

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§37.5001, 37.5002, and 37.5011.

Background and Summary of the Factual Basis for the Proposed Rules

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 35, Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions; 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 by Section Discussion

In addition to the proposed revisions associated with this rulemaking, the proposed rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule

structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§37.5001, Applicability

The commission proposes to amend §37.5001 to remove "retail public utilities" and the reference to Chapter 291. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this language is no longer applicable.

§37.5002, Definitions

The commission proposes to amend §37.5002 to remove the reference to §291.3. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this language is no longer applicable.

§37.5011, Financial Assurance for a Public Water System or Retail Public Utility

The commission proposes to amend §37.5011 to remove "or Retail Public Utility" from the section title and language in subsections (b) and (c) which pertain to functions that were transferred from the commission to the PUC in HB 1600 and SB 567.

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 rules are 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 rules.

The rulemaking is proposed in order to amend rules 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 to amend §§37.5001, 37.5002, and 37.5011 to remove references to Chapter 291, §291.3, and retail public utilities; and remove any language which pertains to functions that were transferred from the commission to the PUC through HB 1600 and SB 567. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this language is no longer applicable.

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 as a result of the implementation or administration of the proposed rules.

Public Benefits and Costs

Ms. Bearse also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules 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 rules are not expected to result in fiscal implications for businesses or individuals. The proposed rules amend current rules to reflect 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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments 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 rules for the first five-year period the proposed rules are in effect. The proposed rulemaking amends current rules 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 rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are 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 amend rules 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 rules are in effect, the proposed rules 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 amend TCEQ rules in Chapter 37 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 amend rules 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 rules 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 proposed rules will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed amendments will 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 these proposed rules constitute a taking under Texas Government Code, Chapter 2007.

The commission proposes this rulemaking for the purpose of amending TCEQ rules in Chapter 37 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 these proposed rules 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 these proposed rules 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 rule because the proposed rules neither relate to, nor have any impact on, the use or enjoyment of private real property, and there would be no reduction in property value as a result of these rules. 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 amend TCEQ rules relating to the economic regulation of water and wastewater utilities. Therefore, the proposed rules would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are 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 O: FINANCIAL ASSURANCE FOR PUBLIC DRINKING WATER SYSTEMS
[AND UTILITIES]**

§§37.5001, 37.5002, 37.5011

Statutory Authority

The amendments are 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 amendments implement House Bill 1600 and Senate Bill 567 passed by the 83rd Texas Legislature, 2013

§37.5001. Applicability.

This subchapter applies to public water systems [and retail public utilities] required to provide evidence of financial assurance under Chapter 290 of this title (relating to Public Drinking Water)[, or Chapter 291 of this title (relating to Utility Regulation)].

§37.5002. Definitions.

For definitions of words and terms and other definitions not found in Subchapter A of this chapter [Chapter,] (relating to General Financial Assurance Requirements)[,] see §290.38[, of this title (relating to Definitions [Rules and Regulations for Public Water Systems])], and §291.3, of this title (relating to Definitions of Terms)].

§37.5011. Financial Assurance for a Public Water System [or Retail Public Utility].

(a) Financial assurance demonstrations shall comply with the wordings of the mechanisms as described in Subchapter A of this chapter (relating to General Financial Assurance Requirements), Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action), and Subchapter D of this chapter (relating to Wording of the Mechanisms for Closure, Post Closure, and Corrective Action), except operation should be substituted for closure.

(b) The prospective owner or operator of a public water system may be ordered to provide adequate financial assurance to operate the system as specified in §290.39(f) of this title (relating to General Provisions). A public water system that was constructed without approval or has a history of noncompliance or is subject to commission enforcement action as specified in §290.39(n) of this title, may be required

to provide financial assurance to operate the system in accordance with applicable laws and rules. [Financial assurance may be required of an applicant requesting approval for a certificate or a certificate amendment or a person establishing, purchasing or acquiring a retail public utility as specified in §291.102(d) of this title (relating to Criteria for Considering and Granting Certificates or Amendments), and §291.109(c) of this title (relating to Report of Sale, Merger, Etc: Investigation; Disallowance of Transaction). A person acquiring a controlling interest in a utility may be required to demonstrate adequate financial assurance as specified in §291.111(c) of this title (relating to Purchase of Voting Stock in Another Utility). The commission may order a utility that has failed to provide continuous and adequate service to provide financial assurance to ensure that the system will be operated as required by §291.114 of this title (relating to Requirements to Provide Continuous and Adequate Service). Such financial assurance will allow for payment of improvements and repairs to the water or sewer system.]

[(c) If rate increases or customer surcharges are determined by the executive director to be an acceptable form for demonstrating financial assurance in accordance with §290.39(n)(3) of this title, such funds shall be deposited into an escrow account with an escrow agent that has the authority to act as an escrow agent and whose escrow operations are regulated and examined by a federal or state agency. At least annually a statement of the account shall be submitted to the executive director.]