

The Texas Natural Resource Conservation Commission (commission) proposes new §§216.21-216.30 concerning municipal water pollution control and abatement. These sections will form a new Subchapter B under Chapter 216 concerning Municipal Water Pollution Control and Abatement Plans.

EXPLANATION OF RULE

The proposed rules will implement revisions to Texas Water Code, §26.177 made by House Bill 1190 (1997) passed during the 75th Texas Legislature (1997). The bill revised Texas Water Code §26.177 and made the section permissive for any community regardless of population, and required only for communities with populations of 10,000 or greater where the Clean Rivers Regional Assessment of Water Quality or other commission assessments or studies demonstrate a water pollution impact not associated with permitted sources. The proposed rulemaking provides flexibility in allowing affected cities the opportunity to correct the problems using those resources available to them within a reasonable time, but not to exceed five years.

Representatives of potentially impacted municipalities participated in the development of the rule providing suggested language and comment on the requirements of the rule.

In developing the rule, program staff has also considered other related matters such as: federal permitting under Phase II of the storm water permitting program; delegation of the National Pollutant Discharge Elimination System permitting program to the state; revision of state and federal water quality standards to address wet weather conditions; evolving federal policy on Total Maximum Daily

Loads; and the development of a state coastal nonpoint source management program in compliance with Section 6217 of the Coastal Zone Management Act.

Proposed new §216.21, relating to Purpose and Policy, explains that the purpose of these rules is to establish procedures and measures to address water pollution, identified in cities of 10,000 or more, that is not attributable to a permitted source. This section also establishes that this subchapter is not intended to prevent the commission from abating or preventing the pollution of water through permits, orders or other actions.

Proposed new §216.22, relating to Applicability, explains that the proposed rule applies to cities with populations of 10,000 or more in which a water quality assessment report has identified a water pollution problem that is not attributable to a permitted source.

Proposed new §216.23, relating to Definitions, includes definitions that apply to this subchapter and are not included in 30 TAC, Chapter 3.

Proposed new §216.24, relating to Water Quality Assessments and Studies, specifically identifies the related water quality assessments and studies which may be used by the executive director to identify water pollution that is not attributable to permitted sources. Water quality assessments and studies which may be used by the executive director to identify water pollution that is not attributable to permitted sources include, but are not limited to, the Commission's program to develop Total Maximum Daily Loads (TMDLs) in accordance with §303(d) of the federal Clean Water Act. In this

scenario, cities and other stakeholders located in watersheds of waterbodies that do not meet applicable water quality standards would be encouraged and given an opportunity to work with the Commission in the development of TMDLs for the segment. TMDLs are technical analyses performed to determine how much pollution a waterbody can receive without violating its water quality standards. If, during the development of a TMDL, sources, other than permitted, in a city are determined to be contributing to the violation of water quality standards, the city will be notified by the executive director and given a reasonable amount of time to correct the problem. Actions undertaken by the city to correct the problem will need to be coordinated with the TMDL Implementation Plan adopted for the waterbody.

Proposed new §216.25, relating to Notice, explains that the executive director will notify a city if it is determined that an assessment or study has identified water pollution that is not attributable to with permitted sources.

Proposed new §216.26, relating to Public Meeting Held by the Commission, explains that unless the executive director and the city agree that the city should be required to develop and implement a water pollution control and abatement program after expiration of a specified time period, the commission at a commission meeting shall evaluate and take action on the executive director's recommendation. The subsection further explains that the commission may find that the city continues to meet the criteria and needs to implement a program, refer the matter to SOAH, determine that the city is not required to develop a Water Pollution Control and Abatement Program, or issue any other order the commission deems appropriate.

Proposed new §216.27, relating to Water Pollution Control and Abatement Program, explains that a water pollution control and abatement program under this subchapter shall encompass areas within the city's municipal boundaries and its extra-territorial jurisdiction and explains the elements of such a program.

Proposed new §216.28, relating to Submittal of Water Pollution Control and Abatement Programs, details the process for a city submitting a water pollution control and abatement program to the commission.

Proposed new §216.29, relating to Amendment Procedures for Water Pollution Control and Abatement Programs, details the process for the city to submit an amendment to the program for commission review and approval. The proposed rule also provides that the commission may, on its own motion or in response to a petition by the executive director, require the city to amend its program.

Proposed new §216.30, relating to Appeals, explains that any person affected by any ruling by a city related to waste pollution control and abatement outside of the corporate limits, may appeal such an action to the commission or the appropriate state district court.

FISCAL NOTE

Mr. Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five years these proposed sections are in effect, there will be fiscal implications as a result of enforcement and administration of the sections. The effect on state government will be an increase in

cost associated with the development and administration of a program that will include the review of water quality assessment data, processing notifications, preparing for public meetings and contested hearings, and processing appeals and amendments to water pollution control and abatement plans. The cost to state government is estimated to be approximately \$65,000 per year for the first five years the rules are in effect. The net effect of the provisions of House Bill 1190 and these proposed rules will be to reduce the potential costs to local governments of compliance with Water Code §26.177 because of the repeal of the mandatory provisions for development of a pollution abatement plan. The effect on local government will be the costs to those cities of greater than 10,000 population that demonstrate a water pollution impact not attributable to permitted sources. The costs to any one city that makes such demonstration will vary according to the plan the city develops to resolve the problem and will also vary according to the level and extent of problem, size of city, and complexity of the plan. The actual costs to any affected city can only be determined on a site-specific basis. No additional fees will be imposed on any affected city to implement this program.

PUBLIC BENEFIT

Mr. Minick has also determined that for the first five years these proposed new sections are in effect, the public benefit anticipated as a result of enforcement of and compliance with these sections will be improvements in the control and abatement of water pollution coming from non-point sources in the areas and municipalities where water quality assessments have identified water pollution problems. Another public benefit expected is the improvement of the quality of surface water resources in the State. The provisions of House Bill 1190 and these rules as proposed impose costs only on certain cities with demonstrated water quality problems. Other than those costs that have been described for

affected cities under this rule, there are no economic costs to any person, including any small business, anticipated as a result of compliance with the rule as proposed.

REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirement of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because the rule is not a “major environmental rule” as defined in that section of the code and does not exceed any standard, requirement or authority set by federal or state law or delegated agreement. Although the proposed rule is intended to protect the environment, it does not meet the other of the two separate requirements that must be met for the definition to apply. The proposed rulemaking will not 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. Furthermore, even if the proposed rule met the definition of a “major environmental rule”: (1) the proposed rule does not exceed a standard set by federal law; (2) the proposed rule does not exceed any expressed requirement of state law; (3) there is no delegation agreement or contract directly applicable to the proposed rule, and (4) the rule is not adopted solely under the general powers of the commission, but is adopted under the specific authority of Texas Water Code §26.177.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to implement requirements of §26.177 of the Texas Water Code. The

proposed rule will substantially advance this specific purpose by establishing procedures to address water pollution that is not attributable to permitted sources in cities with populations of 10,000 or more. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the rule governs actions a city must take to abate and/or prevent water pollution occurring within its jurisdiction. The rule requires cities to identify and regulate discharges into waters in the state which are non-permitted and may be contributing to the pollution of a water body. To the extent a municipality must enact an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure to address the issue of non-permitted discharges which might have an effect on real private property, §2007.003(b)(4) of the Texas Government Code exempts a municipality from application of the Private Real Property Act.

COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the proposed rulemaking and found that the rule does not govern air pollution emissions, on site sewage disposal systems, or underground storage tanks or other specific nonpoint source control related actions expressly identified under Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor does it govern or authorize actions listed in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the CMP. However, the development and implementation of water pollution control and abatement plans, where appropriate, will provide significant protection for coastal natural resources and will be an integral part of the state's coastal non-point source pollution control program.

PUBLIC HEARING

A public hearing on the proposal will be held on November 10, 1998 at 10:00 a.m. in Room 2210 of the TNRCC Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured to receive oral or written comments by interested persons. Individuals may present oral statements, when called upon, in the order of registration. Open discussion within the audience will not occur during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Written comments on the proposal should refer to Rule Log No. 97164-216-WT and may be mailed to Lutrecia Oshoko, MC 204, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

Written comments must be received by 5:00 p.m., November 30, 1998. Such comments will not receive individual responses, but will be addressed in the preamble of the adopted rules and published in the *Texas Register*. For more information, please contact Arthur Talley of the Data Collection Section at (512) 239-4546.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Water Code, §5.103 and §26.011 which provides the commission authority to adopt rules necessary to carry out its powers and duties under the provisions of the Texas Water Code, and under §26.177 which provides the Commission with the authority to

establish rules providing the criteria for the establishment of water pollution control and abatement programs and the review and approval of those programs.

There are no other codes, statutes or rules that will be affected by this proposal.

SUBCHAPTER B : MUNICIPAL WATER POLLUTION CONTROL AND ABATEMENT

§§216.21 - 216.30

§216.21. Purpose and Policy.

(a) The purpose of this subchapter is to establish procedures and measures in accordance with Texas Water Code, §26.177(a) to address water pollution that is not attributable to permitted sources in cities that have a population of 10,000 or more persons.

(b) An unauthorized discharge is a violation of Texas Water Code, §26.121. Nothing in this subchapter is intended to limit or prevent the commission from abating or preventing the pollution of water in the state through permits, orders, or other enforcement actions authorized under the Texas Water Code, Chapter 26, or other applicable state or federal law.

§216.22. Applicability.

(a) This rule applies to any city with a population of at least 10,000 persons, based on the most recent federal decennial census, and in which a water quality assessment report required by Texas Water Code, §26.0135 or other commission assessment or study, as described in §216.24 of this title (relating to Water Quality Assessments and Studies), has identified water pollution that is not attributable to permitted sources. Cities meeting applicability shall be required to satisfy applicable

provisions of this subchapter upon receipt of notice issued by the executive director pursuant to §216.25 of this title (relating to Notice).

(b) A city whose population falls below 10,000, based on the most recent federal decennial census, will no longer have a duty to satisfy the applicable provisions of this subchapter upon the executive director's receipt from the city of the most recent federal decennial census indicating that the population has fallen below 10,000.

(c) A Water Pollution Control and Abatement Program submitted under this subchapter is not a Water Pollution and Abatement Plan as provided by Texas Water Code, §26.121(a)(2)(B).

§216.23. Definitions.

Terms defined in Chapter 3 of this title (relating to Definitions) will have the same meaning when used in this subchapter unless the definition is specifically modified in this section.

(1) **City** - A municipality or city existing, created, or organized under the general, home rule, or special laws of this state.

(2) **Extra Territorial Jurisdiction** - An area outside the corporate limits of a municipality as defined in Local Government Code, §42.021.

(3) **Permitted Sources** - A source that discharges or is required to discharge pollution into or adjacent to waters in the state as authorized by a valid permit, general permit, or rule pursuant to the Texas Water Code, the federal Clean Water Act, or other applicable state or federal law.

(4) **Pollution** - The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to public health, safety or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose. This definition includes, but is not limited to, nonpoint sources of pollution as those sources are defined and identified pursuant to Chapter 220 of this title (relating to Regional Assessments of Water Quality), the federal Clean Water Act, the Coastal Management Act, Chapter 6217, and other applicable state and federal statutes, regulations, policies, and guidance.

(5) **Significant Waste Discharge** - The discharge of waste to waters in the state which causes or threatens to cause pollution.

(6) **Water Pollution Control and Abatement Program** - A program developed pursuant to this Chapter that includes personnel, services, functions, schedules, and reports developed by a city to prevent or correct water pollution problems within its jurisdiction.

§216.24. Water Quality Assessments and Studies.

Water quality assessments and studies that may be used by the executive director to identify water pollution that is not attributable to permitted sources shall consist of one or more of the following:

(1) State Water Quality Inventory. The state program which assesses the quality of surface and ground waters resulting in a report describing the status of water quality in the state in accordance with the Federal Clean Water Act, §305(b);

(2) Clean Rivers Program. Watershed water quality assessments conducted in accordance with Texas Water Code, §26.0135;

(3) State Nonpoint Source Assessment. The state program implemented in compliance with Federal Clean Water Act, §319(a) which identifies surface and ground waters in the state which cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of the federal Clean Water Act without additional controls for nonpoint sources of pollution;

(4) Total Maximum Daily Load. Pursuant to Clean Water Act §303(d), the identification and prioritization of waters within the state for which the effluent limitations required by

§301(b)(1)(A) and (B) of the Clean Water Act are not stringent enough to implement any water quality standard applicable to such waters; or,

(5) Other. Special studies, pilot projects, reports, or other quality assured assessments of water quality in the state prepared, approved, or accepted by the executive director that identify non-permitted sources of water pollution within cities, including information used by the executive director for the purpose of updating the state's list of impaired waters prepared in accordance with the federal Clean Water Act, §303(d).

§216.25. Notice.

(a) If it is determined by the executive director that a city has met the criteria set forth in §216.22(a) of this title (relating to Applicability) or the executive director is requiring the city to amend an existing water pollution control and abatement program, the executive director shall notify the city.

This notice shall specify the following:

(1) the basis for the executive director's determination;

(A) That the city meets the criteria set forth in §216.22(a) of this title (relating to Applicability); or,

(B) That the city's existing Water Pollution Control and Abatement Program
should be amended;

(2) that the executive director may undertake additional water quality assessments and studies in the impacted area as set out in §216.24 of this title (relating to Water Quality Assessments and Studies);

(3) that the city may undertake additional water quality assessments and studies in the impacted area within its jurisdiction which comply with quality assurance requirements of the executive director; and,

(4) the time period (not to exceed five years) within which the city may try to correct the problem. The executive director may amend this time period when new or additional information or circumstances warrant such an amendment.

§216.26. Public Meeting Held by the Commission.

(a) After expiration of the time period specified in §216.25(a)(4) of this subchapter, the executive director shall determine whether a city still meets the criteria set forth in §216.22(a) of this subchapter based on water quality assessments and studies set out in §216.24 performed subsequent to the initial determination, taking into consideration any measures taken by the city to correct the problem.

(b) If the executive director determines that a city continues to meet the criteria set forth in §216.22(a) of this subchapter, the executive director at a public meeting held by the commission shall recommend that the city be required to submit a Water Pollution Control and Abatement Program or, when appropriate, amend an existing Water Pollution Control and Abatement Program.

(c) No public meeting shall be required if the executive director and the city agree that the city should be required to develop and implement a Water Pollution Control and Abatement Program, or amend an existing Program. In lieu of a public meeting, the city, based on an agreement with the executive director, may request that the commission issue an agreed order to submit a Program as described in §216.27 (relating to Water Pollution Control and Abatement Program) or an amendment to an existing Program as described in §216.29 (relating to Amendment Procedures for Water Pollution Control and Abatement Programs).

(d) The city shall cause notice of the public meeting to be published in accordance with Sections 39.5 and 39.7 of Chapter 39 of this title (relating to Public Notice, General Provisions and Text of Public Notice) informing the public of the meeting and that the public has thirty (30) days prior to the public meeting to provide written comment to the commission on whether the city should be required to develop and implement a Water Pollution Control and Abatement Program or amend an existing Water Pollution Control and Abatement Program.

(e) After consideration of the matter at the public meeting, the commission may:

(1) refer the matter to SOAH for a contested case hearing conducted pursuant to the Administrative Procedure Act (APA) to determine whether the city continues to meet the criteria set forth in §216.22(a);

(2) determine that the city is not required to submit a Water Pollution Control and Abatement Program;

(3) determine that the city continues to meet the criteria set forth in §216.22(a) of this subchapter and approve the executive director's recommendation that the city be required to develop, or where appropriate amend, and implement a Water Pollution Control and Abatement Program ; or

(4) issue any other order the commission deems appropriate.

(f) The public meeting held by the commission pursuant to this section shall satisfy the requirement of the public hearing mandated by Texas Water Code Section 26.177.

(g) A commission order issued pursuant to subsection e) of this section is a final and appealable order under Texas Water Code §5.351. As a prerequisite to appeal, a motion for rehearing under §80.271 of this title (relating to Motion for Rehearing) must be filed within twenty (20) days after the date the city or the city's attorney of record is notified of the commission's final decision or order under this subchapter.

§216.27. Water Pollution Control and Abatement Programs.

(a) The Water Pollution Control and Abatement Program of a city shall encompass the area within a city's municipal boundaries and, subject to Texas Water Code, §26.179 (relating to Designation of Water Quality Protection Zones in Certain Areas), may include areas within its extra-territorial jurisdiction which in the judgment of the city should be included to enable the city to achieve its objectives for the area within its territorial jurisdiction.

(b) The city shall include in the Program the services and functions which, in the judgment of the city or as may be reasonably required by the commission, will provide effective water pollution control and abatement for the city, including the following services and functions:

(1) the development and maintenance of an inventory of all significant waste discharges into or adjacent to the water within the city and, where the city so elects, within the extraterritorial jurisdiction of the city, without regard to whether or not the discharges are authorized by the commission;

(2) the regular monitoring of all significant waste discharges included in the inventory prepared pursuant to Subparagraph (1) of this subsection;

(3) the collecting of samples and the conducting of periodic inspections and tests of the waste discharges being monitored to determine whether the discharges are being conducted in

compliance with this chapter and any applicable permits, orders, or rules of the commission, and whether they should be covered by a permit from the commission;

(4) a procedure for obtaining compliance by the waste dischargers being monitored, including where necessary the use of legal enforcement proceedings;

(5) the development and execution of reasonable and realistic plans for controlling and abating pollution or potential pollution resulting from generalized discharges of waste which are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater; and

(6) any additional services, functions, or other requirements as may be prescribed by commission rule to effectuate the purposes of this subchapter.

§216.28. Submittal of Water Pollution Control and Abatement Programs.

A Water Pollution Control and Abatement Program shall be submitted to the executive director of the commission in accordance with the order issued pursuant to §216.26 of this title (relating to Public Meeting Held by the Commission). The Water Pollution Control and Abatement Program for the city shall be signed and sealed by a professional engineer licensed in the State of Texas who shall certify that the city's Program is designed to abate and prevent water pollution not attributable to permitted sources located within the city.

§216.29. Amendment Procedures for Water Pollution Control and Abatement Programs.

(a) A city may amend the Water Pollution Control and Abatement Program for that city at any time by submitting an amended Water Pollution Control and Abatement Program to the executive director of the commission. The amended Water Pollution Control and Abatement Program for the city shall be signed and sealed by a professional engineer licensed in the State of Texas who shall certify that the city's Program is designed to abate and prevent water pollution not attributable to permitted sources located within the city.

(b) The executive director may require a city to amend a Water Pollution Control and Abatement Program for that city when new or additional information or circumstances warrant such changes to effectuate the purposes of this subchapter.

(c) The notice, public meeting, and hearing requirements provided under §§216.25(a) (relating to Notice) and 216.26 (relating to Public Meeting Held by the Commission) of this subchapter shall apply to an amendment of a Water Pollution Control and Abatement Program.

§216.30. Appeals.

Pursuant to Texas Water Code §26.177(d), any person affected by any ruling, order, decision, ordinance, program, resolution, or other act of a city relating to water pollution control and abatement outside the corporate limits of such city adopted pursuant to this subchapter or any other statutory authorization may appeal such action to the commission or district court. An appeal must be filed with the commission's chief clerk within sixty (60) days of the enactment of the ruling, order, decision, ordinance, program, resolution, or act of the city. The issue on appeal is whether the action or program is invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality, and the commission's order on the appeal will be based on whether the city's actions or programs meet these criteria. The commission or district court may overturn or modify the action of the city. If an appeal is taken from a commission ruling, the commission ruling shall be in effect for all purposes until final disposition is made by a court of competent jurisdiction so as not to delay any permit approvals.