

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §220.21, Water Quality Assessment Fees. The commission concurrently proposes amendments to Chapters 303 and 304.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Chapter 220 implements the Texas Clean Rivers Program, under Texas Water Code (TWC), §26.0135.

The Texas Clean Rivers Program staff 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. This proposed amendment would implement Senate Bill (SB) 289, 77th Texas 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 proposal represents 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. This proposed rule would amend §220.21 to specify that the commission may not assess costs 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 BY SECTION DISCUSSION

Section 220.21 is proposed to be amended to add the provision that the commission may not assess costs 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. The word below was changed to in this subsection to reflect current *Texas Register* style.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined for the first five-year period the proposed rule is in effect, no significant fiscal implications for the commission or other units of state and local government are anticipated as a result of administration or enforcement of the proposed rule.

The proposed rule would implement SB 289 (an act relating to the exemption of a certain class of small hydroelectric facilities from water quality assessment fees and watermaster fees), 77th Legislature, 2001, and provides that the commission shall not assess water quality assessment fees against holders of hydroelectric rights that own or operate privately-owned facilities that collectively have a capacity of less than two megawatts. Current rules 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. Water quality assessment fees are used to support the Texas Clean Rivers Program. The program staff 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. Water right holders and wastewater permit holders are assessed water quality assessment fees to pay for the costs of

the program.

The proposed rule would provide an exemption from these fees. There are two known small hydroelectric facilities that would qualify for this exemption. Fee rates are based upon the volume of water allocated in the water right. The estimated amount of the water quality assessment fees assessed for Fiscal Year (FY) 2002 for both facilities is \$6,354. Program fee rates will not be revised to compensate for the potential loss of fee revenue. The average annual budget of the Texas Clean Rivers Program is approximately \$5 million. The loss of revenue is negligible and is not considered significant.

Senate Bill 289 also provides that the watermaster shall not assess fees against holders of hydroelectric rights that own or operate privately-owned facilities that collectively have a capacity of less than two megawatts.

PUBLIC BENEFIT AND COSTS

Mr. Horvath also determined for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule will be continued compliance with state law while maintaining the current Texas Clean Rivers Program.

There are no fiscal implications anticipated to businesses or individuals as a result of implementing the proposed rule, except for the positive implication for the two facilities expected to be exempted.

The proposed rule amendment would implement SB 289 and provides that the commission shall not assess water quality assessment fees against holders of hydroelectric rights that own or operate privately-owned facilities that collectively have a capacity of less than two megawatts. Current rules 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. Water quality assessment fees are used to support the Texas Clean Rivers Program. The program staff 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. Water right holders and wastewater permit holders are assessed water quality assessment fees to pay for the costs of the program.

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SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There are no adverse fiscal implications for small or micro-businesses anticipated as a result of implementation of the proposed rule. The proposed rule would result in positive fiscal implications for the two facilities expected to be exempted from water quality assessment fees.

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The proposed rule would provide an exemption from these fees. There are two known small hydroelectric facilities that would qualify for this exemption. At least one of the facilities and perhaps both, may be considered small businesses. The exemption from water quality assessment fees results in positive fiscal implications for the two facilities. Fee rates are based upon the volume of water allocated in the water right. The estimated amount of the water quality assessment fees assessed for FY 2002 for both facilities is \$6,354. Program fee rates will not be revised to compensate for the potential loss of fee revenue. The average annual budget of the Texas Clean Rivers Program is approximately \$5 million. The loss of revenue is negligible and is not considered significant.

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 §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 proposed amendment is to exempt a certain class of small privately-owned hydroelectric facilities from paying water quality assessment fees under the Texas Clean Rivers Program. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rule and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific purpose of the proposed rulemaking 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 proposing to amend §220.21 of the water quality assessment rules to provide that the Texas Clean Rivers Program staff may not assess fees from a certain class of small privately-owned hydroelectric facilities that collectively generate less than two megawatts.

The commission’s preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this proposed 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 reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule amendment is not subject to the CMP.

ANNOUNCEMENT OF HEARING

A hearing will be held on this proposed rulemaking on October 4, 2001 at 10:00 a.m. at the Texas Natural Resource Conservation Commission Region 13 Office, 14250 Judson Road, San Antonio, Texas. 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 discussions will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All

comments should reference Rule Log Number 2001-048-304-WT. Comments must be received by 5:00 p.m., October 8, 2001. For further information contact Melissa Estes, Policy and Regulations Division, at (512) 239-3937.

STATUTORY AUTHORITY

The amendment is proposed 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 from users of water 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.

This proposed amendment implements the duties and responsibilities of the Texas Clean Rivers Program under TWC, §26.011 and §26.0135, which gives the commission authority to monitor and assess water quality conditions that support water quality management decisions necessary to maintain and improve the quality of the state's water resources.

SUBCHAPTER B: PROGRAM FOR WATER QUALITY ASSESSMENT FEES

§220.21

§220.21. Water Quality Assessment Fees.

(a) - (d) (No change.)

(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 [below]. 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) - (l) (No change.)