

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §290.51.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Water Resource Management Account 153 (Account 153) is the primary source of state funding for essentially all water program related activities of the commission. In 2001, the 77th Legislature passed House Bill 2912 which provided that revenues deposited to Account 153 would be available to the Legislature and the TCEQ to support activities associated with ensuring the protection of the state's water resources. Account 153 supports a wide range of activities associated with water rights, storm water, public drinking water, Total Maximum Daily Load development, water utilities, dam safety, wastewater, river compacts, water availability modeling, water assessment, Confined Animal Feeding Operations, sludge, Clean Rivers Program, and ground water protection. Historically, the agency has used Account 153 as well as the majority of its general revenue appropriations to support its water program activities.

General revenue appropriations to the commission have declined from the \$51 million received in the 2004 - 2005 biennium. In addition, many of the water-related fees that the agency does assess have not increased in seven to ten years. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. As a result, the fund balance is close to being depleted. The current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to cover the costs of its water program activities in fiscal year (FY) 2010 - 2011.

Given the declining availability of funds in Account 153, the commission reviewed those water-related fees it has the authority to change. After a review of the commission's existing water related fees, the

commission is proposing revisions to the consolidated water quality (CWQ) fee, the public health service (PHS) fee, and the water use assessment fee (WUF) to generate sufficient revenue to cover the costs of its water program activities beginning in FY 2010. These fees were identified for a fee increase because, in terms of numbers and categories of fee payers, they represent some of the most broad-based water related fees the agency assesses, revision of these three fees does not require statutory changes, and their revenue stream represents significant water fee collections.

With the depletion of fund balances in Account 153, the commission is proposing changes to ensure that funds to support water program activities will be available in FY 2010. Proposing this change at this time is intended to provide ample notification to potentially affected fee payers to prepare for changes in FY 2010 billings.

This proposal would amend Chapter 290, Public Drinking Water, to ensure that there are sufficient funds in FY 2010 to carry out the tasks required to protect the water resources of the state. In a corresponding rulemaking published in this issue of the *Texas Register*, the commission proposes to amend 30 TAC Chapter 21, Water Quality Fees. It is anticipated that to the extent affected fee payers need to increase rates to their customers through a tariff change, such change could be requested pursuant to 30 TAC §291.21(b)(2)(A)(iv), which authorizes the executive director to approve minor tariff changes in certain instances based on governmental requirements beyond the utility's control.

Within the scope of this proposal, this rulemaking may be adjusted in response to any action taken by the 81st Legislature affecting the commission's water fee structure and appropriations. The amount of general revenue appropriated to the agency to support water program activities could also likely affect the final

assessment for both the CWQ and the PHS fee assessments, but will not affect the WUF fee included in this rule package.

SECTION DISCUSSION

The commission proposes to amend §290.51(a)(3) by increasing the fee amount in subparagraph (A) from \$75 to \$100 and in subparagraph (B) from \$150 to \$175. These increases were determined to be minimal for small systems with 160 connections or less. The commission also proposes to delete the formula, in subparagraph (C) which provides: " $=c^{0.70} \times \$7.40$, where "c" is the number of connections," and in place of the formula provide that the fee will be an amount up to a maximum of \$2.15 per connection. This change requires the same fee per connection for all systems with 161 connections and greater and will generate the necessary revenue to cover the cost of the TCEQ's water program activities. The commission also proposes to change the parameters regarding numbers of connections in subparagraph (B) from 25 - 99 to 25 - 160 and in subparagraph (C) from 100 connections to 161 connections. The commission proposes to amend §290.51(a)(5) by increasing the fee from \$75 to \$100. The assessment determined under §290.51(a)(3)(C) will be applied uniformly to all fee payers in this category and will be determined by the annual appropriations and other associated costs from Account 153. The commission proposes these changes to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities set by the state legislature.

The commission proposes to amend §290.51(a)(6) by updating the payment methods to include electronic funds transfer and the agency's payment portal. These options have been available since September 2004 and reflect current agency practice. Additionally, the commission proposes to change the name of the

agency from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality."

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Chris Hayden, financial analyst with the Chief Financial Officer Division, determined that for the first five-year period the proposed rule is in effect, there will be fiscal implications for the agency with an increase in fee revenue of an estimated \$15.3 million to Account 153. The proposed amendment is not expected to have significant fiscal implications for other state agencies. No significant fiscal implications are anticipated for units of local governments since any fee increases for facilities owned or operated by units of local government are anticipated to be passed on to their customers. The overall increase in fee revenue collected from units of local government is anticipated to be approximately \$14.2 million annually in additional fees.

The proposed rule will increase revenue to Account 153. The current revenue from all assessments is approximately \$4.3 million of which units of state and local government contribute \$3.1 million. The proposed increase in fees is necessary to cover the costs of its water program activities. TCEQ is currently using existing fund balances from Account 153 to adequately fund its water programs required to protect the water resources of the state. Those balances are not being replenished.

Fee adjustments under the proposed rule

The calculations used in preparing this fiscal note were performed assuming the commission receives no general revenue for water program activities and using the maximum assessment amount of \$2.15 per connection for a system with greater than 160 connections. For local governments with systems under 25

connections, the proposed fee rate will increase \$25, from \$75 to \$100 per year. Currently, local government systems with between 25 and 99 connections pay \$150 per year. The proposed rate for systems between 25 and 99 connections is \$175 per year. Because of the changes to the tiers of connections, local governments with between 100 and 160 connections will go from using the formula derived per connection fee to a flat annual fee of \$175. These systems will see a fee decrease that will vary from system to system and range from an \$11 decrease per year to an \$85 decrease per year. For local governments systems with 161 connections and greater, the proposed fee rate will be an amount up to a maximum of \$2.15 per connection per year.

Statewide, the 30 systems with the largest increase under the proposed rule are all cities with over 37,000 connections. These 30 city-owned systems will account for \$8.2 million of the overall increase. Under the proposed amendment all systems with 161 connections or more would pay an amount up to a maximum of \$2.15 per connection per year or 18 cents a month per connection. Under the current rate structure for systems with more than 160 connections, as the number of connections increases, the fee per connection decreases. Under the proposed rule, all systems with 161 and greater connections would be assessed the same rate per connection.

For example, a city with over 1.1 million connections currently pays 11 cents per connection per year. Under the proposed rule this city would pay \$2.15 per connection per year. If the maximum amount of \$2.15 per connection was applied, this would represent an annual increase of \$2.28 million above the current assessment. The maximum increase for a local government system with 2,000 or fewer connections under the proposed rule is less than \$2,800 per year.

It is anticipated the units of local government will pass the increase on to the customer in the water utility bill and, therefore, the fee increases will not be a significant cost to units of state and local government.

The increase will be used to fund the water program activities of the state based on the appropriation levels set by the state legislature. The final fee rate assessment will be determined by the annual appropriations and other associated costs from Account 153.

PUBLIC BENEFITS AND COSTS

Mr. Hayden determined for each year of the first five years the proposed rule is in effect, the public benefit will be the continued protection of the state's water resources by adequate funding of the state's water programs. It is anticipated the systems will pass the increase on to the customer and, therefore, the proposed rule is not anticipated to have a significant fiscal impact on these water systems.

Fee adjustments under the proposed rule

All systems that currently pay PHS fees will be affected. The fee calculation will change and the amount of the fee is determined by the number of connections from the most recent field inspection report. The cost increase to the 4,500 water systems owned by businesses and individuals is projected to be \$1,000,000 annually with an average increase of \$225 in fees. These business and individual-owned systems will be subject to the same fee rate structure as those experienced by local governments. The cost per connection on an annual basis will range from a low of \$4.17 to a high of \$100 for systems under 25 connections; a low of \$1.09 to a high of \$7.00 for systems with total connections between 25 and 160; and, a flat \$2.15 per connection for all systems with greater than 160 connections. These costs are all on an annual basis and are not significant.

The current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to cover the costs of activities in its water programs in FY 2010 - 2011 . The increase will be used to fund the water program activities of the state in accordance with the appropriation levels set by the state legislature. The final fee assessment will be determined by the annual appropriations and other associated costs from Account 153.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impact to the estimated 3,500 small or micro-businesses which own water systems subject to the proposed rule. The proposed rule is anticipated to increase fees by approximately \$265,000 per year with an average increase of \$75 per year and the highest increase less than \$1,000 per year. These increases are expected to be passed on to customers. These small business-owned systems will be subject to the same fee rate structures as those experienced by local governments and large businesses.

The increase will be used to fund the water program activities of the state based on the appropriation levels set by the state legislature. The final fee rate assessment will be determined by the annual appropriations and other associated costs from the Account 153.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed the proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-

business in a material way for the first five years that the proposed rule is in effect. Small or micro-businesses are expected to recover any increased costs by passing any fee increases to their customers.

The increase will be used to fund the water program activities of the state in accordance with the appropriation levels set by the state legislature. The final fee rate assessment will be determined by the annual appropriations and other associated costs from the Account 153.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed the proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect the local economy in a material way for the first five years that the proposed rulemaking is in effect.

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 action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "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 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.

The proposed rule is part of a larger proposed rulemaking to increase fees in order to provide funding for the commission's water program activities. The corresponding rulemaking, a proposed amendment to

Chapter 21, Water Quality Fees, is published in this issue of the *Texas Register*. The proposed amendment to Chapter 290 does not meet the definition of "major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with the statutory requirements set forth in the Texas Water Code (TWC) and Texas Health and Safety Code. Therefore, the commission finds that this rulemaking is not a "major environmental rule."

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225 only applies to a state agency's adoption of a major environmental rule, the result of which it 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.

In this case, the proposed rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the proposed rulemaking does not exceed an express requirement of state law, but rather seeks to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with state law. Third, the proposed rulemaking does not exceed a requirement of a delegation agreement or a contract

between the state and an agency or representative of the federal government to implement a state and federal program. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections which are cited in the STATUTORY AUTHORITY section of this preamble.

Based upon the foregoing, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invites public comment on the draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The commission determined that the proposed rulemaking does not constitute a taking. The specific purpose of the proposed rulemaking is to provide the commission with the additional revenue necessary to operate its water program activities in a manner that is consistent with the statutory requirements set forth in the TWC and Texas Health and Safety Code.

This rulemaking substantially advances this stated purpose by adjusting the factors by which the fees are calculated to provide funding at a level that is sufficient to support a portion of the commission's water program activities.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulation does not affect a landowner's rights in private real property because the rulemaking does not burden, restrict, or limit the owner's right to real property, and does not reduce the market value of real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. The proposed rulemaking will not burden private real property because it amends fee rules which relate to funding for the commission's water program activities.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on April 7, 2009, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Duron, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2009-007-021-PR. The comment period closes April 13, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Kathleen Ramirez, Water Supply Division, (512) 239-6757.

SUBCHAPTER E: FEES FOR PUBLIC WATER SYSTEMS

§290.51

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, including water programs; §5.102, concerning general powers of the commission; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §5.701, which provides statutory direction regarding the uses of fees collected for deposit to the water resource management account; Texas Health and Safety Code (THSC), §341.0315, which establishes the commission's authority over public drinking water supply systems; and THSC, §341.041, which authorizes the commission to assess fees for public drinking water supply systems.

The proposed amendment implements THSC, §341.0315 and §341.041.

§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 \$100 [\$75].

(B) For systems with 25 – 160 [99] connections, the fee will be \$175 [\$150].

(C) For a system with greater than or equal to 161 [100] connections, the fee will be an amount up to a maximum of \$2.15 per connection [= $c^{0.70}$ 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 \$100 [\$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, electronic funds transfer, or through the agency's payment portal, and shall be made payable to the Texas Commission on Environmental Quality [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.