

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §290.267; amendments to §§290.251 - 290.254, 290.256, and 290.260; and the repeal of §290.255.

These amendments, new section, and the repeal of §290.255 are adopted *without changes* as published in the October 23, 2009 issue of the *Texas Register* (34 TexReg 7299) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2009, the 81st Legislature passed House Bill (HB) 2667, relating to performance standards for plumbing fixtures sold in this state. HB 2667 amends Texas Health and Safety Code (THSC), §372.001 and §372.002 to increase efficiency standards, add performance, labeling, and testing requirements, add exemptions, add a five-year phase-in of new standards, and repeal TCEQ labeling and fee requirements for plumbing fixtures sold in this state. HB 2667 adds THSC, §§372.0025, 372.0045, and 372.006 to add exceptions for municipalities or counties, a phase-in of water saving performance standards, and performance standards for nonwater-supplied urinals, respectively. HB 2667 amends Texas Water Code, §5.701(q) to remove the commission's authority to collect fees for testing a product to ensure that the certification is accurate.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission adopts an amendment to 30 TAC Chapter 291, Utility Regulations.

SECTION BY SECTION DISCUSSION

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

The commission adopts the amendment to §290.251 to revise definitions for various plumbing fixtures relating to the subchapter. Terms to be revised are plumbing fixture and toilet. Terms to be added are plumbing fixture fitting, pressurized flushing device, and water closet. The term "ASME" will be deleted, as this acronym is no longer used throughout the subchapter, and the term "ASTM" will be deleted, as this organization is currently known only as ASTM International. As a result of the additions and deletions, some existing definitions will be renumbered accordingly. This amendment is required by THSC, §372.001, as amended by HB 2667.

§290.252. Design Standards.

The commission adopts the amendment to §290.252 to include new performance standards and revise testing requirements for plumbing fixtures. A reference to testing standards established by the American National Standards Institute is removed. All references to testing procedures adopted by the commission for plumbing fixtures are removed. Performance, testing, and labeling requirements for plumbing fixtures prescribed by American Society of Mechanical Engineers Standard A112.19.2-2008 and Canadian Standards Association Standard B45.1-2008 are added. Performance standards for nonwater-supplied urinals are also added. This amendment is required by THSC, §372.002, as amended by HB 2667.

§290.253. Plumbing Fixture List.

The commission adopts the amendment to §290.253 to change the process of providing test results for plumbing fixtures to the commission. All references to testing by the commission and fees were removed by the statute and therefore are removed from this section. This amendment is required by THSC, §372.002, as amended by HB 2667.

§290.254. Removal from List.

The commission adopts the amendment to §290.254 to remove the references to the commission charging fees, which was removed by the statute. The commission replaced a reference to "the department" with "the agency." As a result of the removals, paragraphs are renumbered accordingly. This amendment is required by THSC, §372.002, as amended by HB 2667.

§290.255. Fees.

The commission repeals §290.255, concerning fees charged by the commission. This repeal is required because THSC, §372.002(d) is repealed by HB 2667.

§290.256. Exemptions.

The commission adopts the amendment to §290.256 to add additional exemptions for municipalities and counties that have situations that would require a greater quantity of water, nonwater-supplied urinals, and plumbing fixtures certified by the United States Environmental Protection Agency under the WaterSense program. This amendment is required by THSC, §372.0025, as amended by HB 2667. The commission adopts the amendment to §290.256 to add additional exemptions for heavy-duty commercial urinals, and toilets that are mounted on the wall and discharge to the drainage system on the floor, are located in a correctional facility, are used in a bariatric application, are used by children at a daycare, or consist of a non-tank type commercial bowl connected to the plumbing system through a pressurized device. As a result of these additions, existing subsection (b) is relettered accordingly. This amendment is required by THSC, §372.002, as amended by HB 2667.

§290.260. Labeling.

The commission adopts the amendment to §290.260 to remove the TCEQ's labeling requirements for plumbing fixtures. This repeal is required because THSC, §372.003(a) and (b), concerning labeling requirements, is repealed by HB 2667. As a result of these deletions, the remaining subsections are relettered accordingly.

§290.267. Phase-In of Water Saving Performance Standards.

The commission adopts new §290.267 to add a five-year schedule for phasing in fixtures that comply with the new standards. Procedures for reporting the percentage of models to the commission annually are prescribed. This adopted new section expires September 1, 2013. This new section is required by THSC, §372.0045, as amended by HB 2667.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking requires a regulatory impact analysis under Texas Government Code, §2001.0225. The adopted rulemaking may be a "major environmental rule" under Texas Government Code, §2001.0225. Although the specific intent of the rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, or the public health and safety of the state or a sector of the state, these rules do result in protecting the environment, or conserving water resources. The purpose of this rulemaking is to require certain standards for plumbing fixtures in order to conserve water. These new standards are being implemented because they are required by state law. The adopted rules also repeal the commission's authority to charge fees for testing products to make sure that the products meet the standards. Because these plumbing fixtures that meet the new standards should not cost any more than they would under existing standards, there is no impact on the economy or jobs. Also, these

rules do not exceed a standard of federal law that is not specifically required by state law, exceed an express requirement of state law, exceed a requirement of a federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program, or are proposed solely under the general powers of the agency instead of under a specific state law. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

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

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rulemaking is to describe plumbing fixtures standards in state law to conserve water and to repeal the agency's authority to test products to ensure that they meet the standards and to charge fees for this testing. The adopted rulemaking would substantially advance this stated purpose by placing the standards in the rule and repealing the testing and fee program in the rule. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) 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. There are no other reasonable or practicable alternatives to this rulemaking because it is required by statute.

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 Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on November 17, 2009 in Austin, Texas. The comment period closed on November 23, 2009. The commission received one written comment from an individual but it was outside the scope of this rulemaking.

RESPONSE TO COMMENT

One individual commented on the one meter per residence requirements and the quality of their drinking water.

This rulemaking did not address revisions to the one meter per residence requirements nor did it address drinking water quality; therefore, these comments are outside the scope of this rulemaking.

The commission made no changes in response to these comments.

SUBCHAPTER G: WATER SAVING PERFORMANCE STANDARDS

§§290.251 - 290.254, 290.256, 290.260, 290.267

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC. The amendments and new section are also adopted under Texas Health and Safety Code (THSC), Chapter 372, concerning Environmental Performance Standards for Plumbing Fixtures, which requires the commission to maintain a list of certified plumbing fixtures that may be sold in the state.

The adopted amendments and new section implement THSC, §§372.001, 372.002, 372.0025, 372.0045, and 372.006; and TWC, §5.701.

§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) 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.

(3) 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.

(4) 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.

(5) 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.

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

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

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

(9) Plumbing fixture--A device that receives water, waste, or both and discharges the water, waste, or both into a drainage system. The term includes a kitchen sink, utility sink, lavatory, bidet, bathtub, shower, urinal, toilet, flush valve toilet, or drinking water fountain.

(10) Plumbing fixture fitting--A device that controls and directs the flow of water. The term includes a sink faucet, lavatory faucet, shower head, bath filler, or commercial pre-rinse spray valve.

(11) Pressurized flushing device--A device that contains a valve that:

(A) is attached to a pressurized water supply pipe that is of sufficient size to deliver water at the necessary rate of flow to ensure flushing when a valve is open; and

(B) opens on actuation to allow water to flow into the fixture at a rate and in a quantity necessary for the proper operation of the fixture and gradually closes to avoid water hammer.

(12) Toilet--A water closet.

(13) Water closet--A plumbing fixture that has a water containing receptor that receives liquid and solid body waste and, on actuation, conveys the waste through an exposed integral trap seal into a drainage system.

(14) 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 the following standards:

(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.

(2) The maximum flow from a shower head shall not exceed 2.5 gallons of water per minute at a constant pressure over 80 pounds per square inch.

(3) The maximum volume of water per flush from a urinal and the associated flush valve, if any, sold, offered for sale, or distributed in this state before January 1, 2014:

(A) maximum flow shall not exceed an average of one gallon of water per flush;

and

(B) the urinal and the associated flush valve, if any, must meet the performance, testing, and labeling requirements prescribed by the American Society of Mechanical Engineers Standard A112.19.2-2008 and Canadian Standards Association Standard B45.1-2008 "Vitreous China Plumbing Fixtures and Hydraulic Requirements for Water Closets and Urinals."

(4) Except as provided for in §290.256 of this title (relating to Exemptions), for a urinal and the associated flush valve, if any, sold, offered for sale, or distributed in this state on or after January 1, 2014:

(A) maximum flow shall not exceed an average of 0.5 gallons of water per flush;

and

(B) the urinal and the associated flush valve, if any, must meet the performance, testing, and labeling requirements prescribed by the following standards, as applicable:

(i) American Society of Mechanical Engineers Standard A112.19.2-2008 and Canadian Standards Association Standard B45.1-2008 "Vitreous China Plumbing Fixtures and Hydraulic Requirements for Water Closets and Urinals;" or

(ii) American Society of Mechanical Engineers Standard A112.19.19-2006 "Vitreous China Nonwater Urinals."

(5) For a toilet sold, offered for sale, or distributed in this state before January 1, 2014:

(A) The maximum volume of water per flush shall not exceed an average of 1.60 gallons; and

(B) The toilet must meet the performance, testing, and labeling requirements prescribed by the following standards, as applicable:

(i) American Society of Mechanical Engineers Standard A112.19.2-2008 and Canadian Standards Association Standard B45.1-2008 "Vitreous China Plumbing Fixtures and Hydraulic Requirements for Water Closets and Urinals;" and

(ii) American Society of Mechanical Engineers Standard A112.19.14-2006 "Six-Liter Water Closets Equipped with a Dual Flushing Device."

(6) Except as provided for in §290.256 of this title, for a toilet sold, offered for sale, or distributed in this state on or after January 1, 2014 must be:

(A) A dual flush toilet that meets the following standards:

(i) The average flush volume of two reduced flushes and one full flush may not exceed 1.28 gallons; and

(ii) The toilet must meet the performance, testing, and labeling requirements prescribed by the following standards, as applicable:

(I) American Society of Mechanical Engineers Standard A112.19.2-2008 and Canadian Standards Association Standard B45.1-2008 "Vitreous China Plumbing Fixtures and Hydraulic Requirements for Water Closets and Urinals;" and

(II) American Society of Mechanical Engineers Standard A112.19.4-2006 "Six-Liter Water Closets Equipped with a Dual Flushing Device;" or

(B) A single flush toilet that meets the following standards:

(i) The average flush volume may not exceed 1.28 gallons; and

(ii) The toilet must meet the performance, testing, and labeling requirements prescribed by American Society of Mechanical Engineers Standard A112.19.2-2008 and Canadian Standards Association Standard B45.1-2008 "Vitreous China Plumbing Fixtures and Hydraulic Requirements for Water Closets and Urinals."

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

(8) 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 International Standard F2324-03.

(c) Nonwater-supplied urinal performance standards are the following:

(1) A person may not sell, offer for sale, or distribute in this state a nonwater-supplied urinal in this state unless the nonwater-supplied urinal:

(A) meets the performance, testing, and labeling requirements prescribed by the following standards, as applicable:

(i) American Society of Mechanical Engineers Standard A112.19.19-2006 "Vitreous China Nonwater Urinals;" or

(ii) International Association of Plumbing and Mechanical Officials

Standard ANSI Z124.9-2004 "Plastic Urinal Fixtures;"

(B) provides a trap seal that complies with the building code of the local government in which the urinal is installed; and

(C) permits the uninhibited flow of waste through the urinal to the sanitary drainage system.

(2) The manufacturer or importer must submit to the executive director certified test results from a laboratory accredited by the American National Standards Institute verifying that the nonwater-supplied urinal conforms to the requirements described by paragraph (1) of this subsection.

(3) A person who installs a nonwater-supplied urinal shall install water distribution and fixture supply piping sized to accommodate a water supply urinal to an in-wall point immediately adjacent to the nonwater-supplied urinal location so that the nonwater-supplied urinal can be replaced with a water-supplied urinal if desired by the owner or required by a code enforcement officer.

(4) A person who owns a nonwater-supplied urinal shall clean and maintain the nonwater-supplied urinal in accordance with the manufacturer's instructions.

§290.253. Plumbing Fixture List.

The commission shall make and maintain a current list of plumbing fixtures that are certified to the commission by the manufacturer 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 must:

(1) furnish identification and the performance specifications of the plumbing fixture; and

(2) furnish certified test results from a laboratory accredited by the American National Standards Institute verifying that the plumbing complies with the flow requirements established in §290.252(b) of this title.

§290.254. Removal from List.

(a) A plumbing fixture listed in §290.253 of this title (relating to Plumbing Fixture List) shall be removed from the list if:

(1) the commission finds the manufacturer's or importer's certification to be inaccurately certified;

(2) the agency finds that the fixture does not meet the standards set forth in §290.252(b) of this title (relating to Design Standards).

(b) Prior to removal of the plumbing fixture from the list, a manufacturer or importer shall have the right to seek a hearing with the commission. A hearing held pursuant to this section shall be held in accordance with the Administrative Procedure Act (APA) and the commission's formal hearing procedures.

§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;

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

(5) that is a nonwater supplied urinal;

(6) that has been certified by the United States Environmental Protection Agency under the WaterSense program; or

(7) if it has been determined by the governing body of a municipality or county that to flush a public sewer system located in the municipality or county in a manner consistent with public health, a greater quantity of water is required because of the configuration of the drainage system of buildings located in the municipality or county or the public sewer system.

(b) The water saving performance standards for a urinal and the associated flush valve, if any, sold, offered for sale, or distributed in this state on or after January 1, 2014, are the standards prescribed by §290.252(b)(3) of this title (relating to Design Standards) if the urinal was designed for heavy-duty commercial applications.

(c) The water saving performance standards for a toilet sold, offered for sale, or distributed in this state on or after January 1, 2014, are the standards prescribed by §290.252(b)(5) of this title if the toilet is a water closet that has a design not typically found in a residential application or that is designed for a specialized application, including a water closet that:

(1) is mounted on the wall and discharges to the drainage system on the floor;

(2) is located in a correctional facility, as defined by Texas Penal Code, §1.07;

(3) is used in a bariatric application;

(4) is used by children at a daycare facility; or

(5) consists of a non-tank type commercial bowl connected to the plumbing system through a pressurized flushing device.

(d) 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.

§290.260. Labeling.

(a) Prohibitions. A person may not sell, offer for sale, distribute, or import into this state a new commercial or residential clothes washing machine, dish washing machine, or lawn sprinkler unless the

clothes washing machine, dish washing machine, or lawn sprinkler is marked or labeled in accordance with these sections.

(1) Each clothes washing machine and dish washing machine shall have an attached label that shows the amount of water used per cycle.

(2) Each lawn sprinkler shall be marked with the water usage expressed in gallons per minute (gpm) by either a permanent mark on each sprinkler, or a label or tag attached to each sprinkler.

(b) Exemptions. This section does not apply to those clothes washing machines and dish washing machines that are subject to and are in compliance with the labeling requirements of the National Appliance Energy Conservation Act of 1987, Public Law 100-12 (42 United States Code, §6294) and as amended.

§290.267. Phase-In of Water Saving Performance Standards.

(a) Notwithstanding §290.252(b)(3) and (5) of this title (relating to Design Standards), at least the following percentage of the models of urinals and of the models of toilets offered for sale by a manufacturer in this state must meet the requirements of §290.252(b)(4) and (6) of this title, respectively:

(1) 50% of the models of urinals and of the models of toilets offered for sale on January 1, 2010;

(2) 67% of the models of urinals and of the models of toilets offered for sale on January 1, 2011;

(3) 75% of the models of urinals and of the models of toilets offered for sale on January 1, 2012; and

(4) 85% of the models of urinals and of the models of toilets offered for sale on January 1, 2013.

(b) Not later than January 31 of each year, a manufacturer that offers urinals or toilets for sale in this state shall notify the executive director in writing of the percentage of models of urinals and of the models of toilets offered for sale by the manufacturer in this state that meet the requirements of §290.252(b)(4) and (6) of this title, respectively.

(c) This section expires September 1, 2013.

SUBCHAPTER G: WATER SAVING PERFORMANCE STANDARDS

§290.255

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The repeal is also adopted under Texas Health and Safety Code, Chapter 372, concerning Environmental Performance Standards for Plumbing Fixtures, which requires the commission to maintain a list of certified plumbing fixtures that may be sold in the state.

The adopted repeal implements Texas Health and Safety Code, §372.002.

§290.255. Fees.