

**Effective: February 7, 2002**

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION  
Permanent Rule Change

Rule Log No. 2000-038-216-WT  
Quadrennial Review of Chapter 216; w/concurrent repeals

Chapter 216  
Water Quality Performance Standards for Urban Development

Subchapter A

1. Purpose. This change transmittal provides the page(s) that reflect changes and additions to the Texas Natural Resource Conservation Commission (commission) Volume of Permanent Rules.
2. Explanation of Change. On January 16, 2002, the commission adopted the repeal of Subchapter A, Water Quality Protection Zones, §§216.1 - 216.11, concerning Water Quality Performance Standard for Urban Development *without change* to the proposal published in the October 26, 2001 issue of the *Texas Register* (26 TexReg 8487).
3. Effect of Change. The purpose of the rulemaking is to remove rules that are based on a statute that has been invalidated by opinion of the Texas Supreme Court and by opinion of the Texas Attorney General.

The commission also is adopting, in concurrent action, the review of Chapter 216, Subchapter A as required by Texas Government Code, §2001.039. The adopted rules review can be found in the Review of Agency Rules section in this issue of the *Texas Register*. The commission also terminated a rulemaking it authorized to be commenced (Rule Log Number 1997-187-216-WT) in 1998 in response to a petition by the City of Austin to revise Chapter 216, Subchapter A.

Chapter 216, Subchapter A sets out the procedures and criteria to be used by the commission: 1.) in the review and approval of water quality plans and amendments submitted for tracts of land, 500 acres or larger, designated as water quality protection zones; and 2.) in the designation of water quality protection zones for tracts of land that are less than 1,000 acres but not less than 500 acres in size. In accordance with Texas Water Code (TWC), §26.179, the repeals apply only to areas within the extraterritorial jurisdictions of cities with a population greater than 5,000 (in 1999, raised to 10,000), and in which the municipality has enacted or proposed at least three ordinances to regulate water quality within their extraterritorial jurisdictions in the five years prior to June 17, 1995, or enacts or attempts to enforce three or more ordinances or amendments attempting to regulate water quality or control or abate water pollution in the area in any five-year period. This law does not apply to areas within the extraterritorial jurisdiction of a city with a population greater than 900,000 that has extended an ordinance to prevent the pollution of an aquifer which is the sole or principal drinking water source for the municipality.

The commission believes that the adoption of the repeal of the rules in Chapter 216, Subchapter A is necessary because TWC, §26.179 on which the subchapter is based, was invalidated by the Texas Supreme Court in the case of *FM Properties Operating Co. v. City of Austin*, 22 S.W. 3d 868 (Tex. 2000). In that case, the court held that the pre-1999 version of TWC, §26.179 is an

unconstitutional delegation of legislative power to private landowners. The court did not address the 1999 amendments to TWC, §26.179 because they were enacted after the case began and apply prospectively. However, the Texas Attorney General in Opinion Number JC-0402 (August 2, 2001) concluded consistent with the Supreme Court's decision that the current version of the statute is unconstitutional. Accordingly, the repeal of Chapter 216, Subchapter A, is appropriate. The commission also terminated a rulemaking it authorized to be commenced (Rule Log Number 1997-187-216-WT) in 1998 in response to a petition by the City of Austin to revise Chapter 216, Subchapter A.

Sections 216.1, *Applicability*; 216.2, *Definitions*; 216.3, *Designation of Water Quality Protection Zones*; 216.4, *Expiration*; 216.5, *Agents*; 216.6, *Water Quality Plan*; 216.7, *Actions and Notice*; 216.8, *Annual Reporting Requirements*; 216.9, *Corrective Action*; 216.10, *Enforcement*; and 216.11, *Fee Schedule* are repealed because the statute on which they are based has been invalidated.