

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** October 29, 2010

Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

John Sadlier, Deputy Director
Office of Compliance and Enforcement

Docket No.: 2010-1382-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 213, Edwards Aquifer
Chapter 311, Watershed Protection
Discharge of Pesticides into, Over or Near the Highland Lakes and in Areas Over
the Edwards Aquifer
Rule Project No. 2010-055-311-OW

Background and reason(s) for the rulemaking:

On September 9, 2010, the Texas Parks and Wildlife Department submitted a petition for rulemaking which requested an exemption for discharges associated with pesticide applications authorized by the commission or exempted from permit requirements by federal or state statutes from discharge prohibitions currently found in 30 TAC Chapter 213, Subchapters A and B and in 30 TAC Chapter 311, Subchapters A, B, and F. On November 3, 2010, the commission recommended approval of the petition for rulemaking.

A recent decision from the Sixth Circuit Court of Appeals overturned the United States Environmental Protection Agency's rule which provided that National Pollutant Discharge Elimination System (NPDES) permits were not required for pesticide applications into, over, or near waters of the United States (National Cotton Council of America v. U.S. EPA, 553 F.3d 927). As a result of the Sixth Circuit Court of Appeals decision and because Texas is a delegated state, the discharge of pesticides must now be regulated through the Texas Pollutant Discharge Elimination System (TPDES). By court order, applications of pesticides into, over, or near water in the United States must be authorized under the NPDES program by April 9, 2011. Currently, because the discharge of pesticides is not a point source, Chapters 213 and 311 allows the application of pesticides. However, on April 9, 2011, pesticide application will be prohibited within the Highland Lakes and Edwards Aquifer recharge, contributing and transition zones.

Scope of the proposed rulemaking:

The Office of Compliance and Enforcement (OCE) and the Office of Water are proposing the addition of Subchapter C to Chapter 213 and Subchapter I to Chapter 311, authorizing the application of pesticides within the Highland Lakes and Edwards Aquifer recharge, contributing, and transition zones. Both Chapters 213 and 311 currently contain discharge prohibitions or areas where increased pollutant load is prohibited. Pesticide usage is required for the continued protection of human health and the environment.

A) Summary of what the rulemaking will do:

This proposed rulemaking will add Subchapter C to Chapter 213 and add Subchapter I to Chapter 311. The new subchapters will allow the continued use of pesticides in areas where discharges or increases in pollutant loading will be prohibited after April 9, 2011.

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B) Scope required by federal regulations or state statutes:

The proposed new subchapters are not required by any federal regulations or state statutes.

C) Additional staff recommendations that are not required by federal rule or state statute:

The proposed new subchapters are recommended by staff.

Statutory authority:

- Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state;
- TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction;
- TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013;
- TWC, §7.002, which authorizes the commission to enforce provisions of the TWC;
- TWC, §26.046, which authorizes the commission to hold hearings on the protection of the Edwards Aquifer from pollution;
- TWC §26.121 prohibits unauthorized discharges into or adjacent to water in the state;
- TWC §26.401 states the goal for groundwater protection in the state;
- TWC §28.011 authorizes the commission to make and enforce rules for the protection and preservation of groundwater quality;
- 30 TAC Chapter 213, which regulates activities over the Edwards Aquifer; and
- 30 TAC Chapter 311 which regulates activities over certain watersheds.

Effect on the:

A) Regulated community: The regulated community includes persons attempting to control pests in, over, or near waters of the United States for nuisance, public health, or other purposes in the Highland Lakes or Edwards Aquifer recharge, contributing and transition zones. Examples of individuals or public entities include the general public, state and federal agencies responsible for pest management, businesses responsible for pesticide application, and homeowners associations that apply pesticides. Additionally, public water supply systems could also be affected. This rulemaking will allow the regulated community to continue to apply pesticides in these areas after April 9, 2011 upon commission authorization. No fiscal impact is anticipated from this rulemaking.

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B) Public: Failure to add the proposed new subchapters would prohibit the discharge of pesticides into, over, or near waters of the United States within the Highland Lakes and Edwards Aquifer recharge, contributing and transition zones after April 9, 2011. The inability to control pests could impact public health by preventing mosquito control, restricting recreational activities on the lakes due to invasive aquatic vegetation or invasive animals, restrict state and federal agencies from administering programs within their jurisdiction, restrict water flow volumes due to invasive aquatic vegetation, and increase the potential for public water supply systems to experience taste and odor problems due to excessive vegetation and algae. No fiscal impact to the public is anticipated as pesticides are currently applied in the affected areas.

C) Agency programs: Currently, pesticide applications are not defined as discharges and are allowed within the Highland Lakes and the Edwards Aquifer recharge, contributing, and transition zones so long as they are conducted in accordance with the Federal Insecticide, Fungicide and Rodenticide Act. These pesticide applications do not require any interaction between the applicators, landowners, and the TCEQ, so no impact to agency programs from this proposed rulemaking is expected.

However, authorizations for the application of pesticides under the TPDES program will significantly impact the Water Quality Division by increasing the number of authorizations to process and could also impact OCE by requiring development of investigation protocols, checklists, and reports, as well as possible enforcement of noncompliance with both the TPDES pesticide requirements and the Edwards Aquifer Protection Program.

Stakeholder meetings:

No stakeholder meetings are planned.

Potential controversial concerns and legislative interest:

This proposed rulemaking is recommended for the continued protection of human health and the environment through the use of pesticides. With pesticide application being designated a point source discharge subject to regulation under the NPDES and TPDES program; this proposed rulemaking may be viewed as allowing a discharge over known sensitive areas, the Edwards Aquifer and the Highland Lakes, where discharges or increases in pollutant loading are currently prohibited.

Will this rulemaking affect any current policies or require development of new policies?

No new policies will need to be developed nor will current policies be affected.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If this proposed rulemaking does not go forward the result would be that, effective April 9, 2011, it would be illegal to apply pesticides in areas specified in Chapters 213 and 311 which have a discharge and pollutant load increase prohibition, subjecting the public and the environment to risks associated with the proliferation of pest species.

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Key dates in the proposed rulemaking schedule:

Anticipated proposal date: November 18, 2010
Anticipated *Texas Register* publication date: December 10, 2010
Public hearing date (if any): January 6, 2011
Public comment period: December 10, 2010 - January 14, 2011
Anticipated adoption date: March 9, 2011

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Attachments

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