

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the repeal of §35.202.

Background and Summary of the Factual Basis for the Proposed Repeal

The Public Utility Commission of Texas (PUC) Sunset Legislation, House Bill (HB) 1600 and Senate Bill (SB) 567 passed by the 83rd Texas Legislature, 2013, transferred from the TCEQ to the PUC the functions relating to the economic regulation of water and wastewater utilities effective September 1, 2014.

Concurrent with this proposal, and published in this issue of the *Texas Register*, the commission is proposing revisions to 30 TAC Chapter 37, Financial Assurance; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 80, Contested Case Hearings; Chapter 281, Applications Processing; Chapter 290, Public Drinking Water; Chapter 291, Utility Regulations; and Chapter 293, Water Districts.

Section Discussion

§35.202, Emergency Order for Rate Increase in Certain Situations

The commission proposes the repeal of §35.202. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this section is no longer required.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed repeal is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed repeal.

The rulemaking is proposed in order to repeal an obsolete rule for a program transferred to the PUC through the passage of HB 1600 and SB 567. Effective September 1, 2014, HB 1600 and SB 567 transferred the responsibility for regulating water and wastewater rates, services, and certificates of convenience and necessity from the commission to the PUC. The commission therefore proposes the repeal of §35.202 as this section is obsolete and no longer applies to the commission.

Staff, fees, and functions relating to the economic regulation of water and wastewater utilities were transferred from the TCEQ to the PUC in Fiscal Year 2015. The agency transferred \$1,429,818 out of Water Resource Management Account Number 153 funds and 20.0 full-time employees (FTEs) to the PUC. In addition, there was also a transfer of \$184,000 to the PUC to cover the cost of the contract with the State Office of Administrative Hearings for water and wastewater utility contested case hearings. The Office of Public Utility Counsel was appropriated \$499,680 in Water Resource Management Account Number 153 funds and 5.0 FTEs in Fiscal Year 2015 to represent water and wastewater utility customers as provided by the provisions of HB 1600 and

SB 567.

For Fiscal Year 2016, the legislature increased the appropriation to the PUC and the Office of Public Utility Counsel; the total cost to the Water Resource Management Account Number 153 for Fiscal Year 2016 and 2017 was \$3,567,824 and \$3,567,824, respectively. The total cost to the Water Resource Management Account Number 153 for Fiscal Year 2018 was \$3,470,453.

Since the transfer of the administration and regulation of water and wastewater rates, services, and certificates of convenience and necessity has already taken place, there are no fiscal implications anticipated for the agency, PUC, or for other units of state or local government because of the implementation or administration of the proposed repeal.

Public Benefits and Costs

Ms. Bearse also determined that for each year of the first five years the proposed repeal is in effect, the public benefit anticipated from the rulemaking will be compliance with state law and clear rules for the administration and regulation of water and wastewater rates, services, and certificates of convenience and necessity.

The proposed rulemaking is not expected to result in fiscal implications for businesses or individuals. The proposed rulemaking reflects the transfer of the regulation of

water and wastewater rates, services, and certificates of convenience and necessity to the PUC.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposal is in effect.

Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed repeal does not adversely affect rural communities in a material way for the first five years that the proposal is in effect. The rulemaking would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed repeal for the first five-year period the proposed repeal is in effect. The proposed rulemaking repeals an obsolete rule to reflect the transfer of the regulation of water and wastewater rates, services, and certificates of convenience and necessity to the PUC.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed repeal does not adversely affect a small or micro-business in a material way for the first five years the proposal is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation, but it does provide for a program transferred to the PUC. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the proposed repeal should not impact positively or negatively the state's economy.

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 Texas Government Code, §2001.0225. Texas Government

Code, §2001.0225 applies to a "Major environmental rule" which is defined in Texas Government Code, §2001.0225(g)(3) as a rule with a specific intent "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."

First, the proposed rulemaking does not meet the statutory definition of a "Major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The PUC Sunset Legislation, HB 1600 and SB 567, transferred from the TCEQ to the PUC the functions relating to the economic regulation of water and wastewater utilities. The specific intent of the proposed rulemaking is to repeal an obsolete TCEQ rule in Chapter 35 relating to the economic regulation of water and wastewater utilities. Therefore, the intent is not to protect the environment or reduce risks to human health from environmental exposure, but instead to repeal the rule relating to economic regulation of water and wastewater utilities as those functions were transferred to the PUC.

Second, the proposed rulemaking does not meet the statutory definition of a "Major environmental rule" because the proposed rulemaking would not 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. It

is not anticipated that the cost of complying with the proposal will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed repeal would not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Finally, the proposed rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is 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. This proposed rulemaking does not meet any of the four preceding applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for the economic regulation of water or wastewater utilities; 2) does not exceed any express requirements of Texas Water Code, Chapter 11, 12, or 13, which relate to the economic regulation of water and wastewater utilities; 3) does not 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; and 4) is not proposed solely under the general powers of the agency.

Since this proposed rulemaking does not meet the statutory definition of a "Major environmental rule" nor does it meet any of the four applicability requirements for a "Major environmental rule" this rulemaking is not subject to Texas Government Code, §2001.0225.

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 this proposed rulemaking and performed a preliminary assessment of whether the proposed repeal constitutes a taking under Texas Government Code, Chapter 2007.

The commission proposes this rulemaking for the purpose of repealing an obsolete rule in Chapter 35 relating to the economic regulation of water and wastewater utilities as those functions have transferred from the TCEQ to the PUC.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to the proposed rulemaking based upon an exception to applicability in Texas Government Code, §2007.003(b)(5). The proposed rulemaking is a

discontinuance of the economic regulation of water and wastewater utilities within the TCEQ, which provides a unilateral expectation that does not rise to the level of a recognized interest in private real property. Because the proposed rulemaking falls within an exception under Texas Government Code, §2007.003(b)(5), Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Further, the commission determined that promulgation of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rulemaking because the proposed repeal neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in property value as a result of the proposal. This rulemaking is required due to the transfer of functions relating to the economic regulation of water and wastewater utilities from the TCEQ to the PUC pursuant to HB 1600 and SB 567. The specific intent of the proposed rulemaking is to repeal an obsolete TCEQ rule relating to the economic regulation of water and wastewater utilities. Therefore, the proposed rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking 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 Coastal Coordination Act

implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 7, 2018, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. 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 discussion will not be permitted during the hearing; however, commission staff members 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 Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, 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: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-057-291-OW. The comment period closes on August 13, 2018. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Brian Dickey, Water Supply Division, Plan and Technical Review Section at (512) 239-0963.

SUBCHAPTER E: EMERGENCY ORDERS FOR UTILITIES

[§35.202]

Statutory Authority

The repeal is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The proposed repeal implements House Bill 1600 and Senate Bill 567 passed by the 83rd Texas Legislature, 2013

[§35.202. Emergency Order for Rate Increase in Certain Situations.]

[(a) The commission or executive director may authorize an emergency rate increase under Texas Water Code, §5.508 and §13.4133 for a utility:]

[(1) for which a person has been appointed under Texas Water Code, §13.4132; or]

[(2) for which a receiver has been appointed under Texas Water Code, §13.412; and]

[(3) when the increase is necessary to ensure the provision of continuous and adequate services to the utility's customers.]

[(b) Notwithstanding the provisions of §35.22 of this title (relating to Term and Renewal of Orders), an emergency rate increase may be granted under this section for a period not to exceed 15 calendar months from the date on which the increase takes effect. The commission shall schedule a hearing to establish a final rate within that period.]

[(c) A request for an emergency rate increase must be filed by the utility in accordance with, and must contain the information required by, §35.24 of this title (relating to Application for Emergency or Temporary Order) and the following:]

[(1) the effective date of the rate increase;]

[(2) sufficient information to support the computation of the proposed rates; and]

[(3) any other information requested by the executive director.]

[(d) The effective date must be the first day of a billing cycle, unless otherwise authorized by the commission or the executive director.]

[(e) Any emergency rate increase related to charges for actual consumption will be for consumption after the effective date. An increase or the portion of an increase which is not related to consumption may be billed at the emergency rate on the effective date or the first billing after approval by the commission or the executive director.]

[(f) A utility receiving authorization for an emergency rate increase shall provide notice of the increase to each ratepayer as soon as possible, but not later than the effective date for the new rate. The notice shall contain the following:]

[(1) the utility's name and address, the previous rates, the emergency rates, the effective date of the rate increase, and the classes of utility customers affected; and]

[(2) this statement: "This emergency rate increase has been approved by the Texas Natural Resource Conservation Commission under authority granted by the Texas Water Code, §5.508 and §13.4133, to ensure the provision of continuous and adequate service to the utility's customers. The commission is also required to

schedule a hearing to establish a final rate within 15 months after the date on which the emergency rates take effect. The utility is required to provide notice of the hearing to all customers at least 10 days before the date of the hearing. The additional revenues collected under this emergency rate increase are subject to refund if the commission finds that the rate increase was larger than necessary to ensure continuous and adequate service."]

[(g) The utility shall maintain adequate books and records for a period not less than 12 months to allow for the determination of a cost of service as set forth in §291.31 of this title (relating to Cost of Service).]

[(h) During the pendency of the emergency rate increase, the commission may require that the utility deposit all or part of the rate increase into an interest-bearing escrow account as set forth in §291.30 of this title (relating to Escrow of Proceeds Received Under Rate Increase).]