

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to Subchapter B, Program for Water Quality Assessment Fees; §220.21, Water Quality Assessment Fees. This amendment is made concurrently with amendments to Chapters 303 and 304. Section §220.21 is adopted *without changes* to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6851) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Chapter 220 implements the Texas Clean Rivers Program, under Texas Water Code (TWC), §26.0135. The Texas Clean Rivers Program monitors and assesses water quality conditions that support water quality management decisions necessary to maintain and improve the quality of the state's water resources (as defined in TWC, §26.001(5)). Under TWC, §26.0135, water right holders and wastewater permit holders are assessed fees to pay for the costs of this program. The adopted rule will implement Senate Bill (SB) 289 of the 77th Legislature, 2001, which amends TWC, §26.0135, to provide that the commission shall not assess water quality assessment fees against a holder of a non-priority hydroelectric water right that owns or operates privately-owned facilities that collectively have a capacity of less than two megawatts. This will be a change from the existing rules, which provide that water quality assessment fees shall be established for each water right holder for each water right authorized by category of use, except for irrigation water rights. Amended §220.21 will specify that the commission may not assess water quality assessment fees against a holder of a non-priority hydroelectric right that owns or operates privately-owned facilities that collectively have a capacity of less than two megawatts.

SECTION DISCUSSION

Adopted §220.21 will add the provision that the commission may not assess water quality assessment fees against a holder of a non-priority hydroelectric right that owns or operates privately-owned facilities that collectively have a capacity of less than two megawatts.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the 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 because it does not meet the definition of a “major environmental rule” as defined in that statute because the specific intent of this amendment is not to protect the environment or reduce risks to human health from environmental exposure. The intent of the amendment is to exempt small privately-owned hydroelectric facilities from paying water quality assessment fees under the Texas Clean Rivers Program.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rule and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific purpose of the rulemaking action is to implement legislation which changes who may be assessed water quality assessment fees under the Texas Clean Rivers Program. This rulemaking substantially advances this purpose by amending §220.21 of the water quality management rules to provide that the Texas Clean Rivers Program may not assess fees against small privately-owned hydroelectric facilities.

The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to this rule because this rule amendment does not affect any private real property that is the subject of this rulemaking in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action. This rulemaking only relates to fees charged for water quality assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adoption is not subject to the CMP.

HEARING AND COMMENTERS

A public hearing was held on this rulemaking on October 4, 2001 in San Antonio. No oral comments were received at the hearing, and no written comments were received on the proposed rule amendment.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.0135, which requires assessments of fees against water right holders and wastewater permit

holders to pay for the administrative costs of periodic monitoring and assessment of water quality conditions in each watershed and river basin in the state.

SUBCHAPTER B: PROGRAM FOR WATER QUALITY ASSESSMENT FEES

§220.21

§220.21. Water Quality Assessment Fees.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **BOD** - Five-day biochemical oxygen demand.

(2) **COD** - Chemical oxygen demand.

(3) **Consumptive use** - The use of water for domestic and municipal, industrial, irrigation or mining purposes, consistent with the meaning of these uses for which water may be appropriated under the Texas Water Code, §11.023 and §11.024.

(4) **Final flow limit** - The maximum amount of wastewater discharge authorized by a permit issued in accordance with the Texas Water Code, Chapter 26 expressed as a daily average flow, a daily maximum flow, an annual average or an annual maximum. For the purpose of this section, a final flow limit is expressed in millions of gallons per day of discharge (MGD).

(5) **Flow** - The total by volume of all wastewater discharges authorized under a permit issued in accordance with the Texas Water Code, Chapter 26, expressed as an average flow per day, a maximum flow per day, an annual average or an annual maximum, exclusive of variable or occasional stormwater discharges. Generally, the flow amount used to calculate fees is the sum of the volumes of discharge for all outfalls of a facility, but excludes internal outfalls. However, for those facilities for which permit limitations on the volumes of discharge apply only to internal outfalls, the flow amount used to calculate fees is the sum of the volumes of discharge for all internal outfalls of the facility, exclusive of variable or occasional stormwater discharges.

(6) **Flow type.**

(A) Contaminated - These wastewaters include sanitary wastewater, process wastewater flows or any mixed wastewaters containing more than 10% process wastewaters;

(B) Uncontaminated - These wastewaters include non-contact cooling water or mixed flows which contain at least 90% non-contact cooling water and not more than one million gallons per day of process wastewater.

(7) **Hydropower use** - The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(8) **Inactive permit** - A permit which authorizes a waste treatment facility, where the facility itself is not yet operational or where operation has been suspended.

(9) **Industrial use** - The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric.

(10) **Irrigation use** - The use of water for the irrigation of crops, trees, and pasture land, including but not limited to golf courses and parks which do not receive water through a municipal distribution system.

(11) **MGD** - Million gallons per day.

(12) **Mining use** - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(13) **Municipal use** - The use of treated water within or without a municipality and its environs whether supplied by a person, privately-owned utility, political subdivision, or other entity as well as the use of municipal sewage effluent for certain purposes specified as follows. It includes the use of treated water for domestic purposes, fighting fires, sprinkling streets, flushing sewers and drains, watering parks and parkways, and recreational purposes including public and private swimming pools, the use of treated water in industrial and commercial enterprises supplied by a municipal distribution

system without special construction to meet its demands, and for the watering of lawns and family gardens. Municipal use also includes the application of municipal sewage effluent upon land sites, pursuant to a Texas Water Code, Chapter 26, permit, where:

(A) the primary purpose of the application is the treatment and/or necessary disposal of such effluent; or

(B) the application site is a park, parkway, golf course, or other landscaped area owned by the owner of the permitted sewerage system; or

(C) the effluent applied to such site is generated within an area for which the commission has adopted a no-discharge to surface water rule.

(14) **Navigation use** - A recognized use that is not currently included in any water rights.

(15) **Non-consumptive use** - The use of water for those purposes not otherwise designated as consumptive uses under this section, including hydroelectric power, navigation, non-consumptive recreation and other beneficial uses, consistent with the meaning of these uses and for which water may be appropriated under the Water Code, §11.023 and §11.024.

(16) **Other use** - Any beneficial use not otherwise defined herein.

(17) **Recreational use** - The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aesthetic land enhancement of a subdivision, golf course or similar development.

(18) **Recharge use** - The use of surface water to either increase the amount of natural recharge to an underground aquifer or the injection of water into an aquifer.

(19) **TOC** - Total organic carbon.

(20) **Traditional pollutants** - The wastewater parameters typically found in wastewater permits, specifically oxygen demand (BOD/COD/TOC), total suspended solids (TSS) and ammonia. For the purpose of this section, COD and TOC are converted to BOD values, and the higher value is used in fee calculations. COD and TOC are expressed in terms of BOD at the rate of three pounds of TOC equal to one pound of BOD (3:1) or eight pounds of COD equal to one pound of BOD (8:1).

(21) **TSS** - Total suspended solids.

(22) **Wastewater permit** - A permit issued by the commission under authority of the

Texas Water Code, Chapter 26, including those permits issued under the authority of both the Texas Water Code, Chapter 26 and other statutory provisions (such as the Health and Safety Code, Chapter 361). For the purpose of this section, a permit shall include any authorization under Water Code, Chapter 26 to treat or discharge wastewater, including a registration or permit by rule.

(23) **Water right** - A right acquired under the laws of the state and the rules of the commission to impound, divert, or use state water.

(24) **Aquaculture** - The commercial propagation of aquatic species utilizing ponds, lakes, fabricated tanks and raceways, or other similar structures.

(b) For the purpose of recovery of the costs of development of regional water quality assessments and administration of the provisions of this chapter, a fee is assessed against water right holders and wastewater permit holders in each watershed of the state in proportion to their right to use water from, or to discharge wastewater into, the watershed. The fee calculation is based on the authorized limits contained in wastewater permits and water rights as of September 1 each year. All fee calculations are to be based on the parameters specified in the permit or water right without regard to the actual amount or quality of effluent discharged or the actual amount of water used. Fees do not apply to those domestic and livestock water use applications which are exempt from the need for authorization from the commission.

(c) Wastewater permit holders shall be assessed a fee based on the authority of a permittee to

dispose of or discharge wastewater under a permit or other authorization issued pursuant to the Texas Water Code, Chapter 26. The fee shall be assessed on the basis of permitted flow and traditional pollutant limits and determined as the sum of factors in paragraphs (1) - (3) of this subsection. When calculating the charge based on flow, this amount shall be calculated based on the daily average flow limit in the permit. For permits that do not have a daily average flow limit, the charge shall be based on 50% of the daily maximum flow limit:

- (1) for contaminated discharges, \$375 per MGD;
- (2) for uncontaminated discharges, \$1.75 per MGD;
- (3) for each traditional pollutant, \$3.00 per pound per day.

(d) The annual fee assessed for each wastewater discharge permit shall be a minimum of \$300 and shall not exceed \$40,000. The fee for a permit which does not authorize the discharge of wastewater, including evaporation and land disposal permits, shall be \$200. The fee for an inactive permit shall be \$150. No fee will be assessed for aquaculture wastewater permits.

(e) For municipal or industrial water rights, or portions thereof, not directly associated with a facility or operation which is assessed a fee under subsection (c) or (d) of this section, and for all other types of water rights except irrigation water rights and certain hydroelectric water rights described in this subsection, each water right holder shall pay a fee based on the authorization to impound, divert or

use state water. The fee for each water right authorizing diversion of more than 250 acre-feet per year for consumptive use, other than for irrigation, shall be \$.22 per acre-foot up to 20,000 acre-feet, and \$.08 per acre-foot thereafter. An authorization to impound water will be assessed a fee only when there is no associated consumptive use authorized, and then the fee will be calculated at the nonconsumptive rate described in this subsection. Except for water rights for use for hydroelectric generation, the fee shall be \$.021 per acre-foot for water rights for non-consumptive use above 2,500 acre-feet per year up to 50,000 acre-feet, and \$.0007 per acre-foot thereafter. The fee for water rights for use for hydroelectric generation shall be \$.04 per acre-foot per year up to 100,000 acre-feet and \$.004 per acre-foot thereafter. This fee shall not be assessed against a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts.

(f) Water which is authorized in a water right for consumptive use, but which is designated by a provision in the water right as unavailable for use may be exempted from the assessment of a fee under subsection (e) of this section.

(g) A retail public utility as defined by Texas Water Code, §13.002, which is subject to a water quality assessment fee under this chapter may collect from each customer a charge to recover the amount of the fee assessed. The total amount recovered by a retail public utility shall not exceed the amount assessed under this chapter plus any reasonable costs of collection. Any pass-through mechanism for the fees shall be fair and equitable for all customers and may be subject to review by the commission.

(h) The portion of a water quality assessment fee recovered from a customer of a retail public utility may be listed on the customer's bill as a separate item and may be collected in addition to other regulatory assessments or charges for utility services.

(i) The portion of a water quality assessment fee recovered from a customer by a retail public utility is not part of the rates of that utility. This provision shall apply to a retail public utility providing water and/or wastewater service.

(j) Water quality assessment fees are due within 30 days of the billing date each year. Fees shall be paid by check, either personal or certified, or by money order payable to the commission. A person failing to make payment of the fees imposed under this section when due shall be assessed penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

(k) New wastewater permits and water rights granted after September 1 will be billed at the next regular billing date. Any change in authorization will not affect any fee already billed for the year in which the authorization change is made. Cancellation or revocation, whether by voluntary action on the part of the permittee or water right holder or as a result of proceedings initiated by the commission, will not constitute grounds for a refund of any water quality assessment fee previously paid.

(l) The commission shall monitor both the collection of fees under this section and the

allocation of fee revenues under §220.22 of this title (relating to Allocation of Water Quality Assessment Fee Revenue) for the river basins of the state. The commission shall adjust the fee rates established under this section to the extent necessary to ensure the adequate support of the programs undertaken to implement this chapter and the equitable assessment of fees within each watershed and region of the state. If the fees collected for this program in any fiscal year should exceed \$5 million by more than one percent, the commission shall make a proportional downward adjustment of the fee rates for the next fiscal year to attempt to limit the collection to \$5 million per year.