The Texas Natural Resource Conservation Commission (commission) proposes new §291.145, Preenforcement Threshold of Noncompliance.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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

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

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

Proposed new subsection (b), provides that the purpose of the rule is to 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 and whether an operating entity needs training if the operating entity has a history of compliance problems.

Proposed 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 system by the TWDB or the commission reveals that the governing body has failed to exercise proper care in its fiduciary duties, sufficiently employ or supervise its employees' work-related activities, or ensure adequate operation of its physical facilities, the commission may notify the TWDB.

Proposed new subsection (d), provides that the commission shall notify the TWDB when the commission proposes to assess 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 ordered by the TWDB.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed new section is in effect, there will be no significant fiscal implications for the commission due to administration and enforcement of the proposed rule. The governing body of a political subdivision that provides and manages water and sewer services in economically distressed areas could incur training costs up to $6,000 if the commission determines that these operating entities require additional financial, managerial, or technical training. There would be

no fiscal implications for operating entities not located in economically distressed areas to comply with the proposed rulemaking.

The proposed rule is intended to implement provisions of SB 649, 77th Legislature, 2001, which requires the commission to establish, by rule, criteria to be used to determine if an operating entity needs training. Operating entities, which include units of local government and nonprofit water supply corporations, are responsible for managing and providing water and sewer services. This rule may affect operating entities which seek or have received funding under the EDAP in economically distressed areas of the state. An economically distressed area is an area where the water supply or sewer services are inadequate to meet minimal needs of residential users as defined by TWDB rules; financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and an established residential subdivision was located on June 1, 1989, as determined by the TWDB. There are currently operating entities in 53 counties, primarily located along the Texas/Mexico border, that may seek or have received financial assistance for water and wastewater system-related projects that may be affected by this rulemaking.

Senate Bill 649 requires the commission to adopt procedural rules requiring training under certain conditions for recipients of, and applicants for, financial assistance in economically distressed areas. The proposed rule is intended to provide the criteria the commission will use when determining whether to notify the TWDB that operating entities seeking financial assistance in economically distressed areas require training on financial, managerial, and technical issues prior to receiving monetary assistance. Additionally, the proposed rule is intended to require the commission to include training requirements

in any enforcement action against an operating entity seeking financial aid. These provisions are not anticipated to result in significant fiscal implications for the commission.

If the commission determines an operating entity requires further training, there will be training-related costs to comply with the proposed rule. The commission estimates it would cost an operating entity between approximately $1,500 to $6,000 for a series of three three-hour seminars. The cost to operating entities could be reduced if they apply for and receive financial assistance from the state. The commission does not anticipate that units of government in economically distressed areas would lose funding due to implementation of the proposed rule.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule will be potentially increased rate of compliance with the state's drinking water and wastewater treatment regulations through increased training.

This rulemaking is intended to implement provisions of SB 649, 77th Legislature, 2001, which requires the commission to adopt rules requiring training under certain conditions for recipients of, and applicants for, financial assistance in economically distressed areas. The proposed rule is intended to provide the criteria the commission will use when determining whether to notify the TWDB that operating entities seeking financial assistance in economically distressed areas require training on financial, managerial, and technical issues prior to receiving monetary assistance. Additionally, the

proposed rule is intended to require the commission to include training requirements in any enforcement action against an operating entity seeking financial aid.

This rulemaking may apply to operating entities, which include nonprofit water supply corporations, providing water and wastewater services within the affected 53 counties. If the commission determines an operating entity requires further training, there will be training related costs to comply with the proposed rule. The commission estimates it would cost an operating entity between approximately $1,500 to $6,000 for a series of three three-hour seminars. The cost to operating entities could be reduced if they apply for and receive financial assistance from the state. The commission does not anticipate that operating entities in economically distressed areas would lose funding due to implementation of the proposed rule.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications to small or micro-businesses as a result of implementing the proposed rule, which is intended to implement provisions of SB 649, 77th Legislature, 2001. The bill requires the commission to adopt rules requiring training under certain conditions for recipients of, and applicants for, financial assistance in economically distressed areas. The proposed rule is intended to provide the criteria the commission will use when determining whether to notify the TWDB that operating entities seeking financial assistance in economically distressed areas require training on financial, managerial, and technical issues prior to receiving monetary assistance. Additionally, the proposed rule is intended to require the commission to include training requirements in any enforcement action against an operating entity seeking financial aid.

The proposed rule only affects political subdivisions, which does include nonprofit water supply and sewer corporations. These corporations are member owned and controlled and are not considered to be for-profit small and micro-businesses. Therefore, the commission does not anticipate that any small or micro-businesses will be impacted by provisions in this rulemaking.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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 the proposed rule 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 proposed rule does not exceed a federal standard because

there are no applicable federal standards, exceed an express requirement of state law but rather implement specific state statutes enacted by SB 649, or exceed a requirement of a delegation agreement because there is no applicable delegation agreement. Finally, the proposed rule 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 invites public comment regarding the draft regulatory impact analysis determination during the public comment period. 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 the proposed rule and performed a preliminary assessment of whether the rule constitutes 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 proposed rule will constitute neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation 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 proposed rule 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 invites public comment regarding the consistency determination during the public comment period. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on April 9, 2002 at 10:00 a.m., in Building F, Room 2210 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 before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-052-291-WT. Comments must be received by 5:00 p.m., April 15, 2002. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

STATUTORY AUTHORITY

The new section is proposed under TWC, §5.103 and §5.105, which provide the commission with 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.

The new section implements SB 649, 77th Legislature, 2001, 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.

SUBCHAPTER J: ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

§291.145.

§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 an operating entity needs training because of its history of violations of the commission's rules relating to the financial, managerial, or technical operation of its water or wastewater facilities.

(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 Economically Distressed Areas Program 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 system by the TWDB or commission reveals that the governing body has failed to:

(1) exercise proper care in its fiduciary duties;

(2) sufficiently employ or supervise its employees' work-related activities; or

(3) ensure adequate operation of its physical facilities.

(d) The commission shall notify the TWDB when the commission proposes to assess 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 ordered by the TWDB.