

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes new §291.200.

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

The proposed 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](http://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 proposes revisions to 30 TAC Chapter 290, Public Drinking Water.

### **Section Discussion**

The commission proposes new §291.200 to implement TWC, §13.148, as added by HB 252, requiring retail public utilities and the system(s) that provides 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 proposed 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 general information publication will be developed to assist utilities in notifying the commission when their available water supply is less than 180 days.

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

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are anticipated for other state agencies as a result of administration or enforcement of the proposed rule. Units of local government who are retail public utilities will be required 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. These requirements may result in additional costs for some public utilities and water providers as they may not have the technology or capability to calculate the extent of available water supply.

The proposed rule would implement the provisions of HB 252, which amends the TWC to require 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 bill requires the commission to adopt rules to implement these requirements as well as to prescribe the form and content of the notice. No significant fiscal implications are anticipated for the agency to implement and administer the proposed rule. The effect of the bill is to allow the commission and other state agencies to be proactive in providing assistance to utilities and wholesale water providers when they have less than 180 days of water storage available.

Staff estimates that approximately 1,800 governmental entities or facilities will be affected by the proposed rule. Units of local government who are retail public utilities may not have the technology or capability to calculate the extent of their available water supply in order to report to the commission when their available water supply is less than 180 days. These requirements may result in additional costs for some public utilities and water providers. The estimated costs to retail public utilities and wholesale water providers will be highly variable and agency staff is not able to quantify these costs due to the different types of water sources utilized for water supply. A water system can obtain water from a ground (well) or surface (lake or river) source or a combination of

both. The capacity and type of production, storage, and treatment equipment utilized also has an impact on the amount of available water supply.

In order to mitigate these potential costs, some local governments may find it necessary to increase their rates to fund additional equipment, services, or staff to determine the amount of water supply available. Agency staff is not able to estimate how many retail public utilities and wholesale water providers may increase their rates due to the proposed rule and legislation. However, these local governments may also have the opportunity to receive technical assistance from the TCEQ through the Financial, Managerial, and Technical (FMT) assistance program or the EnviroMentor program. EnviroMentors are qualified professionals with technical or legal expertise on environmental issues who volunteer to help small businesses, local governments, and independent school districts with state environmental rules. Many EnviroMentors are private-sector consultants. Some are engineers; others are successful professionals (for example, a wastewater system operator) who provide peer-to-peer advice. Local governments may also look at regionalization of their water supply systems as an economical alternative.

### **Public Benefits and Costs**

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

rule will be compliance with state law and better management of the amount of water supply available to citizens of the state. The agency and water utilities will have information to implement water supply planning and policy decisions to address future water supply needs throughout the state.

The proposed rule may have fiscal implications for approximately 580 privately owned utilities providing water service. Privately owned retail public utilities may not have the technology or capability to calculate the extent of available water supply in order to report to the commission when their available water supply is less than 180 days. These requirements may result in additional costs for some public utilities and water providers. The estimated costs to retail public utilities and wholesale water providers will be highly variable and agency staff is not able to quantify these costs due to the different types of water sources utilized for water supply. The capacity and type of production, storage, and treatment equipment utilized also has an impact on the amount of available water supply.

These utilities may have to increase their rates in order to compensate for their increased costs for assessments to determine their available remaining water supply. Individuals served by these water systems may experience increased costs for their water. Water utility customers may see their water rates increase to fund additional equipment, contract services, or staff to determine the available water supply remaining.

Affected retail water utilities may also have the opportunity to receive technical assistance from the TCEQ through the FMT assistance program or the EnviroMentor program. Water utility retailers may also look at regionalization of their water supply systems as an economical alternative.

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

Adverse fiscal implications are anticipated for some retail public utilities and wholesale water providers who are small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. There are an estimated 570 small businesses who own approximately 1,600 facilities that may be affected by the proposed rule. The effects of the proposed rule will vary with the size of the business and the level of expertise and resources available to determine the amount of available water supply. The estimated costs to retail public utilities and wholesale water providers will be highly variable and agency staff is not able to quantify these costs due to the different types of water sources utilized for water supply. The equipment needed to perform ground water level measurements may not be available in certain areas of the state and the cost to own such equipment may be prohibitive to small water systems. Calculating surface water supply requires some level of technical expertise for most water system officials. The smaller the water system the less likely they are to have the equipment or technical expertise needed to perform an adequate estimation of their water supply. These systems may have to increase their

rates to compensate for their increased costs. Small businesses that cannot afford the cost of outsourcing the water supply assessment or do not have the technical expertise to conduct the assessment also have the opportunity to receive technical assistance from the TCEQ through the FMT assistance program or the EnviroMentor program.

### **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 rule is necessary to implement state law, and therefore, is consistent with protecting the public health, safety, environmental, and economic welfare of the state.

### **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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed 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 proposed rulemaking is to implement legislative changes enacted by HB 252, which requires 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.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed 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 proposed rule is not expected to be significant with respect to the economy as a whole or a sector of the economy; therefore, the proposed rulemaking will

not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the proposed 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 proposed rulemaking does not meet the four applicability requirements, because the proposed 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 proposed rule; and 4) is not a rule proposal under the general powers of the commission as the proposed rule is required by HB 252.

The commission invites public comment of the draft regulatory impact analysis determination. Written comments 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 this proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission proposed this rulemaking for the specific purpose of implementing legislation enacted by the 83rd Legislature in 2013. The proposed 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 proposed 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 proposed 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 proposed 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 proposed rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

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

The commission reviewed the proposed 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 proposed rule is 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 April 8, 2014, at 2:00 p.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 Derek Baxter, 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 2013-047-290-OW. The comment period closes April 14, 2014. 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](http://www.tceq.texas.gov/nav/rules/propose_adopt.html)*. For further information,  
please contact Elston Johnson, Water Supply Division, (512) 239-6266.

## **SUBCHAPTER M: WATER SHORTAGE REPORT**

### **§291.200**

#### **Statutory Authority**

This new section is proposed 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 proposed 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.