

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §50.31 and §50.131 *without changes* to the proposed text as published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2819) and, therefore will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 1998, the commission entered into a Memorandum of Understanding (MOU) with the United States Environmental Protection Agency (EPA) related to the Texas Pollutant Discharge Elimination System (TPDES) program. The MOU states that the TCEQ will not authorize TPDES discharges into waters of the United States under certain subchapters of 30 TAC Chapter 321, and that these subchapters may be repealed and replaced by general permits. This rulemaking removes references to concentrated animal feeding operations under Chapter 321 that are obsolete and no longer applicable.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 321, Control of Certain Activities by Rule and 30 TAC Chapter 305, Consolidated Permits.

SECTION BY SECTION DISCUSSION

This adopted rulemaking amends §50.31(c)(9) to remove the references to concentrated animal feeding operations (CAFOS) under Chapter 321, Subchapter K from the list of applications that are subject to §50.31. Section 50.31(c)(10) has been renumbered accordingly.

The adoption amends §50.131(c)(7) to remove the references to concentrated animal feeding operations (CAFOS) under Chapter 321, Subchapter K from the list of things excluded from coverage under §50.131. Section 50.131(c)(8) has been renumbered accordingly.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the amendments are not subject to §2001.0225 because they do not meet the criteria for a "major environmental rule" as defined 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, the environment, or the public health and safety of the state or a sector of the state.

The adopted amendments remove obsolete references to concentrated animal feeding operations in Chapter 321. Chapter 321, Subchapters G, H, J, K, M, and O are specified for repeal because they are inactive, obsolete, and have been replaced by TPDES general permits. Therefore, it is not anticipated that the adopted amendments will 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. The commission concludes that these adopted amendments do not meet the definition of a "major environmental rule."

Furthermore, even if the adopted amendments did meet the definition of a major environmental rule, the adopted amendments are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, 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 adopted amendments to §50.31 or §50.131 will not cause any of the results listed in Texas Government Code, §2001.0225(a).

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the adopted amendments do not constitute a major environmental rule, a regulatory impact analysis is not required.

The commission solicited public comment regarding the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination

TAKINGS IMPACT ASSESSMENT

The commission evaluated these amendments and performed an assessment of whether the adopted amendments constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the rulemaking is to remove references to inactive and obsolete sections that have been replaced by general permits. The adopted amendments would substantially advance this stated purpose. Promulgation and enforcement of these adopted amendments would be neither a statutory nor a constitutional taking of private real property because the adopted amendments do not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted amendments would eliminate an unnecessary reference to an obsolete rule that is being repealed. Because the amendments do not affect real property, they do not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the amendment.

Therefore, these amendments will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission determined that the adopted amendments, which are procedural mechanisms for removing references to subchapters no longer applicable, are consistent with CMP goals and policies and will not have a direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation of the amendments will not violate (exceed) any standards identified in the applicable CMP goals and policies. The commission invited public comment regarding the consistency of the rules with the CMP. No comments were received regarding the consistency of the rules with the CMP.

PUBLIC COMMENT

The proposal was published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2819). The comment period closed on June 25, 2007. The commission received no comments on the proposed rulemaking.

SUBCHAPTER C: ACTION BY EXECUTIVE DIRECTOR

§50.31

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.102, which establishes the commission's general authority to carry out its jurisdiction; §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; §5.120, which states the commission shall administer 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; and §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state.

The adopted amendment implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, and 26.011.

§50.31. Purpose and Applicability.

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the commission.

(b) This subchapter applies to any application that is declared administratively complete before September 1, 1999. Any application that is declared administratively complete on or after September 1, 1999 is subject to Subchapter G of this chapter (relating to Action by the Executive Director). Except as provided by subsection (c) of this section, this subchapter applies to:

(1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(2) appointments to the board of directors of districts created by special law;

(3) certificates of adjudication;

(4) certificates of convenience and necessity;

(5) district matters under Chapters 49 - 66 of the Texas Water Code;

(6) districts' proposed impact fees, charges, assessments, or contributions approvable under Local Government Code, Chapter 395;

(7) extensions of time to commence or complete construction;

(8) industrial and hazardous waste permits;

(9) municipal solid waste permits;

(10) on-site waste water disposal system permits;

(11) radioactive material permits or licenses;

(12) rate matters for water and wastewater utilities under Texas Water Code, Chapters 11, 12, or 13;

(13) underground injection control permits;

(14) water rights permits;

(15) wastewater permits;

(16) weather modification measures permits;

(17) driller licenses under Texas Water Code, Chapter 32;

(18) pump installer licenses under Texas Water Code, Chapter 33;

(19) irrigator or installer registrations under Texas Water Code, Chapter 34;

(20) municipal management district matters under Local Government Code, Chapter 375;

(21) determination of the financial, managerial, and technical capacity of applicants for loans from the Texas Water Development Board, if requested by that agency; and

(22) certification of an organization that is installing plumbing in a "self-help" project, in a county any part of which is within 50 miles of an international border.

(c) This subchapter does not apply to:

(1) air quality standard permits under Chapter 116 of this title;

(2) air quality permits under Chapter 122 of this title (relating to Federal Operating Permits);

(3) air quality standard exemptions;

(4) consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

(5) district matters under Texas Water Code, Chapters 49 - 66, as follows:

(A) an appeal under Texas Water Code, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under Texas Water Code, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under Texas Water Code, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under Texas Water Code, §54.239, of a board decision involving the cost, purchase, or use of facilities;

(E) an application under Texas Water Code, §49.351 for approval of a fire department or fire-fighting services plan; or

(F) an application under Texas Water Code, §54.030 for conversion of a district to a municipal utility district;

(6) emergency or temporary orders or temporary authorizations;

(7) actions of the executive director under Chapters 101, 111, 112, 113, 114, 115, 117, 118, and 119 of this title (relating to General Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Control of Air Pollution From Toxic Materials; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; Control of Air Pollution Episodes; and Control of Air Pollution From Carbon Monoxide);

(8) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting); and

(9) an application for creation of a municipal management district under Local Government Code, Chapter 375.

(d) Notwithstanding subsections (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.39(b) - (f) of this title (relating to Motion for Reconsideration) applies. If the rules under which the executive director evaluates a registration

application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

SUBCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR

§50.131

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.102, which establishes the commission's general authority to carry out its jurisdiction; §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; §5.120, which states the commission shall administer 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; and §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state.

The adopted amendment implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, and 26.011.

§50.131. Purpose and Applicability.

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the commission. This subchapter does not affect the executive director's authority to act on an application where that authority is delegated elsewhere.

(b) This subchapter applies to applications that are administratively complete on or after September 1, 1999 to certifications of Water Quality Management Plan (WQMP) updates. Applications

that are administratively complete before September 1, 1999 are subject to Subchapter B of this chapter.

Except as provided by subsection (c) of this section, this subchapter applies to:

(1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(2) appointments to the board of directors of districts created by special law;

(3) certificates of adjudication;

(4) certificates of convenience and necessity;

(5) district matters under Chapters 49 - 66 of the Texas Water Code;

(6) districts' proposed impact fees, charges, assessments, or contributions approvable under Texas Local Government Code, Chapter 395;

(7) extensions of time to commence or complete construction;

(8) industrial and hazardous waste permits;

(9) municipal solid waste permits;

(10) on-site wastewater disposal system permits;

- (11) radioactive waste or radioactive material permits or licenses;
- (12) rate matters for water and wastewater utilities under Texas Water Code, Chapters 11, 12, or 13;
- (13) underground injection control permits;
- (14) water rights permits;
- (15) wastewater permits;
- (16) weather modification measures permits;
- (17) driller licenses under Texas Water Code, Chapter 32;
- (18) pump installer licenses under Texas Water Code, Chapter 33;
- (19) irrigator or installer registrations under Texas Water Code, Chapter 34; and
- (20) municipal management district matters under Texas Local Government Code, Chapter 375.

(c) In addition to those things excluded from coverage under this chapter in §50.102 of this title (relating to Applicability), this subchapter does not apply to:

(1) air quality standard permits under Chapter 116 of this title;

(2) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Exemptions from Permitting) except for concrete batch plants which are not contiguous or adjacent to a public works project;

(3) consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

(4) district matters under Texas Water Code, Chapters 49 - 66, as follows:

(A) an appeal under Texas Water Code, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under Texas Water Code, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under Texas Water Code, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under Texas Water Code, §54.239, of a board decision involving the cost, purchase, or use of facilities; or

(E) an application under Texas Water Code, §54.030 for conversion of a district to a municipal utility district;

(5) actions of the executive director under Chapters 101, 111, 112, 113, 114, 115, 117, 118, and 119 of this title (relating to General Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Control of Air Pollution From Toxic Materials; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; Control of Air Pollution Episodes; and Control of Air Pollution From Carbon Monoxide);

(6) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting); and

(7) an application for creation of a municipal management district under Texas Local Government Code, Chapter 375.

(d) Notwithstanding subsections (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.139(b) - (f) of this title (relating to Motion to Overturn Executive Director's Decision) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.