

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §305.64. Section §305.64 is adopted *without change* to the proposed text as published in the June 7, 2002 issue of the *Texas Register* (27 TexReg 4913) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 2912, 77th Legislature, 2001, amended Texas Water Code (TWC), §26.003, by adding the phrase “taking into consideration” before the words “economic development of the state.” This rulemaking amends §305.64 to reflect the change made by HB 2912 to TWC.

SECTION DISCUSSION

Section 305.64, Transfer of Permits, adopts an amendment to subsection (i)(8), which adds the phrase “taking into consideration” before the words “economic development of the state” and modifies sentence structure to reflect the concept in TWC, §26.003, which is that economic development of the state should be taken into consideration when actions are taken to maintain the quality of water in the state, rather than the actions should be consistent with economic development.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the adopted rule is not subject to §2001.0225 because it does not meet 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule does not meet the definition of a major environmental rule because the specific intent of the rule is to clarify commission policy to state that the commission must take into consideration the economic development of the state. The rule substantially advances this purpose by specifically stating that the commission will take into consideration the economic development of the state when maintaining the quality of water in the state. Since the adopted rule states a policy which requires the consideration of the economic development of the state, the adopted rule is not likely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted rule is not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because the requirement for consideration of the economic development of the state is inserted into policy statements which provide for the protection of the environment and the public health and safety.

In addition, the adopted rule does not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the adopted rule does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) propose to adopt a rule solely under the general powers of the agency.

The adopted rule does not exceed a standard set by federal law because there are no such corresponding federal standards relating to the commission taking into consideration the economic development of the state in maintaining the quality of water in the state. Further, the adopted rule does not exceed an express requirement of state law because it is mandated by state law. The adopted rule does not exceed

the requirements of delegation agreements concerning water quality because the delegation agreements do not establish express requirements for taking into consideration the economic development of the state. Finally, this adopted rule is not adopted solely under the general powers of the agency, but is adopted under the specific provisions of TWC, §26.003 and §26.011. No public comment was received on the regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that Texas Government Code, Chapter 2007 applies to the adopted rule and that the rule does not constitute a statutory or constitutional taking.

The specific purpose of the adopted rule is to conform commission policy to HB 2912, §1.26, which changed state policy to provide that the commission take into consideration the economic development of the state in maintaining water quality in the state. Before enactment of HB 2912, §1.26, the state policy on maintaining the quality of water in the state provided that the commission should maintain water quality consistent with the economic development of the state, in TWC, §26.003.

The adopted rule substantially advances the purpose stated previously by changing the policy of the commission to conform to HB 2912, §1.26.

The adopted rule does not place any burden on real property and it does not obtain any benefit to society from the use of private real property because it does not directly apply to the ownership or use of a particular parcel of private real property.

Promulgation of the adopted rule setting a policy to take into consideration the economic development of the state will not constitute a taking because the adopted rule does not directly apply to the ownership or use of a particular parcel of private real property.

There are no reasonable alternative actions that the commission may take regarding this adopted rule because the policy of the state on this issue has been determined by law through the enactment of HB 2912, §1.26.

Since the adopted rule does not directly apply to the ownership or use of a particular parcel of real property, it does not burden real property in a manner which would be a statutory or constitutional taking. Specifically, the adopted rule does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the adopted rule.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization

identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

PUBLIC COMMENTS

No public hearing was held on this rulemaking and no comments were received during the comment period that closed on July 8, 2002.

**SUBCHAPTER D: AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS,
REVOCATION, AND SUSPENSION OF PERMITS**

§305.64

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which provides the commission with the power necessary and convenient to carry out its responsibilities under TWC, Chapter 26.

§305.64. Transfer of Permits.

(a) A permit is issued in personam and may be transferred only upon approval of the commission. No transfer is required for a corporate name change, as long as the secretary of state can verify that a change in name alone has occurred. An attempted transfer is not effective for any purpose until actually approved by the commission.

(b) Except as provided otherwise in subsection (g) of this section, either the transferee or the permittee shall submit to the executive director an application for transfer at least 30 days before the proposed transfer date. The application shall contain the following:

- (1) the name and address of the transferee;
 - (2) date of proposed transfer;
 - (3) if the permit requires financial responsibility, the method by which the proposed transferee intends to assume or provide financial responsibility, including proof of such financial responsibility to become effective when the transfer becomes effective;
 - (4) a fee of \$100 to be applied toward the processing of the application, as provided in §305.53(a) of this title (relating to Application Fees);
 - (5) a sworn statement that the application is made with the full knowledge and consent of the permittee if the transferee is filing the application; and
 - (6) any other information the executive director may reasonably require.
- (c) If no agreement regarding transfer of permit responsibility and liability is provided, responsibility for compliance with the terms and conditions of the permit and liability for any violation associated therewith is assumed by the transferee, effective on the date of the approved transfer. This section is not intended to relieve a transfer or of any liability.

(d) The executive director must be satisfied that proof of any required financial responsibility is sufficient before transmitting an application for transfer to the commission for further proceedings.

(e) If a person attempting to acquire a permit causes or allows operation of the facility before approval is given, such person shall be considered to be operating without a permit or other authorization.

(f) The commission may refuse to approve a transfer where conditions of a judicial decree, compliance agreement, or other enforcement order have not been entirely met. The commission shall also consider the prior compliance record of the transferee, if any.

(g) For permits involving hazardous waste under the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated, Chapter 361 changes in the ownership or operational control of a facility may be made as Class 1 modifications with prior written approval of the executive director in accordance with §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). The new owner or operator must submit a revised permit application no later than 90 days prior to the scheduled change. A written agreement containing a specific date for transfer of permit responsibility between the current and new permittees must also be submitted to the executive director. When a transfer of ownership or operational control occurs, the old owner or operator shall comply with the requirements of Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities), until the new owner or operator has demonstrated compliance with the requirements of Chapter 37, Subchapter P of this title. The new

owner or operator must demonstrate compliance with the requirements of Chapter 37, Subchapter P of this title within six months of the date of the change of ownership or operational control of the facility. Upon demonstration to the executive director by the new owner or operator of compliance with Chapter 37, Subchapter P of this title, the executive director shall notify the old owner or operator that he no longer needs to comply with Chapter 37, Subchapter P of this title as of the date of demonstration.

(h) The commission may transfer permits to an interim permittee pending an ultimate decision on a permit transfer if it finds one or more of the following:

- (1) the permittee no longer owns the permitted facilities;
- (2) the permittee is about to abandon or cease operation of the facilities;
- (3) the permittee has abandoned or ceased operating the facilities; and

(4) there exists a need for the continued operation of the facility and the proposed interim permittee is capable of assuming responsibility for compliance with the permit.

(i) The commission may transfer a permit involuntarily after notice and an opportunity for hearing, for any of the following reasons:

- (1) the permittee no longer owns or controls the permitted facilities;

(2) if the facilities have not been built, and the permittee no longer has sufficient property rights in the site of the proposed facilities;

(3) the permittee has failed or is failing to comply with the terms and conditions of the permit;

(4) the permitted facilities have been or are about to be abandoned;

(5) the permittee has violated commission rules or orders;

(6) the permittee has been or is operating the permitted facilities in a manner which creates an imminent and substantial endangerment to the public health or the environment;

(7) foreclosure, insolvency, bankruptcy, or similar proceedings have rendered the permittee unable to construct the permitted facilities or adequately perform its responsibilities in operating the facilities; or

(8) transfer of the permit would maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state and/or would minimize the damage to the environment; and

(9) the transferee has demonstrated the willingness and ability to comply with the permit and all other applicable requirements.

(j) The commission may initiate proceedings in accordance with the Texas Water Code, Chapter 13, for the appointment of a receiver consistent with this section.