

Stakeholder Meetings on Changes to the Edwards Aquifer Protection Program Written Comments Received

August 10, 2006:

- The “New Edwards Enforcement Policy” should be considered with the overall Penalty Policy when it is promulgated as a rule in compliance with applicable law and consistent with Commission directive.
- The “New Edwards Enforcement Policy” is inconsistent with the overall Penalty Policy and conclusions from the Enforcement Process Review, particularly as it relates to treatment for small and micro businesses.
- Regional staff with knowledge of the Edwards program often provide direction and input which conflicts with direction and input from the Enforcement staff in the Central Office – regulated entities pay the price for this inconsistency and lack of communication.
- The Executive Director’s process to receive and consider rebuttal evidence is deficient and unfair (it’s entirely arbitrary whether a respondent is allowed a “facts meeting” or may contest the allegations short of an evidentiary hearing).

August 24, 2006:

Comment 1: TCEQ’s current Edwards Aquifer rules fail to provide adequate notice to the regulated community regarding what constitutes a violation.

The definition of the term “regulated activity” at 30 TAC § 213.3(28) is ambiguous. The general language used to define “regulated activity” fails to provide useful guidance regarding when a specific activity is subject to the Edwards Aquifer rules. This ambiguity is compounded by the fact that, in practice, TCEQ staff often employ informal guidelines interpreting the definition of “regulated activity” that are not intuitive. In certain instances, there appears to be little relationship between whether an activity is a “regulated activity” and whether that activity has a potential to adversely affect groundwater.

An example of how TCEQ’s definition of “regulated activity” is ambiguous involves 30 TAC § 213.3(28)(A)(iii), the subsection of the definition regarding the installation of aboveground storage tank facilities on the recharge or transition zones. At the August 10, 2006, public meeting on the Edwards Aquifer rules, TCEQ staff indicated that placing a portable generator with an internal gas tank on property on the recharge or transition zones was a “regulated activity.” Based on this interpretation of the aboveground storage tank provision, it would appear

that the use of any machinery with internal storage tanks on the recharge or transition zones, including lawn equipment, cars, and trucks, would likewise be a “regulated activity.” This example emphasizes how the ambiguity of the rule, combined with TCEQ staff interpretations, fails to provide guidance to property owners sufficient to allow a determination of whether the Edwards Aquifer rule requirements apply to specific situations.

The definition of “regulated activity” is also internally inconsistent because it treats activities with similar potentials to adversely affect groundwater differently. For example, 30 TAC § 213.3(28)(iv)(II) provides that building a fence is not a “regulated activity,” but TCEQ staff have indicated that installing a utility pole would be a “regulated activity.” Building a fence and installing a utility pole involve similar levels of ground disturbance (*i.e.*, digging holes to set the fence posts and utility pole). In many situations constructing a fence may pose a greater threat to groundwater because the construction activities for a fence may be spread over a larger area than setting a single utility pole. TCEQ has not provided any justification why these similar and relatively minor activities should be treated differently under the Edwards Aquifer rules.

To address these issues, TCEQ should clarify the definition of “regulated activity” in 30 TAC § 213.3(28). In addition, TCEQ should publish guidance documents to notify the public as to how the rules apply to specific situations. Guidance documents should incorporate the policy interpretations that TCEQ staff have applied in past cases. By providing such guidance, TCEQ will allow the regulated community to achieve a higher rate of compliance with the Edwards Aquifer rules, which in turn should assist TCEQ in achieving its goal of protecting the health of the Edwards Aquifer.

Comment 2: TCEQ should promulgate de minimis exceptions for small construction activities.

Currently, there is no de minimis exception for very small construction activities in the Edwards Aquifer rules. Because of this, there are a multitude of every-day activities undertaken by property owners on the recharge and transition zones that, according to the rules, require prior authorization of TCEQ. For example, a single-family homeowner on the recharge zone on a lot smaller than 5 acres or a small property owner who decided to construct a raised flower bed, plant an oak tree, or lay a flagstone walkway, would engage in a “regulated activity” under the definition 30 TAC § 213.3 and, thus, have to apply for an EAPP plan approval before engaging in the activity. A property owner who installs a utility pole or erects a mail-box would likewise be engaging in a “regulated activity.”

These types of small construction activities that disturb only small surface areas and that do not directly impact sensitive features should not require the submission of a EAPP plan. TCEQ should promulgate de minimis exceptions for

small activities either by (1) listing specific activities with minimal environmental impacts or (2) prescribing limits on the size of de minimis construction activities. For example, construction activities that disturb less than 100 square feet of surface area and do not affect a sensitive feature could be excluded from the definition of a “regulated activity.”

Comment 3: There is a need for greater public notice about the requirements of TCEQ’s Edwards Aquifer rules.

TCEQ’s Edwards Aquifer rules apply to almost every tenant and property owner in the recharge and transition zones, and many in the contributing zone. Most of those people are not aware of the requirements of TCEQ’s Edwards Aquifer rules. TCEQ should expand its efforts concerning public awareness of the Edwards Aquifer rule requirements. Specifically, TCEQ should work with local governments to ensure that when an entity seeks a permit from a local government they are notified of the requirement to submit a EAPP plan to TCEQ.

Comment 4: There is a need for greater notice and public involvement in changes to TCEQ policies.

TCEQ announced changes to its policy under the Edwards Aquifer rules more than a year and a half after the changes were adopted. This delay did not provide stakeholders with adequate notice and did not afford stakeholders a meaningful opportunity to provide comments to the agency in a timely manner. To better involve stakeholders, and to increase the ability of the regulated community to comply with TCEQ requirements, future changes in policy should be announced, and stakeholder comment received, prior to their adoption.