

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §291.161 and §291.162.

Sections 291.161 and 291.162 are adopted *without changes* to the proposed text as published in the June 15, 2012, issue of the *Texas Register* (37 TexReg 4398) and will not be republished.

### **Background and Summary of the Factual Basis for the Adopted Rules**

This rulemaking amends Chapter 291 to incorporate the requirements of House Bill (HB) 805 from the 82nd Legislature, 2011. Senate Bill (SB) 361, 81st Legislature, 2009, was incorporated into the TCEQ rules in 2009. SB 361 required a retail public utility, exempt utility, or provider or conveyor of potable or raw water in a county with a population of 3.3 million or in an adjacent county with a population of 400,000 or more that furnishes water service to more than one customer to: ensure the emergency operation of its water system during an extended power outage, as soon as safe and practicable following the occurrence of a natural disaster; adopt an emergency preparedness plan (EPP) that demonstrates the affected utility's ability to provide emergency operations; and, submit the plan to the commission for approval. SB 361 required TCEQ to adopt rules implementing Texas Water Code (TWC), §13.1395, that required affected utilities ensure emergency operation at 35 pounds per square inch through the adoption of an EPP. In 2010, affected utilities with customers in Harris

County were required to submit and implement an EPP. Based on HB 805, affected utilities in Harris and Fort Bend Counties were required to prepare and submit an EPP for TCEQ review and approval by February 1, 2012, and to begin implementing the plan by June 1, 2012.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts revisions to 30 TAC Chapter 290, Public Drinking Water.

### **Section by Section Discussion**

#### *§291.161, Definitions*

The commission adopts §290.161(1)(B), the definition of "Affected utility," changing the population threshold from 400,000 to 550,000 as required by HB 805.

#### *§291.162, Emergency Operation of an Affected Utility*

The commission adopts §291.162(j) updating the due dates for submitting the EPP. The existing rule requires systems that exist as of December 1, 2009, to submit an EPP by March 1, 2010. The adopted changes require a system that exists as of November 1, 2011, to submit an EPP by February 1, 2012. These dates were included in HB 805. The commission adopts §291.162(k) to include the due date for implementing an EPP as June 1, 2012, as required by HB 805. As a result of adopted §291.162(k), the commission reletters existing §291.162(k) - (m).

### **Final Regulatory Impact Analysis Determination**

The commission reviewed the adopted rules 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, Texas Government Code, §2001.0225(g)(3).

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

The amendments to Chapter 291 made in response to HB 805 change the county population threshold from 400,000 to 550,000 for identifying affected utilities, as well as providing time tables for newly affected utilities to comply with the requirements of

TWC, §13.1395.

Further, this rulemaking does not meet the statutory definition of a "major environmental rule" because the 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. The specific intent of the rules is to bring Chapter 291 into conformity with HB 805. The amendments expand the counties to which the EPP requirement applies and provides a timeline for newly affected utilities to comply. It is not anticipated that the cost of complying with the amendments will be significant with respect to the economy as a whole; therefore, the 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; 2) does not exceed an express requirement of state law; 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 adopted to be consistent with state law, to ensure the emergency operation of water systems following a natural disaster; and 4) is not adopted 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 invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission did not receive any comments regarding the draft regulatory impact analysis determination.

### **Takings Impact Assessment**

The commission evaluated these rules and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The

specific purpose of the rules is to implement legislation relating to the emergency preparedness of affected utilities. The rules change the number of counties in which "affected utility" will be required to have EPPs. This rulemaking substantially advances this stated purpose by making the commission's rules consistent with HB 805. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these rules because this action does not affect private real property.

Promulgation and enforcement of these rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted 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 EPPs by "affected utilities." These provisions do not impose any burdens or restrictions on private real property. Therefore, the amendments do not constitute a taking under Texas Government Code, Chapter 2007.

### **Consistency with the Coastal Management Program**

The commission reviewed the 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 rules are not subject to the Texas Coastal

Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive any comments regarding the rulemaking's consistency with the CMP.

### **Public Comment**

The commission held a public hearing on July 10, 2012. The comment period closed on July 16, 2012. The commission did not receive any comments on this rulemaking.

## **SUBCHAPTER L: STANDARDS OF EMERGENCY OPERATIONS**

### **§291.161, §291.162**

#### **Statutory Authority**

These amendments are adopted 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 perform any act necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's authority to adopt any rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule. 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 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 amendments implement TWC, §13.1395 as amended by HB 805.

#### **§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 550,000 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.

(4) Population--The population shown by the most recent federal decennial census.

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

(a) An affected utility shall 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 November 1, 2011, shall submit the emergency preparedness plan to the executive director no later than February 1, 2012.

(k) Affected utilities that are existing as of November 1, 2011, shall implement the emergency preparedness plan approved by the executive director no later than June 1, 2012.

(l) 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.

(m) 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.

(n) 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.