

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of Subchapter K, *Criteria and Standards for Best Management Practices Authorized under the Clean Water Act*, §304(e), §308.121.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The purpose of the proposed 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 Federal Register 51164 (September 24, 1998), is administered by the commission. The change in this chapter, necessitated by EPA changes 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 BY 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 proposed for repeal 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 Federal Register* 30886,30900, May 15, 2000).” Since the rule was never activated, no entities in Texas are impacted by the proposed repeal.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed repeal is in effect, there will be no fiscal impact to units of state or local government as a result of implementation of the proposed repeal.

The purpose of the proposed repeal is to conform to new EPA updates to regulations under the CWA. The commission received authority from EPA to issue TPDES permits on September 14, 1998. In order to keep this authority, the commission is required to adopt updated EPA rules that affect the TPDES program. This rulemaking will meet this requirement by repealing provisions that would have established criteria and standards for imposing BMPs in TPDES permits. The corresponding federal requirement was removed from EPA regulations; therefore, the commission is repealing this provision to maintain equivalency with federal rules.

The rule described how BMPs for ancillary industrial activities (materials storage areas, in-plant transfer, process and material handling areas, loading and unloading operations, plant site runoff, sludge and waste disposal areas) would be reflected in permits. Dischargers who use, manufacture, store, handle, or discharge any pollutant listed as toxic under CWA, §307(a)(1) or any pollutant listed as hazardous under CWA, Chapter 311 would have been subject to the requirements of Subpart K for all activities which may result in significant amounts of those pollutants reaching waters of the United States.

The proposed repeal will not affect any units of state or local government because Subpart K was never implemented. The commission anticipates no fiscal implication for units of state and local government due to implementation of the proposed repeal.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed repeal is in effect, the public benefit anticipated from enforcement of and compliance with the proposed repeal will be the elimination of unnecessary regulations.

The proposed repeal is intended to conform to new EPA updates to regulations under the CWA. The commission received authority from EPA to issue TPDES permits on September 14, 1998. In order to keep this authority, the commission is required to adopt updated EPA rules that affect the TPDES program. This proposed rulemaking will meet this requirement by repealing provisions that would have established criteria and standards for imposing BMPs in TPDES permits. The corresponding federal

requirement was removed from EPA regulations; therefore, the commission is repealing this provision to maintain equivalency with federal rules.

The proposed repeal will not affect any individuals or businesses because the federal and state provisions that would have required BMPs in TPDES permits were never implemented. The commission anticipates no fiscal implications for individuals and businesses due to implementation of the proposed repeal.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed repeal, which is intended to conform to new EPA updates to regulations under the CWA.

The commission received authority from EPA to issue TPDES permits on September 14, 1998. In order to keep this authority, the commission is required to adopt updated EPA rules that affect the TPDES program. This proposed rulemaking will meet this requirement by repealing provisions that would have established criteria and standards for imposing BMPs in TPDES permits. The corresponding federal requirement was removed from EPA regulations; therefore, the commission is repealing this provision to maintain equivalency with federal rules.

The proposed repeal will not affect any small or micro-businesses because the federal and state provisions that would have required BMPs in TPDES permits were never implemented. The

commission anticipates no fiscal implications for small and micro-businesses due to implementation of the proposed repeal.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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 proposed 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 repeal does not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed repeal and performed a preliminary assessment of the proposed rulemaking in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed 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 preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to this proposed 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 proposed 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 proposed rulemaking will conform commission

rules to EPA requirements for regulating discharges of pollutants under the CWA to maintain delegated NPDES permitting authority. The NPDES requirements proposed to be incorporated in the commission's rules are consistent with and will aid in achieving CMP goals and policies. The commission also determined that the proposed 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.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-023-305-WT. Comments must be received by 5:00 p.m., May 13, 2002. For further information or questions concerning this proposal, please contact Auburn Mitchell, Office of Environmental Policy, Analysis, and Assessment, (512) 239-1873.

SUBCHAPTER K: CRITERIA AND STANDARDS FOR BEST MANAGEMENT

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

§308.121

STATUTORY AUTHORITY

The repeal is proposed under 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 is proposed to conform the commission's regulations to corresponding EPA regulations under the CWA.

The proposed repeal implements TWC, §5.102, General Powers, and §5.103, Rules.

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