

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §304.61, Costs of Administration. The commission concurrently proposes amendments to Chapters 220 and 303.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Chapter 304 implements the duties and responsibilities of watermaster operations. Under Texas Water Code (TWC), §11.329, holders of water rights that are administered by a watermaster shall reimburse the commission for the expense of watermaster operations. This proposed amendment would implement Senate Bill (SB) 289, 77th Texas Legislature, 2001, which amends TWC, §11.329, to provide that the watermaster shall not assess fees against hydroelectric rights that own or operate 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 watermaster costs shall be established for each water right holder for each water right authorized by category of use. Subchapter G establishes the procedures for establishing accounts, commission approval of assessments and budget, and assessment of costs of watermaster operations. The existing rule provides that costs shall be established for each water right holder for each water right authorization by category of use. This proposed rule would amend §304.61 to specify that the commission may not assess costs for 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 304.61 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. This amendment is proposed to implement SB 289. The proposed amendment also changes the phrase in accordance with to under for simplicity, changes the term hearing to meeting because a public comment meeting is not a formal legal hearing, and deletes the term total because it was redundant.

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, there will not be significant fiscal implications for the commission or other units of state and local government 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 small hydroelectric facilities from water quality assessment fees and watermaster fees), 77th Legislature, 2001, and would provide 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. Holders of water rights that are administered by a watermaster currently reimburse the commission for the expense of watermaster operations. Watermaster costs are established for each water right holder by category of use for each authorized water right. The watermaster assesses an annual fee to each water right holder to cover costs of the watermaster program.

There are two known facilities in the South Texas Watermaster district that would qualify for the proposed exemption from watermaster fees. The amount assessed fluctuates depending upon the projected expenses for operation of the South Texas Watermaster Division, the type of water right held, and the volume of water used. These two facilities combined have been assessed between \$4,000 and \$4,600 each year for the last three years. The combined assessment for Fiscal Year (FY) 2002 is estimated to be \$4,032. Projected expenses for the South Texas Watermaster Division for FY 2002 are approximately \$460,000. The exempted portion would be reallocated to the other 1,217 water rights holders. The increase in assessments to other water rights holders would depend upon the type of water right held and the volume of water used. Any unit of government, business, or individual possessing a water right in the South Texas Watermaster Division may realize an increase in its assessment, but because the amount of the exempted assessment is such a small percentage of the watermaster costs, and would be spread among a large number of water rights holders, the increase is not considered significant.

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 for the South Texas Watermaster Division.

Fiscal implications anticipated to businesses or individuals as a result of implementing the proposed rule are not anticipated to be significant.

The proposed rule would implement SB 289 and would provide 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. Holders of water rights that are administered by a watermaster currently reimburse the commission for the expense of watermaster operations. Watermaster costs are established for each water right holder by category of use for each authorized water right. The watermaster assesses an annual fee to each water right holder to cover costs of the watermaster program.

There are two known facilities in the South Texas Watermaster Division that would qualify for the proposed exemption from watermaster fees. The amount assessed fluctuates depending upon the projected expenses for operation of the South Texas Watermaster Division, the type of water right held, and the volume of water used. These two facilities combined have been assessed between \$4,000 and \$4,600 each year for the last three years. The combined assessment for FY 2002 is estimated to be \$4,032. Projected expenses for the South Texas Watermaster Division for FY 2002 are approximately \$460,000. The exempted portion would be reallocated to the other 1,217 water rights holders. The increase in assessments to other water rights holders would depend upon the type of water right held and the volume of water used. Any unit of government, business, or individual possessing a water right in the South Texas Watermaster Division may realize an increase in its assessment, but the increase is not considered significant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed rule which are not considered to be significant. Any increases in assessments to water rights holders in the South Texas Watermaster Division, including small or micro-businesses, resulting from the adoption of the proposed rule are not considered significant.

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The amount assessed fluctuates depending upon the projected expenses for operation of the South Texas Watermaster Division, the type of water right held, and the volume of water used. There are two known facilities in the South Texas Watermaster Division that would qualify for the proposed exemption from watermaster fees. At least one of these facilities and perhaps both, may be considered small businesses, selling hydroelectric power. The exemption from assessments for the two hydroelectric facilities result in positive fiscal implications for them. These two facilities combined have been assessed between \$4,000 and \$4,600 each year for the last three years. The combined assessment for FY 2002 is estimated to be \$4,032. Projected expenses for the South Texas

Watermaster Division for FY 2002 are approximately \$460,000. The combined assessment which would be exempted represents less than 1% of the watermaster projected expenses. The exempted portion would be reallocated to the other 1,217 water rights holders. The increase in assessments to other water rights holders would depend upon the type of water right held and the volume of water used.

It is not known how many of the 1,217 water rights holders in the South Texas Watermaster Division are small or micro-businesses. There are several different types of water right accounts in the South Texas Watermaster Division including municipal, industrial, irrigation, hydroelectric, recreation, recharge, secondary, salt water, spreader, domestic and livestock, storage, and nonconsumptive. Any small or micro-business possessing a water right in the South Texas Watermaster Division for one of these types of uses may realize an increase in its assessment, but because the amount of the exempted assessment is such a small percentage of the watermaster costs, and would be spread among a large number of water rights holders, the increase 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. The specific intent of this proposed amendment is not to protect the environment or reduce risks to human health from environmental exposure; the intent is to exempt small privately-owned hydroelectric facilities from paying watermaster fees. 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 proposal rulemaking is to implement legislation which changes who may be assessed fees for a watermaster. This rulemaking substantially advances this purpose by proposing to amend §304.61 of the watermaster rules to provide that a watermaster may not assess fees from small privately-owned hydroelectric facilities.

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 the services of a watermaster.

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 and to

adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

This proposed amendment implements the duties and responsibilities of watermaster operations as specified in TWC, §§11.325 - 11.458, which establish water divisions; the watermaster for these water divisions; the duties, responsibilities, and compensation of the watermaster; the commission's authority to establish water divisions and the watermaster; and all duties and responsibilities necessary to carry out the authority of the commission through watermaster operations.

SUBCHAPTER G: FINANCING WATERMASTER OPERATIONS

§304.61

§304.61. Costs of Administration.

Under [In accordance with the] Texas Water Code, §11.329, all holders of water rights that are administered by a watermaster shall reimburse the commission for the expense of watermaster operations. An assessment account shall be established for each water right holder for each water right authorization by category of use. The commission shall 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 [total] assessment for each assessment account shall be the sum of a uniform base charge and, as applicable for that assessment account, either a use fee or a storage fee, or both. The executive director shall file with the commission a copy of the proposed budget. Following a public meeting [hearing], the commission shall issue an order for each water division or group of water divisions, as the commission may determine to be appropriate, approving the assessment income needed for the watermaster operations for the assessment period under consideration. The order shall also specify the base charge per assessment account and the reinstatement fee for delinquent assessment payment.