

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §291.87 *with change* to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4138) and will be republished.

Background and Summary of the Factual Basis for the Adopted Rule

In 2013, the 83rd Legislature passed House Bill (HB) 1461, which requires all retail public utilities to notify their customers of water loss reported in their water loss audits filed with the Texas Water Development Board (TWDB). The notice shall be provided through the utility's consumer confidence report (CCR) or in the customer's bill after the water loss audit is filed. The purpose of this adopted rulemaking is to amend Chapter 291 to reflect the legislative changes to Texas Water Code (TWC), §13.148, Notification of Water Loss.

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, and 30 TAC Chapter 293, Water Districts.

Section Discussion

In addition to implementation of the state law discussed previously, the commission adopts administrative changes throughout the adopted rule to conform with *Texas Register* requirements.

§291.87, Billing

The commission adds §291.87(e)(3) to implement the changes made to TWC, §13.148, in HB 1461 to remain consistent with the amended statute. The rulemaking is adopted to ensure that retail public utilities notify their customers of water loss reported in their filed water loss audits. HB 1461 specifies that the requirement to provide water loss information to customers is in conjunction with water loss audits filed pursuant to TWC, §16.0121, Water Audits (submitted to the TWDB). Adopted paragraph (3) requires the retail public utility to notify its customers of water loss through the next bill sent to its customers following the filing of the water loss audit, unless the retail public utility elects to notify its customers through its next CCR; either notification method is allowed under the legislation. In response to comments, the commission has revised §291.87(e)(3) to clarify that the water loss may be included "on or with" the next bill sent to customers. The commission further renumbers existing §291.87(e)(3) to improve the rule's organizational structure.

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, 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 the rule 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 1461, which requires all retail public utilities to notify their customers of water loss reported in their filed water loss audits. HB 1461 also states that the notice shall be provided through the utility's CCR or in the customer bills after the water loss audit is filed.

In addition, 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 the 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. Furthermore, the adopted rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). There are no federal standards governing the

notification of water loss from retail public utilities to their customers. Second, the adopted rulemaking does not exceed an express requirement of state law. Third, the adopted rulemaking 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 a state and federal program. Finally, the rulemaking will be adopted pursuant to the commission's specific authority in the TWC, Chapter 13, Subchapter E. Therefore, the rule is not adopted solely under the commission's general powers.

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 rule and performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to implement legislative changes enacted by HB 1461, which requires all retail public utilities to notify their customers of water loss reported in their filed water loss audits. HB 1461 also requires that this notice shall be provided through the utility's CCR or in the customer bills after the water loss audit is filed. The adopted rule would substantially advance this purpose by amending Chapter 291 to incorporate the new statutory requirement.

Promulgation and enforcement of this adopted rule would be neither a statutory nor a constitutional taking of private real property. The adopted rule does not affect a landowner's rights in private real property because this rulemaking does not relate to or have any impact on an owner's rights to property. The adopted rule will primarily affect those retail public utilities that experience water loss; this would not be an effect on real property. 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 (CMP).

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

Public Comment

The commission held a public hearing on June 26, 2014. The comment period closed on June 30, 2014. The commission received comments on this rulemaking from the American Water Works Association - Texas Section, Austin Water Utility, the City of Seguin (City), and the San Antonio Water System (SAWS).

American Water Works Association - Texas Section, Austin Water Utility, and SAWS commented that the proposed rule should be revised to accurately reflect the intent of HB 1461. The City requested the executive director's staffs' guidance on compliance with HB 1461.

Response to Comments

Austin Water Utility, American Water Works Association - Texas Section, and SAWS commented that the proposed changes to §291.87(e)(3) should be amended to reflect that the water loss audit results reported to customers of retail public utilities can be provided "on or with" the CCRs or customer bills; the proposed language had indicated that the audit loss results must be provided "in" the CCRs or customer bills. These commenters stressed that, for their customers and the public to receive the most benefit from this reporting and also to reduce confusion, utilities might also include a narrative explaining what the water loss audit results mean. Additionally, Austin Water Utility, American Water Works Association - Texas Section, and SAWS expressed appreciation

"that the proposed rules do not specify what metrics will be used...", stating that "it is important that such details be left up to the individual utilities to determine what data would be the most meaningful for their customers."

In response to these comments, the commission has replaced the word "in" with the phrase "on or with" to more closely reflect the amended statute.

The City requested the executive director's staffs' guidance on complying with HB 1461 during 2014. The City commented that it should have notified its customers in the billing cycle immediately following the City's submission of its water loss audit to the TWDB, which occurred during March, 2014. And, because the City's annual CCRs have already been published and were being distributed at the time of the public hearing, the City finds itself unable to comply with HB 1461's notification methods during 2014; however, the City confirmed its intent to comply with the notification options beginning in 2015.

HB 1461 took effect on September 1, 2013, and required a retail public utility that files a water loss audit with the TWDB to provide notice of said water loss to its customers. HB 1461 allows the retail public utility to provide this information to its customers in the next CCR or the next customer bill after the filing of the audit. The commission understands the

City's dilemma; however, the TCEQ has not been granted legislative authority to either waive or alter the statutory notification requirement. Therefore, no change has been made in response to this comment.

SUBCHAPTER E: CUSTOMER SERVICE AND PROTECTION

§291.87

Statutory Authority

This rule is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules. 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 in TWC, Chapter 13, or implied in 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 adopted rule implements the language set forth in House Bill 1461, which affects all retail public utilities. Therefore, the TWC authorizes a rulemaking that amends §291.87, requiring all retail public utilities to notify their customers of water loss reported in their filed water loss audits.

§291.87. Billing.

(a) Authorized rates. Bills must be calculated according to the rates approved by the regulatory authority and listed on the utility's approved tariff. Unless specifically authorized by the commission, a utility may not apply a metered rate to customers in a subdivision or geographically defined area unless all customers in the subdivision or geographically defined area are metered.

(b) Due date.

(1) The due date of the bill for utility service may not be less than 16 days after issuance unless the customer is a state agency. If the customer is a state agency, the due date for the bill may not be less than 30 days after issuance unless otherwise agreed to by the state agency. The postmark on the bill or the recorded date of mailing by the utility if there is no postmark on the bill, constitutes proof of the date of issuance. Payment for utility service is delinquent if the full payment, including late fees and regulatory assessments, is not received at the utility or at the utility's authorized payment agency by 5:00 p.m. on the due date. If the due date falls on a holiday or weekend, the due date for payment purposes is the next work day after the due date.

(2) If a utility has been granted an exception to the requirements for a local office in accordance with §291.81(d)(3) of this title (relating to Customer

Relations), the due date of the bill for utility service may not be less than 30 days after issuance.

(c) Penalty on delinquent bills for retail service. Unless otherwise provided, a one-time penalty of either \$5.00 or 10% for all customers may be charged for delinquent bills. If, after receiving a bill including a late fee, a customer pays the bill in full except for the late fee, the bill may be considered delinquent and subject to termination after proper notice under §291.88 of this title (relating to Discontinuance of Service). An additional late fee may not be applied to a subsequent bill for failure to pay the prior late fee. The penalty on delinquent bills may not be applied to any balance to which the penalty was applied in a previous billing. No such penalty may be charged unless a record of the date the utility mails the bills is made at the time of the mailing and maintained at the principal office of the utility. Late fees may not be charged on any payment received by 5:00 p.m. on the due date at the utility's office or authorized payment agency. The commission may prohibit a utility from collecting late fees for a specified period if it determines that the utility has charged late fees on payments that were not delinquent.

(d) Deferred payment plan. A deferred payment plan is any arrangement or agreement between the utility and a customer in which an outstanding bill will be paid in installments. The utility shall offer a deferred payment plan to any residential

customer if the customer's bill is more than three times the average monthly bill for that customer for the previous 12 months and if that customer has not been issued more than two disconnection notices at any time during the preceding 12 months. In all other cases, the utility is encouraged to offer a deferred payment plan to residential customers who cannot pay an outstanding bill in full but are willing to pay the balance in reasonable installments. A deferred payment plan may include a finance charge that may not exceed an annual rate of 10% simple interest. Any finance charges must be clearly stated on the deferred payment agreement.

(e) Rendering and form of bills.

(1) Bills for water and sewer service shall be rendered monthly unless otherwise authorized by the commission, or unless service is terminated before the end of a billing cycle. Service initiated less than one week before the next billing cycle begins may be billed with the following month's bill. Bills shall be rendered as promptly as possible following the reading of meters. One bill shall be rendered for each meter.

(2) The customer's bill must include the following information, if applicable, and must be arranged so as to allow the customer to readily compute the bill with a copy of the applicable rate schedule:

(A) if the meter is read by the utility, the date and reading of the meter at the beginning and at the end of the period for which the bill is rendered;

(B) the number and kind of units metered;

(C) the applicable rate class or code;

(D) the total amount due for water service;

(E) the amount deducted as a credit required by a commission order;

(F) the amount due as a surcharge;

(G) the total amount due on or before the due date of the bill;

(H) the due date of the bill;

(I) the date by which customers must pay the bill in order to avoid addition of a penalty;

(J) the total amount due as penalty for nonpayment within a designated period;

(K) a distinct marking to identify an estimated bill;

(L) any conversions from meter reading units to billing units, or any other calculations to determine billing units from recording or other devices, or any other factors used in determining the bill;

(M) the total amount due for sewer service;

(N) the gallonage used in determining sewer usage; and

(O) the local telephone number or toll free number where the utility can be reached.

(3) A retail public utility required to file a water loss audit with the Texas Water Development Board under the provisions of Texas Water Code (TWC), §16.0121, shall notify its customers of its water loss reported in the water loss audit by including the water loss information on or with the next bill sent to its customers following the filing of the water loss audit, unless the retail public utility elects to notify its customers

of its water loss reported in the water loss audit by including the water loss information on or with its next consumer confidence report following the filing of the water loss audit in accordance with §290.272 of this title (relating to Content of the Report).

(4) Except for an affected county or for solid waste disposal fees collected under a contract with a county or other public agency, charges for nonutility services or any other fee or charge not specifically authorized by the TWC or these rules or specifically listed on the utility's approved tariff may not be included on the bill.

(f) Charges for sewer service. Utilities are not required to use meters to measure the quantity of sewage disposed of by individual customers. When a sewer utility is operated in conjunction with a water utility that serves the same customer, the charge for sewage disposal service may be based on the consumption of water as registered on the customer's water meter. Where measurement of water consumption is not available, the utility shall use the best means available for determining the quantity of sewage disposal service used. A method of separating customers by class shall be adopted so as to apply rates that will accurately reflect the cost of service to each class of customer.

(g) Consolidated billing and collection contracts.

(1) This subsection applies to all retail public utilities.

(2) A retail public utility providing water service may contract with a retail public utility providing sewer service to bill and collect the sewer service provider's fees and payments as part of a consolidated process with the billing and collection of the water service provider's fees and payments. The water service provider may provide that service only for customers who are served by both providers in an area covered by both providers' certificates of public convenience and necessity. If the water service provider refuses to enter into a contract under this section or if the water service provider and sewer service provider cannot agree on the terms of a contract, the sewer service provider may petition the commission to issue an order requiring the water service provider to provide that service.

(3) A contract or order under this subsection must provide procedures and deadlines for submitting filing and customer information to the water service provider and for the delivery of collected fees and payments to the sewer service provider.

(4) A contract or order under this subsection may require or permit a water service provider that provides consolidated billing and collection of fees and payments to:

(A) terminate the water services of a person whose sewage services account is in arrears for nonpayment; and

(B) charge a customer a reconnection fee if the customer's water service is terminated for nonpayment of the customer's sewage services account.

(5) A water service provider that provides consolidated billing and collection of fees and payments may impose on each sewer service provider customer a reasonable fee to recover costs associated with providing consolidated billing and collection of fees and payments for sewage services.

(h) Overbilling and underbilling. If billings for utility service are found to differ from the utility's lawful rates for the services being provided to the customer, or if the utility fails to bill the customer for such services, a billing adjustment shall be calculated by the utility. If the customer is due a refund, an adjustment must be made for the entire period of the overcharges. If the customer was undercharged, the utility may backbill the customer for the amount that was underbilled. The backbilling may not exceed 12 months unless such undercharge is a result of meter tampering, bypass, or diversion by the customer as defined in §291.89 of this title (relating to Meters). If the underbilling is \$25 or more, the utility shall offer to such customer a deferred payment plan option for the same length of time as that of the underbilling. In cases of meter tampering, bypass,

or diversion, a utility may, but is not required to, offer a customer a deferred payment plan.

(i) Estimated bills. When there is good reason for doing so, a water or sewer utility may issue estimated bills, provided that an actual meter reading is taken every two months and appropriate adjustments made to the bills.

(j) Prorated charges for partial-month bills. When a bill is issued for a period of less than one month, charges should be computed as follows.

(1) Metered service. Service shall be billed for the base rate, as shown in the utility's tariff, prorated for the number of days service was provided; plus the volume metered in excess of the prorated volume allowed in the base rate.

(2) Flat-rate service. The charge shall be prorated on the basis of the proportionate part of the period during which service was rendered.

(3) Surcharges. Surcharges approved by the commission do not have to be prorated on the basis of the number of days service was provided.

(k) Prorated charges due to utility service outages. In the event that utility service is interrupted for more than 24 consecutive hours, the utility shall prorate the base charge to the customer to reflect this loss of service. The base charge to the customer shall be prorated on the basis of the proportionate part of the period during which service was interrupted.

(l) Disputed bills.

(1) A customer may advise a utility that a bill is in dispute by written notice or in person during normal business hours. A dispute must be registered with the utility and a payment equal to the customer's average monthly usage at current rates must be received by the utility prior to the date of proposed discontinuance for a customer to avoid discontinuance of service as provided by §291.88 of this title.

(2) Notwithstanding any other section of this chapter, the customer may not be required to pay the disputed portion of a bill that exceeds the amount of that customer's average monthly usage at current rates pending the completion of the determination of the dispute. For purposes of this section only, the customer's average monthly usage will be the average of the customer's usage for the preceding 12-month period. Where no previous usage history exists, consumption for calculating the average

monthly usage will be estimated on the basis of usage levels of similar customers under similar conditions.

(3) Notwithstanding any other section of this chapter, a utility customer's service may not be subject to discontinuance for nonpayment of that portion of a bill under dispute pending the completion of the determination of the dispute. The customer is obligated to pay any billings not disputed as established in §291.88 of this title.

(m) Notification of alternative payment programs or payment assistance. Any time customers contact a utility to discuss their inability to pay a bill or indicate that they are in need of assistance with their bill payment, the utility or utility representative shall provide information to the customers in English and in Spanish, if requested, of available alternative payment and payment assistance programs available from the utility and of the eligibility requirements and procedure for applying for each.

(n) Adjusted bills. There is a presumption of reasonableness of billing methodology by a sewer utility for winter average billing or by a water utility with regard to a case of meter tampering, bypassing, or other service diversion if any one of the following methods of calculating an adjusted bill is used:

(1) estimated bills based upon service consumed by that customer at that location under similar conditions during periods preceding the initiation of meter tampering or service diversion. Such estimated bills must be based on at least 12 consecutive months of comparable usage history of that customer, when available, or lesser history if the customer has not been served at that site for 12 months. This subsection, however, does not prohibit utilities from using other methods of calculating bills for unmetered water when the usage of other methods can be shown to be more appropriate in the case in question;

(2) estimated bills based upon that customer's usage at that location after the service diversion has been corrected;

(3) calculation of bills for unmetered consumption over the entire period of meter bypassing or other service diversion, if the amount of actual unmetered consumption can be calculated by industry recognized testing procedures; or

(4) a reasonable adjustment is made to the sewer bill if a water leak can be documented during the winter averaging period and winter average water use is the basis for calculating a customer's sewer charges. If the actual water loss can be calculated, the consumption shall be adjusted accordingly. If not, the prior year average can be used if available. If the actual water loss cannot be calculated and the customer's

prior year's average is not available, then a typical average for other customers on the system with similar consumption patterns may be used.

(o) Equipment damage charges. A utility may charge for all labor, material, equipment, and all other actual costs necessary to repair or replace all equipment damaged due to negligence, meter tampering or bypassing, service diversion, or the discharge of wastes that the system cannot properly treat. The utility may charge for all actual costs necessary to correct service diversion or unauthorized taps where there is no equipment damage, including incidents where service is reconnected without authority. An itemized bill of such charges must be provided to the customer. A utility may not charge any additional penalty or any other charge other than actual costs unless such penalty has been expressly approved by the commission and filed in the utility's tariff. Except in cases of meter tampering or service diversion, a utility may not disconnect service of a customer refusing to pay damage charges unless authorized to in writing by the executive director.

(p) Fees. Except for an affected county, utilities may not charge disconnect fees, service call fees, field collection fees, or standby fees except as authorized in this chapter.

(1) A utility may only charge a developer standby fees for unrecovered costs of facilities committed to a developer's property under the following circumstances:

(A) under a contract and only in accordance with the terms of the contract;

(B) if service is not being provided to a lot or lots within two years after installation of facilities necessary to provide service to the lots has been completed and if the standby fees are included on the utility's approved tariff after a rate change application has been properly filed. The fees cannot be billed to the developer or collected until the standby fees have been approved by the commission or executive director; or

(C) for purposes of this subsection, a manufactured housing rental community can only be charged standby fees under a contract or if the utility installs the facilities necessary to provide individually metered service to each of the rental lots or spaces in the community.

(2) Except as provided in §291.88(h)(2) of this title and §291.89(c) of this title other fees listed on a utility's approved tariff may be charged when appropriate.

Return check charges included on a utility's approved tariff may not exceed the utility's documentable cost.

(q) Payment with cash. When a customer pays any portion of a bill with cash, the utility shall issue a written receipt for the payment.

(r) Voluntary contributions for certain emergency services.

(1) A utility may implement as part of its billing process a program under which the utility collects from its customers a voluntary contribution including a voluntary membership or subscription fee, on behalf of a volunteer fire department or an emergency medical service. A utility that collects contributions under this section shall provide each customer at the time the customer first becomes a customer, and at least annually thereafter, a written statement:

(A) describing the procedure by which the customer may make a contribution with the customer's bill payment;

(B) designating the volunteer fire department or emergency medical service to which the utility will deliver the contribution;

(C) informing the customer that a contribution is voluntary;

(D) if applicable, informing the customer the utility intends to keep a portion of the contributions to cover related expenses; and

(E) describing the deductibility status of the contribution under federal income tax law.

(2) A billing by the utility that includes a voluntary contribution under this section must clearly state that the contribution is voluntary and that it is not required to be paid.

(3) The utility shall promptly deliver contributions that it collects under this section to the designated volunteer fire department or emergency medical service, except that the utility may keep from the contributions an amount equal to the lesser of:

(A) the utility's expenses in administering the contribution program; or

(B) 5.0% of the amount collected as contributions.

(4) Amounts collected under this section are not rates and are not subject to regulatory assessments, late payment penalties, or other utility related fees, are not required to be shown in tariffs filed with the regulatory authority, and non-payment may not be the basis for termination of service.