

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts new §311.91 *without changes* to the proposed text as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10899) and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

On September 9, 2010, the Texas Parks and Wildlife Department submitted a petition for rulemaking (Project Number 2010-058-PET-NR) which requested an exemption for discharges associated with pesticide applications authorized by the commission or exempted from permit requirements by federal or state statutes from discharge prohibitions currently found in Chapter 213, Subchapters A and B; and in Chapter 311, Subchapters A, B, and F. On November 3, 2010, the commission recommended approval of the petition for rulemaking.

A recent decision from the Sixth Circuit Court of Appeals overturned the United States Environmental Protection Agency's (EPA) rule which provided that National Pollutant Discharge Elimination System (NPDES) permits were not required for pesticide applications into, over, or near waters of the United States (*National Cotton Council of America v. U.S. EPA*, 553 F.3d 927). As a result of the Sixth Circuit Court of Appeals decision and because Texas is a delegated state, the discharge of pesticides must now be regulated through the Texas Pollutant Discharge Elimination System (TPDES). By court order, applications of pesticides into, over, or near water in the United States must be authorized under the NPDES program by April 9, 2011. Currently, because the discharge

of pesticides is not a point source, Chapters 213 and 311 allow the application of pesticides. However, on April 9, 2011, pesticide application will be prohibited within the Highland Lakes area (Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls) and Edwards Aquifer recharge, contributing, and transition zones.

This rulemaking allows the application of pesticides to continue within these areas for protection of human health and the environment. The inability to control pests could impact public health by preventing mosquito control, restricting recreational activities in the regulated areas due to invasive aquatic vegetation or invasive animals, restrict state and federal agencies from administering programs within their jurisdiction, restrict the volume of water flow in surface waters overlying the aquifer due to invasive aquatic vegetation, and increase the potential for public water supply systems to experience taste and odor problems due to excessive vegetation and algae in surface waters overlying the aquifer.

Section Discussion

New Subchapter I, §311.91, Discharge of Pesticides, would allow for the continued use of commission authorized pesticide application into the Highland Lakes where the increase of discharges will be prohibited after April 9, 2011.

Final Draft Regulatory Impact Analysis

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 definition of a major environmental rule. A "major environmental rule" means a rule that 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.

This rulemaking would exempt discharges associated with pesticide applications authorized by the commission or exempted from permit requirements by federal or state statute from the discharge prohibitions in Chapter 311, Subchapters A, B, and F. This rule is not a major environmental rule and does not meet any of the four applicability requirements that apply to a major environmental rule. Under Texas Government Code, §2001.0225, this adopted rule does not exceed a standard set by federal law or 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. The adopted rule does not exceed a standard set by federal law nor exceeds the requirement of a delegation agreement.

The rulemaking does not adopt a rule solely under the general powers of the commission

and does not exceed an express requirement of state law.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period; no comments were received.

Takings Impact Assessment

The commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to the adopted rule because the adopted rule is not a taking as defined in Chapter 2007, nor is it a constitutional taking of private real property. The purpose of the rule is to exempt discharges associated with pesticide applications authorized by the commission or exempted from permit requirements by federal or state statute from the discharge prohibitions in Chapter 311, Subchapters A, B, and F.

Promulgation and enforcement of the rule will not affect private real property, which is the subject of the rule, because the new rule will not restrict or limit the owner's right to the property or cause a reduction of 25% or more in the market value of the property.

The rule only applies to environmental testing laboratories that submit data to the commission for use in its decisions. Property values will not be decreased, because the amendments will not limit the use of real property. Thus, this rule will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received concerning the Coastal Management Program.

Public Comment

The commission held a public hearing on January 6, 2011. The comment period closed on January 14, 2011. The commission received comments from the Central Texas Golf Course Superintendent Association (CTGCSA); Jersey Meadows Golf Course; the Lone Star Golf Course Superintendent Association (LSGCSA); TCEQ's Office of Public Interest Counsel (OPIC); the Texas Parks and Wildlife Department; and the Texas Turfgrass Association. All six comments expressed support for the rule as proposed; of the six, three approved of the rule provided that the rule will cover golf courses located within the geographic area specified in Chapter 213. One comment was received from Pape-Dawson Engineers, Inc. with two questions concerning the rule and two questions

on the draft pesticide application permit. One comment was received from Practical Vector Control which did not relate to this rule action and one comment was received from an individual expressing disapproval of the rule action.

RESPONSE TO COMMENTS

The GCSA, the Jersey Meadows Golf Course, the LSGCSA, TCEQ's OPIC, the Texas Parks and Wildlife Department, and the Texas Turfgrass Association expressed support of the rule as proposed, with CTGCSA, LSGCSA, and the Texas Turfgrass Association supporting the rule provided that the rule would apply to golf courses and was not specific to State Agencies.

The rule language as proposed is non-specific and will apply to all pesticide application activities over the Edwards Aquifer as defined by this subchapter and authorized by the TCEQ under the TPDES program. No change was made in response to these comments.

Pape-Dawson Engineers, Inc. asked if the rulemaking would prohibit the use of pesticides on a golf course or park located over the Edwards Aquifer Recharge Zone.

The rulemaking will allow for the continuation of all TCEQ-authorized pesticide applications occurring over the Edwards Aquifer recharge,

contributing, and transition zones. No change was made in response to this comment.

Pape-Dawson Engineers, Inc. asked if the rulemaking would prohibit the sale and delivery of pesticides to users, such as golf courses, parks departments, and homeowners, in areas located within or near the Edwards Aquifer Recharge and Contributing Zone.

The rulemaking will not affect the sale or delivery of pesticides to users in areas located over the Edwards Aquifer recharge, contributing, and transition zones. However, individuals and entities that purchase, sell, or deliver pesticides are required to comply with all the rules and regulations governing the purchase, sale, or delivery of pesticides. No change was made in response to this comment.

Pape-Dawson Engineers, Inc. asked if there will be a "blanket" requirement for all pesticides, or will the TCEQ prepare a list of specific pesticides that are "exempt from the NPDES permit process," and if the proposed rule is adopted and it does not provide exemptions for licensed applicators, what must the applicator do to obtain a NPDES permit for the application of pesticides or herbicides.

These questions pertain to the general permit for pesticide application and are not addressed by this rule action. Information regarding the general permit can be found at:

http://www.tceq.texas.gov/permitting/water_quality/stakeholders/pesticidegp_stakeholder_group.html. No change was made in response to this comment.

Practical Vector Control submitted a comment related to the development of the general permit for pesticide application.

This permit action does not address the development of the general permit for the application of pesticides. Information regarding the general permit can be found at:

http://www.tceq.texas.gov/permitting/water_quality/stakeholders/pesticidegp_stakeholder_group.html. No change was made in response to this comment.

One individual expressed concern that application of pesticides over the Edwards Aquifer is only serving to pollute the environment and that continued application of chemicals only contributes to the continued death and destruction of the environment and human health.

The executive director acknowledges this individual's position, but must respectfully disagree. Use of pesticides over the Edwards Aquifer areas has been occurring for years and is required for the protection of both human health and the environment. Without the use of pesticides, disease carrying vectors, such as mosquitoes, would proliferate and could potentially severely impact human health. Additionally, use of herbicides to control invasive species in our waters is needed; without these herbicides invasive species would overgrow the waters, choking out native species, and possibly lower water quality to the point that aquatic life would be impacted.

SUBCHAPTER I: DISCHARGE OF PESTICIDES

§311.91

STATUTORY AUTHORITY

The new section is adopted under Texas Code (TWC), §5.103, which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and powers provided by the TWC and other laws of Texas; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.105, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC; TWC, §26.011, which authorizes the commission to control and maintain the quality of the water in the state; TWC, §26.121, which prohibits unauthorized discharges into or adjacent to water in the state; and Chapter 311, which regulates discharges into certain watersheds.

The adopted new section implements TWC, §26.011 and §26.121; and Chapter 311, Subchapters A, B, and F.

§311.91. Discharge of Pesticides.

Discharges associated with pesticide applications authorized by the commission or exempted from permit requirements by federal or state statute are exempt from the discharge prohibition in Subchapters A, B, and F of this chapter (relating to Watershed Protection).