

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §291.14 and §291.142.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed rulemaking is intended to implement statutory changes made by House Bill (HB) 3542 and Senate Bill (SB) 700 of the 86th Texas Legislature, 2019.

HB 3542 amends Texas Water Code (TWC), Chapter 13 and adds additional criteria that allow the TCEQ to appoint a person to temporarily manage a utility. Specifically, TWC, §13.4132(a)(3) authorizes the appointment of a temporary manager if a utility provides retail water or sewer utility service through fewer than 10,000 taps or connections and violates a final order of the commission by failing to provide system capacity that is greater than the required raw water or groundwater production rate or the anticipated daily demand of the system; provide a minimum pressure of 35 pounds per square inch (psi) throughout the distribution system under normal operating conditions; or maintain accurate or properly calibrated testing equipment or other means of monitoring the effectiveness of a chemical treatment or pathogen inactivation or removal process. HB 3542 took effect on September 1, 2019.

SB 700 amended TWC, Chapters 5 and 13 to authorize the TCEQ to issue emergency orders with or without a hearing to compel a retail public utility to provide water and/or sewer service to ensure safe drinking water or environmental protection.

Additionally, TCEQ can issue an emergency order to compel a retail public utility to provide an emergency interconnection for not more than 90 days if necessary to ensure safe drinking water or environmental protection. The legislation also amends TWC, Chapter 5 to allow the commission by order or rule to delegate to the executive director of the TCEQ the authority to receive applications, issue emergency orders under TWC, §13.041(h), and authorize in writing a representative or representatives to act on the executive director’s behalf. SB 700 took effect on September 1, 2019.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 35, Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions.

Section by Section Discussion

In addition to the proposed revisions associated with this rulemaking, the proposed rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. Where the proposal of additional subsections, paragraphs, subparagraphs, etc. are proposed, subsequent re-lettering or renumbering are modified accordingly. These changes are non-substantive and are not specifically discussed in this preamble.

§291.14, Emergency Orders

The commission proposes to amend §291.14(a) by moving portions of the existing criteria into proposed subsection (a)(1) and to include two additional criteria as proposed subsection (a)(2) and (3) that would allow the commission or the executive director to issue emergency orders.

§291.142, Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver

The commission proposes to add §291.142(a)(3) to include additional criteria that would allow the commission or the executive director to appoint a person to temporarily manage a utility.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency.

The agency estimates that 329 retail public utilities are operated by units of local government and have a certificate of convenience and necessity and would be affected by this proposed rulemaking. Assuming these units of local government comply with safe drinking water laws and regulations, no fiscal implications are anticipated for units of local government as a result of administration or enforcement of the proposed

rule. If a unit of local government is out of compliance, then the agency may order it to provide an emergency interconnection with a neighboring retail public utility. If this were to occur, there would likely be a one-time cost to the unit of local government.

This rulemaking addresses necessary changes in order to implement SB 700 and HB 3542. The proposed rulemaking includes additional criteria that would allow the agency to issue emergency orders to ensure safe drinking water or environmental protection or provide a limited emergency interconnection. The proposed rulemaking authorizes the agency to appoint a temporary manager under TWC, §5.507 and §13.4132.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules would be in effect, the public benefit anticipated would be compliance with state law.

The proposed rulemaking is not anticipated to impact the estimated 605 investor-owned water and sewer utilities in Texas. Because this fiscal analysis assumes that entities are in compliance with state rules and regulations regarding safe drinking water, no fiscal implications are anticipated for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local

Employment Impact Statement is not required because the proposed rulemaking would not adversely affect a local economy in a material way for the first five years that the proposed rules would be in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking would not adversely affect rural communities in a material way for the first five years that the proposed rules would be in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rulemaking for the first five-year period the proposed rules would be in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rules would not adversely affect a small or micro-business in a material way for the first five years the proposed rules would be in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking would not require the creation of new employee positions, eliminate current employee positions, or require an increase or decrease in fees paid to the agency. The proposed rulemaking would expand an existing regulation to comply with the state law that authorizes the agency to issue emergency orders to ensure safe drinking water or environmental protection or provide a limited emergency interconnection. The agency may appoint a temporary manager under TWC, §5.507 and §13.4132. The proposed rulemaking would not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rules should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The proposed rulemaking is intended to implement statutory changes made by HB 3542 and SB 700 to amend sections to reflect changes to TWC, Chapters 5 and 13. The intent of the changes to §291.14 is to add criteria to allow the executive director to issue emergency orders to compel a retail public utility to provide water and/or sewer service to ensure safe drinking water or environmental protection, or provide an emergency interconnection for not more than 90 days. The intent on the changes to

§291.142 is to add additional criteria that would allow the commission or executive director to appoint a person to temporarily manage a utility.

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. Texas Government Code, §2001.0225 applies to a "Major environmental rule" which is defined in Texas Government Code, §2001.0225(g)(3) as a rule with a specific intent "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."

First, the proposed rulemaking does not meet the statutory definition of a major environmental rule. The specific intent is to protect the environment or reduce risks to human health from environmental exposure. However, the proposed rules 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. It is not anticipated that the cost of complying with the proposed rules would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed rules would not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Second, the proposed rulemaking does not meet any of the four applicability requirements for a major environmental rule listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 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 proposed rulemaking does not meet any of the four preceding applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed any express requirements of TWC, Chapter 5 or 13, which relate to orders issued by the commission, orders issued by the executive director, and emergency orders; 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 a state and federal program; and 4) is not proposed solely under the general powers of the agency.

Since this proposed rulemaking does not meet the statutory definition of a major environmental rule nor does it meet any of the four applicability requirements for a major environmental rule this rulemaking is not subject to Texas Government Code,

§2001.0225.

Takings Impact Assessment

The commission prepared a takings impact assessment for these proposed rules pursuant to Texas Government Code, §2007.043. The specific purpose of these proposed rules is to ensure consistency between the rules and their applicable statutes as amended by recent legislation; to grant the commission and executive director authority, with or without a hearing; to compel a retail public utility with a certificate of public convenience and necessity to provide water and/or sewer service that complies with statutory and regulatory requirements of the commission; to compel a retail public utility to provide an emergency interconnection with a neighboring retail public utility for the provision of temporary water and/or sewer service for up to 90 days; to establish what qualifies as adequate notice to a retail public utility if an emergency order is issued without a hearing; and to add criteria which would allow the commission or the executive director to appoint a person to temporarily manage a utility.

The proposed regulations would not affect a landowner's rights in private real property because this proposed rulemaking would not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The proposed rules do not constitute a taking because they would not burden private real property.

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 would 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 Virtual Hearing

The commission will hold a *virtual* public hearing on this proposal on November 10, 2020, at 10:00 a.m. Central Standard Time. The virtual hearing is structured for the receipt of oral comments by interested persons. Individuals who register may present oral statements when called upon in order of registration. Open discussion will not be permitted during the virtual hearing; however, agency staff members will be available to discuss the proposal 30 minutes prior to and after the virtual hearing via the Teams Live Event Q&A chat function.

Persons who do not have internet access or who have special communication or other accommodation needs who plan to attend the hearing should contact Sandy Wong,

General Law Division at (512) 239-1802 or 1-800-RELAY-TX (TDD) to register.

Accommodation requests should be made as far in advance as possible.

Registration

The hearing will be conducted remotely using an internet meeting service. Individuals who plan to attend the hearing and want to provide oral comments or want their attendance on record must register by November 6, 2020. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on November 9, 2020 to those who registered for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_NWY0ZjIyM2YtNjc1OC00YWNmLWE1NjAtNDJlYWZhMTc2ZWE5%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%220ab3b264-6a49-48c6-afc8-8225e4a7b0ac%22%2c%22IsBroadcastMeeting%22%3a%22true%7d

Submittal of Comments

Written comments may be submitted to Ms. Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to fax4808@tceq.texas.gov. Electronic comments may be submitted at: <https://www6.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 2020-011-291-OW. **The comment period closes on November 17, 2020.** Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Brian Dickey, Water Supply Division, (512) 239-0963.

SUBCHAPTER A: GENERAL PROVISIONS

§291.14

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state and TWC, §13.041(b), concerning General Powers of Utility Commission and Commission; Rules; Hearings, which provides the commission with the authority to adopt any rules reasonably required in the exercise of its powers and jurisdiction.

The proposed amendment implements Senate Bill 700 passed by the 86th Texas Legislature, 2019.

§291.14. Emergency Orders.

(a) The commission or executive director may [also] issue orders under Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) to:

(1) appoint a temporary manager under Texas Water Code, §5.507 and §13.4132; [.]

(2) compel a retail public utility that has obtained a certificate of public convenience and necessity to provide water or sewer service, or both, that complies with all statutory and regulatory requirements of the commission if necessary to ensure safe drinking water or environmental protection; and

(3) compel a retail public utility to provide an emergency interconnection with a neighboring retail public utility for the provision of temporary water or sewer service, or both, for not more than 90 days if necessary to ensure safe drinking water or environmental protection.

(b) If an order is issued under this section without a hearing, the order shall fix a time, as soon after the emergency order is issued as is practicable, and place for a hearing to be held before the commission.

SUBCHAPTER J: ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

§291.142

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state; and TWC §13.041(b), concerning General Powers of Utility Commission and Commission; Rules; Hearings, which provides the commission with the authority to adopt any rules reasonably required in the exercise of its powers and jurisdiction.

The proposed amendment implements House Bill 3542 passed by the 86th Texas Legislature, 2019.

§291.142. Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver.

(a) The commission or the executive director, after providing to the utility notice and an opportunity for a hearing, may authorize a willing person to temporarily manage and operate a utility that:

(1) has discontinued or abandoned operations or the provision of services; [or]

(2) is being referred to the attorney general for the appointment of a receiver under Texas Water Code (TWC), §13.412 for:

(A) having expressed an intent to abandon or abandoned operation of its facilities;

(B) having violated a final order of the commission;

(C) having allowed any property owned or controlled by it to be used in violation of a final order of the commission; or

(D) violates a final judgment issued by a district court in a suit brought by the attorney general under:

(i) TWC, Chapter 7;

(ii) TWC, Chapter 13; or

(iii) Texas Health and Safety Code, Chapter 341; or

(3) provides retail water or sewer utility service through fewer than 10,000 taps or connections and violates a final order of the commission by failing to:

(A) provide system capacity that is greater than the required raw water or groundwater production rate or the anticipated daily demand of the system;

(B) provide a minimum pressure of 35 pounds per square inch throughout the distribution system under normal operating conditions; or

(C) maintain accurate or properly calibrated testing equipment or other means of monitoring the effectiveness of a chemical treatment or pathogen inactivation or removal process.

(b) The commission or the executive director may appoint a person under this section by emergency order under Chapter 35 of this title (relating to Emergency and Temporary Order and Permits; Temporary Suspension or Amendment of Permit Conditions). A corporation may be appointed a temporary manager.

(c) Abandonment includes, but is not limited to:

(1) failure to pay a bill or obligation owed to a retail public utility or to an electric or gas utility with the result that the utility service provider has issued a notice of discontinuance of necessary services;

(2) failure to provide appropriate water or wastewater treatment so that a potential health hazard results;

(3) failure to adequately maintain facilities or to provide sufficient facilities resulting in potential health hazards, extended outages, or repeated service interruptions;

(4) failure to provide customers adequate notice of a health hazard or potential health hazard;

(5) failure to secure an alternative available water supply during an outage;

(6) displaying a pattern of hostility toward or repeatedly failing to respond to the commission or the utility's customers; and

(7) failure to provide the commission or its customers with adequate information on how to contact the utility for normal business and emergency purposes.

(d) This section does not affect the authority of the commission to pursue an enforcement claim against a utility or an affiliated interest.