

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts the amendment to §21.3 *with changes* to the proposed text as published in the March 13, 2009, issue of the *Texas Register* (34 TexReg 1780).

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 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 (TMDL) development, water utilities, wastewater, river compacts, water availability modeling, water assessment, Concentrated Animal Feeding Operations (CAFOs), 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 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 revenue estimates for Account 153 revealed that without an increase in fees there would be 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 adopting 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 is relatively stable and represents significant water fee collections.

This adopted rulemaking amends Chapter 21, Water Quality Fees, 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 adopts the amendment to 30 TAC Chapter 290, Public Drinking Water.

SECTION DISCUSSION

The commission adopts the amendment to §21.3(b)(2) that deletes the reference to a maximum fee for wastewater permits and aquaculture permits in this paragraph and instead refers to the amount as provided in the Texas Water Code (TWC). The statutory caps at the time of proposal were \$75,000 for wastewater permits and \$5,000 for aquaculture permits and are set forth in TWC, §26.0291 and §29.0292, respectively. During the 81st Legislative Session, 2009, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The commission adopts this change to refer to any statutory caps and to allow for the

possibility that the caps may be amended by the legislature in the future. In this paragraph, the commission also adopts the increase of the minimum fee for active permits to \$1,250 and for inactive permits to \$620.

The commission adopts the amendment to §21.3(b)(5) that revises the fee rate schedule to delete the fixed dollar amount for each factor and in its place provide a maximum amount that could be assessed for each factor. The maximum amount adopted for each factor is an increase above the fixed dollar amount that currently exists in the rules. The amount applied to each factor will be determined by the annual appropriations and other costs from Account 153, in addition to any statutory cap on fees for individual permits, and would be applied uniformly to all permits subject to the particular factor being applied. In adopted §21.3(b)(5)(A), the commission increases the amount for contaminated flow from a fixed amount of \$700 per million gallons per day (mgd) to a maximum amount that could be assessed of \$1,090 per mgd. In addition, the commission adopts the amendment to §21.3(b)(5)(A) that defines the acronym mgd as "million of gallons per day." In adopted §21.3(b)(5)(B), the commission increases the amount for uncontaminated flow from a fixed amount of \$10.00 per mgd to a maximum amount that could be assessed of \$18 per mgd. In adopted §21.3(b)(5)(C), the commission increases the amount for traditional pollutants from a fixed amount of \$15 per pound per day to a maximum amount that could be assessed of \$23 per pound per day. In adopted §21.3(b)(5)(D)(i), the commission increases the amount for industrial discharges with a toxic rating of Group I from a fixed amount of \$200 to a maximum amount that could be assessed of \$310. In adopted §21.3(b)(5)(D)(ii), the commission increases the amount for industrial discharges with a toxic rating of Group II from a fixed amount of \$700 to a maximum amount that could be assessed of \$1,090. In adopted §21.3(b)(5)(D)(iii), the commission increases the amount for industrial discharges with a toxic rating of Group III from a fixed amount of \$1,050 to a maximum amount that

could be assessed of \$1,640. In adopted §21.3(b)(5)(D)(iv), the commission increases the amount for industrial discharges with a toxic rating of Group IV from a fixed amount of \$1,575 to a maximum amount that could be assessed of \$2,460. In adopted §21.3(b)(5)(D)(v), the commission increases the amount for industrial discharges with a toxic rating of Group V from a fixed amount of \$3,150 to a maximum amount that could be assessed of \$4,910. In adopted §21.3(b)(5)(D)(vi), the commission increases the amount for industrial discharges with a toxic rating of Group VI from a fixed amount of \$6,300 to a maximum amount that could be assessed of \$9,830. In adopted §21.3(b)(5)(E), the commission increases the amount for a major permit designation from a fixed amount of \$2,000 to a maximum amount that could be assessed of \$3,120. In adopted §21.3(b)(5)(F), the commission increases the amount for a storm water authorization from a fixed amount of \$500 to a maximum amount that could be assessed of \$780. The commission adopts these changes to allow the commission the ability to assess fees as needed to cover, in part, the cost of its water program activities. 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 commission adopts the amendment to §21.3(b)(6)(A) that increases the minimum amount for an active land application permit fee from \$800 per year to \$1,250 per year. The commission adopts this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission adopts the amendment to §21.3(b)(6)(B) that increases the minimum amount for an inactive permit fee from \$400 per year to \$620 per year. The commission adopts this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission adopts the amendment to §21.3(b)(6)(C) that increases the fee for an active storm water permit which authorizes the discharge of storm water only, with no other wastewater, from a fixed amount of \$500 to a maximum amount that could be assessed of \$780. The commission

adopts this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission adopts the amendment to §21.3(b)(6)(D)(iii) that deletes the reference to a maximum fee for aquaculture permits in this paragraph and instead refers to the amount as provided in the TWC. The commission added the word "maximum" between "The" and "annual." This word is needed to make this provision consistent with the language in §21.3(b)(2). The existing statutory cap of \$5,000 is set forth in TWC, §26.0292. The commission adopts this change to refer to any statutory cap and to allow for the possibility that the cap may be adjusted by the legislature in the future.

The commission adopts the amendment to §21.3(b)(7), which provides the commission the authority to adjust CWQ fees through the use of a multiplier. The commission adopts the change to the current multiplier from one to an amount up to a maximum of 1.75 to give the commission sufficient flexibility in assessing fees within the specified parameters. The use and amount of the multiplier will be determined by the annual appropriations and other associated costs from Account 153, in addition to any statutory cap on fees for individual permits, and will be applied uniformly to all permits subject to the water quality fee. Additionally, the commission adopts the requirement that the executive director report to the commission as part of the approval of the annual operating budget the multiplier that will be applied for the upcoming FY.

The commission adopts the amendment to §21.3(c)(3), which provides the commission the authority to assess a fee for consumptive use under a water right that authorizes diversion of more than 250 acre-feet per year. The existing rule provides that the fee for each water right authorizing diversion of more than 250 acre-feet per year for consumptive use is \$.22 per acre-foot up to 20,000 acre-feet, and \$.08 per acre-foot thereafter. Under the adopted change, a fee of \$.385 per acre-foot would be assessed for all water

rights for consumptive use that authorize diversion of more than 250 acre-feet per year, including those above 20,000 acre-feet. The adopted change would delete the provision that reduces the fee to \$.08 for water rights above 20,000 acre-feet per year. The amount of the increase from \$.22 to \$.385 reflects the application of a factor of 1.75, which is the maximum amount adopted as a multiplier for the CWQ fee.

The commission adopts the amendment to §21.3(c)(5) that combines paragraphs (5) and (6) to eliminate a stand-alone provision for the fee for water rights for hydropower purposes and incorporate it into the non-consumptive use paragraph. By incorporating the fee for water rights for hydropower purposes into the non-consumptive use paragraph, the fee amount of \$.04 per acre-foot in the existing rule changes to \$.021 per acre-foot. Additionally, the adopted rule deletes the tiered structure that exists for both the non-consumptive use paragraph and the water rights for hydropower purposes paragraph. That structure provided for reduced fee amounts for usage above a certain threshold. Under the adopted rule the minimum threshold of 2,500 acre-feet per year for assessing a fee, which was inadvertently deleted in the proposal, is added back in. This language promotes administrative efficiency by taking into account the cost associated with issuing bills. The adopted change does not affect the exemption from the fee for a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts. The subsequent paragraph is renumbered and a change is made to paragraph (2) to reflect this adopted change.

FINAL REGULATORY IMPACT ANALYSIS 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 §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 rule is part of a larger rulemaking to increase fees in order to provide funding for the commission's water program activities. The corresponding rulemaking, adopted amendments to Chapter 290, Public Drinking Water, is published in this issue of the *Texas Register*. The adopted amendment to Chapter 21 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 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. 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 the 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 is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirements of state law, unless the rule is specifically required by federal law; 3) 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; 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 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 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 program activities in a manner that is consistent with the statutory requirements set forth in the TWC.

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.

Promulgation and enforcement of the 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 program activities.

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 for this rule on April 7, 2009 in Austin, Texas. At the hearing the commission received comments from the City of Austin (Austin); the City of Houston (Houston); El Paso Water Utilities (El Paso); Luminant Power (Luminant); and the San Antonio Water System (SAWS). The comment period closed on April 13, 2009.

The commission received written comments from: Agua Special Utility District (Agua SUD); American Electric Power (AEP); the Association of Electric Companies of Texas, Inc. (AECT); Bethesda Water Supply Corporation (Bethesda WSC); the Honorable Ronald F. Branson, Mayor of Carrollton (Mayor Branson); Calpine Corporation (Calpine); City of Arlington Water Utilities Department (Arlington Water Utilities); City of Brownwood (Brownwood); City of Carrollton, Public Works Department (Carrollton, Public Works Department); City of Cleburne (Cleburne); City of Denton (Denton); City of Grandview (Grandview); City of Hughes Springs, including the Honorable Reba Simpson, Mayor of City of Hughes Springs; the Honorable James Samples, Mayor Pro Tem, City of Hughes Springs, the Honorable William V. Jones, City Council Member, City of Hughes Springs, and the Honorable Lee Newsom, City Official, City of Hughes Springs (together referred to as Hughes Springs); City of Jefferson (Jefferson); City of Lone Star (Lone Star); City of Odessa (Odessa); City of Ore City (Ore City); City of Pittsburg (Pittsburg); City of Plainview, Public Works Department (Plainview Public Works); City of Pleasanton (Pleasanton); City of Rosenberg (Rosenberg); City of Sugar Land (Sugar Land); City of Taylor Landing (Taylor

Landing); City of Wylie (Wylie); El Paso Water Utilities (El Paso); Guadalupe-Blanco River Authority (GBRA); Hardin County Water Control and Improvement District No. 1 (Hardin County WCID); Kamira Water System (Kamira); Kempner Water Supply Corp. (Kempner WSC); L&L Engineers and Planners, Inc. (L&L); Lake Corpus Christi RV Park and Marina (Lake Corpus Christi RV); Lone Star Chapter of the Sierra Club (Sierra Club); Lower Colorado River Authority (LCRA); Luminant Generation Company LLC (Luminant); New Ulm Water Supply Corp. (New Ulm WSC); Northeast Texas Municipal Water District (Northeast Texas MWD); NRG Texas Power LLC (NRG); SEC Energy Products (SEC); Shin-Etsu Silicones of America (Shin-Etsu); the Honorable Reba Simpson, Mayor of Hughes Springs (Mayor Simpson); Talty Water Supply Corporation (Talty WSC); Texas Association of Business (TAB); Texas Chemical Council (TCC); Texas Municipal League (TML); The Shilk Co., Inc. (Shilk); Upper Guadalupe River Authority (UGRA); Valley Mobile Home Properties (Valley Mobile Home); Water Environment Association of Texas (WEAT); and five individuals. The commission also received a joint comment letter from Arlington Water Utilities; Beaumont Water Utilities; El Paso Water Utilities; Houston Public Works & Engineering; Austin Water Utility; City of Dallas Water Utilities; the Fort Worth Water Department; and the San Antonio Water System. In the RESPONSE TO COMMENT section of this preamble these utilities will be referred to as "the Utilities." WEAT concurs with the comments submitted by the Utilities.

Sierra Club and two individuals supported the rule. Calpine and WEAT supported funding for the commission but suggested changes to the proposed rule as described in the RESPONSE TO COMMENTS section of the preamble. AEP; AECT; Agua SUD; Arlington Water Utilities; Austin; Bethesda WSC; Mayor Branson; Brownwood; Carrollton, Public Works Department; Cleburne; Denton; Grandview; GBRA; Hughes Springs; Houston; Jefferson; Lone Star; Odessa; Ore City; Pittsburg;

Pleasanton; Plainview Public Works; Rosenberg; Taylor Landing; Wylie; El Paso; Hardin County WCID; Kamira; Kempner WSC; L&L; Lake Corpus Christi RV; LCRA; Luminant; New Ulm WSC; Northeast Texas MWD; NRG; SAWS; SEC; Shin-Etsu; Shilk; Sugar Land; TAB; Talty WSC; TCC; TML; UGRA; the Utilities; Valley Mobile Home; and three individuals opposed the rulemaking.

RESPONSE TO COMMENTS

General

One individual commented that they support the rule.

The commission acknowledges the comment in support of the rule.

One individual commented that if this is an attempt to be more efficient and timely in processing applications and more accountable for time and tax payer money spent, then the commenter is supportive because he believes these departments are severely lacking in these areas.

While this increase is intended to allow the commission to continue performing the same level of water program activities in FY 2010 as it is currently performing, the commission has reviewed and will continue to review its processes for improvements in efficiency, including application processing times.

As a state agency, the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the

commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to United States Environmental Protection Agency (EPA) regarding its performance. The commission made no change in response to this comment.

The Sierra Club supports the proposed rules to raise three separate water fees to better support the agency's needs. The Sierra Club also commented that it fully supports changing the PHS fee to a flat per-connection fee and raising the multiplier for the CWQ.

The commission acknowledges the comment in support of the rule.

Calpine expressed support for the efforts by the TCEQ to increase revenue to replace a decrease in general revenue but commented that the selected approach does not provide sufficient lead time for implementation and would disproportionately affect smaller users and dischargers.

Over the past several years the commission has made it widely known what the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The agency made great efforts to provide notice of possible fee increases as early as possible to allow fee payers sufficient time to include such information in their budgeting processes.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to

allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The general revenue appropriation in addition to the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the \$75,000 cap. This would generally include small and medium-sized entities. The commission made no changes in response to this comment.

WEAT commented that it concurs with comments previously submitted to TCEQ by municipal utility directors.

The letter submitted by the municipal utility directors was a joint letter and the commenters from that letter are referred to as "the Utilities" in the RESPONSE TO COMMENT section of this preamble. The commission acknowledges WEAT's support of the Utilities' comments. The commission made no changes in response to this comment.

Rosenberg commented that the commission should allow the governmental unit the ability to invest this money into infrastructure repair/replacement projects thereby reducing impacts on the environment.

The commission appreciates the struggle regulated entities face as they work to maintain compliance with state and federal rules and acknowledges that a utility investing in its infrastructure is desirable.

However, over the past two budget cycles the amount of funding the commission has received from general revenue has decreased and appropriations from Account 153 have increased. During the same time period, water program costs have remained relatively constant but the source of the funding has shifted more heavily toward water fee revenue from general revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency had to raise fees to maintain the same level of water program activities as it is currently providing. The commission made no change in response to this comment.

One individual asked what the fees will pay for.

The fees will provide the majority of funding for the commission's water program which includes activities associated with water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, Clean Rivers Program, and groundwater protection. The commission made no change in response to this comment.

Valley Mobile Home commented that the postcard the commission mailed to potentially affected fee payers had the incorrect Web site listed for the water fees Web page.

On March 9, 2009, the commission mailed a postcard to potentially affected fee payers with a link to a Web page (www.tceq.state.tx.us/go/waterfees) that contained information about the proposed fee rule. The commission regrets that the commenter had difficulty accessing this Web page; however, commission staff has checked the Web address on the postcard and found that it is a good and active link. An alternate link by which the Web page can be accessed is (<http://www.tceq.state.tx.us/agency/waterfees.html>). The commission made no change in response to this comment.

One individual asked why the commission asks for comments.

Texas Government Code, §2001.029(a) provides an opportunity for the regulated community and public to comment on state agency rules. The commission values the opportunity to receive feedback from the public and regulated community regarding its rule proposals and it considers all comments that it receives. The commission made no change in response to this comment.

Hardin County WCID stated that agencies create rules and demands for information that will justify their existence and commented that the fees charged by the agencies are used to pay salaries to people sending out demands for information.

The agency carries out the responsibilities charged to it by the legislature and for certain programs, the EPA. Inherent in some of those responsibilities is the requirement to gather information from regulated entities. The agency has recently conducted a review of agency reports in an effort to reduce or eliminate unnecessary or duplicative reports and has also attempted to streamline the reporting requirements for regulated entities through the development of its electronic reporting systems. The commission made no change in response to this comment.

Agua SUD asked if the State of Texas could implement a statewide environmental tax to individuals and corporate Texas.

The commenter's suggestion of a statewide environmental tax is not within the authority granted to the commission by the legislature. Whether it could be implemented by any other state governmental body is outside the scope of this rulemaking. The commission made no change in response to this comment.

Agua SUD requested that the commission advise all Texans that there will be an increase in their bills to facilitate providing operating funds for the TCEQ and set up manned hotlines to explain to Texans the

reasons for the increases. Agua SUD stated that this would let utility customers know that it would be pointless to argue the fee increases with their local providers.

To assist potentially affected fee payers in planning for their FY 2010 budgets the commission established a Web page that provided information about the proposed fee changes. The link to the Web page is: *<http://www.tceq.state.tx.us/agency/waterfees.html>*.

This Web page can be used as a resource for utilities that receive phone calls from their customers with questions about the fee increases. The commission made no change in response to this comment.

Shin-Etsu commented that the shock of such a fee increase would have immediate negative impacts on the company and would compromise the company's ability to pay future fees to the TCEQ.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, there are federal and state laws which require the commission to carry out specific tasks to protect the state's water resources. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do. Without additional revenue from this fee increase, the agency would not be able to continue the same level of water program activities. In this rulemaking, the agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector or company. The commission made no change in response to this comment.

Mayor Branson and Carrollton, Public Works Department commented that automatically assuming a utility's ability to pass on the fee and declare no fiscal impact does not reflect reality. Carrollton, Public Works Department stated that both their city's utility providers typically increase their rates annually; that they are faced with replacing aging infrastructure at a reasonable level; and, that approximately 10% of its customers pay the minimum rates because of limited incomes and can be financially challenged by these numerous demands on utility rates. Mayor Branson commented that water rates and the affluence of the customer base vary widely throughout the state and even within counties and that not all utilities will be able to easily pass on the increase. Mayor Branson also noted that proposed Senate Bill (SB) 2316 and HB 1433 allow an increased cap from \$75,000 to \$200,000 so there is a likelihood of further fee increases in the near future which will put additional budget pressures on utilities.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. The numbers presented in the commission's rule proposal were based upon a worst case scenario set forth in the fiscal note in the proposed rule that projected a \$30 million shortfall, no change to the \$75,000 cap, and that the agency would receive no general revenue. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the \$75,000 cap. This would generally include small and medium-sized entities.

The increase is not anticipated to significantly impact utilities because utilities generally have the ability to pass the cost on to utility customers. The agency acknowledges the financial impact of imposing fee increases and the financial burden it can place on customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Luminant commented that because the multiplier is part of the regulation, it cannot be readily used to make adjustments in fees collected, and any change in the value must go through the rulemaking process. Luminant stated that as a participant in the stakeholders group for the last major wastewater fee adjustments, Luminant was led to understand that the multiplier was in place to allow for adjustment of revenue without changes to the fee structure. Luminant commented that this now is clearly not the case; and the multiplier concept should be either left at 1.0 or deleted as it is neither necessary nor useful. Luminant stated that a fee structure should be well reasoned and clearly stated, without the need of a multiplier because this would allow the regulated community to evaluate the true impact of any increase.

The multiplier allows the commission to adjust fees across the board without adjusting fee rates on the individual parameters. The multiplier is necessary for the agency to ensure that funding is sufficient to carry out its water program activities and to provide flexibility to respond to legislative actions regarding agency appropriations. The agency has placed a provision in the rules requiring that as part of the operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY. The commission made no change in response to this comment.

As an example of its fiscal responsibilities, Grandview referred to the creation of the proposed Prairie land Groundwater Management district as a potential solution toward addressing the depletion of our aquifers. Grandview stated that the \$.30 per thousand gallons for the water it must pump from the Trinity Aquifers to address the needs of our citizens must be passed on to them as a surcharge and that a coupled with other fees proposed for TCEQ Grandview is facing a significant fiscal impact on this small city.

Grandview's suggestion regarding the creation of the Prairie land Groundwater Management District is not within the scope of this rulemaking. The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, there are federal and state laws which require the commission to carry out specific tasks to protect the state's water resources. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The commission made no change in response to these comments.

Lake Corpus Christi RV commented that it sees no need for any additional fees when we all own our own wells and water rights. Lake Corpus Christi RV commented that it believes the state is exceeding its authority in mandating such fees other than the monthly well sampling.

Federal and state laws require the commission to carry out specific tasks to protect the state's water resources. The commission is responsible for ensuring clean, reliable supplies of water to support the needs of the state. In order for the commission to ensure a clean and reliable supply of water,

the commission must check, evaluate, and address water quality and quantity which requires the commission to incur expenses related to personnel, equipment, laboratory, travel and data management. The commission's authority to establish fees in this rulemaking can be found in TWC, §§5.701, 26.0135, and 26.0291 and also in Texas Health and Safety Code, §341.041. The commission made no change in response to this comment.

Cleburne commented that there has to be some accountability for the services rendered to justify such a large increase in cost.

Over the last several years, the agency has reviewed its water program activities and made efforts to streamline processes and to use technology that provides efficiencies. However, water program activities have not received sufficient funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue it would be required to cut program activities.

As a state agency the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to EPA regarding its performance. The commission made no change in response to this comment.

One individual commented that state resources have been wasted on politically motivated regulatory and propaganda activities and that this shows there is more money presently available.

The commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws. In implementing the programs and activities required under these laws, the commission has attempted to streamline processes, to use technology that provides efficiencies, and to periodically review its programs and their funding to ensure that funds are used as efficiently as possible. These reviews consistently reveal that additional resources are needed and that extra funding is not available. The commission made no change in response to this comment.

One individual commented that a way to reduce spending is to eliminate TCEQ regulatory activity that exceeds EPA guidelines.

The commission must comply with both state and federal environmental laws. This rulemaking affects the CWQ fee, PHS fee, and WUF. These fees come from the following areas within the agency, respectively: the Water Quality Division, the Water Supply Division, and the Water Quality Planning Division. These divisions implement both state and federal laws. The commission made no change in response to this comment.

Wylie asked if the TCEQ is operating as efficiently as it can to perform its delivery of services and whether water purveyors would see an increase in services or assistance provided by this fee increase.

The commission has attempted to streamline processes, to use technology that provides efficiencies, and to periodically review its programs and their funding to ensure that funds are used as efficiently as possible. The fee increases are necessary to allow the commission to continue providing the current level of water program activities and will not result in additional services.

The commission made no change in response to this comment.

The Sierra Club commented that until the legislature adjusts the \$5,000 cap for aquaculture facilities and the \$75,000 cap for all other facilities, it will place a significant burden on some small operators and businesses; however, by making the proposed rule flexible and referring to the statutory cap, it will allow TCEQ to adjust fees if the cap is raised.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the \$75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

GBRA commented that the alternative fee increase rule proposal effectively places most if not all of the commission's costs solely on the backs of those citizens who receive services from municipal water and wastewater systems.

While the proposed fee rate increases will affect citizens who receive services from municipal water and wastewater systems, 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 increase is not projected to significantly impact utilities because utilities generally have the ability to pass the cost to their customers. In addition, the increase is not anticipated to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Plainview Public Works requested more information as to why the overall financial obligations of Account 153 have increased. Plainview Public Works asked whether the financial obligations are increasing because of impacts in the large growth centers in Texas and whether these growth centers should be funding the new financial needs in Account 153.

Over the past two budget cycles, water program costs have remained relatively constant but the source of the funding has shifted more heavily toward water fee revenue from general revenue. During the same time period the amount of funding the commission has received from general revenue has decreased and appropriations from Account 153 have increased. The commission has been using the Account 153 fund balance to cover the water fee revenue shortfall. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities. The need for additional revenue is not related to impacts of large growth centers in Texas. The commission made no change in response to this comment.

Plainview Public Works commented that there is a paragraph on the commission's water fees Web site that has a partial list of programs that the Account 153 supports and asked if any of these programs can be identified as having an inordinate impact on TCEQ accounts.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. Though most of these activities have a fee that can generally be associated with these activities, several do not, such as TMDLs, river compacts, and groundwater protection. In these instances, as well as in addition to supporting the agency's overall water program, the statute authorizes the use of revenue deposited to Account 153. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

TAB recognizes that the uses to which certain water program fees may be applied was broadened by statute in 2001 but commented that there remain practical limits to the ability of an agency to establish the level of an administrative fee. TAB commented that there must be some reasonable relationship between

the fee and the costs incurred or benefit received by the entity paying the fee. TAB stated that a fee that bears no reasonable relationship to cost or benefit ceases to be a fee and becomes a tax.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This rulemaking does not create a tax; rather, it is an increase in fees that is intended to provide a portion of funding for the commission to be able to carry out its regulatory responsibilities related to its water programs. The commission made no change in response to comments.

SAWS commented that the fee increases are extreme. SAWS gave the example that its fee increase for the PHS fee and the CWQ fee is \$1.1 million, or \$1.4 million dollars with an increase in the cap, and would equate to SAWS funding the full-time loaded salaries of 23.6 full time equivalents or over 49,000 man hours a year. Houston commented that the proposed fee increases for the PHS fee and the CWQ fee will be about \$3 million dollars or almost 1% of its operating and maintenance budget. Houston commented that this fee increase does not make any logical sense.

Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at <http://www.tceq.state.tx.us/agency/waterfees.html>. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a \$30 million shortfall, no change to the \$75,000 cap and that the agency would

receive no general revenue. The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

While the fee increases are significant, over the past several years the commission has made it widely known what the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. In addition, the increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to these comments.

Wylie commented that its PHS fee would go up to \$24,598.15 per year from the current \$4,892.65 per year rate which is an increase of nearly 500%. Wylie asked why there is such a drastic increase all at once.

Over the past several years the commission has made it widely known what the impact of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The agency made great efforts to provide notice of possible fee increases as early as possible to allow fee payers sufficient time to include such information in their budgeting processes. Account 153 has always depended on general revenue and when general revenue appropriations were reduced two bienniums ago the agency had to use the fund balance to maintain program operations. Because the Account 153 fund balance is nearly depleted the agency needs to raise the full amount of funding. The increase is not anticipated to significantly impact utilities because utilities generally have the ability to pass the cost to their customers. In addition, the increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Plainview Public Works commented that it would like more information as to the actual fee increase specific to Plainview. Plainview Public Works stated that, using the information provided by the commission, the proposed fee increase for Plainview would be 136% on the CWQ fee and 374% on the PHS fee. Plainview Public Works requests confirmation of these numbers.

Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at <http://www.tceq.state.tx.us/agency/waterfees.html>. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a \$30 million shortfall, no change to the \$75,000 cap, and that the agency would receive no general revenue. The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the \$75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

WEAT commented that with the current statutory cap on the CWQ fee, any change in the fee structure to increase fees will place the burden on small to medium-sized dischargers not currently at the cap. WEAT commented that this increase will, in turn, be passed on to rate-payers.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and will lessen the burden to some extent for those fees that were not at the \$75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

LCRA commented that if the proposed rule is adopted its current fee amounts would nearly double and that if pending legislation is passed raising the fee cap to \$200,000, then the LCRA's total fee amounts would nearly triple.

The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The fee revenue needs to be sufficient to meet Account 153 appropriations.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also

provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Odessa commented that under the proposed rule the fee for services to its drinking water systems would increase from approximately \$13,000 to \$82,000 and that the annual fee associated with the wastewater permit would increase from \$53,410 to \$75,000 (or \$82,107 if HB 1433 passes removing the \$75,000 cap) Cleburne commented that the magnitude of impact associated with the rule is extreme. Cleburne commented that under the proposed rule its PHS fees would increase five to ten fold and the CWQ fees would increase 20 to 25 fold and that this type of increase is significant for a municipality of its size. Denton commented that under the proposed rule its PHS fee will increase by a factor of seven from \$12,280.79 to \$85,579.00. GBRA commented that it does not support the proposed increase in regulatory fees due to the magnitude of the proposed increases and the effect on GBRA's water and wastewater customers who ultimately must pay the increased costs. GBRA listed its fees and showed that its CWQ fee would increase by 92%; its PHS fee would increase by 121%; and its WUF fee would increase by 284%. Arlington Water Utilities commented that for the PHS fee and the WUF fee they will face a single year increase of \$202,515 or 745%. Sugar Land commented that based on the maximum potential fees it would be facing increases roughly totaling \$102,000 and \$45,000 for its CWQ fee and PHS fee, respectively. Sugar Land stated that compared to previous years, this represents over a 300% increase in fees as well as a substantially larger payment in absolute terms. El Paso commented that the commission cannot ignore the total impact of their proposal to raise both the CWQ fee and the PHS fee. For example, El Paso stated, their proposed PHS fee would increase from \$37,050 to a staggering \$397,176 or result in

nearly a 1,000% increase. Further, El Paso stated, their proposed combined increase in water and wastewater fees would go from \$265,838 to \$1,008,972 or an increase of \$743,134 per year.

The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a \$30 million shortfall, no change to the \$75,000 cap and that the agency would receive no general revenue. The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The general revenue appropriation in addition to the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the \$75,000 cap. This would generally include small and medium-sized entities.

The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at <http://www.tceq.state.tx.us/agency/waterfees.html>. The commission made no change in response to this comment.

Northeast Texas MWD noted pending legislation to raise the cap from \$75,000 to \$200,000 and stated that an entity staying at the cap maximum would experience an increase factor of 2.67. Northeast Texas MWD commented that smaller systems would bear the burden of the fee increase and cited itself as an example stating that under the same scenario it would experience an increase factor of 3.58.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance

is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The general revenue appropriation in addition to the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the \$75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

AEP stated that their fees will be increased by 56% to 235% for six out of the seven AEP-owned power plants in Texas with water quality permits and that these amounts will increase substantially if a multiplier is applied in the future. AEP commented that TCEQ may be under the impression that the cost increase can be passed along to our customers; however, rate increases for the utility industry are long and complex processes that can take years.

The commission acknowledges that these fee increases are significant and that certain entities may need prior regulatory approval before passing costs on to their customers; however, without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at

the agency's water fees Web page at <http://www.tceq.state.tx.us/agency/waterfees.html>. The agency built into this rule the ability to modify rates to ensure that funding is sufficient to carry out its water program activities and to provide flexibility to respond to legislative action regarding agency appropriations. The commission made no change in response to this comment.

AEP expressed concern that the fee for uncontaminated flow increased by 80%, the largest percentage increase of all the fees. AEP stated that many of our facilities use a once-through cooling water system that discharges high volumes of uncontaminated flow. AEP commented that this fee increase appears to disproportionately affect the electric utility industry considering many power plants in the state use this technology. AEP commented that uncontaminated flow does not have a significant impact on the environment and should not be subjected to the largest percentage increase. NRG commented that while the fee increases in Chapter 21 ranged from 53% for traditional pollutants to 56% for contaminated flows, storm water, toxicity, and major facility designation there did not appear to be a basis for the increase of uncontaminated flows to 80%. NRG suggested that this fee increase be consistent with the other fee increases. AECT commented that there is inadequate justification for the fee rate for uncontaminated flow to be increased by 80%, when the fee rates for the other discharges listed in §21.3(b)(5) would only increase by a little over 50%, especially since most of the other types of discharges involve discharges of contaminated wastewater. AECT commented that proposed 80% increase in the fee rate for uncontaminated flow would disproportionately affect power plants that use once through cooling water systems because such systems generate significant volumes of uncontaminated flow. Luminant commented that the proposed increase of 80% for uncontaminated flow found in §21.3(b)(5)(B) is the greatest concern and appears to be both excessive and disproportionate. Luminant stated that uncontaminated flow is just that; uncontaminated and that for the electric generating industry this flow

typically consists of noncontact cooling water, which is the most water conserving method available. Luminant also stated that in many cases the water is taken from, and returned for reuse, to an industrial cooling impoundment specifically built for that purpose and that by definition it has the least impact to water quality. Luminant concluded that for these reasons, it is inappropriate to impose such a dramatic increase on the one category classified as uncontaminated. Luminant also noted that this particular category is virtually industry specific, and will have a disproportionate significant impact on the electric utility industry.

The commission acknowledges that there is a difference between uncontaminated and contaminated flows, and this difference is reflected in the rates for each of these factors. In an effort to have all categories of CWQ fee payers bear generally the same percentage of the increase, rates for all of the factors were increased by an average of 56%. Because the class of dischargers with uncontaminated flow had a greater number of fee payers at the cap, the rates for that factor increased at a greater percentage than the average. This rulemaking affects all entities with uncontaminated discharges, not just electric generation facilities. The general revenue appropriation in addition to the changes in the cap for the CWQ fee will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no changes in response to these comments.

Talty WSC commented that its rate will be going up from \$0.70 to \$2.15 and that is more than three times the old rate and that it does not believe that there has been adequate time for water systems to prepare for this increase (along with the many other increases we receive).

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. The agency has made great efforts to provide notice of possible fee increases as soon as possible to allow fee payers sufficient time to include such information in their budgeting processes. The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Kempner WSC understands that six years without an increase in fees is too long. However, Kempner WSC commented that it appears that the six-year time period is being used to not only catch up on lax oversight but to inflate the increases as well. Kempner WSC stated that almost all of the fees are being doubled and in many cases a hundred fold and in some much more than that.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased. Overall, water funding has been relatively constant but the source of the funding has shifted more heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the

same level of water program activities. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a \$30 million shortfall, no change to the \$75,000 cap and that the agency would receive no general revenue. The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to these comments.

El Paso commented that the impact of these fees is substantial. For example, El Paso stated, the amount of monies needed to meet the fees could fund 20 water and wastewater operators or could finance a much needed \$10 million in capital projects.

A utility investing in its staff and infrastructure is desirable and the commission appreciates the struggle regulated entities face as they work to maintain compliance with state and federal rules. The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The commission is required to follow and to enforce state and federal environmental laws and must raise its fees to be able to conduct water program activities as required by these laws. The commission made no change in response to this comment.

Rosenberg commented that it strongly disagrees with the proposed fees and recommend the fees be left at their current amounts for at least an additional two-year period. Rosenberg suggested that after the two-year delay, fee increases should be gradually implemented over a period of years. TCC stated that the preamble to the rule notes that fees have not increased since 2002. TCC commented that inflation would have increased the fees at the facilities that pay the CWQ fee by an average of approximately \$5,900 per facility (source Department of Labor CPI calculator). TCC stated that such dramatic fee increases in a single budget year represent an unwelcome surprise which is exacerbated by increasing the fee during the current budget year. TCC recommended that any fee increase should be phased in so that such dramatic increases are not incurred in a single year and timed such that entities on a calendar FY have adequate notice for budgeting purposes. TCC suggested that a phase in between the years of 2010 and 2015 would provide for more adequate notice. Calpine stated that the budgeting process for municipalities and industrial regulated entities generally begins during the prior calendar and/or FY. For example, Calpine stated, the CWQ fees for the TCEQ FY 2010, which will be invoiced in October 2009, were budgeted by Calpine in August/September 2008. Calpine commented that any fee increase that is implemented for TCEQ FY 2010 will result in a budget variance at each affected facility. Calpine suggested that the

commission could defer the rate increase until at least TCEQ FY 2011 allowing regulated entities adequate time to budget for the change or stagger the implementation over a period of years to minimize the effect of a large percentage increase in fees. Houston commented that the timing of the proposed rule is not good and that not giving all utilities at least one year to plan for the increases would be a burden. Cleburne commented that the proposed increase is not staggered in any manner and fails to recognize budgetary limitations and rate increase requirements that may have to be imposed just to collect these fees. Agua SUD asked if the commission could review its operating costs and improvements annually and increase their costs accordingly over five to ten years. Agua SUD also commented that the commission should reevaluate immediate needs and future projected needs and then increase costs annually over time so that rate payers can adjust their budgets to the increases. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD recommend a phased-in approach with ample time for input from the public and the utilities for increasing fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that raising fees by a factor of three in a single increase is too much at one time for most small systems to bear. LCRA requested that the TCEQ consider implementing the fee increase in a phased-in approach to allow adequate time for LCRA and other affected entities to undertake rate increases and incorporate the new fees into their respective FY budgeting. Wylie asked if the fee increase could be phased in gradually over successive years to allow entities to gradually adjust to and adequately plan for changes. Austin and Luminant commented that the increase in fees should take a phased-in approach. The Utilities and Denton commented that when the time comes for TCEQ to increase fees, it should do so in a phased-in approach with ample time for input from the public and the utilities. The Utilities and Denton commented that cities and local governments typically increase rates in a phased-in approach, and the TCEQ should follow that same lead. Shin-Etsu commented that such a substantial increase in fee should be phased in

gradually over a span of years instead of implemented immediately. Talty WSC does not believe that the water system should suffer for poor planning on the part of TCEQ and suggested that these rates should have been increased gradually since 2001 not taken all at once. El Paso requested that the implementation of the fees be phased in over five years. Sugar Land commented that rather than being phased in, the proposed rules would represent an immediate, appreciable increase. Sugar Land stated that municipalities across the state are already dealing with various other increases related to rising cost of materials, regulatory mandates (e.g. implementation of groundwater conservation districts/subsidence districts) and other factors. Sugar Land encouraged the commission to review the extent of the fee increases and the method by which they are determined from year to year and recommended a phased increase in revenue based on a set fee structure to reduce the impact to local governments and their customers.

The fund balance in Account 153 is inadequate to allow the commission to implement a phased-in approach. Current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue performing the same level of water program activities in FY 2010 - 2011 as it is currently performing. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. More recently, the agency

has held several presentations to statewide water associations to inform them of the water funding shortfall and to let them know that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. The commission made no change in response to this comment.

Arlington Water Utilities opposes the single year large increase especially at a time when all cities are faced with shrinking revenues due to the economic conditions. Arlington Water Utilities commented that when program funding increases are needed, regardless of the source of funding, the increases should be programmed to avoid the shock of very large single year increases. Arlington Water Utilities stated that it pursues a very proactive operational and capital planning system to ensure that the annual cash flows and the periodic rate and tax increases will not unnecessarily and adversely impact the citizens of Arlington in a single year and urges the commission to adopt a similar approach to its program planning.

The commission recognizes the value of prior planning and appreciates the proactive approach of Arlington and other regulated entities. The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. Over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require either fee increases or reduced services. More recently, the agency has held several presentations to statewide water associations to inform them of the water funding shortfall and to inform them that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. 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 agency does not have an adequate fund balance in Account 153 to implement a phased-in approach. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the

impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

TCC commented that the two bills introduced in the House and the Senate set the maximum fee limit at \$200,000 which represents up to a \$125,000 increase (or 167% increase) from the current cap. TCC noted that if a facility remains capped this \$125,000 increase would occur in a single year. TCC commented that if the statutory limit is increased, a phased implementation approach should be used to graduate towards the revised statutory limit so that such a large increase does not occur in a single billing cycle.

The agency does not have an adequate fund balance in Account 153 to implement a phased-in approach. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. In addition to general revenue appropriations, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to these comments.

TCC stated that the timing of the decision on fee rates is critical for regulated entities so that appropriate budgeting decisions can be made. TCC stated that for those regulated entities on a calendar FY, the current state billing cycle, which marks October as the beginning of the FY, is very problematic for timely budgeting. TCC recommended that the TCEQ move the billing period for the water quality fees to the first quarter of the calendar year (second quarter of the State of Texas FY) to allow a greater flexibility for all regulated entities to budget appropriately. TCC commented that for entities on a calendar FY increases in the CWQ fee present an additional burden because the substantial increase over budget is incurred in the current FY since the TCEQ bills these fees in October at the beginning of the State of Texas' FY.

The agency depends on the revenue from the CWQ account to maintain the budget through the early months of the FY. It is not financially feasible to modify the bill date due to nature of the agency's budget cycle. The agency would have been insufficiently funded in the early months of the FY if the fee increase did not take place when planned and would not have been able to perform the same level of water program activities as it is currently providing. The commission made no change to the rule in response to this comment.

Odessa commented that it opposes the proposed dramatic increase in fees because cities are already dealing with the increasing costs related to chemicals, electricity, maintaining qualified personnel, compliance with regulations, and failing infrastructure. Odessa commented that as an enterprise fund, it will have no choice but to pass all of these increased costs on to our utility customers, many of whom are dealing with the impacts of the recession. AECT suggested that at a time when businesses are under

significant economic pressure and uncertainty the TCEQ's proposal to increase water fees needs to involve serious consideration of possible ways to reduce the proposed magnitude of the increases in water fees. El Paso recognized the need for the commission to increase fees but commented that at this time it is not practical for the utility to raise rates to cover these expenses because of both political and economic realities. Rosenberg commented that because of the recent economic downturn the city is not in a position to consider increasing rates to cover the proposed fee increases and that it does not make good economic sense to increase fees at this time. Rosenberg suggested that the commission seek a fee increase after the economy fully recovers and ratepayers again have some disposable income available. Agua SUD stated that it understands the reasons for the increases and stated that the commission performs a valuable service to all of Texas, but commented that these increases are difficult to implement from one day to the next. Sugar Land commented that the economic downturn has led to decreasing system revenues and budget shortfalls and that such a marked increase in regulatory fees in a time when resources are already stretched thin represents an untenable situation. One individual commented that in this bad economic time people have to prioritize and reduce spending and the individual believes that the commission should follow this example. Wylie commented that municipalities are being adversely affected by the current economic status of the nation and that the PHS fee increase represents a substantial impact on the Water Division's annual budget at a time when economic conditions require that we operate as frugally and efficiently as possible while still meeting all the requirements to deliver potable water to our customers. Austin commented that the time is not right for such a dramatic increase in fees in these times of economic hardship when their customers are losing jobs or have had to take pay cuts. Houston commented about the timing of the rule during an economy when people across their city and across the state are losing jobs and stated that it would have a negative impact on Houston and other cities in the state. Valley Mobile Home commented that in this time of economic stress in our country and our state

that the commission needs to tighten its belt like the rest of us and not increase any fees at least until things get back to normal. Valley Mobile Home suggested that the commission join in the spirit and cut salaries to help out. Kamira commented that this is absolutely the wrong time to do this and that TCEQ and the State of Texas should follow the example of families and cut back on something. Kamira requested that the commission instead decrease fees through lay offs or decreased reporting to the agency and get in line with the problems the general public is going through in this time of economic instability. Kamira stated that the fee increase will lead to the water system providing less customer service and a negative opinion of the commission. Kempner WSC commented that these fees are not justified and must be reevaluated particularly with the current economic situation. SEC commented that the last thing we need is more fees in a depressed economy. Shin-Etsu objects to the increase in fees because of the inappropriate timing of the increase as well as lack of tangible benefits to the fee payer. Jefferson stated that it understand the TCEQ has refused to explore reducing costs and commented that TCEQ should look closely to reduce its costs like every other governmental entity in Texas.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. 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 (eDMR), and automated internal processes.

The commission has a publication, *Funding Sources for Utilities*, RG-220, that is available on-line. Additionally, the commission has a program to provide utilities with free assistance to discuss available funding sources for infrastructure repair and replacement projects. If a utility would like to participate in the agency's Financial, Managerial, and Technical Assistance Program, the utility can contact Margot Taunton at (512) 239-6403 or at mtaunton@tecq.state.tx.us. Additionally, small businesses and small local governments can contact the agency's Small Business and Environmental Assistance Division for compliance assistance at (800) 447-2827. The commission made no change in response to this comment.

UGRA asked that given the state of the economy the commission consider maintaining the status quo on fees for the foreseeable future. UGRA stated that any increase in fees will ultimately impact the consumer who is already reeling from economic blows. UGRA asked that the commission consider alternative fiscal management strategies that do not require fee increases.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, federal and state laws to which the commission is subject require that the commission carry out specific tasks to safeguard the environment of the state. In order to carry out 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 and eDMR as well as automating internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional funds, it will be required to cut program activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations at public drinking water systems and wastewater treatment plants. The commission made no change in response to this comment.

The Utilities and Denton commented that cities are facing budgets cuts, decline of local business activity, a freeze on filling vacant positions, and other factors that combine to make the budget process a challenge for cities and water utilities.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, the commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws to safeguard the environment of the state. In order to carry out those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. More recently, the agency has held several presentations to statewide water associations to inform them of the water funding shortfall and to let them know that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. The commission made no change in response to this comment.

Luminant commented that the proposal seems premature, since the legislature is currently in session, appropriations have not been set, and there are a number of related bills under consideration. El Paso requested that the commission consider the timing of implementing any new fees. El Paso stated that it is their understanding that the fees would be implemented in August which is half way through their FY and as such have not budgeted for any fee increase this FY. El Paso requested that the proposed increase not begin until all utilities have had a chance to adjust their budgets for their next FY budget. Luminant commented that the timing is atrocious from a budgetary standpoint and that it is inappropriate to impose a dramatic increase within a budgetary year.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. Waiting until after the session would not have given these entities any advance notice of and, therefore, no ability to plan for increased fees for their FY 2010 budget cycle. The commission wanted to provide as much

notice as possible for potentially affected fee payers as they moved through their budget planning cycles.

The CWQ fee bills will be mailed in October 2009 with the PHS fee bills following in November and the WUF bills being mailed in January 2010.

The commission is raising fees at this time because current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue performing the same level of service for its water program activities in FY 2010 - 2011 as it is currently performing. Without the additional fee revenue, it would be required to cut program activities. This could affect, for example, permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and reducing the number of investigations at public drinking water systems and wastewater treatment plants. The commission made no change in response to this comment.

Taylor Landing commented that a further increase, unjustified by improved services, is unwarranted and suggested that governmental agencies, including TCEQ, start tightening their belts and live within their budgets like everyone else. Taylor Landing suggested that the solution to the commission's need for more funding is not to increase user fees, rather, it is to decrease operating expenses. Shin-Etsu would prefer to see the services and obligations of the TCEQ decrease before significantly raising the fees in dismal economic times.

Over the past several years, the agency has reviewed its water program activities and made significant efforts to streamline processes and to use technologies to create greater efficiency. 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, eDMR, and automated internal processes. The agency will continue to develop more efficient processes.

Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in its water fee rates, the agency would not be able to maintain its current level of water program activities. The commission made no change in response to this comment.

Plainview Public Works asked if the greatest impacts to TCEQ funding be more accurately identified and addressed before everyone in the state is asked to contribute more money for the same service. Odessa commented that increases in fees for all 30 of the fee funds in Account 153 should be considered, rather than placing the burden of the budget shortfall on the three of the 30 funds previously listed. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD stated that TCEQ informed them that there are 30 or more fees that support the TCEQ but only three were chosen for massive increases. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD support looking at all of the fees for equitable increase not just the ones in the

current rule package. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that it believes that at least some legislators recognize that legislation is a necessary part of this proposed rule package given the filing of bills to increase the cap limits. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that since legislative action will be needed to achieve a proper balance, it seems more prudent to look at all fees not just the three in the current proposal. The Utilities and Denton suggested that TCEQ further evaluate all 30 fees for potential increases, even those requiring statutory change, in an effort to spread the impact among those entities bearing the cost of TCEQ funded water-related programs. Luminant commented that the new revenue raised by the fees in this rule proposal may not go to support the programs related to the targeted revenue stream and will result in an inequitable burden on those who are part of that targeted revenue stream.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY 2010. The commission did not select fees that require a statutory change at this time because changes to those fees are outside of the commission's direct control and also the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. In addition to the appropriation of general revenue, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Cleburne commented that there are insufficient checks in the operating budget for the commission to ensure that only the amount of fees absolutely necessary to operate will be collected. Cleburne commented that there are many programs that will be subsidized by this fee increase that do not appear to benefit the city.

As a state agency the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to EPA regarding its performance. The amount of general revenue and Account 153 funds appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, added statutory authority that revenues deposited to that account would

be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. Though most of these activities have a fee that can generally be associated with these activities, several do not, such as TMDLs, river compacts, and groundwater protection. In these instances, as well as in addition to supporting the agency's overall water program, the statute authorizes the use of revenue deposited to Account 153. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

Carrollton, Public Works Department asked that the commission reconsider the proposal and that the commission reengage with the Texas Legislature to increase their appropriations' support for these critical programs. Carrollton, Public Works Department commented that they realize this may be difficult so they also suggest that the commission comprehensively address all the water programs' budgetary needs and ask for statutory rate relief in all those needed to pay their own way. Mayor Branson recommended that the commission accurately forecast the appropriate budget shortfalls in each of the 30+ water program service fees and ask for statutory fee relief within each program.

The commission has sufficient appropriation authority to manage its water programs. The shortage is the amount of fee revenue collected by the agency. The current fee revenue deposited into Account 153 does not support the appropriations and obligations from the fund; therefore, an

increase in fee rates is necessary to support current appropriations from the fund. The amount of general revenue received by the agency is determined by the legislature. The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The fees in this rule will impact the majority of water fee payers throughout the state. Other fees were not selected because they do not generate enough revenue to impact the shortfall and do not have as consistent revenue streams. The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

AECT commented that any necessary increases in water fees should be assessed equitably across all fee payer sectors. By that, AECT means that the water fees for a fee payer sector should be based on the agency resources that are needed for management of the water quality programs for that sector.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The fees in this rule will impact a broad segment of regulated entities throughout the state. The commission made no change in response to this comment.

Carrollton, Public Works Department recommended that the appropriate solution is that budget shortfalls should be proportionally spread between all the water programs that can't cover their forecasted bills.

Mayor Branson and Carrollton, Public Works Department stated that continuing down the proposed path will distort the relationship between actual costs of the program and the fees to recoup those costs.

Carrollton, Public Works Department commented that this will likely also affect organizational assessments to review operational effectiveness and cost efficiencies.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY 2010. The commission did not select fees that require a statutory change at this time because changes to them would be outside of the commission's direct control. Additionally, the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. 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, eDMR, and automated internal processes.

The agency intends to limit the burden on fee payers to only the amount necessary to support the commission's water program activities. The commission made no change in response to this comment.

Mayor Branson commented that if not tax supported, each program should pay its own way. Mayor Branson and Carrollton Public Works Department commented that the city must pay for the services used but the water programs the city doesn't use should not be part of our city's obligation. Lake Corpus Christi RV commented that the fees seem like an attempt to support shortcomings of other departments.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. This statutory authority recognizes that these water-related

activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

SAWS recommended that the legislature keep funding the commission with general revenue while the following items are considered: a phased-in approach to the fee increase and that any increase in fee structure be designed to equitably spread the burden across all water-related programs and activities or identify target increases based on the sum. SAWS asked that it be clearly demonstrated that the fees go to the programs they are intended to cover.

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 amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

At this time, the commission does not have an adequate fund balance in Account 153 to implement a phased-in approach because the past two bienniums have depleted the fund balance. The current

fee revenue is not sufficient to support current appropriations from Account 153 and unless the commission raises water fee rates the agency will not be able to perform the current level of water program activities.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this statutory authority revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

TAB commented that it is appropriate that the commission consider whether those businesses that hold wastewater permits that would be subject to significant fee increases truly impose a cost on the agency or receive a benefit from the commission's performance of its regulatory activities equivalent to an annual cost of conceivably \$200,000. Absent such a finding, it is the position of TAB that further adjustments in other fees, including the PHS fee, be considered because it is clearly the most broadly based and it comes the closest to functioning like the general revenue that is no longer included in the TCEQ budget. TAB commented that if the legislature allocates little general revenue to TCEQ water programs, it should be incumbent on the agency to maximize the collection of needed revenue from the source that most closely resembles general revenue.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. The fee increase is intended to provide enough funding for the commission to be able to carry out its regulatory responsibilities related to its water programs. The commission made no changes in response to this rule.

Rosenberg suggested that the commission ask the legislature to provide additional funding or that the agency perform a top to bottom review and eliminate expenditures to overcome the projected shortfalls, like local governments.

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 amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

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, and eDMR, and as well as automating internal processes. However, water program activities have not been the recipient of excess funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue, it will be required to cut program activities. The commission made no change in response to this comment.

Odessa commented that all taxpayers receive benefits through water and wastewater services; therefore, Odessa suggested that the TCEQ strongly consider financing their budgetary shortfall, at least in part, through Texas general fund revenues and any available federal funds.

The agency is currently using federal funds to support water programs and these funds were taken into consideration by the commission when developing the fee increases. The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

Calpine commented that given the \$75,000 statutory cap on the CWQ fee, any increase in the fee would be absorbed solely by regulated entities currently paying less than the cap. Calpine suggested that the commission could continue to lobby the legislature to approve an increase to the current cap (i.e. HB 1433 and SB 2316); encourage the legislature to reinstate the original water quality program funding for Account 153; or, delay adoption of any fee increase until the legislative session has ended and all associated changes have been evaluated.

Since the cap is set in the TWC and cannot be changed without legislative action the commission designed the fee rates to be as equitable as possible while still ensuring that the fees would generate sufficient revenue to cover the agency's revenue shortfall. The commission provided information to both the Texas House and Senate during the 81st Legislative Session regarding the impacts of raising the CWQ fee cap. The agency has also worked with the legislature to determine general revenue appropriations.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the

shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. In addition to the appropriation of general revenue, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Mayor Branson commented that the Texas Legislature should provide required appropriations for a critical state service and not progressively reduce support, but understands that the legislature has this right. GBRA does support an increase in the commission's funding but through increased general fund appropriations rather than increased regulatory fees. GBRA believes this approach is much more fair and appropriate since all the citizens of the state benefit from the commission's programs. TCC commented that since all Texans benefit from the commission's programs that a more equitable approach is to obtain significant funding from general revenue. TCC encouraged TCEQ to continue to seek funding commensurate with historic funding levels from general revenue given the benefits to the citizens and the economy of the state. Arlington Water Utilities commented that all citizens of the state benefit from the water and wastewater programs therefore Arlington Water Utilities urges the commission to consider a different approach than the historical user fee, namely funding the programs from the general revenue funds of Texas. Arlington Water Utilities urges the commission to work with the legislature to adopt methods to pay for the majority of the commission's water and wastewater programs out of the general revenues of Texas. LCRA requested that TCEQ delay adoption of the fee increase until after the legislative session, so that any general revenue that may be made available to TCEQ can be factored into determining the timing and level of necessary fee increase. LCRA stated that general revenue funding to

supplement a reduced or phased-in fee increase would provide a more balanced approach to paying the cost of TCEQ programs by all Texans who benefit from these programs but are not subject to the fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD believe that there is sound policy for making the general revenue the dominant funding source and the user fee the lower secondary source. Austin commented that the services that the commission provides to the state are beneficial and should be funded with the general relief fund with supplemental funding coming from the fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that the current proposal is not likely to strike the proper balance between general revenue that is used to fund the TCEQ and fees that are used to fund the TCEQ.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

In proposing increases to the PHS fee, the CWQ fee, and the WUF, 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 this comment.

AEP requests that the TCEQ explore all possible sources of funding for its water program. AEP asks that the TCEQ make an effort to convince the Texas Legislature to provide as much general revenue funding as possible for Account 153. AEP also requests that the TCEQ request additional funding from the EPA if this has not already been done. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD recommended that the Texas Legislature appropriate the proper level of funding and that all fee increases be reviewed legislatively to assure a proper funding balance. The Utilities and Denton commented that it is their position that a more balanced approach for underwriting the cost of the TCEQ to carry out these valuable 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. Rosenberg commented that the commission should seek additional funding from the federal government to carry out the various EPA mandates being handed down. The Utilities and Denton commented that it makes more sense than the current rule proposal to reprioritize and reallocate existing general revenue and federal funds that assign a higher priority to the protection of the public health and the viability of the Texas economy. The Utilities and Denton commented that the general revenue funding stream should account for the majority of the TCEQ water program funding, with fees only as a supplemental source.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY

2010. The commission did not select fees that require a statutory change at this time because changes to them would be outside of the commission's direct control. Additionally, the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

Collectively, the water programs of the commission protect public health by ensuring clean and adequate water supplies. In this rulemaking, the agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector or company.

The commenter also suggested that the agency request funds from the EPA to support its water program activities. The commission does seek and receive federal funds from EPA; however, such funds are not sufficient to cover agency programs. The commission made no change in response to these comments.

Brownwood stated that the state and federal government want to put limits on how much utilities can tax and charge for fees and asked what will happen to utilities if a utility's fees to the state are increased and its ability to charge what is needed to maintain its own utilities is reduced. Brownwood commented that TCEQ needs to cut its costs and have the legislature fund the TCEQ back to its original level.

The commission is not aware of any initiative from either the state or federal government that would put limits on how much utilities can tax and charge for fees. Section 291.31 of the commission's rules allows a utility to charge reasonable and necessary expenses for rendering service to rate payers. 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 §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.

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 implemented electronic processes including electronic permitting, eDMRs, and automated internal processes.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased.

Overall, water funding has been relatively constant but the source of the funding has shifted more

heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities. The commission made no change in response to these comments.

WEAT supports full funding of the TCEQ water quality programs and fully supports the agency's attempt to provide for full funding of these programs. However, WEAT believes that CWQ fees should remain at the current levels and the balance of funds needed for agency water quality programs should come from general revenue appropriated by the Texas Legislature.

The commission acknowledges the comment in support of the agency's attempt to provide full funding to its water programs.

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 amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance

is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

One individual commented without the past five to ten years of records listing revenue streams and expenditures for the accounts requesting fee increases the reasoning behind a higher fee request simply looks like propaganda.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased. Overall, water funding has been relatively constant but the source of the funding has shifted more heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities as it is currently providing. The following information presents the funding breakdown between general revenue appropriation and water resource funding (includes fund balance and revenue) for the agency's water programs.

The agency received \$59.5 million in general revenue funding and \$45.7 million in Account 153 funding to fund the 2000 - 2001 water programs. The agency received \$60.5 million in general revenue funding and \$49.1 million in Account 153 funding to fund the 2002-2003 water programs. The agency received \$54.5 million in general revenue funding and \$50.3 million in Account 153 funding to fund the 2004 - 2005 water programs. The agency received \$9.6 million in general

revenue funding and \$90.4 million in Account 153 funding to fund the 2006-2007 water programs.

The agency received \$20.7 million in general revenue funding and \$90.2 million in Account 153 funding to fund the 2008-2009 water programs. The commission made no change in response to this comment.

Carrollton, Public Works Department is concerned about the proposed water program fee increases in the proposed rule, as well as pending legislation to further increase the CWQ fee cap. Carrollton, Public Works Department is supportive of the essential services provided by TCEQ for the water programs mandated by their roles and responsibilities but disagrees with the methodology and process currently proposed to meet Account 153 obligations.

This rule enables the agency to adjust fee rates according to the amount of general revenue and Account 153 appropriated to the commission for water programs. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the

previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

This rule will give the agency the ability to adjust rates to guarantee sufficient funding is available for the commission's water program activities. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The commission made no change in response to this comment.

Luminant acknowledges that there may be a need for some increase in fees, but disagrees strongly with the process used, the excessive increases proposed, and the inequality to the targeted fee payers. Luminant commented that without knowledge of the methodology used, it is difficult to dispute or support the increases proposed and that it is equally difficult to understand the disparity of the proposed increase by category. Therefore, Luminant requests that the commission: provide greater detail, clarity, and justification on current expenditure from Account 153; provide greater detail, clarity, and justification on the need for the proposed increases; provide greater detail and clarity on how the percentages were derived for each category; provide greater detail and clarity on how these increases in fees are distributed across the various groups of fee payers, and specifics on how the increased revenue will be used; equalize the percent increase across all wastewater categories, or provide justification on any variance to a standardized increase; set the fee structure at fixed amounts to allow a level of certainty for both the

agency and the fee payers; and, keep the multiplier found in §21.3(b)(7) at 1.0 or remove it from the regulation as it is neither necessary nor useful.

The commenter asked for greater detail on current expenditures from Account 153. The environmental programs that the agency supports from Account 153 include: water permitting functions, Water Rights, Groundwater Protection, bays and estuary programs, TMDLs, water quality monitoring assessment / standards, wastewater, Clean Rivers Program, and Onsite Septic Systems. For the past two bienniums the agency has been appropriated approximately \$90 million per biennium for its water programs.

The commenter requested greater detail on the need for the proposed increases. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The water programs have always depended on general revenue to supplement their costs. The general revenue appropriated to the commission for water programs have decreased from the 2004 - 2005 amounts. This rule will enable the commission to generate enough revenue from Account 153 to support water programs with the continued level of general revenue funding. This will allow the commission to maintain its current level of service for water programs. Persons interested in viewing historical information concerning the commission's operating budget can go to a Web page entitled Where the Money Goes at <http://www.window.state.tx.us/comptrol/ expendlist/cashdrill.php>.

The commenter asked for greater detail about how the percentages were derived for each category. The fee rates for the proposed rule were based on a worst case projection requiring an additional

\$15 million annually from the CWQ fee and on the assumption that the agency would not receive any general revenue from the legislature.

The commenter asked for greater clarity regarding how the increases in fees will be distributed and how the revenue will be used. When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The revenues will be used to make up the projected shortfall in the revenue to support the agency's water programs.

The commenter requested that the commission equalize the percent increase across all wastewater categories. The commission appreciates the desire to have any increase applied equally across all classes of fee payers. In an effort to have all classes of CWQ fee payers bear generally the same percentage of the increase, rates for all of the factors were increased by an average of 56%.

Because the class of dischargers with uncontaminated flow had a greater number of fee payers at the cap, the rate for that factor increased at a greater percentage than the average. The amount applied to each factor will be determined by the annual appropriations and other costs from

Account 153 and will be applied uniformly to all permits subject to the particular factor being applied.

The commenter asked that the commission set the fee structure at fixed amounts. The ranges set for each factor provide the commission the ability to adjust CWQ fee rates to the level needed to generate enough revenue to maintain its current level of water program activities. Fee rates will be set based on appropriations made to the commission and any adjustment to the cap made by the legislature. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

The commenter asked that the commission keep the multiplier at one or remove it. The multiplier is necessary to enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier to be applied in the upcoming FY. The commission made no change in response to these comments.

Cleburne commented that without more detail and specificity in the annual requirement, the city will have to plan for the largest potential fee to be collected each year and simply hope that the commission will adopt a budget that will not require such a large annual fee. Cleburne commented that this uncertainty in cost is not something the city can, or should budget for without greater certainty. Sugar Land commented

that the change from a straight fee structure to a variable system whose only indicators are maximum potential costs, which are in turn subject to a variable multiplier, compounds existing budget issues. Sugar Land commented that this causes cities to try to budget for what are essentially moving targets. Sugar Land commented that variable fees require local governments to budget for the worst case scenario and that the opportunity costs of this process are potentially enormous as funds desperately needed for other projects are tied up for the potential worst case. Luminant commented that even if the fees are assessed at different rates from year to year, the entities that are part of the Water Quality Fee revenue stream will of necessity be forced to budget the maximum in anticipation of possible changes in the assessment. Luminant commented that this situation will not only increase their costs but will also introduce unwanted ambiguity to the ever tightening budget processes. Grandview commented that it is extremely difficult to adjust to the wide range of the possible fees. Grandview stated that as a municipality it must formulate a budget designed to meet its existing projected operation costs. Grandview stated that with a variance of up to four times the minimum to the possible maximum Grandview finds itself either under budgeting or over budgeting and imposing an unneeded increase on our rate payers. Grandview requested that the commission establish firm figures that would allow Grandview to project costs during its budget process.

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 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 biennium. The agency's overall water

fund appropriations have been relatively constant the past few FYs and it is anticipated to remain so in the future. The consistency of appropriation would enable fee payers to determine their budget before rates are released in summer. The rates would only be impacted by significant changes to appropriations to the commission for its water programs. The commission made no change in response to this comment.

Sugar Land commented that while they understand the need to adequately fund the commission's various water programs, the extent of the costs and the variability of the rate structure in the proposed rules represent a significant unfunded mandate and budgetary impediment to local governments.

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 biennium. The commission is taking action now to provide itself the flexibility to raise fees because current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue providing the same level of service for its water program activities in FY 2010 - 2011 as it is currently providing. Without the additional fee revenue, it would be required to cut water program activities. The commission made no change in response to this comment.

Luminant stated that the background for the proposed rule states that it is the intent to eliminate the fixed dollar amount applied to each factor and replace it with a "maximum amount that could be assessed."

Luminant fears and expects that the "maximum amount that could be assessed" will become the de facto rate.

The agency's authority to expend funds for its programs is limited to its appropriation authority granted by the legislature. For the CWQ, the agency replaced the fixed dollar amount with a range for each factor to enable the agency to adjust fee rates to respond to the amount of general revenue and Account 153 funds appropriated to the commission for its water programs. The amount assessed for each factor would be applied uniformly to all permits subject to the particular factor being applied. The commission made no change in response to this comment.

Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, and Ore City commented that if the rate must rise by 10% overall to generate the funding to cover the anticipated shortfall, then the burden of the 10% needed from an entity covered by an applicable cap will fall on the small utilities. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, and Ore City commented that raising the cap by less than the amount of the percent of increase only shifts the burden to the small systems to raise more.

Regarding the PHS fee the commission's goal was to make assessment of the PHS fee more equitable on a per connection basis. The commission did this by increasing the range of the second tier of the fee payers to 161 connections and by removing the formula on the third tier and replacing it with a flat cost per connection fee of up to \$2.15 per connection per year. Under this rule all utilities with 161 connections or greater will pay the same fee per connection.

Regarding the CWQ fee and WUF the cap is set in the TWC and cannot be changed without legislative action. The commission designed the fee rates to be as equitable as possible while still ensuring that the fees would generate sufficient revenue to cover the agency's revenue shortfall. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap

set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Northeast Texas MWD commented that the amendment to the formula for the WUF significantly impacts the providers in lowly-populated areas (rural) in water abundant areas. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that they believe that the small utility systems may be responsible for an inappropriately large proportion of budget funding due to the caps afforded large utilities. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that it is hard to accept why a preference would be shown to large systems to the detriment of the small systems.

The proposed WUF rate changes no longer include a price break for water right holders with larger water rights. Under the previous fee structure, larger water right holders received a lower overall fee rate per acre-foot than water right holders that were under the acre-foot threshold. The fee rate in this rule will treat all water right holders the same regardless of size.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the

previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

Additionally, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

New Ulm WSC commented that it is a very small rural community and that existing fees and assessments are already a burden to our system and having these increase will make it more of a burden. New Ulm WSC requests that there be some type of adjustment for very small utility companies. Pleasanton requested that in setting fees the commission consider the size of the entity and number of customers. Pleasanton commented that if the rates go up for the smaller entities, such as the City of Pleasanton, they should go up proportionally for the larger ones. L&L commented that it manages five small water systems and they can not afford the increases and that fee increases are not necessary at this time. L&L also commented that fees are already too high for small water and wastewater providers.

Regarding the PHS fee the commission's goal was to make assessment of the PHS fee more equitable on a per connection basis. The commission did this by increasing the range of the second

tier of the fee payers to 161 connections and by removing the formula on the third tier and replacing it with a flat cost per connection fee of up to \$2.15 per connection per year. Under this rule all utilities with 161 connections or greater will pay the same fee per connection. This eliminated the possibility of larger utilities paying only \$.11 per connection and placing a larger burden on smaller systems.

The commission has a publication, *Funding Sources for Utilities*, RG-220, that is available on-line. Additionally, the commission has a program to provide utilities with free assistance to discuss available funding sources for infrastructure repair and replacement projects. If a utility would like to participate in the agency's Financial, Managerial, and Technical Assistance Program, the utility can contact Margot Taunton at (512) 239-6403 or at mtaunton@tecq.state.tx.us. The commission made no change in response to this comment.

SAWS and the Utilities commented that it is opposed to these dramatic fee increases and believes that the large utilities will be responsible for an inappropriately large proportion of budget funding. As an example, the Utilities and Denton stated that the fiscal note with the Chapter 290 revisions states that 30 city-owned systems with more than 37,000 connections will account for \$8.2 million of the overall \$14.2 million increase in the current economic downturn and without the ability to clearly communicate an increase in public health benefits associated with the cost increase to customers. Denton believes that it will be responsible for an inappropriately large portion of budget funding.

The larger municipal utility providers account for 47% of the state's total PHS fee connections.

Under this rule the larger municipal utilities will pay a fee that is based on the number of

connections. This rule changes the complex formula that decreased the fee per connection cost as the number of connections increased. The previous formula-based system allowed the larger systems to only account for 18% of the total amount of fee assessment while serving 47% of the population. This rule simplifies the fee calculation for all water systems and does not require smaller systems to cover a higher percentage of cost in relation to larger systems. The commission made no change in response to this comment.

El Paso commented that the services it receives from the commission do not justify the level of the increase and that the commission seems to be using fees charged to big cities to cover other areas of value to the commission.

The fees in this rule are based on specific factors that are in a permit or authorization. Larger cities use more water resources and are therefore assessed more than smaller entities. The cost is being spread equally across the various fee payers based on permits or authorizations for water and wastewater.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. This statutory authority recognizes that these water-related activities benefit people across the state

and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

New Ulm asked that the commission consider not increasing the CWQ fee or the PHS fee.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, the commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws to safeguard the environment of the state. In order to carry out those tasks the commission needs to ensure that funds exist to pay for what it is required to do. The commission made no change in response to this comment.

El Paso requested that the commission lower the requested fee amount for both the CWQ fee and the PHS fee to a 100% increase over the current fees and that the commission support lowering the cap proposed in HB 1433 to a corresponding value.

The agency intends to limit the burden on fee payers to only the amount necessary to support the commission's water program activities. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from \$75,000 to \$100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of \$150,000.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Shilk commented that during bad economic times they did not agree with increasing any of the fees in the rule proposal. Shilk commented that increasing fees to encourage conservation is nothing more than a tax. Hardin County WCID commented that it does not see the value to the increased fees and that people did not have an opportunity to vote regarding the new fees which Hardin County WCID feels are hidden taxes. One individual commented that the fees are really taxes and that this is not a good time to ask for money when people's budgets are so stretched. Mayor Branson commented that the commission response to its budget shortfall of raising only three fees, converts what are now fees into taxes on the local government utility. Brownwood commented that the fact that TCEQ general revenue has declined causes utilities across the state concern because it looks like another way to increase tax revenue. Brownwood

stated that general fund revenue is generally in form of a tax. Brownwood commented that raising the consolidated water quality fee is just a hidden tax.

This rulemaking does not create a new tax; rather, it is an increase in fees that is intended to provide a portion of funding for the commission to be able to carry out its regulatory responsibilities related to its water programs. The commission selected the fees that generate sufficient revenue, represent a broad spectrum of fee payers, and provide a relatively stable stream of revenue as opposed to one that fluctuates. The fees included the CWQ fee, the WUF, and the PHS fee. The commission made no change in response to this comment.

SAWS commented that the fee increase is not balanced. SAWS gave the example of a large 100 mgd wastewater treatment plant and a one mgd wastewater treatment plant and stated that there should be a lower unit cost calculated into the fees for those efficient systems.

The CWQ fee uses many factors in determining the fee amount. The factors include flow as well as the pollutant values assigned. One of the parameters is contaminated flow measured in mgd. A higher flow under this parameter equates to a higher fee assessed. The commission made no change in response to the comment.

Brownwood commented that it is concerned that increased fees will ensure the same level of service from TCEQ. Brownwood stated that as cities all over the nation look at their budgets in tough times, they look at funding essential services and cutting other non-essential services. Brownwood commented that the TCEQ and State of Texas should do the same. Brownwood commented that one program, for example,

that is non-essential is the Industrial Pretreatment Program. Brownwood stated that utilities are already governed by a permit that sets standards for the utility's effluent discharge. Brownwood questioned why utilities that are already controlled by a permit must also have regulations to control effluent.

Brownwood stated that this program cost utilities and industries hundreds of thousands of dollars each year to regulate effluent that is not causing a problem.

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, eDMR, and automated internal processes. However, water program activities have never been the recipient of excess funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient processes, without the additional funds, it will be required to cut program activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations at public drinking water systems and wastewater treatment plants.

The commenter suggests that the commission eliminate nonessential activities and cites the Industrial Pretreatment Program as an example. The EPA delegated the pretreatment program to the commission's predecessor agency on September 14, 1998. As part of the delegation, the commission is required to operate and manage a program in accordance with 40 Code of Federal Regulations Part 403 to properly regulate publicly owned treatment works (POTWs). The

pretreatment program is to prevent the introduction of pollutants into a POTW by industrial users that may interfere with, pass through, or contaminate the sludge since POTWs are not designed to treat toxics in industrial or even some commercial waste. To address discharges from industries to POTWs, EPA established the national pretreatment program as a component of the National Pollutant Discharge Elimination System permitting program to require industrial and commercial dischargers to treat or control pollutants in their wastewater prior to discharge to POTWs to prevent serious problems. The actual requirement for a POTW to develop and implement a local pretreatment program is a condition of its Texas Pollutant Discharge Elimination System wastewater discharge permit. The commission made no change in response to this comment.

While AEP understands the need for the agency to increase fees, AEP also contends that the proposed increases are higher than necessary. At a time when businesses are under significant economic pressure and uncertainty, AEP believes that the TCEQ's development of proposed rules to increase water fees under Chapter 21 needs to involve serious consideration of possible ways to reduce the increases in the water fees that will be imposed. For example, AEP requests that the TCEQ conduct a formal audit of its water programs that are funded by Account 153 to ensure that such programs are being operated as fiscally efficient as possible.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation in addition to other increases in expenses they may be facing. Over the last several years, the agency has reviewed its water program activities and 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, eDMR, and automated internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue, it would be required to cut program activities. The commission made no change in response to this comment.

L&L suggested that TCEQ delegate some of its duties to the water conservation districts and let them regulate water quality, public health, and water use assessment. L&L commented that local control is the recommended process.

The commission does not have the authority to delegate duties to districts in the manner suggested. Additionally, water districts are only able to operate to the extent authorized under the TWC, other state statutes, or by a special act of the Texas Legislature. The TWC does not grant districts broad authority to regulate water quality, public health or water use assessment. The commission made no change in response to this comment.

Grandview commented that if the state imposes fees on local governments that the local government must either absorb or pass on to its end users then the state has created a fiscal impact. Grandview commented that it is not requiring more services from TCEQ and is quite comfortable in continuing to maintain the same fees for the same quality of service.

The current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue providing the same level of water program activities in FY 2010 - 2011. General revenue appropriations to the commission have declined from the \$51 million received in the 2004 -

2005 biennium. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. The commission made no change in response to this comment.

Fiscal Note

TML commented that the fiscal note produces an entirely new and outlandish result: no governmental action will ever impose a negative fiscal effect on any other unit of government. For example, TML stated that if the federal government were to place an unfunded mandate on the TCEQ, there would be no fiscal note because the TCEQ would simply increase fees, as it is now doing. Further, TML stated that if Congress were to place an unfunded mandate on the Texas Legislature, there would be no fiscal note because the legislature would simply raise taxes or fees paid by Texans.

The fiscal notes to the proposed rule published in the March 13, 2009, issue of the *Texas Register* stated that local governments would not see significant fiscal impacts. The commission assumed that municipal utilities would pass the cost of the increase along to its customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

TML commented that the purpose of a fiscal note is to quantify the amount of revenue that an affected unit (or units) of government would be forced to generate as the result of a proposed action. TML stated that the fiscal note in question clearly and utterly fails to do so.

The fiscal note to the proposed rule provided information on fee ranges for local government to allow them to determine their potential expenses. The fiscal note also provided local government information on estimated cost and percentages of increase along with the average increase for systems of different sizes. Additionally, the fiscal note contained similar information for businesses. Since there are approximately 10,000 fee payers affected by this rule, it is not feasible to list for each entity the specific impacts of the proposed fee rate changes. For specific information, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find contact information at the agency's water fees Web page at <http://www.tceq.state.tx.us/agency/waterfees.html>. The commission made no change in response to this comment.

§21.3, Fee Assessment.

AECT commented that at a time when businesses are under significant economic pressure and uncertainty, they believe that the TCEQ's development of proposed rules to increase water fees under §21.3 needs to involve serious consideration of possible ways to reduce the increases in the water fees that will be imposed under §21.3.

Over the last several years, the agency has reviewed its water program activities and 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, eDMR, and automated internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional funds, it will be required to cut program

activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations.

The commission reviewed all of the agency's water fees in order to determine how to meet its financial obligations for water-related activities beginning in FY 2010. The commission selected the fees that generate sufficient revenue, represent a broad spectrum of fee payers, and provide a relatively stable stream of revenue as opposed to one that fluctuates. These fees included the CWQ fee, the WUF, and the PHS fee. The commission made no change in response to this comment.

Luminant is concerned about what it considers significant and random increases proposed for the fee categories; particularly in light of the proposed increase of the multiplier found in §21.3(b)(7). Luminant commented that either separately, or especially in combination, the proposed increases to the fees and/or the multiplier will result in a significant increase in the cost of producing electricity. Luminant commented that the multiplier found in §21.3(b)(7) is unnecessary and only serves to disguise the true cost of the fees. Luminant commented that the additional proposed 1.75% increase applied by the multiplier, when combined with the proposed increase of each category, actually results in an increase in the annual wastewater fees to Luminant of 223%. Luminant commented that by any standard, this is excessive.

The commission acknowledges that the fee increases are significant but these increases are required at this time. The agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector. The multiplier is necessary to

enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY.

The proposal rates were based on the agency's projected worst case scenario that projected a \$30 million shortfall, no change from the \$75,000 cap, and that the agency would receive no general revenue.

The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

AECT commented that in §21.3(b)(7) the commission is proposing to raise the multiplier from 1.0 up to 1.75. AECT commented that a potential 75% increase in total fee could significantly increase the fee. AECT stated that the proposed rule provides that the multiplier would be applied each FY and might change annually. AECT commented that this would introduce a level of uncertainty that businesses would find onerous for the planning of their budgets and operations. This multiplier variability calls for

some phase-in or limits on annual increases in the multiplier, irrespective of the proposed fee rate increases.

The commission acknowledges that the fee increases are significant but these increases are required at this time. The agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector. The multiplier is necessary to enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY.

The proposal rates were based on the agency's projected worst case scenario that projected a \$30 million shortfall, no change from the \$75,000 cap, and that the agency would receive no general revenue. The amount of general revenue currently in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. If the Appropriations Act as currently written becomes law, the agency would be able to allocate to its water program the same amount of general revenue as in the previous biennium, \$9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The commission values the need for prior planning. 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 agency does not have an adequate fund balance in Account 153 to implement a phased-in approach for the new fee rates including the multiplier. The commission made no change in response to this comment.

TCC commented that the proposed rule language allows for a 1.75 multiplier; however, the rule language itself does not reference what constitutes a baseline for the 1.75 multiplier. TCC also commented that the proposed rule language specifies up to a maximum rate for the various specific billing attributes, as well as referencing the statute for a maximum fee. TCC stated that the 1.75 multiplier text in the proposed rule is confusing and contradictory and recommended that it should be eliminated.

Under the previous rule the multiplier was set at 1.0 which was the baseline. Under this rule, the baseline is still 1.0 but the rule allows the commission to apply a multiplier up to 1.75. The multiplier will apply to the total amount after the new fee assessments have been calculated under the new rates. The agency anticipates adjusting the multiplier only as necessary to meet an increase in obligations against Account 153. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY. The commission made no change in response to this comment.

AECT stated that most electric generation companies have made substantial investments to secure water rights in advance of the time when they will actually need the water in order to ensure that adequate water will be available for future electric generating units and for existing electric generating units during droughts. AECT commented that increasing the §21.3(c) water fees will have a negative, possibly significant, impact on the electric generation industry.

The commission acknowledges that electric generation utilities have a substantial investment in securing water rights, however, the fee rate in this rule will treat all water right holders, large or small, the same depending on type of use. While the tiered fee structure for higher volume water usage was eliminated, the fee for water rights for hydropower purposes was reduced under this rulemaking. 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 sector. The commission made no change in response to this comment.

§290.51, Fees for Services to Drinking Water System.

Bethesda WSC is against the proposed TCEQ increase for PHS fees. Currently water utilities are burdened with additional water chemical sampling costs and other mandated programs. Given the extremity of this statute the TCEQ should allow "regulatory fees" assessments as a line item on customer billing.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation in addition to other increases in expenses they may be facing. However, without additional revenue from this fee increase, the agency would not be able to continue its same

level of water program activities. 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.

Whether the commission is exercising its original jurisdiction over an IOU or its appellate jurisdiction over a water supply corporation the commission has rules that govern what can be charged in the utility's rate and what can be listed on the utility bill. Section 291.76(b) requires a utility service provider which provides potable water or sewer utility service to collect a regulatory assessment from each retail customer and remit the fee to the commission. Section 291.76(g) allows a utility service provider to include the assessment as separate line item on a customer's bill or include it in the retail charge. Section 291.31 allows a utility to charge reasonable and necessary expenses to rendering service to rate payers. The commenter mentions sampling costs as an expense for the utility. Section 291.21(k)(2)(A) allows the utility to collect a surcharge for sampling fees not already included in the utility's rate. The commission made no change in response to this comment.

§21.3

STATUTORY AUTHORITY

The amendment is adopted 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 use of fees collected for deposit to the water resource management account; §26.011, which requires the commission to control water quality in the state; §26.0135, which directs the commission to apportion, assess, and recover reasonable costs of administering the water quality management program under that section; §26.0291, which establishes a water quality fee and water use fee for wastewater permit holders and water rights holders; and, §26.0292, which addresses the manner in which the commission assesses fees for aquaculture facilities.

The adopted amendment implements TWC, §§26.011, 26.0135, 26.0291, and 26.0292.

§21.3. Fee Assessment.

(a) The fee calculation is based on the authorized limits contained in wastewater permits and water rights as of September 1 each year, without regard to the actual amount or quality of effluent discharged or the actual amount of water used.

(b) Assessment for wastewater permits.

(1) An annual fee is assessed against each person holding a wastewater permit. A separate fee is assessed for each wastewater permit.

(2) The maximum fee which may be assessed any permit, including an aquaculture permit, is the amount, if any, set forth in Texas Water Code, Chapter 26 [\$75,000, except that the maximum for an aquaculture permit is \$5,000]. The minimum fee for an active permit is \$1,250 [\$800]. The minimum fee for an inactive permit is \$620 [\$400].

(3) In assessing a fee under this chapter, the commission considers the following factors:

(A) flow volume, and type;

(B) traditional pollutants;

(C) toxicity rating;

(D) storm water discharge;

(E) major designation;

(F) active or inactive status;

(G) discharge or retention;

(H) the designated uses and ranking classification of waters affected by waste discharges; and

(I) the costs of administering the following commission programs:

(i) water quality administration, including inspection of waste treatment facilities and enforcement of the provisions of Texas Water Code (TWC), Chapter 26, the rules and orders of the commission, and the provisions of commission permits governing waste discharges and waste treatment facilities;

(ii) the Texas Clean Rivers Program, under TWC, §26.0135, which monitors and assesses water quality conditions that support water quality management decisions necessary to maintain and improve the quality of the state's water resources (as defined in TWC, §26.001(5)).

(4) For the purpose of fee calculation, chemical oxygen demand (COD) and total organic carbon (TOC) are converted to biochemical oxygen demand (BOD) values and the highest value is used for fee calculation. The conversion rate for TOC is three pounds of TOC is equal to one pound of BOD (3:1). The conversion rate for COD is eight pounds of COD is equal to one pound of BOD (8:1).

(5) Fee rate schedule. Except as provided in paragraph (6) of this subsection, the fee shall be determined as the sum of the following factors:

(A) contaminated flow, an amount up to a maximum of \$1,090 [\$700] per million gallons per day (mgd);

(B) uncontaminated flow, an amount up to a maximum of \$18 [\$10] per mgd;

(C) traditional pollutants, an amount up to a maximum of \$23 [\$15] per pound per day;

(D) toxic rating for industrial discharges:

(i) Group I, an amount up to a maximum of \$310 [\$200];

(ii) Group II, an amount up to a maximum of \$1,090 [\$700];

(iii) Group III, an amount up to a maximum of \$1,640 [\$1,050];

(iv) Group IV, an amount up to a maximum of \$2,460 [\$1,575];

(v) Group V, an amount up to a maximum of \$4,910 [\$3,150]; and

(vi) Group VI, an amount up to a maximum of \$9,830 [\$6,300];

(E) major permit designation, an amount up to a maximum of \$3,120 [\$2,000];

and

(F) storm water authorization, an amount up to a maximum of \$780 [\$500].

(6) For the types of permits listed in this paragraph, these additional guidelines will apply in determining the fee assessment.

(A) Land application (retention) permits. The fee assessed a land application permit shall be 50% of that calculated under paragraph (5) of this subsection. However, in no event shall the fee for an active land application permit be less than \$1,250 [\$800] per year.

(B) Inactive permits. The fee assessed an inactive permit shall be 50% of that calculated under paragraph (5) of this subsection. In the event an inactive permit is for a land application operation, the fee assessed shall be 25% of that calculated under paragraph (5) of this subsection. However, in no event shall the fee for an inactive permit be less than \$620 [\$400] per year.

(C) Storm water only permits. The fee for an active permit which authorizes discharge of storm water only, with no other wastewater, is an amount up to a maximum of \$780 [\$500].

(D) Aquaculture permits.

(i) In determining the flow volume to be used in fee calculation for an aquaculture production facility under paragraph (5) of this subsection, the flow for the facility shall be the facility's permitted annual average flow, or the facility's projected annual average flow if the permit does not have an annual average flow limitation.

(ii) If the facility's permit does not have an annual average flow limitation, the facility's projected annual average flow for the upcoming period from September 1 to August 31 shall be submitted to the executive director by June 30 preceding the fee year and shall be signed and certified as required by §305.44 of this title (relating to Signatories to Applications), and that amount will be used for fee calculation.

(iii) The **maximum** annual fee for aquaculture production facilities is the amount, if any, set forth in TWC, Chapter 26 [shall not exceed \$5,000].

(7) A multiplier may be applied to adjust the total fee per permit, which would also adjust the total assessment for all permits under the Water Quality Fee Program. The multiplier will be an amount up to a maximum of 1.75. As part of the approval of the annual operating budget, the executive director shall report to the commission the multiplier that will be applied for the upcoming fiscal year.

[At the time of initial implementation, the multiplier is set at 1.0, with no impact on the fees.]

(c) Assessment for water rights.

(1) An annual fee is assessed against each person holding a water right, except for those exemptions specified in this section. A separate fee is assessed for each water right. These fees do not apply to water uses, including domestic and livestock use, which are exempt from the need for authorization from the commission under TWC, Chapter 11.

(2) This fee will apply to all municipal or industrial water rights, or portions thereof, not directly associated with a facility or operation which is assessed a fee under subsection (b) of this section, and to all other types of water rights except agriculture water rights and certain hydroelectric water rights described in paragraph (5) [(6)] of this subsection.

(3) The fee for each water right authorizing diversion of more than 250 acre-feet per year for consumptive use shall be \$.385 [\$.22] per acre-foot [up to 20,000 acre-feet, and \$.08 per acre-foot thereafter].

(4) An authorization to impound water will be assessed a fee only when there is no associated consumptive use authorized, and then the fee will be calculated at the nonconsumptive rate described in paragraph (5) of this subsection.

(5) The fee for water rights for non-consumptive use above 2,500 acre feet per year, including hydropower purposes, shall be \$.021 per acre-foot. The fee shall not be assessed against a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts.

[(5) Except for water rights for hydropower purposes, the fee shall be \$.021 per acre-foot for water rights for non-consumptive use above 2,500 acre-feet per year, up to 50,000 acre-feet, and \$.0007 per acre-foot thereafter.]

[(6) The fee for water rights for hydropower purposes shall be \$.04 per acre-foot per year up to 100,000 acre-feet, and \$.004 per acre-foot thereafter. This fee shall not be assessed against a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts.]

(6) [(7)] Water which is authorized in a water right for consumptive use, but which is designated by a provision in the water right as unavailable for use, may be exempted from the assessment of a fee under paragraph (3) of this subsection.