

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §291.143 and §291.161.

Background and Summary of the Factual Basis for the Proposed Rules

During the 88th Texas Legislative Session (2023), House Bill (HB) 1500 and HB 4559 passed, and require amendments to 30 Texas Administrative Code (TAC) Chapter 291 to implement the enacted legislation.

Texas Water Code (TWC), §13.4132, enacted in HB 1500, establishes the duration of an emergency order appointing a temporary manager to operate a utility that discontinues operation or is referred for appointment of a receiver.

This rulemaking reflects changes to TWC, §13.1395 enacted in HB 4559, which amended the definition of “affected utility” by changing county population. The amended population maintains the applicability of the counties required to have an Emergency Preparedness Plan (EPP) under TWC, §13.1395 or TWC, §13.1394.

Section by Section Discussion

§291.143 Operation of a Utility by a Temporary Manager.

The commission proposes to amend §291.143 to revise the term limit of a temporary manager from 180 to 360 days, based on the duration of an emergency order, and provide for renewal of the emergency order in accordance with TWC, §13.4132 as amended by HB 1500.

§291.161 Definitions.

The commission proposes to amend the definition of “affected utility” in §291.161(1)(B)(ii) to change the population from “550,000” to “800,000” in accordance with TWC, §13.1395 as amended by HB 4559. The amended population maintains the applicability of the counties required to have an Emergency Preparedness Plan (EPP) under TWC, §13.1395 or TWC, §13.1394.

Fiscal Note: Costs to State and Local Government

Kyle Girten, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

Public Benefits and Costs

Mr. Girten determined that for each year of the first five years the proposed rules are in effect, the public benefit will be compliance and consistency with state law, specifically HB 4559 and HB 1500 from the 88th Texas Legislative Session (2023). The proposed rulemaking is not anticipated to result in significant fiscal implications 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 does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are 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 rule for the first five-year period the proposed rules are 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 do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking amends an existing regulation, and it does not create, expand, repeal, or limit this regulation. The proposed rulemaking does 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 commission 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 provide a duration for an emergency order issued under TWC, §13.4132 and to revise the county population in the definition of affected utility in TWC, §13.1395(a)(1), which applies to those affected utilities which are required to submit emergency preparedness plans to the commission for review and approval.

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 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; does not exceed any express requirement of state law; 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 under THSC, §341.031 and §341.0315, which allows the commission to adopt and enforce rules related to public drinking water, as well as under the general powers of the commission.

The commission invites public comment regarding the draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

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

The commission proposes these rules to implement HB 1500 and 4559, 88th Texas Legislative session (2023). HB 1500 amended TWC, §13.4132 by establishing a duration of 360 days, with the possibility of renewal, for an emergency order issued to appoint a temporary manager of a water system that ceases operation or is referred for appointment of a receiver. HB 4559 amended TWC, §13.1394(a)(1) by changing the county population in the definition of “affected utility.” An affected utility is required to file an emergency preparedness plan with the executive director for review and approval.

The Commission’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). The rulemaking is an action that is taken to fulfill obligations mandated under state law for all of the proposed rules. The rulemaking related to emergency orders and emergency preparedness plans is also an action 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)(4) and (13).

First, the rulemaking is an action taken to fulfill obligations under state law. The duration of an emergency order appointing a temporary manager is now established under TWC, §13.4132(b-1), and the county population in the definition of “affected utility” impact those affected

utilities who are required to submit emergency preparedness plans to the commission under TWC, §13.1395(a)(1).

Second, the rulemaking related to the duration of emergency orders and to the submission of emergency preparedness plans by affected utilities are actions that are taken in response to a real and substantial threat to public health and safety. The proposed rules would ensure the continuity of operation of public water systems by temporary managers appointed pursuant to emergency orders with a duration established by the legislature and by ensuring that emergency preparedness plans are submitted by affected utilities in appropriate counties designated by the legislature. The proposed rules would significantly advance the public health and safety purpose; and does not impose a greater burden than is necessary to achieve the public health and safety purpose. These rules advance the public health and safety by ensuring appropriate governmental regulation and do so in a way 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).

Further, the commission has determined that promulgation and enforcement of these rules 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 rules because the rules neither relate to, nor have any impact on, the use or enjoyment of private real property, and there would be no reduction in property value as a result of these rules. The rules require compliance regarding the duration of an emergency order appointing a temporary manager or receiver as now established under state law, and compliance regarding submission by an affected utility to the commission of its emergency preparedness plan, which is meant to

ensure public health and safety. Therefore, the rules would not constitute a taking under Texas Government Code, Chapter §2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the sections proposed for amendments are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will the amendments affect any action or authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking 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 hybrid virtual and in-person public hearing on this proposal in Austin on September 12, 2024 at 10:00 a.m. in building F; room 2210 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 starting at 9:30 a.m.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by September 10, 2024. 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 September 11, 2024, to those who register 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://events.teams.microsoft.com/event/1edc845c-d424-4035-9209-3f5b3eaa3880@871a83a4-a1ce-4b7a-8156-3bcd93a08fba>

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 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to 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://tceq.commentinput.com/comment/search>. File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2024-015-290-OW. The comment period closes at 11:59 p.m. on September 17, 2024. 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 Rhea Miller, Emergency Preparedness and Response Section, at 512-239-5728 or by email at rhea.miller@tceq.texas.gov.

SUBCHAPTER J: ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

§291.143

Statutory Authority

The rulemaking is proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to perform any act necessary to carry out its jurisdiction; TWC, §5.103 and TWC, §5.105, which establish the commission's authority to adopt any rules necessary to carry out its powers and duties; Texas Health and Safety Code (THSC), §341.031, which requires drinking water supplies to meet standards established by the commission; and THSC, §341.0315, which requires public drinking water systems to comply with commission standards established to ensure the supply of safe drinking water.

The proposed rulemaking implements legislation enacted by the 88th Texas Legislature in 2023: TWC, §13.4132 in House Bill (HB) 1500 and TWC, §13.1395(a)(1) in HB 4559.

§291.143. Operation of a Utility by a Temporary Manager.

(a) By emergency order under Texas Water Code (TWC), §5.507 and §13.4132, the commission or the executive director may appoint a person under Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) to temporarily manage and operate a utility that has discontinued or abandoned operations or the provision of services, or which has been or is being referred to the attorney general for the appointment of a receiver under TWC, §13.412.

(b) A person appointed under this section has the powers and duties necessary to ensure the continued operation of the utility and the provision of continuous and adequate services to customers, including the power and duty to:

(1) read meters;

(2) bill for utility services;

(3) collect revenues;

(4) disburse funds;

(5) request rate increases if needed;

(6) access all system components;

(7) conduct required sampling;

(8) make necessary repairs; and

(9) perform other acts necessary to assure continuous and adequate utility service as authorized by the commission.

(c) Upon appointment by the commission, the temporary manager will post financial assurance with the commission in an amount and type acceptable to the commission. The temporary manager or the executive director may request waiver of the financial assurance requirements or may request substitution of some other form of collateral as a means of ensuring the continued performance of the temporary manager.

(d) The term of an emergency order issued to appoint a temporary manager may not exceed 360 days. The emergency order may be renewed:

(1) once for a period not to exceed 360 days, or

(2) if the utility is undergoing a sale, transfer, merger, consolidation, or acquisition required to be reported to the Public Utility Commission under Tex. Water Code §13.301, until the sale, transfer, merger, consolidation, or acquisition process is complete.

(e) [(d)] The temporary manager shall serve a term not to exceed 360 [of 180] days, unless:

(1) specified otherwise by the commission;

(2) an extension is requested by the executive director or the temporary manager and granted by the commission under subsection (d) above;

(3) the temporary manager is discharged from his responsibilities by the commission; or

(4) a superseding action is taken by an appropriate court on the appointment of a receiver at the request of the attorney general.

(f) [(e)] Within 60 days after appointment, a temporary manager shall return to the commission an inventory of all property received.

(g) [(f)] Compensation for the temporary manager will come from utility revenues and will be set by the commission at the time of appointment. Changes in the compensation agreement can be approved by the executive director.

(h) [(g)] The temporary manager shall collect the assets and carry on the business of the utility and shall use the revenues and assets of the utility in the best interests of the customers to ensure that continuous and adequate utility service is provided. The temporary manager shall give priority to expenses incurred in normal utility operations and for repairs and improvements made since being appointed temporary manager.

(i) [(h)] The temporary manager shall report to the executive director on a monthly basis. This report shall include:

(1) an income statement for the reporting period;

(2) a summary of utility activities such as improvements or major repairs made, number of connections added, and amount of water produced or treated; and

(3) any other information required by the executive director.

(j) [(i)] During the period in which the utility is managed by the temporary manager, the certificate of convenience and necessity shall remain in the name of the utility owner; however, the temporary manager assumes the obligations for operating within all legal requirements.

SUBCHAPTER L: STANDARDS OF EMERGENCY OPERATIONS

§291.161

Statutory Authority

The rulemaking is proposed under Texas Water Code (TWC) §5.013, which establishes the general jurisdiction of the commission; TWC §5.102, which establishes the commission's general authority to perform any act necessary to carry out its jurisdiction; TWC §5.103 and TWC §5.105, which establish the commission's authority to adopt any rules necessary to carry out its powers and duties; Texas Health and Safety Code (THSC) §341.031, which requires drinking water supplies to meet standards established by the commission; and THSC §341.0315, which requires public drinking water systems to comply with commission standards established to ensure the supply of safe drinking water.

The proposed rulemaking implements legislation enacted by the 88th Texas Legislature in 2023: TWC §13.4132 in House Bill (HB) 1500 and TWC §13.1395(a)(1) in HB 4559.

§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 conveyer of potable or raw water service that furnishes water service to more than one customer is an affected utility as defined in TWC₁ §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) 3.3 million or more; or

(ii) 800,000 [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 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.

(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.