

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts amendments to §305.502, Definitions and Abbreviations, and §305.503, Fee Assessment. Section 305.503 is adopted *with changes* to the proposed text as published in the April 7, 2000 issue of the *Texas Register* (25 TexReg 2969). Section 305.502 is adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted amendments incorporate recent legislative changes impacting fees for aquaculture production facilities. Senate Bill (SB) 873, 76th Legislature, 1999, added §26.0292 to the Texas Water Code (TWC) which directs that combined fees for the waste treatment inspection program and the Clean Rivers Program may not total more than \$5,000 in any year. Prior to adoption, annual waste treatment inspection fees for industrial dischargers, including aquaculture facilities, were established with a cap not to exceed \$25,000.

The commission adopts amendments to §305.503 to include a provision, in subsection (g)(3), capping the waste treatment inspection fee for aquaculture production facilities at \$5,000. Currently, no fee is assessed for aquaculture facilities for the Clean Rivers Program, under 30 TAC §220.21(d). The commission determined that because the number of aquaculture facilities with active individual wastewater discharge permits is relatively small, the amount of funds that would be collected by the Clean Rivers Program through a redistribution of the fees for aquaculture production facilities is insignificant. Therefore, the Clean Rivers Program fee for aquaculture facilities will remain at zero, and the waste treatment inspection fee was set so as not to exceed \$5,000 annually.

SB 873 also directs that the commission by rule provide that fees charged among aquaculture facilities be reasonably assessed according to the pollutant load of the facility. The current fee rate schedule is based in part upon the assignment of “points” as a measure of pollutant potential, flow volume, contamination, and pollutant parameters (e.g. ammonia, suspended solids, oxygen demand, etc.). Under the adopted

rules, fees for aquaculture facilities will continue to be assessed according to this point system. A separate fee rate schedule was not proposed for aquaculture facilities because pollutant loadings and pollutant potential from these facilities were not determined to be significantly different than those from many other industries for which fees are calculated. In order to distribute the waste treatment inspection fee more proportionately among aquaculture facilities, the adopted rule, in §305.503(g)(3), provides that in determining the flow volume points for a facility, the flow for the facility shall be the permitted annual average flow for the facility or, if the facility's permit does not have an annual average flow limitation, the flow shall be the projected annual average flow for the facility. The projected annual average flow, for the period from September 1, 2000 to August 31, 2001, for a facility that does not have an annual average flow permit limitation shall be submitted to the executive director by November 1, 2000 and shall be signed and certified as required by 30 TAC §305.44. In subsequent years, 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 and shall be signed and certified as required by §305.44. This change will lower the waste treatment inspection fee for those facilities that only discharge a limited number of days per year, which is typical for certain types of aquaculture production facilities.

SECTION BY SECTION DISCUSSION

Adopted §305.502 added a definition for aquaculture production facilities, corrected typographical errors, incorporated minor style changes for consistency with the *Texas Register* format, and improved readability.

Adopted §305.503 was revised to cap the annual waste treatment inspection fee for aquaculture production facilities at \$5,000. Adopted §305.503 was also revised to provide that in determining flow volume points for aquaculture production facilities, the flow for the facility shall be the annual average flow for the facility or, if the facility's permit does not have an annual average flow limitation, the flow

shall be the projected annual average flow for the facility. The projected annual average flow, for the period from September 1, 2000 to August 31, 2001, for a facility that does not have an annual average flow permit limitation shall be submitted to the executive director by November 1, 2000 and shall be signed and certified as required by §305.44. In subsequent years, if the facility's permit does not have an annual average flow, 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 and shall be signed and certified as required by §305.44. In addition, the amendment included minor style changes for consistency with the *Texas Register* format and to improve readability.

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 is not subject to §2001.0225 because it does not meet the definition of "major environmental rule." The specific intent of this rulemaking was to designate the maximum amount of waste treatment inspection fees that may be charged to aquaculture production facilities. The specific purpose of the fee is to help pay the expenses of the TNRCC in inspecting waste treatment facilities and enforcing the laws of the state and rules of the commission governing waste discharges and waste treatment facilities. The adopted rules will not impact substantive requirements for aquaculture production facilities so there will be no material effect on the items listed in the definition. In addition, the rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a), in that the waste treatment inspection fees are specifically required by TWC, §26.0292; the amendments do not exceed any express requirements of state law; and the amendments do not involve any delegation agreements or contracts.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking was

to implement provisions of legislation, SB 873, that place a cap on fees that may be assessed on aquaculture production facilities. The legislation directs the commission to limit fees charged to aquaculture production facilities for the waste treatment inspection program and Clean Rivers Program to no more than \$5,000 total in any one year. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because most aquaculture facilities will realize a cost savings as a result of the amendments.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking and found that the proposal is a rulemaking subject to the Texas Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission prepared a consistency determination for this rule pursuant to 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). CMP policies applicable to the rules include the following: 1) discharges in the coastal zone shall comply with water-quality-based effluent limits; 2) discharges in the coastal zone that increase pollutant loadings to coastal waters shall not impair designated uses of coastal waters and shall not significantly degrade coastal water quality unless necessary for important economic or social development; and 3) to the greatest extent practicable, new wastewater outfalls shall be located where they will not adversely affect critical areas. Promulgation and enforcement of the rules will be consistent with the applicable CMP goals and policies because the rule amendments will require that the combined total of waste treatment inspection fees and Clean Rivers fees charged to aquaculture facilities cannot exceed \$5,000. These amendments will not adversely affect the applicable CMP goals which are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, because the amendments are not substantive in nature but rather only affect the amount of fees charged

aquaculture production facilities. In addition, the rules do not violate any applicable provisions of the CMP's stated goals and policies.

HEARINGS AND COMMENTERS

The public comment period closed May 8, 2000. A public hearing was not held. Written comments were received from Fred B. Werkenthin, Jr. representing the Texas Aquaculture Association (TAA). The TAA generally opposed the rulemaking in its current form and suggested significant changes to the rulemaking as stated in the ANALYSIS OF TESTIMONY section of this preamble.

ANALYSIS OF TESTIMONY

The TAA stated that the proposed rulemaking failed to meet the legislative intent of SB 873 of having the fees proportionally assessed among various aquaculture facilities. Additionally, TAA stated that the proposal would result in many aquaculture facilities of various sizes paying fees at or near the \$5,000 cap. The TAA expressed that a different methodology for calculating fees is appropriate. For example, TAA stated that TNRCC should develop a methodology in which the largest facility would be charged \$5,000 in fees; a facility one-half its size would pay about \$2,500. The TAA requested that the commission consider two different ways of calculating fees for aquaculture facilities. One method would be based on actual flow; the other based on pond size under production.

The commission agrees in part with this comment. The commission agrees that the proposed rulemaking failed to meet the legislative intent of SB 873 by failing to provide that the wastewater treatment inspection fee assessed after the effective date of the proposed rules would be reasonably proportional among aquaculture production facilities. Under the proposed rules, fees for an aquaculture production facility would have been calculated under the same methodology as for other facilities. Under that methodology, the flow volume points used, in part, to calculate the fee, is based upon the permitted flow from the facility, either the daily average flow or annual average

flow. All permitted aquaculture production facilities currently have a daily average flow limitation. Due to the seasonal nature of most types of aquaculture production facilities, in which discharges are normally made from the facility only during certain times of the year, an annual average flow limitation would result in a lower flow limitation and, therefore, a lower assessed fee. Under the proposed rulemaking, the fees assessed aquaculture facilities would have been made reasonably proportional among the facilities by using the permitted annual average flow limitation for the facilities to calculate the fees only after the permits were amended to include an annual average flow limitation. During the interim, the fee calculation would have been based on the existing methodology using the permitted flow from the facility which, for all permitted aquaculture facilities, is a daily average flow. This would have generally resulted in a higher and less proportional fee than if an annual average flow were used in determining the fee.

Therefore, in order to provide for the reasonably proportional assessment of fees among aquaculture facilities after the effective date of the rules, the adopted rules provide that in order to determine the flow volume points used, in part, to calculate the waste treatment inspection fee, the flow for the facility shall be the permitted annual average flow or, if the facility's permit does not have an annual average flow limitation, the flow for the facility shall be the projected annual average flow for the facility. The adopted rules also provide that the projected annual average flow, for the period from September 1, 2000 to August 31, 2001, for a facility that does not have an annual average flow permit limitation shall be submitted to the executive director by November 1, 2000 and shall be signed and certified as required by §305.44. In subsequent years, 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 and shall be signed and certified as required by §305.44. This will ensure that wastewater treatment inspection fees assessed after the effective date of the adopted rules are

reasonably proportional among aquaculture production facilities without requiring the facilities to take any action to amend their permits.

The commission does not agree that implementation of SB 873 requires that the assessment of wastewater treatment inspection fees must be entirely proportional so that the largest facility should be assessed \$5,000 in fees and a facility one-half its size should be assessed \$2,500 in fees.

The TWC, §26.0292(c), enacted by SB 873, provides that the commission must provide that “among aquaculture facilities, the fees charged under this section are reasonably assessed according to the pollutant load of the facility.” The statute does not require exact proportionality according to the size of the facility but rather requires that among aquaculture facilities the fees must be reasonably assessed according to the pollutant load of the facility. The fee calculations made under §305.503 are based upon a schedule that takes into account the pollutant load (oxygen demand, total suspended solids, ammonia nitrogen) of an aquaculture production facility along with other factors such as flow and the type and size of the facility. This generally results in higher fees for facilities with higher pollutant loads. While this fee calculation schedule may not result in exact proportionality based upon the size of a facility, it results in a reasonably proportional assessment according to the pollutant load amongst the facility.

The commission disagrees that fees for aquaculture production facilities should be based on pond size under production. Production pond acreage is not a good representation of pollutant load because larger pond acreage does not necessarily coincide with larger discharges or pollutant load especially if the facility recycles a large portion of the water in its ponds. Instead the fee should be based upon the annual average flow from the facility, either the permitted annual average flow, or if there is no permitted annual average flow, the projected annual average flow for the facility. The annual average flow from the facility is a better indicator of the pollutant load from the facility than the pond sizes under production.

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.102, which provides the commission with general powers to carry out duties under the TWC and §§5.103, 5.105, and 5.120, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state and to establish and approve all general policies of the commission.

Additionally, these amendments are adopted under TWC, §26.0291 and §26.0292, which provide the commission with the authority to impose an annual waste treatment inspection fee on permittees and require the commission to cap fees for aquaculture facilities at \$5,000 per year.

SUBCHAPTER M: WASTE TREATMENT INSPECTION FEE PROGRAM

§305.502, §305.503

§305.502. Definitions and Abbreviations.

(a) **Definitions.** The definitions contained in the Texas Water Code, §26.001, shall apply herein. The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) **Annual waste treatment fee** - A fee charged to each permittee holding a permit or otherwise authorized to treat or discharge wastewater under the Texas Water Code, Chapter 26.

(2) **Aquaculture production facility** - An establishment engaged in the propagation and/or rearing of aquatic species which utilizes ponds, lakes, fabricated tanks and raceways, or other similar structures.

(3) **Biomonitoring** - The determination of total (whole-effluent) toxicity of permitted discharges as required by and consistent with the provisions of §307.1(d) of this title (relating to General Policy Statement).

(4) **Commission** - The Texas Natural Resource Conservation Commission.

(5) **Flow limit** - The maximum amount of wastewater discharge authorized during any term of the permit, expressed as a daily average flow, a daily maximum flow, an annual average, or an annual maximum.

(6) **Flow** - The total by volume of all wastewater discharges authorized under a permit expressed as an average flow per day, a maximum flow per day, an annual average, or an annual maximum, exclusive of variable or occasional stormwater discharges. Generally, the flow is based on the sum of the volumes of discharge for all outfalls of a facility, but excludes internal outfalls. However, for those facilities for which permit limitations on the volumes of discharge apply only to internal outfalls, the flow is based on the sum of the volumes of discharge for all internal outfalls of the facility, exclusive of variable or occasional stormwater discharges.

(7) **Flow volume** -

(A) **Type I** - These wastewaters include sanitary wastewater, process wastewater flows, or any mixed wastewaters containing more than 10% process wastewaters;

(B) **Type II** - These wastewaters include non-contact cooling water or mixed flows which contain at least 90% non-contact cooling water and not more than one million gallons per day of process wastewater.

(8) **Fund** - The water quality fund.

(9) **Heat load parameter** - The temperature limitation specified in a permit. For purposes of assessing the waste treatment fee, points are assigned according to the existence of a temperature limitation within a waste discharge permit.

(10) **Inactive permit** - A permit which authorizes a waste treatment facility, but where the facility itself is not yet operational or where operation has been suspended.

(11) **Land application/evaporation permit** - A permit which does not authorize the discharge of wastewaters into surface waters in the state. These permits include, but are not limited to, permits for evaporation ponds and irrigation systems.

(12) **Major permit** - A permit designated as a major permit, in conformance with applicable EPA guidance documents, by either EPA or the commission and subject to provisions of National Pollutant Discharge Elimination System (NPDES) or Texas Pollutant Discharge Elimination Systems (TPDES) permit authority, respectively.

(13) **Parameter** - A variable which defines a set of physical properties whose values determine the characteristics of a waste discharge. Those parameters to be considered under the waste treatment facility fee are:

(A) pollutant potential;

(B) flow volume;

(C) biochemical oxygen demand (BOD)/chemical oxygen demand (COD)/total organic carbon (TOC) value;

(D) total suspended solids (TSS) value;

(E) ammonia value;

(F) heat load; and

(G) major/minor designation.

(14) **Payment** - Receipt by the commission of the full amount of the annual waste treatment fee.

(15) **Permit** - Any permit issued by the Texas Natural Resource Conservation Commission under authority of the Texas Water Code, Chapter 26, including those permits issued under the authority of both the Texas Water Code, Chapter 26, and other statutory provisions (such as the Health and Safety Code, Chapter 361). For the purpose of this subchapter, the term "permit" shall include any other authorization for the treatment or discharge of wastewater, including permits by rule.

(16) **Pollutant potential** - A rating assigned to a permit based on:

(A) for industrial permits, the source(s) of wastewater, the Standard Industrial Classification of the facility and the specific type of operation; or

(B) for domestic permits, an authorized flow of greater than 1.0 million gallons per day (mgd) and/or the existence of biomonitoring requirements or toxic numerical discharge limits.

(17) **Report only permit** - A permit which authorizes the variable or occasional discharge of wastewaters with a requirement that the volume of discharge be reported but without any limitation on the volume of discharge.

(18) **Stormwater outfall or permit** - A permit or outfall(s) which authorizes the variable or occasional discharge of accumulated stormwater and stormwater runoff, but without any specific limitation on the volume of discharge.

(19) **Toxicant numerical limit** - A permit discharge limit established for any toxicant identified or otherwise defined in accordance with the provisions of §307.6 of this title (relating to Toxic Materials).

(20) **Traditional pollutants** - The wastewater parameters typically found in wastewater discharge permits, specifically BOD/COD/TOC, TSS, and ammonia. For purposes of assessing the waste treatment fee, points are assigned to these parameters if they are included in a permit.

(b) Abbreviations. The following abbreviations apply to these sections.

(1) BOD - Biochemical oxygen demand.

(2) COD - Chemical oxygen demand.

(3) mgd - Million gallons per day.

(4) Mg/l (milligrams per liter) - All limits measured in mg/l are converted to pounds per day (lb/day) using the following conversion: mg/l multiplied by the flow volume in mgd multiplied by 8.34 equals lb/day.

(5) SIC - Standard Industrial Classification(s) assigned to a facility generating wastewater.

(6) TNL - Toxicant numerical limit.

(7) TOC - Total organic carbon.

(8) TSS - Total suspended solids.

§305.503. Fee Assessment.

(a) An annual waste treatment fee is assessed against each person holding a permit or other authorization issued under the authority of the Texas Water Code, Chapter 26. The amount of the fee is determined by specific permit parameters for which a facility is authorized as of each September 1. The maximum fee which may be assessed each permit is \$11,000, except that for Texas Pollutant Discharge Elimination Systems (TPDES) permits, the maximum fee which may be assessed is \$25,000.

(b) In assessing a fee, the commission may consider the following parameters for each permit:

(1) pollutant potential;

(2) flow volume;

(3) traditional pollutants;

(4) heat load;

(5) major/minor designation;

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

(7) the costs of obtaining and administering the TPDES program, upon delegation by the EPA.

(c) Except as provided in subsections (g) and (j) of this section, the commission shall assign a point value to each of the permit parameters in subsection (b) of this section. The assigned value(s) shall be weighted according to the specific permit limits and the weighted values summed. The sum of the variable point values under subsection (f) of this section and the set values established under subsection (g) of this section are multiplied by the current fee rate under subsection (h) of this section to determine the fee to be assessed.

(d) 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 higher value is assessed points. The conversion for TOC is three pounds of TOC is equal to one

pound of BOD (3:1). The conversion for COD is eight pounds of COD is equal to one pound of BOD (8:1).

(e) For the purpose of fee calculation, a permit which authorizes a secondary treatment system consisting of ponds or lagoons at limits of 30 milligrams per liter (mg/l) BOD and 90 mg/l total suspended solids (TSS) shall be assumed to be equivalent to 20 mg/l BOD and 20 mg/l TSS. This equivalency is based on treatment provided by different types of secondary treatment systems.

(f) Fee rate schedule. Except as provided in subsection (g) of this section, each permit shall be assessed a fee based on the specific parameters assigned to the permit and determined by the following schedule. Each permit shall be reviewed to determine the individual values for the parameters covered by this schedule.

(1) Pollutant potential

(A) Industrial discharges: Group I = 2 Points; Group II = 10 Points; Group III = 15 Points; Group IV = 20 Points; Group V = 30 Points; Group VI = 40 Points.

(B) Domestic discharges: Group I (less than 1.0 mgd, no biomonitoring or toxicant numerical limit) = 2 Points; Group II (greater than or equal to 1.0 mgd and/or biomonitoring, but no toxicant numerical limit) = 10 Points; Group III (toxicant numerical limit) = 15 Points.

(C) Evaporation/land application permits with a toxic rating of I will be assessed only one point for pollutant potential. Pollutant potential points = _____.

(2) Flow volume.

(A) Type I:

Figure: 30 TAC §305.503(f)(2)(A) (No change.)

æ.05 mgd = 4 points
>.05 but æ.25 = 7 points
>.25 but æ 2 = 14 points
> 2 but æ 4 = 28 points
> 4 but æ 6 = 46 points
> 6 = 72 points

(B) Type II:

Figure: 30 TAC §305.503(f)(2)(B) (No change.)

æ 1 mgd = 3 points
> 1 but æ 5 = 10 points
> 5 but æ 10 = 20 points
> 10 but æ 50 = 30 points
> 50 but æ 500 = 40 points
> 500 mgd = 50 points

(C) Flow volume points = _____.

(3) Traditional pollutants.

(A) Oxygen demand. (COD and TOC limits are converted to BOD values and the higher value is used).

Figure: 30 TAC §305.503(f)(3)(A) (No change.)

æ 50 lb/day = 1 point
> 50 but æ 100 = 5 points
> 100 but æ 250 = 10 points
> 250 but æ 500 = 20 points
> 500 but æ 750 = 30 points
> 750 but æ 1000 = 40 points
> 1000 but æ 3000 = 60 points
> 3000 lb/day = 80 points
Oxygen Demand Points = _____

(B) Total suspended solids.

Figure: 30 TAC §305.503(f)(3)(B) (No change.)

æ 50 lb/day = 1 point
> 50 but æ 100 = 5 points
> 100 but æ 250 = 10 points
> 250 but æ 500 = 20 points
> 500 but æ 750 = 30 points
> 750 but æ 1000 = 40 points
> 1000 but æ 3000 = 60 points
> 3000 lb/day = 80 points

Total Suspended Solids = _____

(C) Ammonia.

Figure: 30 TAC §305.503(f)(3)(C) (No change.)

æ 250 lb/day = 0 points
> 250 but æ 500 = 10 points
> 500 but æ 1000 = 20 points
> 1000 but æ 3000 = 30 points
> 3000 lb/day = 40 points
Ammonia Points = _____

(4) Heat load. If heat loading parameter is not present = 0 points; if heat loading parameter is present = 10 points. Heat Load Points = _____.

(5) Major/minor designation: EPA minor facility = 0 points; EPA major facility = 10 points. Major Facility Points = _____.

(g) Set point permits. The following fees are assessed for permits to which the parameters under subsection (f) of this section are not applicable.

(1) Evaporation/land application permits.

Figure: 30 TAC §305.503(g)(1) (No change.)

Industrial Discharges = 5 points

Domestic Discharges
< .1 mgd = 4 points
Æ .1 mgd = 10 points

(2) Report only or stormwater outfall(s) and permits—12 points. Stormwater permit outfalls for which flow discharge parameters have been established shall be assessed a fee under subsection (f) of this section. Set points = ____.

(3) Aquaculture production facility discharge permits. In determining the flow volume points for an aquaculture production facility under subsection (f)(2) of this section, 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. If the facility's permit does not have an annual average flow limitation, the facility's projected annual average flow for the 12-month period from September 1, 2000 to August 31, 2001, shall be submitted to the executive director by November 1, 2000 and shall be signed and certified as required by §305.44 of this title (relating to Signatories to Applications). In subsequent years, 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 and shall be signed and certified as required by §305.44 of this title. The annual fee for aquaculture production facilities shall not exceed \$5,000.

(h) The annual fee to be assessed is calculated by multiplying the total points determined under subsections (f) and (g) of this section by the rate of \$75 per point. Permits having both process wastewater discharges assessed under subsection (f) of this section and stormwater discharges assessed under subsection (g) of this section shall be assessed the total of the fees determined under the respective subsections, not to exceed the maximum fee under subsection (a) of this section.

(i) The fee assessed an inactive permit shall be 50% of that calculated under subsection (f) and subsection (g) of this section. In no event shall the fee for an inactive permit be less than \$150 per year.

(j) Upon delegation of the National Pollutant Discharge Elimination System, a fee shall be determined by multiplying the base fee provided by subsection (c) of this section by a factor not to exceed 2.3. The minimum fee shall not be less than \$150 more than the pre-existing fee. This subsection shall not apply to domestic wastewater treatment facilities or confined/concentrated animal feeding operations until August 31, 1999.