

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§216.1 - 216.11, concerning Water Quality Performance Standard for Urban Development.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

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 proposing, in concurrent action, the review of Chapter 216 as required by Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999. The proposed notice of review can be found in the Review of Agency Rules section of this issue of the *Texas Register*. The commission also proposes to terminate a rulemaking it authorized to be commenced (Rule Log Number 1997-187-216-WT) in 1998 in response to a petition of the City of Austin to revise Chapter 216, Subchapter A, since this matter is now moot.

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 proposal of the repeals 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 No. 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, appears appropriate. The commission also proposes to terminate a rulemaking it authorized to be commenced (Rule Log Number 1997-187-216-WT) in 1998 in response to a petition of the City of Austin to revise Chapter 216, Subchapter A.

SECTION BY SECTION DISCUSSION

Section 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 proposed for repeal because the statute on which they are based has been invalidated.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five years the proposed rulemaking is in effect, no significant fiscal implications are anticipated for the agency, and no fiscal implications are anticipated for other units of state and local government as a result of administration or enforcement of the proposed rulemaking.

The repeals are proposed in accordance with a decision of the Texas Supreme Court and a subsequent opinion of the Texas attorney general that TWC, §26.179 is invalid. Texas Water Code, §26.179 was the basis for establishing rules for water quality protection zones in certain urban areas. The statute 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.

Prior to these issues being considered by the Texas Supreme Court, the City of Austin petitioned the agency to modify rules relating to establishing water quality protection zones in certain urban areas. A rulemaking was initiated, but was postponed to await the rulings of the Texas Supreme Court and the Texas Attorney General.

The proposed rulemaking would delete provisions which allowed an owner or owners of large tracts of land used for development within the extraterritorial jurisdiction of certain cities under certain circumstances, to designate water quality protection zones. Under current provisions, the owner or owners of a contiguous tract comprised of less than 1,000 acres but at least 500 acres of land may submit an application for plan approval to the executive director (ED). After the plan is approved, the owner would record the designation of the zone in the deed records of the county in which the land is located. The creation of the zone is effective upon deed recordation. In addition, the owner or owners of a contiguous tract of 1,000 acres or more of land may create a water quality protection zone that will become effective upon recordation of the designation in the deed records of the county in which the land is located.

For applications for approval of water quality plans and water quality plan amendments, an application fee is assessed based upon the total acreage of new development proposed in the zone or portion of the zone under consideration by the proposed water quality plan or amendment. In addition, for each water quality protection zone, an annual compliance and inspection fee is assessed based upon the total acreage of development that has occurred since the designation of the zone and which exists within the water quality protection zone at the end of each calendar year.

All plans received by the agency have been in the extraterritorial jurisdiction of the City of Austin. Since fiscal year (FY) 1998, there were 19 water quality protection zones created and the agency has collected \$179,737 in water quality protection zone fee revenue. In FY 2000, \$13,259 was collected in fee revenue. No fee revenue was collected in FY 2001 or FY 2002 as fee collection had been

suspended due to the legal decisions. As the agency had not been collecting fee revenue, loss of the fee revenue due to the implementation of the proposed rulemaking is not considered significant.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that the public benefit anticipated from the proposal will be in compliance with state law by eliminating rules that are based on a statute which has been declared unconstitutional. The repeals are proposed in accordance with a decision of the Texas Supreme Court and a subsequent opinion of the Texas Attorney General that TWC, §26.179 is invalid. This section of TWC was the basis for establishing rules for water quality protection zones in certain urban areas. The statute 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.

Prior to these issues being considered by the Supreme Court, the City of Austin petitioned the agency to modify rules relating to establishing water quality protection zones in certain urban areas. A rulemaking was initiated, but was postponed to await the rulings of the Texas Supreme Court and the Texas Attorney General.

The proposed rulemaking would delete provisions which allowed an owner or owners of large tracts of land used for development within the extraterritorial jurisdiction of certain cities under certain circumstances, to designate water quality protection zones. Under current provisions, the owner or owners of a contiguous tract comprised of less than 1,000 acres but at least 500 acres of land may

submit an application for plan approval to the ED. After the plan is approved, the owner would record the designation of the zone in the deed records of the county in which the land is located. The creation of the zone is effective upon deed recordation. In addition, the owner or owners of a contiguous tract of 1,000 acres or more of land may create a water quality protection zone that will become effective upon recordation of the designation in the deed records of the county in which the land is located.

For applications for approval of water quality plans and water quality plan amendments, a non-refundable application fee is assessed based upon the total acreage of new development proposed in the zone or portion of the zone under consideration by the proposed water quality plan or amendment. In addition, for each water quality protection zone, an annual compliance and inspection fee is assessed based upon the total acreage of development that has occurred since the designation of the zone and which exists within the water quality protection zone at the end of each calendar year.

All plans received by the agency have been in the extraterritorial jurisdiction of the City of Austin. Since FY 1998, there were 19 water quality protection zones created and the agency has collected \$179,737 in water quality protection zone fee revenue. In FY 2000, \$13,259 was collected in fee revenue. No fee revenue was collected in FY 2001 or FY 2002 as fee collection had been suspended due to the legal decisions. As the agency had not been collecting fee revenue, loss of the fee revenue due to the implementation of the proposed rulemaking is not considered significant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications to small or micro-businesses are anticipated due to the implementation of the proposed rulemaking. There are no known small or micro-businesses that have property with designated water quality protection zones.

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Adoption of the proposed rulemaking would have no affect on current practices for small or micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and has determined that a local employment impact statement is not required because the proposal does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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 proposed 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 proposed rulemaking is to repeal rules based on a statute that has been invalidated by decision of the Texas Supreme Court 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 is proposed specifically to repeal rules that lack statutory foundation and does not meet any of these four criteria of a “major environmental rule.” The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed repeal and performed a preliminary assessment of whether the proposed repeal constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to repeal Subchapter A because the statute on which it is based has been invalidated. Adoption of the repeal 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 proposed 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 proposed repeal of Subchapter A is not subject to the CMP.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis,

and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-038-216-WT. Comments must be received by 5:00 p.m., November 26, 2001. For further information, please contact Auburn Mitchell, Regulation Development Section, at (512) 239-1873.

STATUTORY AUTHORITY

The repeals are proposed 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 proposed as a result of a rule review done in accordance with the requirements of Texas Government Code, §2001.039, and in accordance with the requirements of the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years.

The proposed repeals implement TWC, §5.102, General Powers, and §5.103, Rules.

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.