

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** May 11, 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.:** 2011-1226-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 290, Public Drinking Water  
Chapter 291, Utility Regulations  
HB 805 (EPP) and Federal Ground Water Rule (GWR), Total Organic Carbon (TOC) Rule, and EPA Method 334.0  
Rule Project No. 2011-056-290-OW

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

This rulemaking will make changes to Chapters 290 and 291 to incorporate the requirements of House Bill (HB) 805, 82nd Legislature, 2011, relating to emergency preparedness plans (EPP). Proposed changes will also make Chapter 290 consistent with the federal Ground Water Rule (GWR) and the federal Total Organic Carbon (TOC) Rule. This rulemaking will also address an inconsistency with federal rules that resulted when the United States Environmental Protection Agency (EPA) adopted Method 334.0 for continuous chlorine residual analyzers. Additionally, staff recommends a change to the definition of groundwater under the direct influence of surface water (GUI), to make it consistent with agency practice and the federal GWR.

HB 805

Senate Bill (SB) 361, 81st Legislature, 2009, was incorporated into TCEQ rules in 2009. SB 361 required a retail public utility, exempt utility, or provider or conveyor of potable or raw water in a county with a population of 3.3 million or in an adjacent county with a population of 400,000 or more that furnishes water service to more than one customer: to ensure the emergency operation of its water system during an extended power outage, as soon as safe and practicable following the occurrence of a natural disaster; to adopt an EPP that demonstrates the affected utility's ability to provide emergency operations; and, to submit the plan to the commission for approval. SB 361 required TCEQ to adopt rules to implement Texas Water Code (TWC), §13.1395, and to meet the specific requirements to ensure emergency operation at 35 pounds per square inch (psi) through the adoption of the EPP as well as develop an EPP template that lists and explains the necessary preparations and all the commission rules and standards pertaining to EPPs. Currently, affected utilities with customers in Harris County are required to submit and implement an EPP. Based on HB 805, affected utilities in Harris and Fort Bend Counties will be required to prepare and submit an EPP for TCEQ review and approval by February 1, 2012, and to begin implementing the plan by June 1, 2012. The bill allows a one-time extension to each

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of these deadlines (to March 1, 2012 for submittal and to September 1, 2012 for implementation).

GWR

Federal rules for microbiological monitoring have been in place since 1989. On October 12, 2006, the EPA adopted the GWR, which primarily focuses on groundwater sources, to provide additional protection from fecal contamination. The commission adopted the GWR on December 19, 2008 (Rule Project 2006-045-290-PR). Under Title 40, Code of Federal Regulations (CFR) §142.10, the commission must adopt rules at least as stringent as the federal rules to maintain primacy over public water systems (PWS) in Texas. TCEQ is proposing revisions to the existing Chapter 290 rules to provide language that is consistent with the federal rule.

**Scope of the rulemaking:**

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

The proposed rulemaking would bring Chapters 290 and 291 into conformity with HB 805, the federal GWR, TOC, and EPA Method 334.0. The federal regulations implement the federal Safe Drinking Water Act. The proposed amendments made by HB 805 expand the counties to which the EPP requirement applies and provide a timeline for newly affected water systems to comply. The proposed amendments made for the GWR establish rule language consistent with that used in the federal regulations, including a change to the definition of GUI to make it consistent with 40 CFR §141.2. The GWR provides a definition of GUI that includes the use of documentation of well construction characteristics and geology with field evaluation to determine if groundwater source of drinking water is a GUI. The TCEQ's existing definition of a GUI only reflects the use of water quality data to make the determination of a GUI. The proposed amendments to the TOC Rule correct an inaccuracy in the applicability statement that made the state requirements broader than the federal requirements. The proposed amendments related to EPA Method 334.0 make it an approved method for measuring chlorine residual in drinking water.

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

HB 805

The proposed amendments would incorporate HB 805 that expands the counties to which the EPP requirement applies and provide a timeline for newly affected water systems to comply.

GWR

The purpose of the GWR is to provide increased protection against microbial pathogens in PWSs that use groundwater sources. The EPA is particularly concerned about groundwater systems that are susceptible to fecal contamination since disease-causing pathogens may be found in fecal contamination. The GWR requires additional microbial sampling from the groundwater source in the event of a coliform-positive sample in the distribution system. The GWR also requires that "significant deficiencies" identified by the TCEQ be corrected by the system within an established timeframe. In reviewing the state

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rule, the executive director's staff and the EPA determined that state revisions are needed to conform to the federal GWR. The majority of the changes are minor such as adding the terms "raw groundwater source monitoring," "significant deficiencies," and "situations," as well as revising the definition of GUI as it relates to mixed systems referred to in the GWR. These terms are prominent in the federal language and are proposed in several areas to provide consistency with the federal rule and to clarify the state rule.

TOC

The proposed amendments are made to correct an inaccuracy in the applicability statement of the TOC Rule that made the state requirements broader than the federal requirements.

EPA Method 334.0

The proposed amendments include EPA Method 334.0 as an approved method for measuring chlorine residual in drinking water.

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

**§290.46**

Update the microbiological submission subsection to specify that samples must be submitted in a manner prescribed by the executive director to give the commission more flexibility with how data should be reported.

**§290.109**

Update the reporting requirements subsection to include a statement that data must be submitted in a manner prescribed by the executive director to give the commission more flexibility with how data should be reported.

**§290.116**

Rephrase the "in lieu of" statements in all applicable citations because they are confusing in the existing language and have generated several questions and complaints from the regulated community.

**§290.122**

Delete the term "violation" in §290.122(a)(2)(D) where it says "notice violation" because the regulated community must post a notice, not a notice violation. Add additional electronic posting methods in all applicable subdivisions to give the regulated community more flexibility with posting options.

**Statutory authority:**

These amendments are proposed under TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to perform any act necessary to carry out its jurisdiction; TWC §5.103, which establishes the commission's authority to adopt any rules necessary to carry out its powers

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and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule; Texas Health and Safety Code (THSC), §341.031(a), which establishes the commission's authority to adopt and enforce rules to implement the federal Safe Drinking Water Act (42 United States Code, §§300f, *et seq.*); THSC, §341.0315, which requires public drinking water systems to comply with commission rules adopted to ensure the supply of safe drinking water. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated or implied by TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The proposed amendments implement TWC, §13.1395, as amended by HB 805, the federal GWR, TOC Rule, and the chlorine residual analyzer Method 334.0, which implement the federal Safe Drinking Water Act.

**Effect on the:**

**A.) Regulated community:**

HB 805

HB 805 expands the EPP requirement, previously limited to Harris County, into Fort Bend County. All PWSs in Fort Bend County serving connections with overnight accommodations will be affected by this regulation. It is estimated that fewer than 175 systems will be affected. Cost of compliance varies because the affected utilities have eight options to achieve compliance. Thus, the cost can vary depending on the option chosen and with the size and complexity of the system. Additionally, a financial waiver is available for systems for which the cost of compliance would result in a significant financial burden to its customers.

GWR

PWSs will be affected by this rulemaking but the effect will be minimal because the Water Supply Division's Drinking Water Protection Team has been providing guidance using a combination of the existing state rule language and the federal rule language contained in the CFR. Although the proposed rule changes for the GWR are significant, the additional federal requirements are not anticipated to significantly increase costs to the regulated community. Also, there will not be any compliance impacts to the regulated community because the Water Supply Division's Drinking Water Protection Team has been implementing the requirements of the GWR consistent with the federal requirements.

TOC

The proposed amendments made for the TOC Rule are to correct an inaccuracy in the applicability statement that extended the state requirements of §290.112 to treatment plants that are not subject to the corresponding federal requirements; therefore, it is not anticipated that the effect of complying with the proposed amendments will be significant.

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EPA Method 334.0

The proposed amendments made for EPA Method 334.0 make it an approved method for measuring chlorine residual in drinking water; therefore, it is not anticipated that the effect of complying with the proposed amendments will be significant.

**B.) Public:**

HB 805

The cost of compliance for HB 805 will be passed along to the customers of the affected utilities. Also, the customers will receive the benefit of having emergency operations following a natural disaster.

GWR

Customers of PWSs would be minimally affected by this rulemaking due to a slight increase in public notices from groundwater systems as a result of violations or situations associated with the GWR.

TOC

There is no anticipated impact as a result of this rulemaking.

EPA Method 334.0

There is no anticipated effect to the public as a result of this rulemaking because the proposed amendments only provide an additional method for analyzing chlorine residual.

**C.) Agency programs:**

HB 805

HB 805 is an expansion of an existing project. The Water Supply Division will outsource most of the project and estimates a two-year implementation period with a cost of \$250,000 for the first year.

GWR

The program areas affected by this rulemaking would be the Water Supply Division, Regional Offices, and Enforcement Division. The Water Supply Division would make changes to the text of public education materials and correspondence provided to systems that commit violations or have situations associated with the GWR. The Regional Offices will be affected as a result of the requirements for investigations and correspondence to the regulated community. The Enforcement Division may receive requests for information about the changed rules as well as a potential increase in enforcement cases. The changes and effects discussed will be minimal due to the Water Supply Division's implementation activities already in place since the GWR became effective in December 2009.

TOC

There is no anticipated impact as a result of this rulemaking.

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*EPA Method 334.0*

Rulemaking is proposed to make Method 334.0 an approved method for measuring chlorine residual in drinking water. This allows PWSs more flexibility in complying with programs associated with the measurement of chlorine residuals. Therefore, it is anticipated that there will be minimal effect to agency programs as a result of this rulemaking.

**Stakeholder meetings:**

The rule team held a stakeholder meeting on September 13, 2011. The meeting was coordinated through the Drinking Water Advisory Work Group and meeting information was posted on the agency's Web site. There were no specific comments received. The general discussion during the meeting was appreciative of the TCEQ clarifying the state regulations to be consistent with the federal regulations. The stakeholder meeting resulted in no changes to this rulemaking. There will be a public hearing during the comment period for this rulemaking on July 10, 2012 in Austin, Texas.

**Potential controversial concerns and legislative interest:**

HB 805 expands an existing program. The expansion has been anticipated since the passage of the first EPP requirement, and will affect a relatively small number of water systems.

The GWR has historically been a controversial rule because it requires additional microbiological sampling, corrective actions, public notifications, and reporting for PWSs. However, no significant changes are contained in the proposed rule language revisions so prolonged public dispute or debate is not anticipated. The revisions are proposed to conform to the federal rule language.

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

HB 805 expands the EPP program into Fort Bend County. All of the water systems that serve overnight accommodations will be affected by this regulation, whereas they were not affected in the past. TCEQ will apply existing EPP policies to newly affected water systems. There will be no effect on existing policies or the development of new policies as a result of rulemaking associated with the GWR, TOC Rule, and EPA Method 334.0.

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

If TCEQ does not include HB 805 in the TCEQ's rules, the TCEQ's rules and the state statute would be in conflict. The only other options would be to repeal our current rules and implement HB 805 directly from the statute.

Direct implementation of the federal Safe Drinking Water Act and its amendments by the EPA would be the alternative. The state of Texas must adopt, implement, and enforce regulations at least as stringent as the EPA's Safe Drinking Water Act to maintain primary

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enforcement authority for drinking water. Where states do not meet that requirement, the EPA performs direct implementation of the Safe Drinking Water Act and its amendments through its regional offices.

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

**Anticipated proposal date:** May 30, 2012  
**Anticipated *Texas Register* publication date:** June 15, 2012  
**Public hearing date (if any):** July 10, 2012  
**Public comment period:** June 15, 2012 through July 16, 2012  
**Anticipated adoption date:** October 17, 2012

**Agency contacts:**

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**Attachments**

HB 805; GWR; TOC; and EPA Method 334.0

cc: Chief Clerk, 2 copies  
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