

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §290.51.

The amendment is adopted *with change* to the proposed text as published in the December 4, 2015, issue of the *Texas Register* (40 TexReg 8731) and will be republished.

Background and Summary of the Factual Basis for the Adopted 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 Texas Legislature passed House Bill (HB) 2912 which provided that revenues deposited to Account 153 would be available to support activities associated with ensuring the protection of the state's water resources. Account 153 supports a wide range of activities including water rights, storm water, public drinking water, total maximum daily load development, water utilities, wastewater, river compacts, water availability modeling, water assessment, concentrated animal feeding operations, sludge, Clean Rivers Program, and groundwater protection. Historically, the agency has used Account 153 as well as the majority of its general revenue appropriations to support its water programs.

General revenue appropriations to TCEQ have declined over the past few years. In addition, many of the water-related fees that the agency assesses have not increased in

at least six years. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. Current revenue estimates for Account 153 reveal insufficient funds for TCEQ to cover the costs of its water programs in fiscal year (FY) 2016. The agency is facing an approximate \$2.5 million dollar shortfall in Account 153 for FY 2016. The shortage is due to additional appropriations, an increase in cost of fringe benefits, and the Statewide Cost Allocation Plan.

The revenue estimates for Account 153 revealed that without an increase in fees there will be insufficient funds for the agency to cover the costs of its water programs in FYs 2016 - 2017. HB 1, General Appropriations Act, Article IX, Section 18.01, Contingency Appropriation: Water Resource Management Account, (84th Texas Legislature, 2015) authorized the agency to increase the public health service (PHS) fee and the consolidated water quality (CWQ) fee.

Given the declining availability of funds in Account 153, the commission reviewed the water-related fees it has the authority to change. HB 1, General Appropriations Act, Article IX, Section 18.01, Contingency Appropriation: Water Resource Management Account, (84th Texas Legislature, 2015) authorized the agency to increase the PHS fee and the CWQ fee. After a review of the commission's existing water-related fees, the commission proposed revisions to the PHS fee to generate sufficient revenue to cover the costs of its water programs beginning in FY 2017. This fee was identified for a fee

increase because, in terms of numbers and categories of fee payers, this fee represents the most broad-based water-related fee the agency assesses, revision of this fee does not require statutory changes, and the revenue stream is relatively stable and represents significant water fee collections.

The adopted rulemaking amends Chapter 290, to ensure that there are sufficient funds in FY 2017 to carry out the tasks required to protect the water resources of the state.

Section Discussion

§290.51, Fees for Services to Drinking Water System

The commission adopts the amendment to §290.51(a)(3) by increasing the maximum fee amounts in subparagraph (A) from \$100 to \$200 and in subparagraph (B) from \$175 to \$300. These increases were determined to be minimal for small systems with 160 connections or less. For systems with 161 connections or more, the commission adopts an increase to the maximum fee amount in subparagraph (C) from \$2.15 per connection to \$4.00 per connection to generate the necessary revenue to cover the cost of TCEQ's water programs. The assessment determined §290.51(a)(3)(C) will be applied uniformly to all fee payers with 161 connections or more and will be determined by the annual appropriations and other associated costs from Account 153. The commission adopts these changes to allow the ability to assess fees as needed to cover the costs of its water programs.

The agency's purpose in adopting the maximum fee rates is to ensure adequate water program funding for multiple biennia. The anticipated increase in 2017 will be less than 15% from the current rate. The plan is to adjust this fee based on funding needs on an annual basis in order to limit the financial impact to water systems required to pay this fee.

The commission received comments requesting that notice be provided to water systems to allow budget planning for increases and the commission to justify the needed increases in future rules. In response to these comments, the commission added subsection (c) which requires the agency to provide notification through an appropriate notification process, such as, but not limited to, *Texas Register* publication.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to Texas Government Code, §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 adopted rulemaking to increase fees in order to provide funding for the commission's water programs does not meet the definition of a "major environmental rule" because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted 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 (THSC). Therefore, the commission finds that this rulemaking is not a "major environmental rule."

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because the rulemaking does not meet any of the four applicable requirements specified in Texas Government Code, §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 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.

In this case, the adopted rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the adopted 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 adopted 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 a specific house bill and state statutes 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 invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The commission determined that the adopted rulemaking does not constitute a taking. The specific purpose of the adopted 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 TWC and THSC.

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

Promulgation and enforcement of this adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted 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 adopted rulemaking will not burden private real property because it amends fee rules which relate to funding for the commission's water programs.

Consistency with the Coastal Management Program

The commission reviewed the adopted 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 adopted rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

Public Comment

The commission held a public hearing on January 5, 2016. The comment period closed on January 11, 2016. The agency did not receive any comments at the public hearing.

The commission received written comments from: the Honorable State Representative Abel Herrero (Representative Herrero), the City of Austin, the City of Houston, the City of Fort Worth, the City of Plano, the Texas Municipal League (TML), the Texas Rural Water Association (TRWA), Martin Luther Lutheran Church, and one individual.

A late comment was received with similar concerns to other commenters.

Response to Comments

Comment

The City of Fort Worth commented that the maximum fee per connection will almost double from \$2.15 to \$4.00 and will result in an 86% increase to their current payment to TCEQ of \$691,308.85. The City of Plano stated that the 86% increase would negatively impact the city by \$153,000. The City of Houston stated that the increase to \$4.00 will result in a total increase of more than \$1.7 million, and the plan for future years appears to be adjusted based on "funding needs" implying that the fees may be significantly higher in 2017 and in future years. TRWA commented that doubling the PHS fee would create a burden on small rural water systems and their customers, and the current proposal would raise the Tier 1 rate up to \$200 from the current \$100 and the Tier II rate up to \$300 from \$175. TRWA supports TCEQ's efforts to implement this increase in stages with only \$25 increases to both tiers in FY 2017; however, this leaves open the possibility of much steeper increases in subsequent years, which TRWA would oppose. Martin Luther Lutheran Church commented that doubling of fees is excessive in today's economy. TML commented that the maximum fee for Tier I systems will increase by \$100, Tier II will increase by \$125, and Tier III will almost double, increasing from \$2.15 to \$4.00 per connection. TML commented that this means a city with 300,000 connections will be confronted with a potential budget increase of \$555,000 each year.

Response

The commission acknowledges the comment in support of the agency's attempt to implement the fee in stages.

During the last rulemaking to increase this fee in 2009, the agency received a number of comments about gradually increasing the fee to meet the agency funding needs. The agency agreed with stakeholders from the previous rule that gradual increases would place less of a burden on water systems of various sizes. This rule gives the agency the ability to adjust rates to guarantee sufficient funding is available for the commission's water programs. Without additional revenue from this fee increase, the agency would not be able to continue the same level of water programs.

The agency set the maximum amounts to gradually increase the fee as water funding needs increase, rather than drastically raise the rates on water systems to support the agency water programs. In order to accomplish this, the agency set maximum fee rates in rule. The maximum rates were calculated to address the agency water funding needs for multiple years.

The FY 17 increase will not exceed those identified in the Proposal Fiscal Notice: Costs to State and Local Government section of the proposed

preamble. The agency has utilized this process of gradually increasing fees based on water needs for the CWQ fee since 2012. The increases have never been excessive and only generated enough revenue to cover the agency's water program funding shortages. The agency anticipates applying this same approach to the PHS fee. The agency anticipates that the \$2.8 million increase between FY 16 and FY 17 to be one of the larger increases.

The agency is phasing in the increase over multiple years based on the water funding needs of the agency and will not double the fee immediately.

The commission made no change in response to these comments.

Comment

TML commented that Texas cities would prefer that, rather than forcing cities to impose a state tax increase, the legislature should provide adequate funding to TCEQ. The City of Austin commented that a more balanced approach for underwriting the cost of the commission to carry out its regulatory programs should come from the Texas general revenue funds and supplemental federal funds, such as the Safe Drinking Water Act grants rather than specific use fees. The City of Plano commented that the legislature did not provide TCEQ's request for additional funding to support the agency's water programs in the 84th Texas Legislative Session. Alternatively, the legislature recognized

a budget shortfall for TCEQ and authorized the agency to raise fee rates by rule. The City of Fort Worth commented that the purpose of this fee increase is to make up for the appropriation shortfall.

Response

The amount of general revenue and Account 153 appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations. The legislature has to make difficult funding choices each session, and some funding requests cannot be funded with general revenue.

The agency is supplementing the water programs with federal funds, and these funds were taken into consideration by the commission when developing the fee increase needs. The agency is also anticipating a reduction in federal funds which need to be supplemented with fee funds to support water programs.

The commission made no change in response to these comments.

Comment

The City of Plano commented that this is an unfunded mandate that will adversely result in higher utility rates for the citizens of Plano. The City of Fort Worth commented that while TCEQ was instructed to raise fee rates by rule to ensure adequate revenue is available to support the agency's water programs, it is not the responsibility of Texas water utilities and their customers to make up that difference, especially when the increase is not related to new programming or additional services, and this means the increase must be passed along to its ratepayers, who are already overburdened with government-imposed taxes and fees. The City of Fort Worth commented that this fee increase is nothing more than a "state tax increase" on municipal water customers. TML asks in its comments, "where does TCEQ anticipate this money will come from?...It is expected that governmental entities will pass the fee increase on to their customers in their water utility bill." In other words, the proposed fee increase is nothing more than a "state tax increase" on municipal water customers. TRWA commented that it urges TCEQ to continue to take into account the burden to small systems and their customers when implementing future increases to the PHS fee.

Response

The commission acknowledges that there is never an ideal time for fee payers to face a fee increase. However, federal and state laws, to which the commission is subject, require that the commission carry out specific tasks to protect the state's water resources. These water-related activities benefit

people across the state. All Texans benefit from clean and adequate water supplies. To undertake those tasks, the commission needs to ensure that funds exist to pay for what the agency is required to do.

Over time, the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, electronic discharge monitoring reports, and automated internal processes.

TCEQ is assessing the fee against the approximately 6,900 entities classified as a water system in the state. This includes, but is not limited to, municipalities, private companies, water supply corporations, water districts, school districts, river authorities, federal facilities, and state facilities.

The commission made no change in response to these comments.

Comment

The City of Houston commented that the evolving connection-based fee structure places a disproportional burden on large utilities. The City of Houston further commented that TCEQ's workload and dedicated resources are not defined or assigned by the number of connections and asserts that the larger entities actually require less oversight due to their bigger, more experienced staff. The City of Fort Worth commented that all public water systems are impacted by this rule proposal, but large systems continue to bear the lion's share of the burden of fee increases and generally require less regulatory oversight from TCEQ.

Response

In adopting increases to the PHS fee, the agency has tried to spread the impact of the fee increase across a broad segment of fee payers so as not to unduly impact any one group of fee payers. The fee increases in this rule will be used to protect the water resources of the state and were developed as the most effective way for the agency to adjust revenue levels while spreading the financial burden as equitably as possible among those who benefit from clean and reliable water resources.

The commission made no change in response to these comments.

Comment

An individual requested no more increases, as the public already pays enough. The commenter suggests that TCEQ cut back on this agency, which is too bloated as it is. Further, the individual stated that nobody wants more water fees as the public already pays nitrate testing fees, monthly readings, lab fees, yearly inspection fees, etc.

Response

The commission acknowledges that there is never an ideal time for fee payers to face a fee increase. However, federal and state laws, to which the commission is subject, require that the commission carry out specific tasks to protect the state's water resources. These water-related activities benefit people across the state. All Texans benefit from clean and adequate water supplies. To undertake those tasks, the commission needs to ensure that funds exist to pay for what it is required to do.

Over time, the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, electronic discharge monitoring reports, and automated internal processes.

The commission made no change in response to this comment.

Comment

The City of Austin commented that the rule does not stipulate how water systems such as Austin Water Utility will be informed of future increases, since rules will not be needed for raising the fees from the intended amount to the maximum of \$4.00. The City of Austin suggested that the proposed rule only increase the fee to \$2.45 per connection now, and future rulemaking increases the fees, as needed, above the initial recommended amount of \$2.45 by the commenter. The commenter stated that this would give notice to water systems to allow budget planning for increases, and the commission should justify the needed increases in future rules.

Response

Significant portions of the budget planning process are out of the agency's direct control. The agency's budget is determined biennially by the legislature including how much the agency is authorized to spend and how much general revenue or fee revenue the agency will receive. The fee rates will be set at a rate that will generate sufficient revenue to meet the agency's operating needs. The commission recognizes the need for advance notice in the budgeting process and will work to let fee payers know what their rates will be as early as possible each year.

The commission added §290.51(c) in response to comments. Subsection (c) requires the agency to provide notification through an appropriate notification process, such as, but not limited to, *Texas Register* publication.

Comment

Representative Herrero commented regarding his concern over the proposed fee increase by TCEQ in §290.51. Representative Herrero understood that §290.51 would raise fees for large water systems to fund TCEQ inspection, analysis, and review of public water systems. Representative Herrero commented that the City of Corpus Christi is implementing a long-term strategy to protect and invest in water resources and the proposed fee increases could jeopardize the city's plan.

Response

TCEQ is facing a \$2.5 million shortage in FY 16 and \$5.1 million shortage in FY 17 without implementing a fee increase in the Account 153. TCEQ is adopting the revisions to the fee now to cover costs of its water programs beginning in FY 2017. The fee increase will be assessed against approximately 6,900 entities classified as public water systems in the state. Every public water system will experience an increase from \$25 - \$300,000

depending on the size. Any changes to the rule need to be in effect by late summer of 2016.

The commission made no change in response to this comment.

Comment

The City of Austin commented that the water study was not referenced or mentioned in the rule proposal, and if the water study has been done then it should be included in the justification for the fee increases and provided to the regulated water utility industry.

The City of Fort Worth commented that the water study should include the benefit each payer receives and the methodology used for assessing fees based on agency workload and fee payer benefits. Also, the City of Fort Worth commented that this information should be included in the justification alongside any proposal supporting a PHS fee for the regulated water utility industry.

Response

The commission is currently conducting a study on the agency's water program funding, as required by HB 1. The study will not be completed prior to the adoption of the rule package, and the agency water funding shortage had to be addressed prior to the 85th Texas Legislative Session.

The commission determined that the rule package has been developed in a manner intended by the study. HB 1 stated, "The TCEQ shall base any future fee rate modifications made to ensure sufficient revenues to the Water Resource Management Account on the findings of that study, provided such fee rate changes do not conflict with any statutory provisions relating to water-related fees or water-related programs, and provided such fee rates do not exceed any maximum levels set in statute."

The commission made no change in response to these comments.

Comment

TRWA commented that the regulated community may be confused about the statement in the preamble in the "Background and Summary of the Factual Basis for the Proposed Rule" section, stating the executive director of TCEQ has the authority to authorize a tariff change based on this fee increase when presumably this authority has transferred to the Public Utility Commission of Texas.

Response

The commission agrees with the commenter and removed the text from the adoption preamble.

Comment

Martin Luther Lutheran Church commented that the proposed rule is specifically discriminating against small country churches.

Response

The fee increase will be assessed against approximately 6,900 entities classified as public water systems in the state. This includes, but is not limited to municipalities, private companies, water supply corporations, water districts, school districts, river authorities, federal facilities, and state facilities. Each entity will experience an increase from \$25 - \$300,000 depending on the size.

The commission made no change in response to this comment.

SUBCHAPTER E: FEES FOR PUBLIC WATER SYSTEMS

§290.51

Statutory Authority

The amendment is adopted under the 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; TWC, §5.013, which establishes the commission's authority over various statutory programs, including water programs; TWC, §5.102, concerning general powers of the commission; TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules; TWC, §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 adopted amendment implements House Bill 1, General Appropriations Act, Article IX, Section 18.01 (84th Texas Legislature, 2015); and 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 an amount up to a maximum of \$200.

(B) For systems with 25 - 160 connections, the fee will be an amount up to a maximum of \$300.

(C) For a system with greater than or equal to 161 connections, the fee will be an amount up to a maximum of \$4.00 per connection.

(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 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, money order, electronic funds transfer, or through the agency's payment portal, and shall be made payable to the Texas Commission on Environmental Quality. 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.

(c) The commission may adjust the fee rates in subsection (a) of this section through an appropriate notification process, such as, but not limited to, *Texas Register* publication, based on the agency's cost of administering the water programs.