

The Texas Commission on Environmental Quality (commission or TCEQ) proposes new §311.91.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

On September 9, 2010, the Texas Parks and Wildlife Department submitted a petition for rulemaking 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 30 TAC 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 proposed rulemaking would allow the application of pesticides to continue within the

Highland Lakes area for protection of human health and the environment. The inability to control pests could impact public health by preventing mosquito control, restricting recreational activities on the lakes 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 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.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning Chapter 213, Edwards Aquifer.

SECTION DISCUSSION

The new Subchapter I, §311.91, Discharge of Pesticides, would allow for continued use of commission authorized pesticide application within the Highland Lakes area where discharges are prohibited.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed rule is not expected to have a fiscal impact on other state agencies or units of local government.

A recent decision from the Sixth Circuit Court of Appeals overturned the EPA's rule which provided that NPDES permits were not required for pesticide applications into, over, or near

waters of the United States. The proposed rulemaking would add Subchapter I to Chapter 311 to allow the application of pesticides to continue within the Highland Lakes area after April 9, 2011.

The proposed rule will not have a fiscal impact on state agencies and units of local government in the Highland Lakes area. The proposed rule will allow governmental entities to continue to apply pesticides for pest control purposes. Unless continued pesticide application is allowed, governmental entities in the Highland Lakes area could not control pests that impact public health, have the potential to restrict water flow volumes, or cause taste and odor problems for public water supply systems. Examples of activities that could be affected without the proposed rule are: control of mosquitoes, control of invasive aquatic vegetation, control of algae, and control of invasive animals.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be continued protection of the public health and the environment in the Highland Lakes area.

The proposed rule will not have a fiscal impact on individuals or businesses in the Highland Lakes area. The proposed rule will allow individuals and businesses to continue to apply pesticides to control pests, which without pesticide use, would not be adequately controlled. Examples of pest control that will be allowed under the proposed rule are: control of mosquitoes, control of invasive aquatic vegetation, control of algae, and control of invasive animals.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses in the Highland Lakes area as a result of the proposed rule. Small and micro-businesses will be allowed to continue to apply pesticides to control pests, which without pesticide use, would not be adequately controlled.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with federal regulations and to protect human health and the environment. The proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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 proposed 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 proposed 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.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007, does not apply to the proposed rulemaking because the proposed rulemaking 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 proposed rule will not affect private real property, which is the subject of the rule, because the proposed rulemaking will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. The proposed rule only applies to the continued application of pesticides in the Highland Lakes area. Property values will not be decreased, because the proposed rulemaking will not limit the use of real property. Thus, the proposed rule will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed 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 proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 6, 2011, at 2:00 PM in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle.

The hearing is structured for the receipt of oral or written comments by interested persons.

Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779.

Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Ms. Natalia Henricksen, Texas Register Coordinator, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-055-311-OW. The comment period closes January 14, 2011. Copies of the

proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Ms. Lynda Clayton, Water Quality Division, 512-239-4591; or Mr. George Ortiz, Field Operations Support Division, 512-239-1457.

SUBCHAPTER I: DISCHARGE OF PESTICIDES

§311.91

STATUTORY AUTHORITY

The new section is proposed under Texas Water 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; and TWC, §26.011, which provides that the commission administers the provisions of TWC, Chapter 26, establishes the level of quality to be maintained, and controls the quality of the water in the state; TWC, §26.011, which grants the commission with the powers necessary or convenient to carry out its responsibilities; and 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 proposed 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).