The Texas Commission on Environmental Quality (commission) adopts new §308.91 *with change* to the proposed text as published in the December 6, 2002 issue of the *Texas Register* (27 TexReg 11482). The primary purpose of the new section is to incorporate by reference United States Environmental Protection Agency (EPA) regulations relating to cooling water intake structures in the commission rule which corresponds to those federal regulations.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

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 of 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). The approved state program, i.e., the Texas Pollutant Discharge Elimination System (TPDES) program, published September 24, 1998 in the *Federal Register* (63 FR 51164), is administered by the commission. The changes in this chapter, necessitated by EPA changes to federal regulations, are part of an effort by the commission to revise several chapters of its rules to maintain equivalency with EPA's regulations and thereby to maintain delegated NPDES permitting authority.

SECTION DISCUSSION

New §308.91, Criteria Applicable to Cooling Water Intake Structures under the Clean Water Act, §316(b), incorporates language contained in 40 Code of Federal Regulations (CFR) §§125.80 - 125.89. The EPA rule implemented the Clean Water Act, §316(b) for new facilities that use water withdrawn from rivers, streams, lakes, reservoirs, estuaries, oceans, or other waters of the United States for

cooling purposes. The national requirements establish the best technology available, based on a two-track approach, for minimizing adverse environmental impact associated with the use of these structures. Track I establishes national velocity intake capacity and velocity requirements based on size, as well as location- and capacity-based requirements to reduce intake flow below certain proportions of certain waterbodies. For fresh water rivers and streams, intake flow must be less than or equal to 5% of the mean annual flow; for lakes and reservoirs, intake flow may not disrupt natural thermal stratification or turnover pattern (where present) of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency; for estuaries or tidal rivers, intake flow must be less than or equal to 1% of the tidal excursion volume; for oceans, there are no proportional flow requirements. Track I also requires the permit applicant to select and implement design and construction technologies under certain conditions to minimize impingement mortality and entrainment. Track II allows permit applicants to conduct site-specific studies to demonstrate to the commission that alternatives to the Track I requirements will reduce impingement mortality and entrainment for all life stages of fish and shellfish to a level of reduction comparable to the level the facility would achieve at the cooling water intake structure if it met the Track I requirements.

This rule applies to new greenfield facilities and stand-alone facilities that use cooling water intake structures to withdraw water from waters of the United States and that have or require a TPDES permit issued under the Clean Water Act, §402. Greenfield facilities are facilities that are constructed at a site at which no other source is located, or that totally replace the process or production equipment at an existing facility (see 40 CFR §122.29(b)(1)(i)). Stand-alone facilities are new, separate facilities that

are constructed on property where an existing facility is located and with processes that are substantially independent of the existing facility at the same site (see 40 CFR §122.29(b)(1)(iii)). New facilities subject to this regulation include those that have a design intake flow of greater than two million gallons per day and that use at least 25% of the withdrawn water for cooling purposes. Specifically, the new rule applies to owners or operators of any facility that meets all of the following: the greenfield or stand-alone facility meets the definition of a new facility specified in 40 CFR §125.83; the new facility uses a newly constructed or modified existing intake structure or structures, or the facility obtains cooling water by any sort of contract or arrangement with an independent supplier that has a cooling water intake structure; the new facility's cooling water intake structure(s) withdraw(s) water from waters of the United States and at least 25% of the water withdrawn is used for contact or non-contact cooling purposes; the new facility has a design flow of greater than two million gallons per day; the new facility has an NPDES permit or is required to obtain one. Use of cooling water does not include obtaining cooling water from a public water system or the use of treated effluent that otherwise would be discharged to a water of the United States. This provision is intended to prevent circumvention of these requirements by creating arrangements to receive cooling water from an entity that is not itself a point source. Changes to a cooling water intake structure are considered modifications for purposes of the rule only if such changes result in an increase in design capacity. Generally, facilities that meet these criteria fall into two major groups: new steam electric generating facilities and new manufacturing facilities. The rule does not apply to existing facilities including major modifications to existing facilities that may be "new sources" in 40 CFR §122.29 as that term is used in the EPA's effluent guidelines and standards program.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 it does not meet the criteria for a "major environmental rule" as set out in that statute. A 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, or the environment or public health and safety of the state or a sector of the state. The adoption will not adversely affect, in a material way, 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. The new section additionally does not require regulatory analysis under Texas Government Code, §2001.0225 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 new section does not introduce additional regulatory requirements that are not currently enforced by the EPA or the commission. Therefore, the commission concludes that a regulatory analysis is not required in this instance because the adopted rule does not meet any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of the adopted rule in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to ensure that the commission's requirements for permits are equivalent to EPA's NPDES permitting regulations. The rule will substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because this is an action that does not adversely affect real property and also is within the exceptions of Chapter 2007 because it is reasonably taken to fulfill an obligation mandated by federal law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that it is rulemaking subject to Coastal Coordination Act Implementation Rules under 31 TAC §505.11(b)(4) because it involves a rule governing a specifically listed individual commission action (issuance or approval) that may affect a coastal natural resource area. Therefore, the rulemaking must be consistent with applicable goals and policies of the Texas Coastal Management Program (CMP).

The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies. CMP goals applicable to the adopted rule include 31 TAC §501.12(5), concerning balance of the benefits from economic development and multiple human uses of the coastal zone and benefits from protecting, preserving, restoring, and enhancing coastal natural resource areas; §501.14(a)(1)(B), concerning electric

generating facilities using once-through cooling systems to be located and designed to have the least adverse effects practicable, including impingement or entrainment of estuarine organisms; and §501.14(r)(1)(A)(vi), concerning commission administration of the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state. The rulemaking incorporates by reference federal requirements to prevent the entrainment of aquatic or marine organisms with cooling water at new facilities that uptake at least two million gallons per day of water (with at least 25% of the total water used for cooling purposes). The rulemaking applies statewide, including the coastal areas.

PUBLIC COMMENT

The public comment period ended on January 6, 2003. No comments were received during the comment period.

SUBCHAPTER I: Criteria Applicable to Cooling Water Intake Structures under Clean Water Act, §316(b)

§308.91

STATUTORY AUTHORITY

The new section 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 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.

§308.91. Criteria Applicable to Cooling Water Intake Structures under the Clean Water Act, §316(b).

The following regulations contained in 40 Code of Federal Regulations (CFR) Part 125, as amended, are incorporated by reference.

(1) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.80, What are the purposes and scope of this subpart?

(2) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.81, Who is subject to this subpart?

(3) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.82, When must I comply with this subpart?

(4) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.83, What special definitions apply to this subpart?

(5) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.84, As an owner or operator of a new facility, what must I do to comply with this subpart?

(6) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.85, May alternative requirements be authorized?

(7) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.86, As an owner or operator of a new facility, what must I collect and submit when I apply for my new or reissued NPDES permit?

(8) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.87, As an owner or operator of a new facility, must I perform monitoring?

(9) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.88, As an owner or operator of a new facility, must I keep records and report?

(10) Subpart I - Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, §125.89, As the Director, what must I do to comply with the requirements of this subpart?