

The Texas Natural Resource Conservation Commission (commission) adopts the repeal of Subchapter K, Criteria and Standards for Best Management Practices Authorized under the Clean Water Act, §304(e), §308.121, *without change* as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 3019).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of the rulemaking is to eliminate a provision that incorporated by reference a regulation of the United States Environmental Protection Agency (EPA), which EPA has now removed from its regulations.

On September 14, 1998, the State of Texas was authorized by EPA to administer and enforce the National Pollutant Discharge Elimination System (NPDES) program for regulating discharges of pollutants into waters in the state under the federal Water Pollution Control Act, as amended, 33 United States Code, §§1251 *et seq.* (commonly referred to as the Clean Water Act or CWA). The approved state program, i.e., the Texas Pollutant Discharge Elimination System (TPDES) program, 63 FR 51164 (September 24, 1998), is administered by the commission. The repeal of Subchapter K, necessitated by EPA revisions to its regulations, is part of the commission's effort to revise several chapters of its rules to maintain equivalency with EPA regulations and to thereby maintain delegated NPDES permitting authority.

SECTION DISCUSSION

Section 308.121, Criteria and Standards for Best Management Practices Authorized under the Clean Water Act, §304(e), which adopted by reference 40 Code of Federal Regulations (CFR) Part 125, Subpart K (Subpart K), is repealed to comply with EPA removal of Subpart K from its regulations. This provision would have established criteria and standards for imposing best management practices (BMPs). However, Subpart K was never activated and EPA said that the original purpose of this regulation “is now better served by EPA’s existing BMPs provisions in 40 CFR §122.44(k), and accompanying guidance for developing and implementing BMPs (65 FR 30886 and 30900, May 15, 2000).” Since the rule was never activated, no entities in Texas are impacted by the repeal.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Because the specific intent of the adopted rulemaking is to repeal a rule that incorporated a provision in EPA regulations, that was never activated and has now been removed, and does not add regulatory requirements to existing rules, the rulemaking is not anticipated to have an adverse material effect on the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, this rulemaking does not meet the definition of a “major environmental rule” as defined in the Texas Government Code, because §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 commission concludes that a regulatory analysis is not required because the proposed amendment does not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the repeal and performed an assessment of the rulemaking in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to repeal a rule that incorporated a provision in EPA regulations, that was never activated and has now been removed, and does not add regulatory requirements to existing rules. The assessment indicates that Texas Government Code, Chapter 2007 does not apply to this rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law and 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 reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the rule is subject to the CMP and must be consistent with applicable CMP goals and policies

in 31 TAC §501.12 and §501.14. The rulemaking will conform commission rules to EPA requirements for regulating discharges of pollutants under the CWA to maintain delegated NPDES permitting authority. The repeal is consistent with CMP goals and policies. The commission also determined that the rulemaking will not have a direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

PUBLIC COMMENT

A public hearing was not held on this rulemaking. The public comment period closed May 13, 2002, and no comments were received.

SUBCHAPTER K: CRITERIA AND STANDARDS FOR BEST MANAGEMENT

PRACTICES AUTHORIZED UNDER THE CLEAN WATER ACT, §304(e)

§308.121

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state. The repeal conforms the commission's regulations to corresponding EPA regulations under the CWA.

§308.121. Criteria and Standards for Best Management Practices Authorized under the Clean Water Act, §304(e).