to a river authority. Lastly, SB 1234 allows a MMD to include within its creation petition a boundary description using verifiable landmarks and a descriptive name followed by phrase "improvement district."

SB 573 affects retail public utilities and municipalities. Retail public utilities seeking to obtain a water and/or sewer CCN within the corporate boundaries or ETJ of a municipality in counties other than Cameron, Fannin, Grayson, Guadalupe, Hildago, Red River, Willacy, and Wilson Counties are affected because the retail public utility is required to request consent from the municipality and/or to seek service from the municipality. The retail public utility is also required to meet additional criteria before the CCN can be granted and must design and construct facilities to serve the area according to the municipality's standards. Municipalities are affected because they would be the recipient of a request for consent and/or for service from a retail public utility seeking to obtain a CCN within the municipality's corporate boundaries or ETJ. The municipality would need to respond to the consent and/or request for service, or choose to submit no response. If no response is received in 180 days, the TCEQ could then grant the CCN to the retail public utility in the municipality's corporate limits or ETJ. Furthermore, municipalities are affected if a retail public utility is successful in obtaining a CCN within the corporate boundaries or ETJ of the municipality. If the retail public utility is an Investor Owned Utility (IOU) and a CCN is granted within the municipality's corporate boundaries, then the municipality would have original rate setting jurisdiction over the IOU's rates and service policies within its corporate limits. SB 573 also affects a municipality not in Cameron, Fannin, Grayson, Guadalupe, Hildago, Red River, Willacy, or Wilson Counties that seeks to obtain a CCN beyond its ETJ if a landowner elects to opt-out of a CCN. In addition, SB 573 affects retail public utilities by changing the requirements for when the TCEQ may revoke a CCN by shortening the review period for certain types of expedited revocation requests filed under TWC, §13.254(a-1), from 90 to 60 days. SB 573 also created a process that would affect a CCN holder, whether a municipality or another form of a retail public utility because it allows a landowner owning at least a 25-acre tract to request an expedited release from the CCN in certain counties. If a landowner was successful in getting his land removed from the CCN, then the CCN holder would have a reduced service area and would need to seek compensation from the landowner for losses resulting from the removed portion.

B.) Public:

Re: Docket No. 2011-1225-RUL

HB 679, HB 1901, SB 914, and SB 1234 do not affect the general public nor do they create a new group of affected persons. SB 18 affects the general public and affected persons owning property outside of a MUD's boundary because this bill sets further eminent domain power limitations outside of a MUD's boundaries; however, SB 18 does not create a new group of affected persons. SB 512 also affects the general public and affected persons desiring to be a supervisor of a FWSD; however it does not create a new group of affected persons. SB 573 affects any affected person whose property is located in the corporate boundaries or ETJ of a municipality where a retail public utility is seeking to obtain a water and/or sewer CCN. Additionally, SB 573 affects any affected person owning 50 acres or more either wholly or partially within the boundaries of an existing CCN by reducing the review period from 90 to 60 days. SB 573 creates a group of affected persons that were not affected before, comprised of affected persons owning a 25-acre tract that is wholly or partially located within the boundaries of an existing CCN in certain counties. SB 573 created a process for this group of affected persons to allow them to request an expedited release from an existing CCN. If a landowner is successful in getting his land removed from a CCN, the landowner may be required to compensate the CCN holder for losses associated with the removed area.

C.) Agency programs:

For the first five-year period the proposed rules are in effect, the agency would use currently available resources when administering or enforcing the provisions.

Stakeholder meetings:

There will be a public hearing for this rulemaking on December 4, 2012 in Austin, Texas.

Potential controversial concerns and legislative interest:

The executive director has processed several requests for decertification of a CCN under TWC, §13.254(a-5) for a landowner owning 25 acres or more either wholly or partially within a CCN in certain counties. The regulated community, especially non-profit water supply corporations, has expressed concerns regarding whether the land can be released from a CCN without taking federal debt into consideration before the decertification.

The executive director's decision to approve a decertification application was challenged in federal court; this matter remains pending.

In a separate application from a landowner requesting to be released from an existing CCN under TWC, §13.245(a-5), the CCN holder challenged the executive director's decision to decertify a portion of the CCN because the CCN holder believed that service was already provided to the property being decertified. During the May 30, 2012 commission agenda, Docket No. 2011-2271-UCR was remanded back to the executive director for further review and action as deemed appropriate. This matter remains pending with the executive director's staff.

Re: Docket No. 2011-1225-RUL

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

No.

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

Without approval, Chapters 291 and 293 will be inconsistent with existing state statutes. There are no alternatives to this rulemaking.

Key points in the proposal rulemaking schedule:

Anticipated proposal date:	October 17, 2012
Anticipated <i>Texas Register</i> publication date:	November 2, 2012
Public hearing date (if any):	December 4, 2012
Public comment period:	November 2, 2012 through December 10, 2012
Anticipated adoption date:	March 2013

Agency contacts:

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Attachments

HB 679, HB 1901, SB 18, SB 512, SB 573, SB 914, and SB 1234

cc: Chief Clerk, 2 copies
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