

The Texas Natural Resource Conservation Commission (commission) adopts the repeal of §§216.1 - 216.11, concerning Water Quality Performance Standard for Urban Development *without change* to the proposal published in the October 26, 2001 issue of the *Texas Register* (26 TexReg 8487).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS

The purpose of the rulemaking is to remove rules that are based on a statute that has been invalidated by opinion of the Texas Supreme Court and by opinion of the Texas Attorney General.

The commission also is adopting, in concurrent action, the review of Chapter 216 as required by Texas Government Code, §2001.039. The adopted rules review can be found in the Review of Agency Rules section in this issue of the *Texas Register*. The commission also terminated a rulemaking it authorized to be commenced (Rule Log Number 1997-187-216-WT) in 1998 in response to a petition by the City of Austin to revise Chapter 216, Subchapter A.

Chapter 216, Subchapter A sets out the procedures and criteria to be used by the commission: 1.) in the review and approval of water quality plans and amendments submitted for tracts of land, 500 acres or larger, designated as water quality protection zones; and 2.) in the designation of water quality protection zones for tracts of land that are less than 1,000 acres but not less than 500 acres in size. In accordance with Texas Water Code (TWC), §26.179, the repeals apply only to areas within the extraterritorial jurisdictions of cities with a population greater than 5,000 (in 1999, raised to 10,000), and in which the municipality has enacted or proposed at least three ordinances to regulate water quality within their extraterritorial jurisdictions in the five years prior to June 17, 1995, or enacts or attempts to

enforce three or more ordinances or amendments attempting to regulate water quality or control or abate water pollution in the area in any five-year period. This law does not apply to areas within the extraterritorial jurisdiction of a city with a population greater than 900,000 that has extended an ordinance to prevent the pollution of an aquifer which is the sole or principal drinking water source for the municipality.

The commission believes that the adoption of the repeal of the rules in Chapter 216, Subchapter A is necessary because TWC, §26.179 on which the subchapter is based, was invalidated by the Texas Supreme Court in the case of *FM Properties Operating Co. v. City of Austin*, 22 S.W. 3d 868 (Tex. 2000). In that case, the court held that the pre-1999 version of TWC, §26.179 is an unconstitutional delegation of legislative power to private landowners. The court did not address the 1999 amendments to TWC, §26.179 because they were enacted after the case began and apply prospectively. However, the Texas Attorney General in Opinion Number JC-0402 (August 2, 2001) concluded consistent with the Supreme Court's decision that the current version of the statute is unconstitutional. Accordingly, the repeal of Chapter 216, Subchapter A, is appropriate. The commission also terminated a rulemaking it authorized to be commenced (Rule Log Number 1997-187-216-WT) in 1998 in response to a petition by the City of Austin to revise Chapter 216, Subchapter A.

SECTION BY SECTION DISCUSSION

Sections 216.1, *Applicability*; 216.2, *Definitions*; 216.3, *Designation of Water Quality Protection Zones*; 216.4, *Expiration*; 216.5, *Agents*; 216.6, *Water Quality Plan*; 216.7, *Actions and Notice*; 216.8,

Annual Reporting Requirements; 216.9, *Corrective Action*; 216.10, *Enforcement*; and 216.11, *Fee Schedule* are repealed because the statute on which they are based has been invalidated.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the 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 the repeal of Chapter 216, Subchapter A, would not result in a rule which meets 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. Because the specific intent of the rulemaking is to repeal rules based on a statute that has been invalidated by decision of the Texas Supreme Court and does not add regulatory requirements to existing rules, the rulemaking is not anticipated to have an adverse material effect on 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. In addition, this repeal is not intended to protect the environment or reduce risks to human health from environmental exposure. Therefore, this rulemaking does not meet the definition of a “major environmental rule.” In addition, §2001.0225 only applies to 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 requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or 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. The rulemaking specifically repeals rules that lack statutory foundation and does not meet any of these four criteria of a “major environmental rule.”

TAKINGS IMPACT ASSESSMENT

The commission evaluated the repeal and performed an assessment of whether the repeal constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that assessment. The specific purpose of the rulemaking is to repeal Subchapter A because the statute on which it is based has been invalidated. Adoption of the rulemaking would not affect private real property, restrict or limit the owner’s right to property that otherwise would exist in the absence of the rulemaking, or be the producing cause of the reduction in the market value of private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*) and the commission’s rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. Therefore, the repeal of Subchapter A is not subject to the CMP.

PUBLIC COMMENTS

The public comment period closed on November 26, 2001, and no comments were received. A public hearing was not held.

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC; and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state. The repeals are adopted as a result of a rule review done in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years.

SUBCHAPTER A: WATER QUALITY PROTECTION ZONES

§§216.1 - 216.11

§216.1. Applicability.

§216.2. Definitions.

§216.3. Designation of Water Quality Protection Zones.

§216.4. Expiration.

§216.5. Agents.

§216.6. Water Quality Plans.

§216.7. Actions and Notice.

§216.8. Annual Reporting Requirements.

§216.9. Corrective Action.

§216.10. Enforcement.

§216.11. Fee Schedule.