

The Texas Commission on Environmental Quality (commission) adopts amendments to §§290.251 - 290.253 and 290.256. The amendments are adopted *without changes* to the proposed text as published in the September 30, 2005, issue of the *Texas Register* (30 TexReg 6208) and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 79th Legislature, 2005, passed House Bill (HB) 2428, which relates to water and energy saving performance standards for commercial pre-rinse spray valves. HB 2428 amended Texas Health and Safety Code (THSC), §372.001, by adding a definition for commercial pre-rinse spray valves and THSC, §372.005, by adding performance standards for commercial pre-rinse spray valves and related fees.

This bill requires the commission to develop and maintain a current list of commercial pre-rinse spray valves that are certified to the commission by the manufacturer or importer and meet the performance standards. This bill also allows the commission to remove from the list any valve the commission determines to be inaccurately certified. Next, this bill allows the commission to assess a reasonable fee to the manufacturer or importer for an inspection of a commercial pre-rinse spray valve to determine the accuracy of the certification in an amount determined by the commission to cover the expenses incurred in implementing THSC, Chapter 372. Finally, HB 2428 provided temporary exemptions for sellers, distributors, lessors, or importers of these valves.

HB 2428 is effective January 1, 2006.

#### SECTION BY SECTION DISCUSSION

The commission adopts the amendments to §§290.251 - 290.253 and 290.256 to implement THSC, Chapter 372, as amended by the 79th Legislature, and the exemption provisions of HB 2428.

Section 290.251, Purpose, Authority, and Definitions, is amended by adding the definitions for “ASTM” and for “Commercial pre-rinse spray valve” and by adding commercial pre-rinse spray valves to the list of plumbing fixtures. The commission also proposes to renumber the subsequent definitions.

In §290.251(3), the commission adds the definition for “ASTM” to specify the meaning of the term. This acronym is used in THSC, §372.005, as amended by the 79th Legislature. The commission is using this term in the adopted rules to ensure that the commission’s rules correspond to the THSC.

In §290.251(4), the commission defines “Commercial pre-rinse spray valve” as a handheld device that is designed and marketed for use with commercial dishwashing and ware washing equipment and that is used to spray water on dishes, flatware, and other food service items to remove food residue before the items are cleaned in a dishwasher or ware washer or by hand. This definition is from THSC, §372.005, and is included in the adopted rule to implement THSC, §372.005, as amended by the 79th Legislature.

The amendment to §290.251(9), renumbered to paragraph (11), would add commercial pre-rinse spray valves to the definition of plumbing fixtures. The commission adopts this amendment to implement THSC, §372.005, as amended by the 79th Legislature.

In §290.252, Design Standards, the commission adds the American Society for Testing and Materials standards to the list of water saving performance standards in subsection (b).

Section 290.252(b)(7) specifies the maximum flow rate from a commercial pre-rinse spray valve. The commission adopts this amendment to implement THSC, §372.005, as amended by the 79th Legislature.

In §290.253, Plumbing Fixture List, the commission adds to subsection (a)(1) the words, “or the American Society for Testing and Materials.” This amendment allows plumbing fixtures to be tested using these standards. The commission adopts this amendment to implement THSC, §372.005, as amended by the 79th Legislature.

In §290.253, the commission adds subsection (c), to allow the commission to assess against a manufacturer or importer a reasonable fee for an inspection of a commercial pre-rinse spray valve to determine the accuracy of the manufacturer’s or importer’s certification in an amount determined by the commission to cover the expenses incurred in the administration of this chapter. The commission adopts this amendment to implement THSC, §372.005, as amended by the 79th Legislature.

In the amendment to §290.256, Exemptions, the commission will reclassify the existing text as subsection (a). This text will now read as “(a) These sections do not apply to a plumbing fixture:. . .” This amendment allows the commission to add a subsection (b), which will define exemptions to the

new commercial pre-rinse spray valve rules. The commission adopts this amendment to implement HB 2428, §3.

Also in the amendment to §290.256, the commission adds subsection (b), which will provide exemptions for sellers, distributors, lessors, or importers of certain commercial pre-rinse spray valves sold before September 1, 2006. The commission adopts this amendment to implement HB 2428, §3.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 the Texas Administrative Procedure Act. A “major environmental rule” is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Here, the primary purpose of the adopted rules is to protect the environment through standardization and regulating the flow rate of pre-rinse spray valves, thereby reducing water and energy use. The adopted rules will not have an adverse material impact because they: 1) allow retailers, distributors, lessors, and importers of pre-rinse spray valves to continue selling their January 1, 2006, inventories or deliveries received up to February 1, 2006, until September 1, 2006; 2) do not require current users of these valves to purchase new units; and 3) limit the commission to assess a reasonable fee.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a), where the adopted rules: 1) are specifically required by state law, namely THSC, §372.001 and §372.005; 2) do not exceed the express requirements of THSC, §372.001 and §372.005; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program where there is no federal delegation regarding commercial pre-rinse spray valves and there is no agreement or contract between the federal government and the State of Texas or commission on commercial pre-rinse spray valves; and 4) are not an adoption of a rule solely under the general powers of the commission. Additionally, some of the adopted rulemaking is procedural in nature and does not address environmental risks or exposures. For example, the statutory requirement for the commission to maintain a list of commercial pre-rinse spray valves and the authority to assess a fee do not impact the environment.

Based on this assessment, the adopted rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The primary purpose of this adopted rulemaking action is to improve the water and energy saving performance standards of certain plumbing fixtures by requiring manufacturers and future users of commercial pre-rinse spray valves to implement spray valves with reduced flow rates. The adopted rules would substantially advance this

stated purpose because reducing the flow rate of water used by the operators of pre-rinse spray valves will save water and energy in the State of Texas.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted regulations do not affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, 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 regulations. More specifically, these rules do not require current operators of commercial pre-rinse spray valves to replace their existing equipment with the reduced flow valves and give businesses time to deplete their existing inventories. There are no burdens imposed on private real property, and the benefits to society are a more efficient use of water and energy of the State of Texas. Therefore, the adopted amendments do not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

#### PUBLIC COMMENT

The public comment period closed at 5:00 p.m. on October 31, 2005. The commission received comments from the Plumbing Manufacturers Institute (PMI).

PMI suggested modifications to the proposed rules as stated in the RESPONSE TO COMMENTS section of this preamble.

#### RESPONSE TO COMMENTS

##### *§290.253, Plumbing Fixture List*

PMI requested that the commission remove or modify the requirement for the development and maintenance of a current list of commercial pre-rinse spray valves that are certified by the manufacturer. PMI stated that the Energy Policy Act of 2005 requires that the Federal Trade Commission and the Department of Energy establish manufacturer reporting requirements for commercial pre-rinse spray valves and that the requirement for both a federal filing and a state filing is duplicative. PMI requested that the commission provide a provision in this section that allows those manufacturers that have complied with the Energy Policy Act of 2005 to submit their federal paperwork to the commission.

**The commission responds that HB 2428 amended THSC, §372.001, by adding a definition for commercial pre-rinse spray valves and THSC, §372.005, by adding performance standards for commercial pre-rinse spray valves, registration requirements, and related fees. If the commission did not amend its rules and incorporate the legislature's changes to the THSC, then the**

**commission's rules would not comply with the amended statutes and could cause confusion due to the inconsistency between the statutes and rules. Additionally, HB 2428 directs a commercial pre-rinse spray valve manufacturer or importer to supply to the commission, in the form prescribed by the commission, the identification and the performance specifications of the pre-rinse spray valve. Nothing in the rules precludes the manufacturer or importer from submitting the federal paperwork as long as it meets the requirements in §290.253. No change was made to the rule.**

## **SUBCHAPTER G: WATER SAVING PERFORMANCE STANDARDS**

### **§§290.251 - 290.253, 290.256**

#### **STATUTORY AUTHORITY**

The amendments are adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code. The amendments are also adopted under THSC, §372.001(5), concerning the definition of a commercial pre-rinse spray valve, and §372.005, concerning commercial pre-rinse spray valve performance standards.

The adopted amendments implement THSC, §372.001(5) and §372.005 and the exemption provisions of HB 2428.

#### **§290.251. Purpose, Authority, and Definitions.**

(a) Purpose. The purpose of this subchapter is to establish water saving performance standards and labeling requirements for plumbing fixtures; establish labeling requirements for dishwashing machines, lawn sprinklers, and clothes washing machines; and establish reporting requirements for clothes washing machines. This subchapter applies to plumbing fixtures, dishwashing machines, lawn sprinklers, and clothes washing machines that are manufactured, imported, or otherwise supplied for sale in Texas unless the item is manufactured exclusively for sale outside of the state.

(b) Authority. The authority for these sections is Texas Health and Safety Code, Chapter 372, titled *Environmental Performance Standards for Plumbing Fixtures*.

(c) Definitions. The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **ANSI**--The American National Standards Institute.

(2) **ASME**--The American Society of Mechanical Engineers.

(3) **ASTM**--The American Society for Testing and Materials.

(4) **Commercial pre-rinse spray valve**--A handheld device that is designed and marketed for use with commercial dishwashing and ware washing equipment and that is used to spray water on dishes, flatware, and other food service items to remove food residue before the items are cleaned in a dishwasher or ware washer or by hand.

(5) **Import**--The physical movement of merchandise into the State of Texas, including shipments to distributors, shipments to factory distributing branches, direct factory sales, shipments to retailers, shipments to factory distributing branches, shipments to sales districts, and shipments to factory-owned distributing outlets.

(6) **Importer**--A business or individual that brings into the state plumbing fixtures from other countries or states for resale or installation (other than for their own domicile) within the state.

(7) **Major supplier**--A business or individual that provides plumbing fixtures to others for resale or installation (other than for their own domicile) within the state.

(8) **Manufacturer**--Someone who manufactures plumbing fixtures or clothes washing machines.

(9) **Model**--A type or design of a plumbing fixture.

(10) **Order**--A request to purchase plumbing fixtures from a manufacturer, major supplier, or importer.

(11) **Plumbing fixture**--A sink faucet, lavatory faucet, faucet aerator, shower head, urinal, toilet, flush valve toilet, drinking water fountain, or commercial pre-rinse spray valve.

(12) **Toilet**--A toilet or water closet except a wall-mounted toilet that employs a flushometer valve.

(13) **Water consumption factor**--The quotient of the total weighted per cycle consumption divided by the capacity of the clothes washer, as stated in 10 Code of Federal Regulations Part 430, Subpart B, Appendix J, September 1, 2001.

**§290.252. Design Standards.**

(a) A person may not sell, offer for sale, distribute, or import into the State of Texas a plumbing fixture for use in the state unless the plumbing fixture meets the water saving performance standards provided by subsection (b) of this section and the plumbing fixture is listed in §290.253 of this title (relating to Plumbing Fixture List).

(b) The water saving performance standards for a plumbing fixture are those established by the American National Standards Institute (ANSI), the American Society for Testing and Materials (ASTM), current revision, or the following standards, whichever are the more restrictive.

(1) The maximum flow from a sink or lavatory faucet or a faucet aerator shall not exceed 2.20 gallons of water per minute at a pressure of 60 pounds per square inch when tested in accordance with ANSI testing procedures.

(2) The maximum flow from a shower head shall not exceed 2.75 gallons of water per minute at a constant pressure equal to 80 pounds per square inch when tested in accordance with ANSI testing procedures.

(3) The maximum volume of water per flush from a urinal and the associated flush valve, if any, shall not exceed an average of one gallon when tested in accordance with ANSI testing procedures.

(4) The maximum volume of water per flush from a toilet shall not exceed an average of 1.60 gallons when tested in accordance with ANSI testing procedures.

(5) The maximum volume of water per flush from a wall mounted toilet that employs a flushometer valve shall not exceed an average of 2.00 gallons when tested in accordance with ANSI testing procedures.

(6) All drinking water fountains shall be operated by a self-closing valve.

(7) The maximum flow rate from a commercial pre-rinse spray valve shall not exceed 1.6 gallons of water per minute when tested with the method specified in ASTM F2324-03.

**§290.253. Plumbing Fixture List.**

(a) The commission shall make and maintain a current list of plumbing fixtures that are certified to the commission by the manufacturer or importer to meet the water saving performance standards established by §290.252(b) of this title (relating to Design Standards). To have a plumbing fixture included on the commission's current list, a manufacturer or importer must:

(1) furnish identification method and testing data that clearly indicates that the plumbing fixture was tested in accordance with American National Standards Institute or the American Society for Testing and Materials requirements and complies with the flow requirements established in §290.252(b) of this title; or

(2) submit an identified sample plumbing fixture to the commission for testing and verification of water saving performance standards by the department; and

(3) pay the appropriate fee as listed in §290.255 of this title (relating to Fees).

(b) The commission retains the right to request a sample of the plumbing fixture for testing.

(c) The commission may assess against a manufacturer or importer a reasonable fee for an inspection of a commercial pre-rinse spray valve to determine the accuracy of the manufacturer's or importer's certification in an amount determined by the commission to cover the expenses incurred in the administration of this chapter.

**§290.256. Exemptions.**

(a) These sections do not apply to a plumbing fixture:

(1) that has been ordered by or is in the inventory of a building contractor or a wholesaler or retailer in Texas on or before January 1, 1992;

(2) such as a safety shower or aspirator faucet, that, because of the fixture's specialized function, cannot meet the standards established by these sections (example: fixtures in handicapped modified showers, etc.);

(3) originally installed before January 1, 1992, that is removed and reinstalled in the same building on or after that date; or

(4) imported only for use at the importer's domicile.

(b) These sections do not apply to a commercial pre-rinse spray valve that:

(1) as of January 1, 2006:

(A) is in the inventory of a commercial pre-rinse spray valve retailer, distributor, lessor, or importer; or

(B) has been ordered by a commercial pre-rinse spray valve retailer, distributor, lessor, or importer and is delivered before February 1, 2006; and

(2) is sold before September 1, 2006.