

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

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

This rulemaking is proposed to amend 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 (psi) through the adoption of an EPP. Currently, affected utilities with customers in Harris County are required to submit and implement an EPP. Based on HB 805, affected utilities in Harris and Fort Bend Counties will be required by the proposed rules

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 proposes revisions to 30 TAC Chapter 290, Public Drinking Water.

### **Section by Section Discussion**

#### *§291.161, Definitions*

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

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

The commission proposes to amend §291.162(j) to update the due dates for submitting the EPP. The current rule requires systems that exist as of December 1, 2009, to submit an EPP by March 1, 2010. The proposed changes require a system that exists as of November 1, 2011, to submit an EPP by February 1, 2012. The updated dates were included in HB 805. The commission proposes to add §291.162(k) to include the due date for implementing an EPP as June 1, 2012, as required by HB 805. The commission proposes to renumber existing §291.162(k) - (m) to accommodate the addition of proposed §291.162(k).

### **Fiscal Note: Costs to State and Local Government**

Jeffrey Horvath, Strategic Planning and Assessment Section Analyst, has determined that for the first five-year period the proposed rules are in effect, in general no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules. The proposed rules will affect certain water utilities in Harris and Fort Bend Counties and may result in fiscal implications for these utilities as they may choose to purchase backup power generators.

The proposed rulemaking implements the requirements of HB 805 from the 82nd Legislature, 2011. In 2009, the 81st Legislature enacted SB 361 to require that certain water utilities located in Harris County ensure the emergency operation of their water systems during an extended power outage after a natural disaster. The requirements of the bill did not include utilities in Fort Bend County. HB 805 amended the TWC by changing the population threshold of an affected county from 400,000 to 550,000. This statutory change mandates that the water utility EPP requirements apply to Fort Bend County as well as to Harris County. HB 805 also specifies that the newly affected utilities in Fort Bend and Harris Counties are required to submit an EPP to the TCEQ for review and approval by February 1, 2012.

The newly affected utilities include those that furnish potable or raw water to more than one customer, as well as cities, water districts, river authorities, non-profit water supply corporations, and investor owned utilities. The proposed rules are anticipated to affect

approximately 161 water systems in Harris and Fort Bend Counties. These 161 systems include all affected utilities in Fort Bend County and the utilities in Harris County that began operation after the deadlines set forth in SB 361. Of the 161 systems, the proposed rules are anticipated to affect approximately 121 water systems owned by local governments, four state-owned water systems, and 36 privately owned systems.

In a corresponding rulemaking, the commission also proposes revisions to Chapter 290, which will also incorporate changes required by the passage of HB 805. Of the 161 newly affected utilities, 157 meet the definition of a public water system applicable to Chapter 290 (public water systems with at least 15 connections or 25 people). Because the proposed rulemaking affects facilities regulated under the public drinking water requirements in Chapter 290 and the utility regulation requirements under Chapter 291, this fiscal note will include all 161 systems because the proposed amendments will apply to facilities regulated under both chapters.

Affected water utilities will have to prepare an EPP that will ensure the operation of its water system at 35 psi during an extended power outage by one or more of the following options: automatically starting auxiliary generators, sharing of auxiliary generator capacity, negotiation of leasing and contracting agreements (mutual aid agreements), use of portable generators, on-site electrical generation, hardening of the electric transmission and distribution system, or direct engine or right angle drives. Even though affected utilities have these options, agency experience with utilities in Harris

County already subject to the EPP requirements has shown that utilities have chosen to either purchase a generator or enter into a mutual aid agreement with another utility.

In fact, based upon this experience, staff estimates that 80% of the newly affected utilities will choose to purchase a generator rather than enter into a mutual aid agreement even though a mutual aid agreement that complies with the requirements of the proposed rules is not expected to result in additional costs for the affected utilities.

This fiscal note assumes that utility costs will be based upon whether they purchase a generator or enter into a mutual aid agreement.

Systems serving 250 or more connections that do not have elevated storage were already required to have emergency power before the passage of SB 361. Therefore, it is assumed that entities with less than 250 connections will need to either enter into a mutual aid agreement or purchase a generator (typically a 150 kilowatt diesel generator is adequate to power their facilities). There are approximately 34 systems with fewer than 250 connections that are owned by units of state or local government. Staff estimates that the cost of a new 150 kilowatt generator including installation is approximately \$55,000. Staff also estimates that 80% of the newly affected utilities will choose to purchase a generator rather than enter into a mutual aid agreement.

Therefore, the total estimated costs to purchase generators for approximately 27 water utilities owned by units of state or local government is estimated to be \$1,485,000.

Maintenance costs are estimated to be approximately \$1,000 each year per generator or \$27,000 each year for all 27 utilities. Individuals served by these systems can expect to

pay more for their water services if the utility purchases a generator. The cost increase will depend upon the number of connections serviced by the utility and the number of facilities owned by the local government. Individuals would also be expected to benefit from the continued function of their water service during and after a natural disaster.

One affected utility that is owned by a local government pumps raw surface water to other systems that use the surface water to produce drinking water. The cost of a generator for the raw water pumps would be more expensive because raw water pumps require more power. A 500 kilowatt generator for this utility is expected to cost approximately \$106,750.

The TCEQ will be required to review and respond to EPP submittals from the newly affected utilities. The agency will also be required to inspect the newly affected utilities to ensure compliance with the approved EPP. The Water Supply Division will use currently available resources to contract for the review of the EPP submittals in Fiscal Year 2012. The agency will also be required to inspect the newly affected utilities for compliance and may need to expend additional resources in Fiscal Year 2013, depending on compliance rates and whether follow up enforcement activities will be required.

### **Public Benefits and Costs**

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules

will be the additional protection of human health and safety by ensuring the continued operation of water utilities following a natural disaster.

In general, the proposed rules are not anticipated to have significant fiscal implications for businesses or individuals. However, the proposed rules will affect approximately 36 private or investor owned water utilities in Harris and Fort Bend Counties. Individual customers of these newly affected utilities may be required to pay higher water rates if these utilities purchase and maintain generators. Of the 36 identified water utilities, some have more than 100 connections and therefore will have to spend more for larger generators than those utilities with 100 or less connections. Staff estimates that a privately owned utility with 100 connections or less will need to purchase a 50 kilowatt generator that is estimated to cost \$31,900 (about \$6.00 per connection per month including maintenance costs). However, these costs are highly dependent of the number of facilities the utility has and the number of customers. Maintenance costs are estimated to be approximately \$1,000 each year. If all 36 utilities purchase a 50 kilowatt generator, costs could total approximately \$1,148,400 in the first year the rules become effective.

### **Small Business and Micro-Business Assessment**

In general, no adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or implementation of the proposed rules. However, the proposed rules will affect approximately 36 private or investor owned water utilities in

Harris and Fort Bend Counties. These privately owned utilities are thought to be either a small or micro-business. Individuals who are customers of these affected utilities may be required to pay higher water rates if these utilities choose to purchase generators. Of the 36 identified water utilities, some have more than 100 connections and therefore will have to spend more for larger generators than those utilities with 100 or less connections. Staff estimates that a 50 kilowatt generator would cost approximately \$31,900 and that consumers may see a cost increase of about \$6.00 per connection per month. However, these costs are highly dependent on the number of utility facilities and the number of customers. If all 36 utilities purchase a 50 kilowatt generator, costs could total approximately \$1,148,400 in the first year the rules become effective.

### **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 in order to implement state law and are necessary to protect public health and safety in the event 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 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 proposed 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 proposed 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 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. The specific intent of the proposed rules is to bring Chapter 291 into conformity with HB 805. The proposed 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 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; 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 proposed 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 invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated 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 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 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 EPPs by "affected utilities." 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 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 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 Hearing**

The commission will hold a public hearing on this proposal in Austin on July 10, 2012, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Michael Parrish, 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.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-056-290-OW. The comment period closes July 16, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose\_adopt.html*. For further information, please contact Matt Court, Public Drinking Water Section, (512) 239-5844.

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

### **§291.161, §291.162**

#### **Statutory Authority**

These amendments 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 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 proposed 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 [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.

(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 [December 1, 2009], shall submit the emergency preparedness plan to the executive director no later than February 1, 2012 [March 1, 2010].

(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) [(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.

(m) [(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.

(n) [(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.