

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §311.6, Allowable Storm Water Runoff and Certain Non-Storm Water Discharges; §311.16, Allowable Storm Water Runoff and Certain Non-Storm Water Discharges; and §311.56, Allowable Storm Water Runoff and Certain Non-Storm Water Discharges. Sections 311.6, 311.16, and 311.56 are adopted *with changes* to the proposed text as published in the August 25, 2000 issue of the *Texas Register* (25 TexReg 8322).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Chapter 311 provides that the disposal of wastewater within defined watersheds, or water quality areas, is either prohibited or is allowed only under certain conditions. Current Subchapters A and B prohibit all discharges within the Lakes Travis and Austin Water Quality Areas and Lakes Inks and Buchanan Water Quality Areas, respectively, except for discharges from sewage treatment facilities that meet a defined level of effluent quality. Current Subchapter F prohibits discharges into or adjacent to water in the state within the Lakes Lyndon B. Johnson and Marble Falls Water Quality Areas except for discharges from treatment facilities that meet a defined level of effluent quality.

The commission received authority from the United States Environmental Protection Agency (EPA) to administer the Texas pollutant discharge elimination system (TPDES) program on September 14, 1998. Although the commission has not previously operated a separate state storm water permitting program, the current requirements in Subchapters A, B, and F could be interpreted to restrict the development and issuance of TPDES storm water permits within these watersheds. The commission is adopting revisions to these subchapters to allow the discharge of storm water runoff and certain other non-storm

water discharges if authorized by a TPDES permit. The TPDES discharge permits are currently being developed to authorize storm water and certain non-storm water discharges throughout the state. The adopted new sections would allow the issuance of these permits within the specified watersheds. The commission is also adopting revisions to the new sections which recognize that these rules do not prohibit these same discharges within the specific watersheds under a federal national pollutant discharge elimination system (NPDES) permit.

The discharge of storm water runoff and certain other non-storm water discharges are currently authorized in the federal NPDES storm water permit program. The commission could choose to be more stringent in the TPDES program than the EPA is in the NPDES program, by imposing a blanket prohibition on all such discharges. However, the commission's opinion is that it is environmentally appropriate and economically sound to allow the discharges to continue. These point source storm water and other discharges have been authorized under the NPDES program for several years, and they existed before they were regulated. Continuing the discharges under a regulatory program of individual and general permits is appropriate to ensure that the discharges do not cause an environmental problem. The commission will carefully consider the necessary terms and conditions of each proposed permit before it is issued.

Conversely, to now entirely prohibit these discharges would cause serious economic disruption. Businesses that rely on being able to discharge their storm water and other discharges would have to either find another means of disposing of the water, or shut down their business. Because of the volume of storm water, methods other than discharge would likely be prohibitively expensive. The

EPA has issued permits for these discharges based on EPA's finding that the permit conditions maintain water quality. The TPDES program will continue to regulate these discharges to ensure that they do not have an adverse environmental impact. Therefore, the adoption of these rules to enable the commission to continue the NPDES policy authorizing these discharges is appropriate.

SECTION BY SECTION DISCUSSION

Adopted new §§311.6, 311.16, and 311.56 (Allowable Storm Water Runoff and Certain Non-Storm Water Discharges) allow the commission to issue TPDES permits to regulate the discharge of storm water runoff from industrial facilities, municipal separate storm sewer systems, and construction activities into the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas. The new rules also allow the commission to issue TPDES permits to regulate the discharge of the following 11 non-storm water discharges into these water quality areas: fire-fighting activities; fire hydrant flushings; potable water sources, including drinking fountain water and water line flushings; uncontaminated air conditioning or compressor condensate; lawn watering and similar irrigation drainage; pavement washdown without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed); routine external building wash down that does not use detergents or other compounds; uncontaminated ground water or spring water; foundation or footing drains where flows are not contaminated with process materials such as solvents; spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and storm water or ground water seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

New §§311.6(a) and (b), 311.16(a) and (b), and 311.56(a) and (b) have been revised from the proposal to clarify that permittees authorized under a federal NPDES permit for the discharges listed in §§311.6(a) and (b), 311.16(a) and (b), and 311.56(a) and (b) may also be allowed to discharge into the specified water quality areas.

New §§311.6(b)(11), 311.16(b)(11), and 311.56(b)(11) have been modified from the proposal to clarify that either discharges of storm water *or* groundwater seepage (rather than storm water *and* groundwater seepage) from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities may be allowed under these rules.

New §§311.6(c), 311.16(c), and 311.56(c) were added since the proposal to clarify that these rules do not restrict the powers of other governmental entities to adopt and enforce local pollution control ordinances.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has made a determination that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Government Code. Comments were solicited on the draft regulatory impact analysis determination; however, no comments were received.

The specific intent of the adopted new sections is to protect the environment by clarifying that, when

allowed under a permit or other authorization, these rules do not prohibit storm water and certain non-storm water discharges into the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas. The new sections, however, do not adversely affect 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; therefore, the new sections do not constitute a major environmental rule.

The adopted rules do not adversely affect the economy or a sector of the economy. In actuality, the rules will result in an overall economic savings because without these adopted new sections, these rules could be interpreted to require that all covered discharges would have to be collected and disposed of in some other manner. Any alternative discharge method would be very expensive, and would thus result in an adverse economic impact.

The adopted new sections will not adversely affect productivity because the changes clarify that the discharge of storm water directly into the lakes in the affected water quality areas may be authorized. If the rules were not amended, however, there could be an adverse affect on productivity, competition, and jobs because the rules could be interpreted to require the affected industries to contain and dispose of storm water in some other manner than discharging to water in the state.

The adopted new sections will not adversely affect jobs because the affected industries will be able to discharge storm water in a way that is both economically practical and environmentally safe. If the rules were not amended, there could be a negative impact on jobs because the rules could be interpreted to require the impacted industries to spend resources on collecting and disposing of storm water. If the

affected industries were required to collect and treat storm water, there would necessarily be less money to spend on other areas of the business; thus, jobs could be affected.

Additionally, the adopted new sections will not adversely affect competition; in fact, if the rule were not amended, there could be a significant adverse impact on competition. Industries that do not discharge into the affected water quality areas could have a definite competitive advantage over those that do discharge into the water quality areas. Because industries that do not discharge into one of the affected water quality areas will not be required to collect storm water, but the rules could be interpreted to require the same industries that do discharge into affected water quality areas to collect the storm water; those industries that do not discharge into the affected water quality areas could have a definite competitive advantage.

Furthermore, the adopted rules will not adversely affect the environment for two reasons. First, the discharges described in the rules will not add significant concentrations of pollutants to the lakes because the quality of storm water and the certain other non-storm water discharges will be maintained through the TPDES permit or other authorization. Second, storm water is currently being discharged into the affected lakes, under the terms of existing authorizations from the EPA. Under federal law, Texas permits must be at least as stringent as the expiring NPDES permit; thus, these adopted new sections will not degrade the affected water bodies.

The public health and safety of the state will not be adversely affected by the adopted new sections because the new sections only give the agency the authority to authorize storm water discharges. The

adopted new sections do not authorize any specific discharge; thus, the new sections will not have an impact on public health and safety.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a final Takings Impact Assessment for these adopted rules under Texas Government Code, §2007.043. The specific purpose of the adopted new sections is to authorize the discharge of storm water and certain types of non-storm water into the water quality areas of Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls.

Promulgation and enforcement of these adopted rules will not affect private real property which is the subject of the rules because the new sections will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. First, the new sections enable the commission to authorize discharges of storm water, and certain other kinds of non-storm water, which might otherwise not be authorized. Thus, property owners' use of their property will not be restricted.

Secondly, property values will not be decreased because the new sections will not limit the use of the property. Conversely, if the rules were not amended, property values could decrease because the rules could be interpreted to require industries that discharge into the affected water quality areas to collect and dispose of storm water, and the other authorized non-storm water discharges. The collection and treatment cost would render the property less valuable, thus reducing the property value. Thus, these rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action or authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

HEARING AND COMMENTERS

A public hearing on this proposal was scheduled for September 11, 2000 in Austin. No one appeared at the hearing to provide oral testimony. The public comment period closed on September 25, 2000.

Three commenters provided written comments on the proposal. The Lower Colorado River Authority (LCRA); Chemical Lime, Ltd. (Chemical Lime); and the City of Houston all provided general comments in support of the proposed revisions. The LCRA and Chemical Lime provided comments that included suggested changes to the rules. These suggested changes are addressed in the Analysis of Testimony section.

ANALYSIS OF TESTIMONY

The LCRA commented that it strongly supports most of the proposed rules along with the stated intent to protect the environment through storm water regulations in the subject water quality areas. Chemical Lime commented that with a few minor exceptions, they strongly support the proposed revisions to Chapter 311. The City of Houston commented that it supports the proposed revisions and strongly agrees with limiting the revisions to Chapter 311 to those subchapters that currently prohibit the

permitting of storm water discharges into certain watersheds.

The commission appreciates the support expressed for the proposed changes to Chapter 311.

Chemical Lime commented that §311.6(b)(11) should be revised to be consistent with the language in the EPA's storm water multi-sector general permit for mineral mining and processing facilities that was published in the *Federal Register* on September 29, 1995. Specifically, Chemical Lime commented that §311.6(b)(11) should be revised from "(11) discharges of storm water and groundwater seepage ..." to "(11) discharges of storm water or groundwater seepage..."

The commission agrees with the comment and has made the recommended change in §311.6(b)(11). Additionally, §311.16(b)(11) and §311.56(b)(11), which include the same language, have been changed for consistency.

Chemical Lime commented that the proposed language in both §311.6(a) and (b) should be revised to reference NPDES permits. Chemical Lime requests the revisions to clarify that permittees authorized under an NPDES permit for the discharges listed in §311.6(a) and (b) are allowed to discharge into water quality areas, between the date the proposed rule becomes effective, and the date that the TPDES storm water multi-sector general permit becomes effective.

The commission agrees with the comment and has changed §311.6(a) and (b). The commission has also changed §311.16(a) and (b), and §311.56(a) and (b), which contain the same language, for

consistency. The commission determined that the revisions are needed to clarify that if a discharge is authorized under an NPDES permit, and is defined in §§311.6(a), 311.6(b), 311.16(a), 311.16(b), 311.56(a) or 311.56(b), these rules will not prohibit the discharge within the water quality area.

The LCRA commented that it agreed that the rule should be amended to allow discharges from the activities listed in the proposed rules, and that adequate water quality protection for the Highland Lakes would be provided by statewide general permits for 12 of the 14 listed activities. However, LCRA recommended that discharges of storm water runoff from industrial and construction sites should be authorized by a regional general permit. The regional permit would be consistent with compliance standards set out in either the TNRCC's Edwards Aquifer Rules, or LCRA's Lake Travis Nonpoint Source Pollution Control Ordinance. The City of Houston commented that they support the proposed amendments that will authorize the TNRCC to permit storm water discharges and certain non-storm water discharges, and that it is not appropriate to specify discharge parameters. Discharge parameters should be delineated in the permits for those types of discharges, within the chapter.

The commission has not modified the rule based on the LCRA's comments. The proposed rules simply clarify that the discharge of certain types of storm water and non-storm water into the various water quality areas is not prohibited by these rules. The proposed rules do not authorize any specific discharges, nor are the rules a general permit for discharge of any substance.

The LCRA commented that language should be added to the current draft language to ensure that the new Chapter 311 rules will not prevent the enforcement of existing regional storm water runoff ordinances or preempt adoption and enforcement of new water quality regulations. The LCRA suggested that the following language should be added to Subchapter A, §§311.6, 311.16, and 311.56: “(c) Any permits authorized by the TNRCC pursuant to (a) or (b) shall be subject to any ordinances, resolutions or authorizations issued by local governments or political subdivision, including municipalities, counties and river authorities.”

The commission agrees with the intent of LCRA’s suggestion, that these rules should not be interpreted to supercede any local pollution control measures. Therefore, using slightly different language, the commission has amended §§311.6(c), 311.16(c), and 311.56(c) to clarify that these rules do not restrict the powers of other governmental entities to adopt and enforce local pollution control ordinances.

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103 and §26.011, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code or other laws of this state. Section 26.011 also gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

SUBCHAPTER A: LAKES TRAVIS AND AUSTIN WATER QUALITY

§311.6

§311.6. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.

(a) The following discharges of storm water runoff may be authorized by a Texas pollutant discharge elimination system (TPDES) permit or a national pollutant discharge elimination system (NPDES) permit:

- (1) storm water runoff from industrial facilities;
- (2) storm water runoff from municipal separate storm sewer systems; and
- (3) storm water runoff from construction activities.

(b) The following non-storm water discharges may be authorized by a TPDES permit or a NPDES permit:

- (1) discharges from fire fighting activities;
- (2) discharges from fire hydrant flushings;

(3) discharges from potable water sources, including drinking fountain water and water line flushings;

(4) discharges from uncontaminated air conditioning or compressor condensate;

(5) discharges from lawn watering and similar irrigation drainage;

(6) discharges from pavement wash down without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(7) discharges from a routine external building wash down that do not use detergents or other compounds;

(8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water or groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

(c) Nothing in this subchapter is intended to restrict the powers of the commission or any other governmental entity to prevent, correct, or curtail activities that result or may result in pollution in the water quality area. In addition to the rules of the commission, a TPDES permit applicant may also be required to comply with local pollution control ordinances and regulations.

SUBCHAPTER B: LAKES INKS AND BUCHANAN WATER QUALITY

§311.16

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103 and §26.011, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties the Texas Water Code or other laws of this state. Section 26.011 also gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

§311.16. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.

(a) The following discharges of storm water runoff may be authorized by a Texas pollutant discharge elimination system (TPDES) permit or a national pollutant discharge elimination system (NPDES) permit:

- (1) storm water runoff from industrial facilities;
- (2) storm water runoff from municipal separate storm sewer systems; and
- (3) storm water runoff from construction activities.

(b) The following non-storm water discharges may be authorized by a TPDES permit or a NPDES permit:

- (1) discharges from fire fighting activities;
- (2) discharges from fire hydrant flushings;
- (3) discharges from potable water sources, including drinking fountain water and water line flushings;
- (4) discharges from uncontaminated air conditioning or compressor condensate;
- (5) discharges from lawn watering and similar irrigation drainage;
- (6) discharges from pavement wash down without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);
- (7) discharges from a routine external building wash down that do not use detergents or other compounds;
- (8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water or groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

(c) Nothing in this subchapter is intended to restrict the powers of the commission or any other governmental entity to prevent, correct, or curtail activities that result or may result in pollution in the water quality area. In addition to the rules of the commission, a TPDES permit applicant may also be required to comply with local pollution control ordinances.

SUBCHAPTER F: LAKES LYNDON B. JOHNSON AND MARBLE FALLS WATER

QUALITY

§311.56

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103 and §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code or other laws of this state. Section 26.011 also gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

§311.56. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.

(a) The following discharges of storm water runoff into or adjacent to water in the state may be authorized by a Texas pollutant discharge elimination system (TPDES) permit or a national pollutant discharge elimination system (NPDES) permit:

- (1) storm water runoff from industrial facilities;
- (2) storm water runoff from municipal separate storm sewer systems; and
- (3) storm water runoff from construction activities.

(b) The following non-storm water discharges into or adjacent to water in the state may be authorized by a TPDES permit or a NPDES permit:

- (1) discharges from fire fighting activities;
- (2) discharges from fire hydrant flushings;
- (3) discharges from potable water sources, including drinking fountain water and water line flushings;
- (4) discharges from uncontaminated air conditioning or compressor condensate;
- (5) discharges from lawn watering and similar irrigation drainage;
- (6) discharges from pavement wash down without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);
- (7) discharges from a routine external building wash down that do not use detergents or other compounds;
- (8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water or groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

(c) Nothing in this subchapter is intended to restrict the powers of the commission or any other governmental entity to prevent, correct, or curtail activities that result or may result in pollution in the water quality area. In addition to the rules of the commission, a TPDES permit applicant may also be required to comply with local pollution control ordinances and regulations.