

The Texas Commission on Environmental Quality (TCEQ) adopts amendments to 30 Texas Administrative Code §§291.160, 291.161, and 291.162, and the addition of new §291.163.

Amended §§291.160, 291.161, and 291.162, and the addition of new §291.163 are adopted *without changes* to the adopted text as published in the July 14, 2023, issue of the *Texas Register* (48 TexReg 3889) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2021, the 87th Legislature passed Senate Bill (SB) 3, which relates to preparing for, preventing, and responding to weather emergencies and power outages. SB 3 requires that certain water service providers ensure emergency operations during an extended power outage. SB 3 amended Texas Water Code (TWC), Chapter 13, by adding §13.1394, Standards of Emergency Operations, amending §13.1395, Standards of Emergency Operations in Certain Counties. New TWC §13.1394, requires that affected utilities create an emergency preparedness plan that shows how an affected utility will provide emergency operations and submit that plan to the TCEQ for review and approval. TWC §13.1394, stipulates that a water service provider must maintain 20 pounds per square inch (psi) of pressure, or a water pressure approved by the executive director, during power outages that last longer than 24 hours as soon as it is safe and practicable following a natural disaster. The statute also specifies that the TCEQ has 90 days to review the plan, once the plan is submitted, and either approve it or recommend changes. Once the TCEQ approves the plan the water service provider must operate in accordance with the plan and maintain any generators in accordance with manufacturer's specifications. TWC §13.1394 also specifies that the TCEQ will conduct inspections to ensure compliance and that waivers to these requirements are available under certain circumstances. SB 3 stated in Section 36(b) that each affected utility was to submit to the TCEQ an emergency

preparedness plan required by TWC §13.1394, no later than March 1, 2022, and stated in Section 36(c) that the emergency preparedness plan was to be implemented no later than July 1, 2022, unless the affected utility had obtained an adjusted, TCEQ approved timeline. The TCEQ notes that these additions to the TWC, made by SB 3, give the TCEQ the authority to regulate water service providers that have not previously been regulated by the TCEQ because, as the definition appears in TWC §13.1394, not all affected utilities are public water systems.

Amended TWC §13.1395, excludes from the requirement of creating an Emergency Preparedness Plan those raw water services that are unnecessary or otherwise subject to interruption or curtailment during emergencies pursuant to contract.

In response to the widespread power and equipment failures and drinking water outages and shortages during Winter Storm Uri in 2021, the TCEQ organized an after-action review to evaluate the factors that impacted public water systems across the state. This review resulted in findings and recommendations to enhance and integrate additional public water system critical infrastructure resiliency measures. These findings and recommendations were presented to the TCEQ during a work session, held on May 19, 2022.

Section by Section Discussion

§291.160, Purpose

The TCEQ adopts to amend §291.160 to add a reference to TWC §13.1394 and to adjust the verb tense of the section based on the addition.

§291.161, Definitions

The TCEQ adopts this rulemaking to amend the definition of "affected utility" by adding language to encompass the definitions of affected utility in TWC §13.1394 and §13.1395. The TCEQ adopts these amendments to reflect the requirements in TWC §13.1394(a)(1) and §13.1395(a)(1). Current subsection lettering will be revised to accommodate the amended definition.

The TCEQ adopts this rulemaking to amend the definition of "emergency operations" to clarify the minimum water pressure that affected utilities must provide during emergency operations. This clarification is consistent with the requirements under TWC §13.1394, which is 20 pounds per square inch, or a pressure approved by the executive director, and TWC §13.1395, which is 35 pounds per square inch.

§291.162, Emergency Operation of An Affected Utility

The TCEQ adopts this rulemaking to amend the title of §291.162 to clarify that this section is applicable to affected utilities as defined in TWC §13.1395.

The TCEQ adopts this rulemaking to amend §291.162(d) to clarify that this subsection does not apply to raw water services that are unnecessary or otherwise subject to interruption or curtailment during emergencies under a contract as stated in TWC §13.1395.

The TCEQ adopts this rulemaking to amend §291.162(e) to revise the appendix reference from "Appendix J" to "Appendix G2" for consistency with adopted amendment to §290.47.

The TCEQ adopts this rulemaking to amend §291.162(f) with language that refers to the generator maintenance requirements listed in adopted amendments to §290.46(m)(8). This adopted change is a recommendation approved by the TCEQ as a result of the After-Action Review, which found that additional maintenance to critical equipment and increased protection against adverse weather conditions will have reduced the impacts to water infrastructure during the winter storm.

The TCEQ adopts this rulemaking to amend §291.162(i) to change "subchapter" to "section" based on the adopted addition of §291.163 to the subchapter. This amendment will make language consistent with adopted additions to §291.163(i).

The TCEQ adopts this rulemaking to delete §291.162(j) and (k) because the deadlines listed in these subsections have passed and are no longer applicable; subsection lettering will be revised to accommodate these deletions.

The TCEQ adopts this rulemaking to amend new §291.162(j) to clarify that affected utilities created after December 31, 2012, are required to have emergency preparedness plans approved and implemented prior to providing water to customers.

§291.163, Emergency Operation of an Affected Utility as defined in TWC §13.1394

The TCEQ adopts this rulemaking to add new §291.163 to provide regulatory requirements for

affected utilities as defined in TWC §13.1394.

The TCEQ adopts this rulemaking to add §291.163(a) which requires an affected utility to adopt and submit to the executive director for approval an emergency preparedness plan that demonstrates the utility's ability to provide emergency operations and a timeline for implementing the plan, as required by TWC §13.1394(b)(2)(A) and §13.1394(b)(2)(B).

The TCEQ adopts this rulemaking to add §291.163(b) which requires the executive director to review the emergency preparedness plan submitted by an affected utility, to determine if the plan is acceptable, and to request additional information or recommend changes if the plan is not acceptable. The executive director's request for information or recommended changes must be made on or before the 90th day after the executive director receives the plan as required by TWC §13.1394(c).

The TCEQ adopts this rulemaking to add §291.163(c), to include §291.163(c)(1) through §291.163(c)(14), which provides the 14 emergency operation options available to affected utilities as listed in TWC §13.1394(c)(1) through §13.1394(c)(14).

The TCEQ adopts this rulemaking to add §291.163(d) which requires affected utilities that provide raw surface water to wholesale customers to include in their emergency preparedness plan how they intend to provide raw water services to their wholesale customers during emergencies. This requirement does not apply to raw water services that are unnecessary or otherwise subject to interruption or curtailment during emergencies under a contract under TWC §13.1394(d).

The TCEQ adopts this rulemaking to add §291.163(e) which addresses the requirement for the TCEQ to develop an emergency preparedness plan template. This new subsection informs affected utilities that they may use the template included in Appendix G1 of §290.47 to create their emergency preparedness plan as required under TWC §13.1394(g).

The TCEQ adopts this rulemaking to add §291.163(f) which requires that any generator used as part of an approved emergency preparedness plan must be inspected, operated and maintained according to the manufacturer's specifications, per TWC §13.1394(h) and the requirements listed in §290.46(m)(8), which are adopted in a companion rulemaking in response to the After-Action Review, which found that additional maintenance to critical equipment and increased protection against adverse weather conditions will have reduced the impacts to water infrastructure during the winter storm.

The TCEQ adopts this rulemaking to add §291.163(g) which allows the executive director to grant an affected utility a financial waiver to the requirement of submitting an emergency preparedness plan pursuant to TWC §13.1394(j). The executive director will consider whether complying with the emergency preparedness plan requirements will cause a significant financial burden on the affected utilities customers. The adopted rule requires that the affected utility submit documentation to the executive director that must demonstrate the significant financial burden on customers before a waiver is granted.

The TCEQ adopts this rulemaking to add §291.163(h) which allows an affected utility to adopt and enforce limitations on water use while the utility is providing emergency operations pursuant to TWC §13.1394(k).

The TCEQ adopts this rulemaking to add §291.163(i), which states that information provided by an affected utility under this section is confidential and is not subject to disclosure under Texas Government Code, Chapter 552 as stated in TWC §13.1394(l).

The TCEQ adopts this rulemaking to add §291.163(j), which provides that affected utilities which are established after December 31, 2022, must have an emergency preparedness plan approved and implemented prior to providing water to customers. The TCEQ adopts this addition based on emergency preparedness plan submission and implementation deadlines in March and July 2022, respectively, included in SB 3 for existing affected utilities.

The TCEQ adopts this rulemaking to add §291.163(k) which provides that an affected utility that cannot provide a minimum of 20 psi, or a water pressure approved by the TCEQ, during emergency operations to revise and submit their emergency preparedness plan within 180 days of restoration of power, and that based on a review of the plan, the executive director may require additional or alternative auxiliary emergency facilities to implement TWC §13.1394(b)(1).

Final Regulatory Impact Determination

The TCEQ reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to §2001.0225. A "major environmental rule" means 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 rulemaking does not meet the statutory definition of a "major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the rulemaking is to ensure that affected utilities have emergency preparedness plans to provide potable water service during emergency operations.

Second, the rulemaking does not meet the statutory definition of a "major environmental rule" because the rules 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. It is not anticipated that the cost of complying with the adopted rules will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendments will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Finally, the rulemaking does not meet any of the four applicability requirements for a "major environmental rule" listed in Texas Government Code §2001.0225(a). Section 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 rulemaking does not meet any of the preceding four applicability requirements because this rulemaking: does not exceed any standard set by federal law for public water systems and is

consistent with and no less stringent than federal rules; does not exceed any express requirement of state law under Texas Health and Safety Code (THSC), Chapter 341, Subchapter C; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government; and is not based solely under the general powers of the agency, but specifically under TWC §5.107 which establishes the TCEQ's authority to collect regulatory assessments from utility service providers under TWC Chapter 13; THSC §341.031, which allows the TCEQ to establish public drinking water standards and adopt and enforce rules to implement the federal Safe Drinking Water Act, as well as under SB 3, which authorizes the TCEQ to promulgate rules in its implementation of TWC §13.1394 and §13.1395, and the other general powers of the TCEQ.

The TCEQ invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No written comments on the Draft Regulatory Impact Analysis Determination were received.

Takings Impact Assessment

The TCEQ evaluated this rulemaking and performed a preliminary assessment of whether these rules constitute a taking under Texas Government Code, Chapter 2007.

The TCEQ adopts these rules to clarify existing requirements and for the specific purpose of implementing SB 3, 87th R.S. (2021), which requires the TCEQ to receive, review, and monitor compliance with affected utilities' emergency preparedness plans to ensure provision of potable water service during emergency operations.

The TCEQ's analysis indicates that Texas Government Code, Chapter 2007, does not apply to

these rules based upon exceptions to applicability in Texas Government Code §2007.003(b)(13). The rulemaking is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the public health and safety purpose; and that does not impose a greater burden than is necessary to achieve the public health and safety purpose. Texas Government Code §2007.003(b)(13). Lack of potable water service during emergency operations constitutes a real and substantial threat to public health and safety and requires appropriate governmental regulation. The rules significantly advance the public health and safety purpose by ensuring appropriate governmental regulation of affected utilities' emergency preparedness plans and do so in a way that does not impose a greater burden than is necessary to achieve the public health and safety purpose.

Further, the TCEQ has determined that promulgation and enforcement of these rules will 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 rules neither relate to, nor have any impact on, the use or enjoyment of private real property, and there will be no reduction in property value as a result of these rules. The rules require affected utilities to submit emergency preparedness plans, comply with their emergency preparedness plans, and operate under their emergency preparedness plans during emergency operations. Therefore, the rules will not constitute a taking under Texas Government Code Chapter 2007.

Consistency with the Coastal Management Program

The TCEQ reviewed the adopted 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 adopted rules are not subject to the Texas Coastal Management

Program.

The TCEQ invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received during the public comment period.

Public Comment

The TCEQ held a public hearing on August 11, 2023. The comment period closed at 11:59 p.m. on August 14, 2023. No comments were received on the proposed rule. However, public comments were received regarding Chapter 290 which are addressed in that concurrent rulemaking.

SUBCHAPTER L: STANDARDS OF EMERGENCY OPERATIONS

§§291.160 – 291.163

Statutory Authority

These amendments are adopted under the authority of the Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Texas Health and Safety Code (THSC), §341.0315, which requires public water systems to comply with commission rules adopted to ensure the supply of safe drinking water.

The adopted amendments implement TWC §13.1394, as added by requirements in Senate Bill (SB) 3 of the 87th Texas Legislative Session (2021), and TWC §13.1395. Additional commission adopted amendments provide clarity to existing rules.

§291.160. Purpose.

Texas Water Code, Chapter 13, Subchapter E, §13.1394 and §13.1395, prescribes the duties of the commission relating to standards for emergency operations of affected utilities. The statutes require [statute requires] that the commission ensure that affected utilities provide water service as soon as safe and practicable during an extended power outage. This subchapter sets forth requirements and implementation of emergency operation planning of affected utilities as defined in this subchapter. Public water systems must comply with the emergency operations requirements as defined in Chapter 290, Subchapter D of this title (relating to Rules and Regulations for Public Water Systems).

§291.161. Definitions.

For the purposes of this subchapter, the following definitions apply.

(1) Affected utility –

(A) 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 is an affected utility as defined in TWC §13.1394; or [:]

(B) 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 is an affected utility as defined in TWC §13.1395 in a county with a population of:

(i) [(A) In a county with a population of] 3.3 million or more; or

(ii) [(B) In a county with a population of] 550,000 or more adjacent to a county with a population of 3.3 million or more.

(2) Emergency operations--The operation of an affected utility [a water system] during an extended power outage at a minimum water pressure of 20 pounds per square inch (psi), or a water pressure approved by the executive director as required under TWC §13.1394 or 35 psi as required under TWC §13.1395. [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 as defined in TWC §13.1395.

(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. This subsection does not apply to raw water services that are unnecessary or otherwise subject to interruption or curtailment during emergencies under a contract.

(e) The affected utility may use the template in Appendix G2 [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 and the requirements listed in §290.46(m)(8) of this title.

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

[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.]

~~(j)~~ [(l)] Affected utilities which are established after December 31, 2012 [the effective date of this rule] must have emergency preparedness plans approved and implemented prior to providing water to customers.

(k) [(m)] 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.

(l) [(n)] 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.

§291.163. Emergency Operation of an Affected Utility as defined in TWC §13.1394

(a) An affected utility shall adopt and submit to the executive director for approval an emergency preparedness plan that demonstrates the utility's ability to provide emergency operations and a timeline for implementing the plan.

(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 request additional information or recommend changes to the plan. The executive director shall communicate to the affected utility the request for information or recommendations on or before the 90th day after the executive director receives the plan.

(c) An emergency preparedness plan shall include one or more of the following:

(1) the maintenance of automatically starting auxiliary generators;

(2) the sharing of auxiliary generator capacity with one or more affected utilities, including through participation in a statewide mutual aid program;

(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) the maintenance of direct engine or right-angle drives;

(8) designation of the water system as a critical load facility or redundant, isolated, or dedicated electrical feeds;

(9) water storage capabilities;

(10) water supplies delivered from outside the service area of the affected utility;

(11) the ability to provide water through artesian flows;

(12) redundant interconnectivity between pressure zones;

(13) emergency water demand rules to maintain emergency operations; or

(14) any other alternative determined by the executive director to be acceptable.

(d) Each affected utility that supplies, provides, or conveys raw surface water to wholesale customers shall include in its emergency preparedness plan provisions for demonstrating the capability of each raw water intake pump station, pump station, and pressure facility necessary to provide water service to its wholesale customers. This subsection does not apply to raw water services that are unnecessary or otherwise subject to interruption or curtailment during emergencies under a contract.

(e) The affected utility may use the template in Appendix G1 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 inspected, operated, and maintained according to the manufacturer's specifications and the requirements listed in §290.46(m)(8) of this title.

(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 section is confidential and is not subject to disclosure under Texas Government Code, Chapter 552.

(j) Affected utilities, established after December 31, 2022, must have emergency preparedness plans approved and implemented prior to providing water to customers.

(k) If an affected utility fails to provide a minimum of 20 psi, or a water pressure approved by the commission, 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.