

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §291.200 *without change* to the proposed text as published in the March 14, 2014, issue of the *Texas Register* (39 TexReg 1857) and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

The adopted rulemaking would implement changes made to the Texas Water Code (TWC), §13.148, in House Bill (HB) 252, 83rd Legislature, 2013, relating to the requirement for a retail public utility and each entity from which the utility is obtaining wholesale water service for the utility's retail system to: 1) determine the number of days of water supply available for them to use; and 2) report to the commission when their available water supply is less than 180 days. The commission is required to adopt rules to implement the requirements of this section as well as to prescribe the form and content of the notice. The commission has been implementing the requirements of HB 252 on a voluntary basis, but the provisions of HB 252 made the reporting mandatory effective September 1, 2013. HB 252 creates a reporting responsibility for retail public utilities and the wholesale providers from which they purchase water. The commission has an existing 180-day self-reporting process in place. The commission's Water Supply Division has an existing online form for public water systems (PWSs) to report when available water supplies are less than 180 days. The form's title is the "PWS Drought Contingency Plan Reporting Form" and is located at: www.droughtreport.org. Utilities may also report the current stage of their drought contingency plan and the other water

supply impacts they are experiencing by telephone using Small Business and Environmental Assistance's drought hotline (1-800-447-2827), which is available from 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m., Monday through Friday. Utilities reporting a water shortage in accordance with the requirements of HB 252 may use the drought hotline for assistance in meeting the water shortage reporting requirements but will need to confirm the water shortage reporting utilizing either the online drought reporting form, regular or electronic mail, or facsimile. The commission closely monitors PWSs that report having less than a 180 day supply of water. The commission contacts the PWSs on a weekly basis to determine their current status and identify the types of resources available to assist them. The commission also monitors PWSs that self-report having greater than 180 days, but have indicated to the commission that they may have a water shortage situation if drought conditions persist.

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

Section Discussion

The commission adopted new §291.200 to implement TWC, §13.148, as added by HB 252, requiring retail public utilities and the entities that provide the utility's wholesale water service to provide the commission a report on the status of their water supply once the available supply is less than 180 days. The adopted rulemaking would require a

retail public utility and each entity from which the utility is obtaining wholesale water service to determine the number of days of water supply available for them to use and to report to the commission when their available water supply is less than 180 days using the commission's online "PWS Drought Contingency Plan Reporting Form" discussed in the Background and Summary section of this preamble. If reporting cannot be accomplished using the online drought reporting form, utilities may report their water shortage utilizing another reporting option. A regulatory guidance publication will be developed to assist utilities in notifying the commission when their available water supply is less than 180 days.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule creation to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to implement legislative changes enacted by HB 252, which requires a retail public utility and the entities that provide the utility wholesale water service to notify the commission when the utility or entity is reasonably certain that its available water supply is less than 180 days.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the adopted rule is not expected to be significant with respect to the economy as a whole or a sector of the economy; therefore, the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because it does not meet any of the four applicability requirements 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. The adopted rulemaking does not meet the four applicability requirements, because the adopted rule: 1) does not exceed a standard set by federal law; 2) does not exceed an express requirement of state law; 3) does not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the adopted rule; and 4) is not a rule adoption under the general powers of the commission as the adopted rule is required by HB 252.

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 this adopted rulemaking and performed an assessment of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission adopted this rulemaking for the specific purpose of

implementing legislation enacted by the 83rd Legislature in 2013. The adopted rulemaking creates new §291.200. The commission's analysis revealed that creating this rule section would achieve consistency with TWC, §13.148, as added by HB 252. The adopted rulemaking would require a retail public utility and the system(s) that provides the utility wholesale water service to notify the commission when the utility or entity is reasonably certain that its available water supply is less than 180 days.

A "taking" under Texas Government Code, Chapter 2007, means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking of private real property would occur by requiring a retail public utility and the entities that provide wholesale service to the retail public utility to notify the commission when its available water supply is less than 180 days, the commission has determined that promulgation and enforcement of this adopted rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the adopted rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking.

Therefore, the adopted rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas 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 April 8, 2014. The comment period closed on April 14, 2014. The commission did not receive any comments on this rulemaking.

SUBCHAPTER M: WATER SHORTAGE REPORT
§291.200

Statutory Authority

This new section is adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out duties under the TWC; TWC, §5.103, which establishes the commission's general authority to adopt any rules necessary to carry out the powers and duties under the provision of the TWC and other laws of this state; TWC, §5.105, which establishes the commission's authority to set policy by rule; and TWC, §13.148, which requires the commission to adopt rules for water shortage reporting.

The adopted rule implements TWC, §13.148.

§291.200. Water Shortage Reporting.

(a) A retail public utility as defined by Texas Water Code, §13.002(19) and each entity from which the utility is obtaining wholesale water service for the utility's retail system shall report to the executive director when the utility or entity is reasonably certain that the water supply will be available for less than 180 days. The reporting must be accomplished by utilizing the online "PWS Drought Contingency Plan Reporting Form."

(b) If reporting cannot be accomplished in accordance with subsection (a) of this section then the retail public utility or entity from which the utility is obtaining wholesale water service may report to the executive director by United States Postal Service mail, program electronic mail, or facsimile.