

The Texas Natural Resource Conservation Commission (commission) adopts the amendment to §290.51, Fees for Services to Drinking Water System *with changes* to the proposed text as published in the October 12, 2001 issue of the *Texas Register* (26 TexReg 7981) and it will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 2912, §3.07, 77th Legislature, 2001 mandates the commission to consider equity in the establishment of the public drinking water fee rates. The adopted amendment to this chapter is intended to consider equity while maintaining the existing revenue stream. Based on the new assessment, the revenue generated from the fee does not exceed the amount appropriated by the legislature for fiscal year (FY) 2002, nor is it greater than the revenue generated in FY 2001. This rulemaking results in a more equitable distribution of fees assessed on all size water systems.

SECTION DISCUSSION

In response to public comment, §290.51(a)(3) is adopted with changes to the proposed text. The adopted amendment to §290.51(a)(3) deletes the existing language and replaces it with a new §290.51(a)(3) that calculates the fees the commission will charge for services provided to community and nontransient noncommunity water systems using a more simplified and equitable method. The adopted amendment provides that for a system with fewer than 25 connections, the fee will be \$75; for systems with 25 - 99 connections, the fee will be \$150; and for a system with greater than or equal to 100 connections, the fee will be calculated as $c^{0.70} \times \$7.40$, where "c" is the number of connections. The remaining language in the section has been reformatted for readability.

Based on analysis of public comment, the fee calculation will be adopted with changes. The proposed fee calculation included the formula $c^{0.75} \times \$4.80$; the adopted fee calculation will be $c^{0.70} \times \$7.40$.

For noncommunity water systems and water systems under 100 connections, the fee rates will remain the same as proposed. The adopted amendment will continue to assess, on average, decreased fees to the smaller water systems (less than 2,000 connections) and will reduce the increase to larger water systems (greater than or equal to 5,000 connections). This adopted amendment will make no changes to over 55% of the fee payers from the proposed rule. The adopted amendment will only increase the fees an average of less than 2% from the proposed rule to the approximately 250 water systems that have between 2,000 and 4,999 connections. The approximately 175 water systems with greater than or equal to 5,000 connections will pay, on average, less than was originally proposed.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and that determined the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule.” “Major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, 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. This rulemaking is administrative only and considers equity while generating overall revenue at the current revenue stream. Therefore, the rulemaking does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law. The adopted rule does not exceed an express requirement of state law, because it is authorized by and consistent with the requirements of Texas Health and Safety Code (THSC), §341.041(a), as amended by HB 2912, §3.07. The adopted rule does not exceed the requirements 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 because the rule is consistent with, and does not exceed, federal requirements and is in accordance with THSC, §341.041(a), which requires the commission to establish fees sufficient to cover the costs of administering the federal Safe Drinking Water Act. The adopted rule is not adopted solely under the general powers of the agency, but will be adopted under the express requirements of THSC, §341.041(a).

The commission solicited comments on the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact assessment for this rule under Texas Government Code, §2007.043. The specific purpose of this rulemaking is to consider equity while generating overall revenue at the current revenue stream. The rulemaking contains administrative rule changes only and does not affect private real property. Therefore, the rulemaking will not constitute a takings under the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adopted rulemaking is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules subject to the Texas Coastal Management Program (CMP), nor does it affect any action or authorization identified in §505.11. This rulemaking concerns only administrative rules of the commission intended to consider equity while generating overall revenue at the current revenue stream. Therefore, the rulemaking is not subject to the CMP.

The commission solicited comments on the consistency determination. No comments were received on the consistency determination.

HEARING AND COMMENTERS

A public hearing was held on November 8, 2001 in Austin. The comment period closed on November 12, 2001. The commission received comments from Alliance for a Clean Texas (ACT); Cedar Ridge R.V. Park (CRRVP); the City of Austin (COA); the City of Greenville (COG); the City of Houston (COH); Glen Haven Utility Company (GHUC); Oakwood Property Owners Association (OPOA); Ratcliff Water Supply Corporation (RWSC); the Texas Department of Criminal Justice (TDCJ); the Texas Rural Water Association (TRWA); and West Houston Mobile Home and Greens Road Mobile Home (WH&GR MH). Oral comments were provided at the public hearing by ACT. Nine commenters generally supported the rulemaking, or supported the rulemaking with suggested changes. Two commenters opposed the rulemaking.

RESPONSE TO COMMENTS

ACT commented that while it believes the commission has taken an important first step toward meeting the legislative intent of HB 2912, it believes the rulemaking does not go far enough in promoting equity among users and does not allow the commission to charge fees sufficient to cover the reasonable costs of administering the Safe Drinking Water Act Program. ACT stated that the effect of the rulemaking would be to increase fees on the largest utilities in the state, keep fees on medium-sized utilities relatively stable, and decrease fees on the smaller systems slightly. ACT further stated that while the rulemaking is certainly more equitable than the present structure, it does not substantially change the present system, nor does it ensure the long-term funding needs of the water program.

The commission believes that the fee structure included in the rulemaking results in a more equitable distribution of fees assessed on all size water systems. The fees generated will be sufficient to meet the legislative appropriations for this biennium and the current needs of the drinking water program. The fee structure of this rulemaking is intended to address the equity language in HB 2912. However, the commission is aware of the importance of continually addressing program needs in order to satisfy federal requirements and to ensure the safe delivery of drinking water to all Texans; it is through this ongoing evaluation that long-term funding needs are better addressed.

The commission recognizes that the larger systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems; although the adopted amendment does increase the fees from the current rates for the larger water systems, it does

reduce the fees from the proposed version of the rule, thus reflecting the economies of scale of the larger water systems.

ACT also commented that the rulemaking is specifically designed to be revenue-neutral and only raise approximately the same amount, and while the commission is obligated to make the fee revenue neutral for the coming two years, it is also reasonable to adopt rules now that will allow the commission to raise the fee in the future should the legislature allow it, and thus ACT believes that the rulemaking is not equitable and has not been designed to raise sufficient funds.

The commission currently has the authority to raise fees and funding flexibility in order to support the cost of the program. The commission also has the authority to raise fees over what is appropriated, up to a maximum, if needed. The fee structure of this rulemaking is intended to address the equity language in HB 2912. However, the commission is aware of the importance of continually addressing funding needs and it is through this ongoing evaluation that long-term funding needs are better addressed.

ACT supplied suggested rule language that would charge a flat per-connection rate with minimum and maximum fees as well as rule language for a request to require the commission to submit a report of the results of the program to the legislature by the beginning of each regular legislative session. ACT stated that its suggested rule language would allow the agency to establish the annual per-connection rate on an annual basis to raise the amount budgeted through the appropriations process; would allow the commission to report the results of its program to the legislature assuring that the fee charged is fair

and adequate and the money is being used to assure the health and safety of all Texans; and that with these adjustments to the rulemaking, the commission should be able to implement an annual safe drinking water fee which is fair and adequate.

The commission disagrees with a flat per-connection fee because such a fee does not reflect the economies of scale which are exhibited in the drinking water regulatory program. A flat per-connection fee to all water systems would place a great burden on the large water systems; also, a flat per-connection fee to all water systems does not recognize that larger water systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems. The commission does currently report on the performance of the program through quarterly and annual performance measures. The commission believes that the rulemaking will be fair and adequate.

CRRVP commented that fees are a hardship on the smaller size systems and requested that the commission not increase fees for the smaller systems and to please consider them during the rulemaking by reducing or eliminating the fees on the smaller size systems.

The commission analyzed the fiscal impact to smaller water systems and determined that the majority of water systems with less than 100 connections would pay a reduced fee.

The COA commented that it supports the commission's drinking water program and the concept of paying for it with fees levied on drinking systems, but suggests lowering further the proposed fees for

the two smallest system size categories and that the magnitude of the fee increase on large systems be reduced. COA stated that the proposed fee structure inadequately addresses the most extreme inequities and exacerbates bias built into the current fee structure and the formula for calculating the proposed fee does not reflect economies of scale. COA stated that the public drinking water fee should not be looked at in isolation.

The commission believes that the rulemaking addresses inequities in the current system. The commission analyzed the fiscal impact to the two smallest system size categories and determined that the majority of those water systems with less than 100 connections would pay a reduced fee. As a result of public comment, the commission adjusted the fee formula to reduce the increase to the largest water systems.

The commission recognizes that the larger systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems; although the adopted amendment does increase the fees from the current rates for the larger water systems, it does reduce the fees from the proposed version of the rule, thus reflecting the economies of scale of the larger water systems. The commission believes that the fee structure included in the rulemaking results in a more equitable distribution of fees assessed on all size water systems.

The fee structure of this rulemaking is intended to address the equity language in HB 2912, §3.07 and is not intended to address the funding structure of all the commission programs. However,

the commission is aware of the importance of continually addressing funding needs and it is through this ongoing evaluation that long-term funding needs are better addressed.

COG commented that it opposes the fee changes because it will not experience lower fees such as the majority of other systems between 100 and 11,000 connections will experience.

This rulemaking is intended to implement the language in HB 2912, §3.07, addressing equity language. The rulemaking therefore requires a change in the manner in which the agency will assess this fee. To address inequities in the current system, the larger water systems will be required to pay a greater percentage of the overall revenue generated, which requires a slight increase from the current fee. The number of connections that the COG currently carries will result in a fee increase because COG falls into the category of the top 5% of larger water systems.

COH commented that while it applauds the commission's desire to infuse equity into the existing rate structure, it believes the larger systems are being placed in the position of subsidizing the smaller water systems, and objects to the rulemaking. COH stated that while the existing "cost per connection" could be viewed as an inequity to the smaller systems, the actual fee is quite small and it could be argued that the rulemaking does not accurately reflect the expenses associated with the administration of the commission's program if examined on a system-by-system basis. COH further stated that if the commission provided information that would substantiate its expenses to administer its program among the various water systems, then the city would be supportive of the rulemaking.

The commission is attempting to reflect the economies of scale which are exhibited in the drinking water regulatory program. The commission recognizes that the larger systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems; although the adopted amendment does increase the fees from the current rates for the larger water systems, it does reduce the fees from the proposed version of the rule, thus reflecting the economies of scale of the larger water systems. As a result of public comment, the commission adjusted the fee formula to reduce the increase to the largest water systems.

The intent of this fee is not to collect a system-by-system cost, but to cover the costs of the program. However, the commission is aware of the importance of continually addressing funding needs and it is through this ongoing evaluation that long-term funding needs are better addressed.

GHUC commented that it supports the reduction of fees for small water systems and appreciates the commission's concern for the rising costs to run its small system.

The commission appreciates GHUC's comment.

OPOA commented that it believes the rulemaking represents a more equitable distribution of costs to administer the programs and services of the federal Safe Drinking Water Act and it fully supports the rulemaking.

The commission appreciates OPOA's comment.

RWSC commented that it opposes the fee changes because its fees will increase and believes the commission should have another break in fee charges for systems of 100 to 300 connections with a fee of not more than \$3.00 per connection.

This rulemaking is intended to implement the language in HB 2912, §3.07, addressing equity language. The rulemaking therefore requires a change in the manner in which the agency will assess this fee. To address inequities in the current system, some systems will be required to pay a slight increase from the current fee. The commission analyzed the fiscal impact and determined that the increases to such water systems would be minimal. Therefore, the commission does not agree with the proposal made by RWSC.

TDCJ commented on the inaccuracy of inspection report data used for billing purposes and supplied updated information to be used to determine the number of connections for the purpose of calculating its fees.

The commission appreciates the information provided by the TDCJ and will adjust the TDCJ data used to determine the number of connections for the purpose of calculating TDJC's fees.

TRWA commented that it commends the commission for proposing a new fee structure that seeks to remedy the current inequities contained within the fees for public water systems, and that while equity will be improved with the rulemaking, true equity will not be achieved. TRWA stated that it supports the flat per-connection fee that was proposed by ACT. TRWA stated that regardless of the location, it

remains a statewide responsibility for the commission to ensure that all public water systems provide acceptable services and therefore it only seems logical that a fee designed to ensure adequate funding for the state's drinking water program be funded on a per capita basis.

The commission disagrees with a flat per-connection fee because such a (per capita) fee does not reflect the economies of scale which are exhibited in the drinking water regulatory program. A flat per-connection fee to all water systems would place a great burden on the large water systems; also, a flat per-connection fee to all water systems does not recognize that larger water systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems.

TRWA stated that the rulemaking improves equity when considering the smallest public water systems but still results in striking differences between the cost paid per-connection for small systems as compared to large systems. TRWA further stated that large cities will likely argue that they should be charged less due to economies of scale or because the commission costs for administering the program for their systems is less than for small systems, but TRWA is aware of no empirical evidence that substantiates that claim.

The commission is attempting to reflect the economies of scale which are exhibited in the drinking water regulatory program. The commission recognizes that the larger systems do not require as much agency oversight in proportion to the number of connections as the smaller water systems.

The intent of this fee is not to collect a system-by-system cost, but to cover the costs of the program.

WH&GR MH commented that it is a burden to comply with the commission rules and requested that the commission consider waiving the fees to water systems that are not charging any fees for the water.

The commission analyzed the fiscal impact to such systems and determined that the fee is a minimal expense. Even the smallest of systems affect the regulatory workload and its subsequent costs which must be recovered through fees collected.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which establish the commission's general authority to adopt rules; and THSC, §341.041(a), as amended by HB 2912, §3.07, which states that the commission may charge fees sufficient to cover the reasonable costs of administering the programs and services of the federal Safe Drinking Water Act and requires the commission to consider equity among persons required to pay the fees when setting the amount of the fees.

SUBCHAPTER E: FEES FOR PUBLIC WATER SYSTEMS

§290.51

§290.51. Fees for Services to Drinking Water System.

(a) Purpose and scope.

(1) The purpose of this section is to establish fees for services provided by the commission to public water systems.

(2) The commission will provide services to public water systems, as follows:

(A) scheduling of analysis of drinking water for chemical content;

(B) collection of samples of drinking water for chemical analyses;

(C) review system data for evaluation of sampling waivers;

(D) inspect public water systems;

(E) review plans for new systems and major improvements to existing systems;

and

(F) provide technical assistance as needed.

(3) The fees which the commission will charge for services provided to community and nontransient noncommunity water systems under this subsection will be according to the following schedule.

(A) For a system with fewer than 25 connections, the fee will be \$75.

(B) For systems with 25 - 99 connections, the fee will be \$150.

(C) For a system with greater than or equal to 100 connections, the fee = $c^{0.70}$
X \$7.40, where "c" is the number of connections.

(i) The number of connections will be determined from data collected from the latest agency inspection report.

(ii) All nontransient noncommunity systems, state, federal, and other community water system installations determined by the commission to serve large populations through a few connections will have the number of connections for fee purposes determined by dividing the population served by a value of ten.

(iii) Examples of such installations include, but are not limited to, universities, children's homes, correctional facilities, and military facilities which generally do not bill customers for water service.

(4) New public water systems will not be assessed a fee for services until water is supplied to the first connection.

(5) The commission will charge a fee of \$75 for services provided to noncommunity water systems which are not addressed in paragraph (3) of this subsection.

(6) All fees are due by January 1 of each year, shall be paid by check or money order, and shall be made payable to the Texas Natural Resource Conservation Commission. Penalties and interest for the late payment of fees shall be assessed in accordance with Chapter 12 of this title (relating to Payment of Fees).

(b) Failure to make payments as required under this section will subject the violator to the penalty provisions of the Texas Health and Safety Code, Chapter 341, Subchapter C.