

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§291.160 - 291.162.

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

In 2009, the 81st Legislature passed Senate Bill (SB) 361, relating to the requirement that certain water service providers ensure emergency operations during an extended power outage. SB 361 amends Texas Water Code (TWC), Chapter 13, by adding §13.1395, Standards of Emergency Operation, and §13.1396, Coordination of Emergency Operations. TWC, §13.1395, requires that affected utilities prepare an emergency preparedness plan that shows that the utility has the ability to provide emergency operations and submit that plan to the commission. TWC, §13.1396, outlines the coordination efforts among an affected utility, its county judge, and its office of emergency management as well as each retail electric provider that sells electric power to an affected utility and each electric utility that provides transmission and distribution service to an affected utility.

TWC, §13.1395, provides that a water service provider may use the commission's template to develop its emergency preparedness plan and must include one of eight means for maintaining 35 pounds per square inch (psi) of pressure during power outages that last longer than 24 hours as soon as it is safe and practicable following natural disasters. The statute also specifies that the commission has 90 days once the plan is submitted to review the plan and either approve it or recommend changes. Once the commission approves the plan, the water service provider must operate in accordance with its plan and maintain any generators in accordance with manufacturer's specifications. TWC, §13.1395, also specifies that the commission will conduct inspections to ensure compliance and that waivers to these requirements are available under certain circumstances. Additionally, these additions to the TWC made by SB 361

give the commission the authority to regulate water service providers that have not previously been regulated by the TCEQ.

SB 361, Section 2(c), requires that each affected utility submit to the commission its emergency preparedness plan required by TWC, §13.1395, no later than March 1, 2010.

The proposed applicability is based on population estimates from the Texas State Data Center and Office of the State Demographer for 2005, the midpoint between federal decennial censuses.

The commission solicits comments on the appropriate sources and year of population data to determine the counties to which this rule applies. Potential sources of population data include, but are not limited to, the most recent federal decennial census, the most recent federal population estimate, population projections by the Texas State Data Center and Office of the State Demographer, and local appraisal districts. Further, the commission solicits comments on which counties adjacent to Harris County would be subject to this proposed rule.

Written comments on the appropriate sources of population data and year, and the applicability of this proposal may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### SECTION BY SECTION DISCUSSION

The commission proposes to add a new Subchapter L, Standards of Emergency Operations, including §§291.160 - 291.162, to include the requirements to implement TWC, §13.1395, as amended by SB 361.

The commission proposes new §291.160, Purpose, to give the purpose of the standards of emergency operations and to inform public water systems that they must comply with requirements for emergency operation in 30 TAC Chapter 290, Subchapter D.

The commission proposes new §291.161, Definitions, to add definitions necessary to implement TWC, §13.1395, as amended by SB 361. The commission proposes to define "affected utility" in §291.161(1) as providers or conveyors of potable or raw water service which furnish more than one customer and are located in counties with specific population and location criteria. The commission proposes to define "emergency operations" in §291.161(2) as maintaining pressure during 24-hour or longer power outages. The commission proposes to define "extended power outage" in §291.161(3) as a power outage lasting more than 24 hours.

The commission proposes new §291.162, Emergency Operation of an Affected Utility, to define the specific requirements of emergency operation plans including the contents, submission, implementation, revision, enforcement, waivers, and extensions. The commission proposes new §291.162(a) to require an affected utility to ensure the emergency operations of its water system by providing 0.35 gallons per minute per connection, or the average daily demand, if data is available, whichever is greater, and adopt and submit an emergency preparedness plan to the executive director. The commission proposes new §291.162(b) to require the executive director to review the plans within 90 days of receipt. The commission proposes new §291.162(c) to list the eight options in TWC, §13.1395(c). The commission proposes new §291.162(d) to require that suppliers of surface water to wholesale customers include in their emergency preparedness plan provisions for the actual installation and maintenance of automatically

starting auxiliary generators or distributive generation facilities for each facility necessary to provide water to its wholesale customers. The commission proposes new §291.162(e) to allow the affected utility to use the plan template in Appendix J of Chapter 290. The commission proposes new §291.162(f) to require that the emergency generator be operated and maintained according to the manufacturer's specifications. The commission proposes new §291.162(g) to allow the executive director the ability to grant waivers for significant financial burden. The commission proposes new §291.162(h) to allow the affected utility to adopt and enforce limitations on water use during emergency operations. The commission proposes new §291.162(i) to allow the information submitted under this subchapter to remain confidential. The commission proposes new §291.162(j) to require emergency preparedness plans for affected utilities that exist on December 1, 2009 to be submitted to the executive director no later than March 1, 2010. The commission proposes new §291.162(k) to require affected utilities created after the effective date of this rule to have an approved emergency preparedness plan before providing water to customers. The commission proposes new §291.162(l) to allow an affected utility to file a written request for an extension with the executive director. The commission proposes new §291.162(m) to allow the executive director to require a revised emergency preparedness plan under certain circumstances. These new provisions are required to implement TWC, §13.1395, as amended by SB 361.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The agency will use currently available resources to review emergency preparedness plans for compliance and inspect affected utilities to ensure compliance with those plans under the provisions of SB 361. SB 361 requires retail public utilities,

exempt utilities, or providers or conveyors of raw water service in a county with a population of 3.3 million or in an adjacent county with a population of 400,000 or more furnishing water service to more than one customer to establish emergency preparedness plans to ensure emergency operations of water systems during extended power outages as soon as safe and practicable following the occurrence of a natural disaster. Governmental entities that do not already meet emergency preparedness plan options found in SB 361 may experience cost increases, although those cost increases are not expected to be significant.

The proposed rules amend Chapters 290 and 291 to implement the agency's mandates found in SB 361. The bill requires the agency to adopt rules ensuring emergency operation of water systems at 35 psi through the adoption of an emergency preparedness plan in counties that meet the population criteria found in the bill. Currently, the bill's provisions will affect Harris and Fort Bend counties. The agency is also required to develop an emergency preparedness plan template listing and explaining necessary preparations, agency rules, and standards pertaining to emergency preparedness plans. This fiscal note details the fiscal implications of the proposed amendments to Chapter 291, and the fiscal implications of amendments to Chapter 290, pertaining to public water systems with at least 15 connections or 25 people, are found in a separate, but related fiscal note. Chapter 291 pertains to entities that are not public water systems (exempt utilities and providers or conveyors of potable or raw water service that furnish water service to more than one customer in the specified counties).

Current rules require emergency power for systems serving 250 or more connections that do not have elevated storage. The proposed rules will require local governments in Harris County and Fort Bend County that furnish water to more than one customer to prepare an emergency preparedness plan ensuring

operation of their water systems at 35 psi during an extended power outage by one of the following options: automatically starting auxiliary generators, sharing of auxiliary generator capacity, negotiation of leasing and contracting (mutual aid) agreements, use of portable generators, on-site electrical generation, hardening of the electric transmission and distribution system, and direct engine or right angle drives.

Staff estimates that there may be as many as four (4) water districts in Harris and Fort Bend Counties that provide raw water to other water systems. These water districts will have to prepare an emergency preparedness plan to ensure the operation of their water systems at 35 psi during extended power outages by one of the following options: utilizing automatically starting auxiliary generators or distributive generation facilities. Of these two mandated options for maintaining water flow, a generator will have a lower initial cost. Staff believes that a 500 kilowatt generator should be adequate for these raw water pump facilities, and the cost for this size generator is expected to be approximately \$106,750. This cost is not expected to have a significant fiscal impact on these water districts since they could recoup costs through increased monthly rates. Local governments that purchase raw water from these districts could see cost increases, but the fiscal impact of making water available in a suitable timeframe to other water providers after natural disasters will depend on the customer base and operational methods of water systems purchasing raw water. In any case, increased costs would be associated with more convenience to the affected public. Consumers of water could see rates increase, but the increase will depend on the size and operations of the water system providing water. Most cost increases are not expected to be significant for each consumer, and consumers are expected to experience more rapid deployment of water services in emergency situations.

## PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be additional protection against loss of water service during a natural disaster.

Privately owned exempt utilities that furnish water will have to prepare an emergency preparedness plan that will ensure the operation of its water system at 35 psi during an extended power outage by one of the following options: automatically starting auxiliary generators, sharing of auxiliary generator capacity, negotiation of leasing and contracting (mutual aid) agreements, use of portable generators, on-site electrical generation, hardening of the electric transmission and distribution system, and direct engine or right angle drives.

Exempt utilities (utilities that are not public water systems with less than 14 connections) in Harris and Fort Bend counties are generally small or micro businesses, and the fiscal impact of the proposed rules can be found in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT section of this fiscal note.

## SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The proposed rules could have adverse fiscal implications for small or micro-businesses that own or operate exempt utilities in Harris County and Fort Bend County if they are not able to participate in a mutual aid agreement with other water providers. If these exempt utilities cannot enter into a mutual aid agreement, they may be required to purchase a generator. Staff believes that one 50 kilowatt generator at a cost of approximately \$31,900 could meet the 35 psi requirements of the proposed rules. To recoup the

cost of this generator, staff estimates that the monthly charge per connection would be as much as \$35 per month for approximately 10 years. The per connection cost to consumers of exempt water utilities is highly dependent on the number of facilities the utility owns and the number of customers it serves.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law. SB 361 did not exempt small businesses in Harris and Fort Bend counties from the requirements to establish emergency preparedness plans to ensure emergency operations of water systems during extended power outages as soon as safe and practicable following the occurrence of a natural disaster.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are 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 does not meet the definition of a "major environmental rule" as defined by that statute. A "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.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of this rule to protect the environment or reduce risks to human health from environmental exposure. The specific intent of this rule is to require certain water utilities, providers, and conveyors, to have emergency preparedness plans for maintaining water pressure following a disruption in service caused by a natural disaster. These rules are not required by federal regulations.

The proposed amendments to Chapter 291 set out who the affected utilities are and how they may comply with the requirements. The proposed amendments require water utilities, providers, and conveyors of potable or raw water to submit for commission approval emergency preparedness plans demonstrating how they can maintain 35 psi following a natural disaster that causes an extended power outage, while providing for waivers for those who can show that the requirement would result in a significant financial burden to its customers.

Further, this rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed amendments would not 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. It is not anticipated that the cost of complying with the proposed amendments will be significant with respect to the economy as a whole; therefore, the proposed amendments will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory

impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for treatment of water used in public water systems and is specifically required by state law; 2) does not exceed the requirements of state law under TWC, Chapter 13, Subchapter E; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program on treatment of water used in public water systems, but rather is proposed to be consistent with state law in order to ensure that emergency operations of water systems are commenced as soon as safe and practicable following the occurrence of a natural disaster; and 4) is not proposed solely under the general powers of the agency, but rather specifically under TWC §13.041, which allows the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The commission invites public comment regarding this draft regulatory impact analysis determination. 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 these proposed rules and performed an analysis of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to implement certain recently enacted legislation relating to the emergency preparedness of affected utilities. The proposed rules require an "affected utility" that is located within a county with a population of 3.3 million or more, or a county with a population of 400,000 or more that is adjacent to a county with a population of 3.3 million or more to comply with emergency operations (SB 361). This rulemaking substantially advances this stated purpose by making the commission's rules consistent with the new statutory language. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this action does not affect private real property.

Promulgation and enforcement of these proposed rules will constitute neither a statutory nor a constitutional taking of private real property. The proposed regulations do not adversely 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 the owner's right to property. More specifically, these rules implement legislation addressing the adoption of emergency preparedness plans by "affected utilities" (SB 361). These provisions do not impose any burdens or restrictions on private real property. Therefore, the proposed amendments do not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any

action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6).

The specific intent of the proposed rules is to amend the rules to be consistent with recent legislative enactments (SB 361) to address the submission and review of emergency preparedness plans by affected utilities which is a procedural mechanism and is administrative in nature. Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

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 HEARINGS

The commission will hold two public hearings on this proposal in Harris County. The first hearing will be on September 21, 2009 at 2:00 p.m. at the Houston-Galveston Area Council, located at 3555 Timmons Lane, Houston, Texas 77027. The second hearing will be held on September 22, 2009 at 2:00 p.m. at the Katy Branch Library, located at 5414 Franz Road, Katy, Texas 77493. The hearings are 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 prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Jessica Rawlings, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Jessica Rawlings, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-032-290-PR. The comment period closes September 28, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Reyna Holmes, Water Supply Division, (512) 239-6183.

**SUBCHAPTER L: STANDARDS OF EMERGENCY OPERATIONS**

**§§291.160 - 291.162**

STATUTORY AUTHORITY

The new rules are proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under this code and other laws of this state; and TWC, §5.105, which authorizes the commission to adopt rules as necessary to carry out its powers and duties under the TWC. 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 also 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 new rules implement TWC, §13.1395.

**§291.160. Purpose.**

Texas Water Code, Chapter 13, Subchapter E, §13.1395, prescribes the duties of the commission relating to standards for emergency operations of affected utilities. The statute requires that the

commission ensure that affected utilities provide water service as soon as safe and practicable during an extended power outage. This subchapter sets forth requirements and implementation of emergency operation planning of affected utilities as defined in this subchapter. Public water systems must comply with the emergency operations requirements as defined in Chapter 290, Subchapter D of this title (relating to Rules and Regulations for Public Water Systems).

**§291.161. Definitions.**

For the purposes of this subchapter, the following definitions apply.

(1) Affected utility--Any retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes water service to more than one customer:

(A) In a county with a population of 3.3 million or more; or

(B) In a county with a population of 400,000 or more adjacent to a county with a population of 3.3 million or more.

(2) Emergency operations--The operation of a water system during an extended power outage at a minimum water pressure of 35 pounds per square inch.

(3) Extended power outage--A power outage lasting for more than 24 hours.

**§291.162. Emergency Operation of an Affected Utility.**

(a) An affected utility shall:

(1) Ensure the emergency operation of its water system by providing 0.35 gallons per minute per connection, or the average daily demand, if data is available, whichever is greater, during an extended power outage as soon as safe and practicable following the occurrence of a natural disaster; and

(2) Adopt and submit to the executive director for its approval an emergency preparedness plan that demonstrates the utility's ability to provide emergency operations.

(b) The executive director shall review an emergency preparedness plan submitted by an affected utility. If the executive director determines that the plan is not acceptable, the executive director shall recommend changes to the plan. The executive director must make its recommendations on or before the 90th day after the executive director receives the plan.

(c) An emergency preparedness plan shall provide for one of the following:

(1) the maintenance of automatically starting auxiliary generators;

(2) the sharing of auxiliary generator capacity with one or more affected utilities;

(3) the negotiation of leasing and contracting agreements, including emergency mutual

aid agreements with other retail public utilities, exempt utilities, or providers or conveyors of potable or raw water service, if the agreements provide for coordination with the division of emergency management in the governor's office;

(4) the use of portable generators capable of serving multiple facilities equipped with quick-connect systems;

(5) the use of on-site electrical generation or distributed generation facilities;

(6) hardening the electric transmission and distribution system serving the water system;

(7) for existing facilities, the maintenance of direct engine or right angle drives; or

(8) any other alternative determined by the executive director to be acceptable.

(d) Each affected utility that supplies, provides, or conveys surface water to wholesale customers shall include in its emergency preparedness plan provisions for the actual installation and maintenance of automatically starting auxiliary generators or distributive generation facilities for each raw water intake pump station, water treatment plant, pump station, and pressure facility necessary to provide water to its wholesale customers.

(e) The affected utility may use the template in Appendix J of §290.47 of this title (relating to Appendices) to assist in preparation of the plan.

(f) An emergency generator used as part of an approved emergency preparedness plan must be operated and maintained according to the manufacturer's specifications.

(g) The executive director may grant a waiver of the requirements of this section to an affected utility if the executive director determines that compliance with this section will cause a significant financial burden on customers of the affected utility. The affected utility shall submit financial, managerial, and technical information as requested by the executive director to demonstrate the financial burden.

(h) An affected utility may adopt and is encouraged to enforce limitations on water use while the utility is providing emergency operations.

(i) Information provided by an affected utility under this subchapter is confidential and is not subject to disclosure under Texas Government Code, Chapter 552.

(j) Affected utilities that are existing as of December 1, 2009, shall submit the emergency preparedness plan to the executive director no later than March 1, 2010.

(k) Affected utilities which are established after the effective date of this rule must have emergency preparedness plans approved and implemented prior to providing water to customers.

(l) An affected utility may file with the executive director a written request for an extension, not

to exceed 90 days, of the date by which the affected utility is required under this subchapter to submit the affected utility's emergency preparedness plan or the date the affected utility is required to implement the plan.

(m) If an affected utility fails to provide a minimum of 35 pounds per square inch throughout the distribution system during emergency operations as soon as it is safe and practicable following the occurrence of a natural disaster, a revised emergency preparedness plan shall be submitted for review and approval within 180 days of the date normal power is restored. Based on the review of the revised emergency preparedness plan, the executive director may require additional or alternative auxiliary emergency facilities.