

The Texas Natural Resource Conservation Commission (commission) adopts new §291.145, Preenforcement Threshold of Noncompliance, *with change* to the proposed text as published in the March 15, 2002 issue of the *Texas Register* (27 TexReg 1982).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Senate Bill (SB) 649 (an Act relating to training requirements for applicants for, and recipients of, financial assistance for water and sewer services under the Economically Distressed Areas Program (EDAP)), 77th Legislature, 2001, added Texas Water Code (TWC), Chapter 17, Subchapter M, and mandates the commission, by rule, to establish a preenforcement threshold of noncompliance at which the commission may notify the Texas Water Development Board (TWDB) that an operating entity needs training.

SECTION DISCUSSION

Adopted new §291.145 includes definitions for certain words; provides the purpose of the adopted rule; provides the criteria used for the adopted rule; and provides notification of enforcement actions related to the adopted rule.

Adopted new subsection (a) is included to clearly define the terms “operating entity” and “preenforcement threshold of noncompliance” as used in the adopted rule.

Adopted new subsection (b) provides that the purpose of the rule is to evaluate whether the managerial, financial, and technical capabilities of an operating entity that is an applicant for, or recipient of,

financial assistance from the EDAP are adequate to meet program requirements or to remain financially viable and whether an operating entity needs training if the operating entity has a history of compliance problems.

Adopted new subsection (c) provides the criteria the commission may use when determining whether to notify the TWDB that an operating entity needs training. If an inspection or other assessment of the water or sewer system by the TWDB or the commission reveals that the governing body has failed to properly exercise its fiduciary duties, properly manage its employees' work-related activities, or ensure adequate operation of its physical facilities, the commission may notify the TWDB.

Adopted new subsection (d) provides that the commission shall notify the TWDB when the commission assesses a penalty against an operating entity and that if the commission assesses a penalty against an operating entity in an enforcement action, the enforcement order shall contain a provision requiring that the operating entity receive training as required by the TWDB.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

"Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may 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. The intent of this rulemaking is to implement SB 649, which requires the commission to adopt rules requiring training under certain conditions for recipients of, and the applicants for, certain financial assistance in economically distressed areas. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). Specifically, the rulemaking does not exceed a federal standard because there are no applicable federal standards; exceed an express requirement of state law, but rather implements specific state statutes enacted by SB 649; or exceed a requirement of a delegation agreement because there is no applicable delegation agreement. Finally, the rulemaking was not developed solely under the general powers of the commission, but specifically developed to implement SB 649, which requires the commission to establish, by rule, a preenforcement threshold of noncompliance at which the commission may notify the TWDB that an operating entity needs training.

The commission solicited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments on the draft regulatory impact analysis determination were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and determined that the rule does not constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to implement SB 649, which requires the commission to adopt procedural rules requiring training under certain conditions for recipients of, and the applicants for, certain financial assistance in economically distressed areas. Promulgation and enforcement of the rulemaking will constitute neither a statutory

nor a constitutional taking of private real property. Specifically, the rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. There are no burdens imposed on private real property under this rulemaking as the rulemaking neither relates to nor has any impact on the use or enjoyment of private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rulemaking is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program, nor does it affect any action or authorization identified in §505.11. The rulemaking concerns only the determination of preenforcement thresholds of noncompliance and the subsequent appropriate notification. Therefore, the rulemaking is not subject to the Texas Coastal Management Program.

The commission solicited public comment regarding the consistency determination during the public comment period. No comments on the consistency determination were received.

PUBLIC COMMENT

A public hearing was held on Tuesday, April 9, 2002. No one commented at the hearing. Written comments were received from the Texas Water Development Board (TWDB or board) and one

individual. The commenters were not specifically in favor or against, but rather offered suggested changes/improvements to the proposed rule language.

RESPONSE TO COMMENTS

An individual commented that the rule should establish minimum criteria for determining when an entity needs assistance, that it is preferable to have training available when the new operating entity is established, and that an alternative solution would be to allow new utilities (serving less than 100,000 people) to receive one notice of violation letter (NOV) before they are required to receive training.

The commission disagrees with this comment. Training is already available to any operating entity if requested. The commission disagrees with the comment regarding size restrictions because the statute applies to all operating entities that participate in the EDAP. The commission disagrees with the suggestion that new utilities serving under 100,000 people be allowed to receive one NOV before they are required to receive training. The statute clearly articulates the criteria upon which a referral to the board for training can be made. No change has been made in response to this comment.

The TWDB suggested the following rule language regarding the definition of preenforcement threshold of noncompliance in subsection (a)(2): “the point at which the commission determines that an operating entity needs training because its financial, managerial, or technical capabilities are inadequate to ensure that operation of its water or wastewater facilities will meet requirements of the Economically

Distressed Areas Program, Subchapter K, Chapter 17 Water Code (EDAP) or are inadequate to ensure its financial viability.”

The commission agrees with the suggested rule language and has revised the rule language in response to this comment. However, the commission is replacing “Subchapter K” with “Subchapter M” to correctly reference the statute.

The TWDB suggested the addition of the words “Upon request of the board” and the replacement of “may” with “shall” in subsection (b).

The commission disagrees with these suggested revisions because they impose requirements that are not directed by statute. The suggested language would mandate that the commission refer operating entities to the board for training rather than allowing the commission the discretion articulated by the statute. No change has been made in response to this comment.

The TWDB suggested the restructuring of subsection (b) into a subsection (b) and (c) and the subsequent relettering of the subsections.

The commission disagrees with the formatting suggestion and declines to make this change as formatting changes are unnecessary to the readability and understanding of the rule.

The TWDB suggested the replacement of “may” with “shall” and the addition of the words “or sewer” in subsection (c).

The commission disagrees with the replacement of “may” with “shall” because it imposes a requirement that is not directed by statute. The statute provides that the commission may evaluate and refer an operating entity for training. The suggested language would mandate that the commission refer operating entities to the board for training rather than allowing the commission the discretion articulated by the statute. No change has been made in response to this part of the comment. However, the commission agrees with the addition of the words “or sewer” for the purposes of consistency and to clarify that both water and sewer systems are subject to these requirements. The commission has added language to the rule in response to the comment regarding the addition of the term “sewer.”

The TWDB suggested revising the rule language in subsection (c)(1) to say “properly exercise its fiduciary duties” rather than “exercise proper care in its fiduciary duties.”

The commission agrees with the suggested rule language and has revised the rule language in response to this comment.

The TWDB suggested the following rule language in subsection (c)(2): “employ personnel qualified to operate its water or sewer system or properly supervise its employees’ work-related activities; or....”

The commission disagrees with the specific rule language suggested because the current structure of subsection (c) was formatted to make a distinction among the financial, managerial, and technical capabilities in paragraphs (1) - (3), respectively. However, the commission agrees that subsection (c)(2) should be revised to read as “properly manage its employees’ work-related activities” in order to ensure that the managerial duties of a governing body are more explicit.

The TWDB suggested the following rule language to subsection (d): “The commission shall notify the board when the commission proposes to assess or assesses a penalty against an operating entity that is participating in or is eligible to participate in EDAP. If the commission assesses a penalty against such an operating entity or enters into a settlement or agreed order in an enforcement action against such an operating entity, the enforcement order, settlement, or agreed order shall contain a provision requiring the operating entity to receive training as determined appropriate by the board.”

The commission agrees with the suggested rule language adding “or assesses” and has made this change to the rule in response to this part of the comment. The commission disagrees with the comment suggesting the addition of the rule language “that is participating in or is eligible to participate in EDAP.” The suggested rule language would expand this rule outside the scope of the statute. The statute only provides for referrals when an operating entity is seeking financial assistance from the board, rather than being simply eligible. No change has been made to the rule in response to this part of the comment. The commission disagrees with the suggested rule language adding “such,” “or enters into a settlement or agreed order,” “against such an operating entity,” and “settlement, or agreed order” because the suggested rule language is

outside the scope of the statute. The statute provides that the commission shall include a provision only in an enforcement action requiring training as mandated by the board when the commission assesses a penalty. No change has been made to the rule in response to this part of the comment. Lastly, the commission disagrees with the specific rule language suggestion replacing the word “ordered” with “determined appropriate.” However, the commission agrees to replace the word “ordered” with “required” in order to allow the rule to be flexible enough to address all necessary board decisions.

The commission also revised subsection (d) to correct inconsistencies with the statute. The words “proposes to assess” have been deleted.

SUBCHAPTER J: ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

§291.145

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; and TWC, §17.993(c), as adopted by SB 649, 77th Legislature, which requires the commission to establish, by rule, a preenforcement threshold of noncompliance at which the commission may notify the TWDB that an operating entity needs training.

§291.145. Preenforcement Threshold of Noncompliance.

(a) Definitions.

(1) **Operating Entity** - The governing body of a political subdivision, as defined by Texas Water Code, §17.921(3) and by the rules of the Texas Water Development Board (TWDB), responsible for providing water supply and sewer services and the management of its water and sewer system.

(2) **Preenforcement Threshold of Noncompliance** - The point at which the commission determines that an operating entity needs training because its financial, managerial, or technical capabilities are inadequate to ensure that operation of its water or wastewater facilities will

meet requirements of the Economically Distressed Areas Program ((EDAP), Texas Water Code, Chapter 17, Subchapter M) or are inadequate to ensure its financial viability.

(b) The commission may evaluate whether the managerial, financial, and technical capabilities of an operating entity who is an applicant for, or recipient of, financial assistance from the EDAP are adequate to meet program requirements or to remain financially viable. The commission may also evaluate whether an operating entity needs training if the operating entity has a history of compliance problems.

(c) The commission may notify the TWDB that the operating entity needs training if an inspection or other assessment of the water or sewer system by the TWDB or commission reveals that the governing body has failed to:

- (1) properly exercise its fiduciary duties;
- (2) properly manage its employees' work-related activities; or
- (3) ensure adequate operation of its physical facilities.

(d) The commission shall notify the TWDB when the commission assesses a penalty against an operating entity. If the commission assesses a penalty against an operating entity in an enforcement

action, the enforcement order shall contain a provision requiring that the operating entity receive training as required by the TWDB.