The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §§216.21-216.30, concerning Municipal Water Pollution Control and Abatement. The new sections are adopted with changes to the proposed text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11072). These sections will form a new Subchapter B under Chapter 216.

EXPLANATION OF RULES

The rules implement revisions to Texas Water Code, §26.177 made by House Bill 1190 (1997) passed during the 75th Texas Legislature. The bill revised Texas Water Code, §26.177 and made the development and submission of a water pollution control and abatement plan permissive for any community regardless of population. However, a plan is required for cities 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 attributable to non-permitted sources. The rulemaking also provides flexibility in allowing affected cities the opportunity to correct the problem before the commission determines whether to require the submission of a plan as provided by §26.177. Such opportunity will be for a reasonable time, but not to exceed five years, to reflect resources available to an affected city and to coordinate this program with the five-year basin cycle water quality management program provided under Texas Water Code, §26.0285.

In developing the rules, program staff has also considered other matters such as: federal permitting under Phase II of the storm water permitting program; delegation of the National Pollutant Discharge Elimination System (NPDES) 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

(TMDLs); and the development of a state coastal nonpoint source management program in compliance with the Coastal Zone Management Act, §6217.

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 attributable to non-permitted sources. 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.

New §216.22, relating to Applicability, explains that the 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 attributable to non-permitted sources.

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

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 attributable to non-permitted sources. Water quality assessments and studies which may be used by the executive director to identify water pollution that is attributable to non-permitted sources include, but are not limited to, the commission's program to develop TMDLs in accordance with the federal Clean Water Act, §303(d). 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 and implementation 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, non-permitted sources in a city are determined to be contributing to water pollution, 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.

New §216.25, relating to ~~Notice~~ Notice of Initial Determination, explains that the executive director will notify a city if it is determined that an assessment or study has identified water pollution that is attributable to non-permitted sources.

New §216.26, relating to ~~Public Meeting Held by the Commission~~ Final Determination of Applicability, explains that unless the executive director and the city agree that the city ~~should be required to~~ will develop and implement a water pollution control and abatement program after expiration of a specified time period, the commission at a regularly scheduled commission meeting shall evaluate and take action on the executive director's recommendation. The section further explains that the commission may find that if the city continues to meet the criteria and needs to implement a program, refer the matter to the State Office of Administrative Hearings (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. The section also explains that the executive director will incur the burden of demonstrating that the city meets the criteria in §216.22(a).

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 extraterritorial jurisdiction and explains the elements of such a program.

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.

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 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.

New §216.30, relating to Appeals, explains that any person outside the corporate city limits, but within the extraterritorial jurisdiction (ETJ) 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.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirement of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because the rules are not a "major environmental rule" as defined in that section of the Code and do not exceed any standard, requirement, or authority set by federal or state law or delegated agreement. Although the rules are intended to protect the environment, they do not meet the other requirements that must be met for the definition to apply. The 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, the rules are not adopted solely under the general powers of the commission, but are adopted under the specific authority of Texas Water Code, §26.177.

The rules are intended to assist the commission in identifying water pollution from non-point sources and to improve the quality of surface water resources in the state. In order for the commission to ameliorate the adverse affects of non-point source pollution to surface waters in the state, it must be able to identify water pollution from non-point sources affecting not only the surface water, but the environment generally. Enacting these rules will provide an overall benefit to the economy, sectors of the economy, productivity, competition, jobs, the environment, and the public health and safety of the state and affected sectors of the state because by identifying the existence of non-point source pollution and tracing it back to a source which can be regulated beneficially affects the entire state, especially the public health and the public safety, because the ultimate goal is to abate a source of pollution that is contaminating the surface water in the state.

The identification of non-point source pollution costs the state and affected municipalities less in the long run because the more polluted water courses become from non-point source pollution, the fewer municipalities and industrial users the commission will be able to permit for discharges into waters in the state. Obtaining a permit will only become more difficult over time because stream segment assimilative capacities will not be available for additional discharges. This in turn will affect a municipality's ability to accommodate a burgeoning population demanding additional services from the city. A detailed response to specific comments submitted on the Regulatory Impact Analysis (RIA) is found elsewhere in this preamble.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment (TIA) for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. A detailed response to specific comments submitted on the TIA is found elsewhere in this preamble. The specific purpose of the rules is to implement requirements of Texas Water Code, §26.177. The rules will substantially advance this specific purpose by establishing procedures to address water pollution that is attributable to non-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 rules govern actions a city must take to abate and/or prevent water pollution occurring within its jurisdiction. The rules require 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,

Texas Government Code, §2007.003(b)(4) exempts a municipality from application of the Private Real Property Act.

COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the rulemaking and found that the rules do not govern specific actions identified in the Coastal Management Plan subject to consistency with the Coastal Management Program (CMP), including air pollution emissions, on-site sewage disposal systems, underground storage tanks, or other specific non-point 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 CMP. Nor does it govern or authorize actions listed in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rules are 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, and have been included in the state's submission to the National Oceanic and Atmospheric Administration (NOAA) for purposes to meeting the requirements of the federal Coastal Zone Management Act, §6217.

~~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.~~

HEARING AND COMMENTERS

A public hearing was held on November 10, 1998 in Austin. Oral comment was presented by Texas Cities Coalition on Stormwater (TCCOSW). Written comments were received from TCCOSW, the City of Fort Worth (COFW), City of Vernon (COV), City of Pflugerville (COP), City of Cleburne (COC), City of Dallas (COD), City of Arlington (COA), City of North Richland Hills (CONRH), Texas Coastal Management Program (TGLO), and the Texas Municipal League (TML).

GENERAL COMMENTS

COFW commented that the proposed rules do not take into account the work done and the money spent by municipalities having to comply with the National Pollutant Discharge Elimination System. COC commented that the proposed rules do not state how these rules affect the Texas Pollutant Discharge Elimination System (TPDES) and asked if designation under these rules constitutes designation under the TPDES program and requires a permit. COC also asked if a Water Pollution Control and Abatement Plan (WPCAP) serves to comply with TPDES requirements. COD commented that abatement programs under the United States Environmental Protection Agency (EPA) Municipal Separate Storm Sewer System (MS4) Permits required of Phase I and Phase II cities should be acceptable water pollution control and abatement programs and that the commission should not duplicate efforts through the proposed rules. COD further commented that if these rules are proposed to be TNRCC's new storm water permit program, then the City of Dallas would support the change. However, if this is another program in addition to the present storm water permit program, the City of Dallas opposes the proposal. COA commented that Phase I NPDES permittees that have a Storm Water Management Program in place should be exempt from the proposed §216.22 (Applicability). COA also commented that §216.27(b)(5) imposes more restrictive planning or a duplication of plans already in place on Phase I NPDES MS4 cities that have storm sewer discharge permits. TCCOSW commented that the rule should also address the relationship between the federal stormwater permitting program for municipal separate storm sewer systems (MS4) and the proposed rule as mentioned in the RIA.

The rules implementing Texas Water Code, §26.177 do not duplicate or otherwise affect NPDES or TPDES stormwater permitting, nor place duplicative or unnecessary burdens on cities.

Discharges covered by the rules address non-permitted sources of water pollution. NPDES permits, Phase I or Phase II Stormwater, seek to address permitted sources and therefore, would not be duplicated by the §26.177 program. Rather, the program seeks to address pollution not covered by a permitting program.

TCCOSW argued that the commission should implement §26.177 as an integral part of its ongoing Statewide Watershed Management Approach. TCCOSW described the Statewide Management Approach as resulting in a Watershed Action Plan for each water quality limited waterbody in the state and cited 40 Code of Federal Regulations (CFR) Part 130 as a reference.

The commission disagrees with the comment that §26.177 should only be implemented as part of the Statewide Watershed Management Approach described by TCCOSW. The Watershed Management Approach recommended by TCCOSW is the TMDL program prescribed by the federal Clean Water Act and over which EPA has ultimate oversight and approval authority. The commission believes that TMDLs are a valid approach to §26.177 and is pursuing the development of TMDLs in accordance with EPA directives. However, the commission believes that relying solely upon the TMDL program for §26.177 is inconsistent with the statute, which specifically identifies a state initiated program among a range of assessments and studies to be used to support activities under §26.177.

TGLO commented that in order for the state's §6217 (Coastal Zone Act Reauthorization Amendments) coastal non-point source pollution control program to meet federal approval, the measures under

subsection (g) of that provision ("g" measures) must be implemented to restore and protect coastal water quality. TGLO suggested that "g" measures should only apply to cities in which the TNRCC identifies pollution to coastal waters; water pollution problems would be conclusively presumed corrected once the city demonstrated that it had widely implemented "g" measures or when a WPCAP is required, if the program provides for widespread implementation of the "g" measures. TGLO also commented that the reference to "the Coastal Management Act, Chapter 6217" in §216.23(4) should be changed to "§6217 of the Coastal Zone Act Reauthorization Amendments of 1990."

The commission responds that NOAA guidance provides that a state implement "g" measures for the category of non-point source pollution or alternatives that are as effective as the "g" measures. NOAA also allows states to focus their non-point source programs on areas with known non-point source water quality problems. The state has submitted the §26.177 program as part of its urban non-point source pollution control strategy and believes that it meets NOAA criteria as part of an effective and focused program. For urban non-point source problems that exist outside the scope of the §26.177 program, the commission will rely on other statutory authorities including, but not limited to, Texas Water Code, §26.121. The reference raised by the commenter will be changed in the rule.

COFW commented that it was not given the opportunity to participate in the development of the rules.

In addition to considering written and oral comments submitted during the public comment period, the commission and its staff are always willing to meet with any person or entity on a

proposed rulemaking. The Texas Municipal League, which represents municipalities and their interests, and the Texas Cities Coalition on Stormwater, a group of 86 Texas cities that present and address concerns related to water quality in the state, asked to meet with staff to discuss the proposed rules. At their request, commission staff provided these groups with versions of the proposed rule as it was being developed. Updates on the development of the rule were also presented to the public at large at various regulatory forums. Commission staff pursued rulemaking using the standard provision of working with organizations and associations representing potentially impacted parties.

TCCOSW requested that the commission consider an alternative version of the rule that it submitted. COV also encouraged the alternative rule proposed by the TCCOSW over the commission proposed rule.

The commission responds that the alternative version of the rule proposed by TCCOSW has been considered and the specific recommendations contained in the alternative version of the rule are addressed individually in the commission's responses to comments on the proposed rule.

COP commented that "City" and "city's jurisdiction" are used interchangeably in the rules and asked whether the scope of compliance is limited to the city limits, the city's ETJ, or to regulatory jurisdiction.

The scope of applicability of Chapter 216 is limited to a city's corporate city limits. Compliance with a city's plan is applicable to the city's ETJ as well as within its corporate limits. However, to

trigger the review, the pollution identified must be within the city's corporate boundaries. In accordance with §216.27(a), the city's efforts to alleviate the problem by submitting a water pollution control and abatement program may involve the city's ETJ to the extent the city deems necessary. Section 216.27(a) provides that if non-permitted pollution is identified within the city's corporate limits and the source of the non-permitted pollution is coming from the city's ETJ, the city may involve the ETJ to the extent necessary to control the source of non-permitted pollution that is identified within the city's boundaries.

COC commented that the city's costs of water quality and compliance monitoring should be included in the fiscal note.

The commission acknowledges that some cities could incur certain monitoring costs; however, monitoring would only be required of cities that have a population of at least 10,000 and where the commission has found water pollution attributable to non-permitted sources and have not corrected the water pollution problem on their own since the initial notice was provided five years earlier and must now submit a water pollution control and abatement plan. Monitoring would only be required of those discharges that the city deemed significant or as reasonably required by the commission which may vary from size, amount of discharge, and type of pollutant discharged. The costs to any one city that meets the applicability requirements will vary according to the plan the city submits, the level and extent of the non-permitted source pollution problem, size of the city, and the complexity of the plan. The actual costs to any affected city can only be determined on a site-specific basis. Staff cannot predict in advance how many cities would fall into this

category of monitoring; however, staff does not anticipate the number being great. No changes will be made to the fiscal note.

TML commented that a city's actions to ensure compliance or bring legal enforcement could have a significant impact upon the economy, productivity, competition, jobs, or environment in a sector of the state. TCCOSW asserts that the commission's conclusions that the rulemaking is not a major environmental rule because the rule will not adversely affect the economy of the state, 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 are in error, and that the commission must prepare a full RIA as part of the final rulemaking. TCCOSW maintains that the rulemaking is clearly a major environmental rule, since it's specific intent is to protect the environment. As a result of the rule, cities may be forced to stringently regulate land development and construction activities. This regulation will impose additional costs on development that could be significant. The change from pollution attributable to non-permitted sources to pollution not attributable to permitted sources alters the balance of and greatly exceeds the requirements of the statute. The commission also states that the rule is limited to cities with populations over 10,000 that have water pollution problem attributable to non-permitted sources, and do not have a federal stormwater permit; however, the text of the proposed rule does not provide an exemption for cities with federal stormwater permits.

The commission maintains that the rules do not meet the full definition of a "major environmental rule." The requirements of Government Code, §2001.0225, apply only to rules that meet the definition of a "major environmental rule." This definition contains two separate requirements

that must both be met for the definition to apply: 1) the specific intent of the rule is to protect the environment or reduce risks to human health from environmental exposure; and 2) the rule 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. Although the rule's intent is to protect the environment, this is not a major environmental rule because there is a reasonable expectation that the provisions of the rule will not adversely affect in a material way any of the sector's identified in the definition. The use of the word "may" indicates that whether the rule has an effect on 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 is not a positive determination one way or the other. Rather, the inquiry is whether there is a reasonable expectation that the rule will result in a material adverse effect. A material adverse effect is one having real importance or great consequence. It is not a foregone conclusion that a city's actions in complying with this rule will be of great consequence or real importance. The mere possibility that a city's actions could have an impact on the economy of business or industry does not qualify this rule as a major environmental rule. Even if this rule qualified as a major environmental rule because it meets the definition and could be determined to positively have a material adverse effect on 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, §2001.0225 would still not apply. This proposed rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This

proposal does not exceed a standard set by federal law because there is no federal law requiring or preempting the commission in its adoption of this rule. This proposal does not exceed an express requirement of state law because the rule and the water control and abatement program contemplated under §216.27 mirrors Texas Water Code, §26.177. This proposal does not exceed a requirement of a delegation agreement because there is no delegation agreement applicable to this issue. And, this proposal does not adopt a rule solely under the general powers of the agency, e.g., Texas Water Code, §5.103 and §5.105, but rather under a specific state law, i.e., Texas Water Code, §26.177. In light of the foregoing, the commission maintains that a full RIA is not required for this rule.

The adopted version of Chapter 216 now uses the phrase "pollution attributable to non-permitted sources" in accordance with §26.177 in order to avoid any confusion in the meaning or interpretation of the statute.

While the text of the rule does not contain a provision that expressly exempts cities with federal stormwater permits, the commission believes that §26.177 is aimed at non-permitted sources of water pollution. NPDES permits, Phase I or Phase II Stormwater, seek to address permitted sources. This state program shall not overlap or duplicate federal stormwater permitting programs to the extent that the federal program addresses sources of pollution.

TML commented that if a city must employ compliance and legal measures against private waste dischargers and employ land use restrictions, the rule has the potential to create a burden on private real

property. COP commented that the rule will have an impact on private property that will place the burden directly on property owners or taxpayers. TCCOSW commented that the commission's evaluation is not limited to only burdens directly caused by the TNRCC's action; rather, the commission must evaluate direct and indirect burdens. Also, that because the commission acknowledges that cities may be required to regulate the activities of the general public, the commission is also acknowledging that the rule may impose burdens on private real property. Both TML and TCCOSW commented that a full TIA is required.

This rule does not impose a burden on private real property because private real property is not the subject of the regulation. This rule is aimed at requiring a city with non-permitted sources of pollution within its corporate boundaries to ameliorate the effects of that pollution. The commission has incorporated verbatim §26.177(b) in §216.27 of the rule. If and when non-permitted sources of pollution are identified, the city is free to craft any type of solution to remedy the problem within the confines of the rule, which is a reiteration of the statute. Land use restrictions are not mandated by the statute or the rule; therefore, the commission disagrees with the TML comment that the city must employ land use restrictions to achieve the objectives of the rule.

The commission also disagrees that a full TIA is required. Section 2007.043(b) requires the TIA to identify the burdens imposed on private real property and the benefits to society resulting from the proposed rule. The inquiry for the commission in preparing a TIA is whether the action will place a burden on private property that affects the right the property owner had before the

existence of the regulation and which is the producing cause of a reduction of at least 25% in the market value of the affected property. The adoption of this rule does not place a burden on private property that restricts or limits the owner's right to property that would otherwise exist in the absence of Chapter 216. There is no existing right to conduct activities or use private property in a manner that results in an unauthorized discharge of waste into or adjacent to waters of the state. A preexisting limitation on the use of all real property in this state is found in Texas Water Code, §26.121. Section 26.121 prohibits the discharge into or adjacent to any water in the state of sewage, municipal waste, recreational waste, agricultural waste, or industrial waste or any other waste which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any water of the state in the state. The commission rules in Chapter 216 do not exceed this preexisting prohibition; rather, they articulate measures that the city may be required to take to ensure compliance with Water Code, Chapter 26.

Many rules ultimately and indirectly burden property owners, but they do not burden property. Land use restrictions placed on property by a city is the decision of the city, not a mandate of Chapter 216 and this rule is not aimed at prohibiting a landowner from making use of his or her property.

The Private Real Property Preservation Act (the Act) specifically exempts actions taken by a municipality with the exception set out in §2007.003(a)(3). That is, except when a municipality takes action that has effect in the extraterritorial jurisdiction of the municipality that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction, it is exempt

from the Act (Texas Government Code, §2007.003(b)). There is also an exemption from the Act under §2007.003(b)(4) which excludes from coverage an action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law. As this rule will articulate measures the city must take to fulfill an obligation mandated by state law, the city is exempt from a challenge under the Act.

§216.21. PURPOSE AND POLICY COMMENTS

TML commented that the proposed rule changes the language of the statute and that this shifts the burden of proof from the TNRCC to the city and this result was not intended nor authorized by the statute. TML commented that the statute places the burden on the TNRCC--that the source of the problem be identified by TNRCC and that the TNRCC determine that the source is not already covered by a permit. TCCOSW also objected to the rules applicability as set out in §216.21(a) and §216.22(a). The change of the language found in the statute of the triggering finding from "water pollution is attributable to non-permitted sources" to the proposed rule language of "water pollution that is not attributable to permitted sources" could, it maintains, have serious consequences for the cities since under the proposed rule the commission could require preparation of a program if there was water pollution of unknown origin, unless the city could show that the pollution was not caused by a permitted source.

The commission responds that the proposed language does not literally nor intentionally shift the burden of proof onto cities. However, to avoid any confusion, the rule language will track the language contained in the statute. The commission's intent has always been that the executive

director maintains the burden of proof in identifying the source of the water pollution and asserting that the source is not covered by a permit. The executive director will use all of the commission's water quality related programs and their data to make the determination related to this subchapter.

TCCOSW objected to the sentence in proposed §216.21(b) that states that an "unauthorized discharge is a violation of the Texas Water Code, §26.121." TCCOSW maintains that, generally, §26.121 of the Texas Water Code prohibits the discharge of "waste" and "pollutants"; unauthorized discharges not containing waste or pollutants are generally not violations of the Texas Water Code. Therefore, the sentence should be deleted.

The commission responds that it will amend the rule to clarify that an unauthorized discharge relates to a discharge of waste and pollutants as it is defined in the Texas Water Code.

§216.22. APPLICABILITY COMMENTS

TCCOSW urged the commission to articulate a clear and objective test for the applicability of these rules. To do this, TCCOSW commented that clear and objective criteria are needed to ensure consistency and predictability in applying the rules. TCCOSW also suggested that the TNRCC use a test that is based on language that has a more developed meaning, such as language from 40 CFR Part 130, and that is consistent with other water quality related programs such as the commission's Statewide Watershed Management Approach. The alternative rule proposal by TCCOSW specifies that

§26.177 would be implemented when pollutant loadings from unpermitted sources in a city exceed the load allocation for such sources specified in a Watershed Action Plan for the waterbody.

The commission disagrees with the comment that specific criteria to be used to trigger the requirements of §26.177 should be stated in the rule. The criteria to be used to trigger the requirements of §26.177 will depend upon the circumstances that are present in a particular city. In individual circumstances, the commission will rely on the definition of pollution as set forth by the Texas Legislature. The commission will utilize available scientific methods to identify instances of pollution and to make determinations as to the causes and sources of pollution.

The commission also disagrees with the comment because it presumes that the federal TMDL requirements are the sole basis for §26.177, which the commission believes to be inconsistent with the statute. The commission further disagrees with the comment as it pertains to implementing the provisions of §26.177 based upon the development of TMDLs. The procedures recommended by TCCOSW are not consistent with procedures specified in EPA guidance on TMDLs. The TCCOSW procedures provide for §26.177 to be implemented when pollutant loadings from non-permitted sources exceed allocations for these sources specified in Watershed Action Plans. TMDL procedures specify that management programs such as §26.177 be used to achieve the load allocations established by a TMDL. Pollutant loadings from non-permitted sources which exceed the allocations established in a Watershed Action Plan would be cause for amending a water pollution control and abatement program established under §26.177 or other appropriate action.

TCCOSW objected to the language in §216.22(a) which states that "cities meeting applicability shall be required to satisfy applicable provisions of this subchapter upon receipt of notice issued by the executive director…." TCCOSW commented that this language could be interpreted to mean that municipalities must develop and implement programs immediately after the executive director determines applicability and long before the commission enters an order requiring the development of a program.

The commission disagrees with the comment. The rule establishes the procedures to be used by the commission to determine if a city should be required to develop and implement a water pollution control and abatement program. These procedures provide an opportunity for a city to correct the problem and a public hearing prior to requiring a city to develop and implement a water pollution control and abatement program.

TCCOSW further commented that applicability should not be triggered by the presence of sources over which a city has no regulatory jurisdiction. COC commented that a city should not be held responsible for pollutant loading caused for example by agricultural runoff. TML commented that a statement be added to the proposed rule stating that a program will not require a city to take action which it lacks authority to take. COP commented that the rule will place too much of a burden on cities by making cities responsible for stormwater runoff from areas that the city may not have control over, including agriculture.

The commission disagrees with the comment. These rules will not impose any requirement on a municipality for which the municipality has no statutory authority to implement or enforce. The commission recognizes that additional language in §216.22(a), relating to Applicability, will make the requirements clearer.

COC commented that the definitions provided in these proposed rules and the wording of §26.121(a)(2)(B) makes it unclear how a WPCAP differs from a Water Pollution and Abatement Plan.

A Water Pollution and Abatement Plan relates to a plan that a landowner must submit for review and approval prior to the commencement of construction on the Edwards Aquifer Recharge Zone to protect the quality of water in the aquifer. It would not cover surface water pollution from non-permitted sources across the state as provided by Texas Water Code, §26.177.

§216.23. DEFINITIONS COMMENTS

TCCOSW commented that "Non-Permitted Sources" should be defined in the rule and that the Legislature intended "non-permitted sources" to mean "non-point sources." TCCOSW recommended the following definition: "Non-Permitted Sources-Sources of water pollution that are not required to obtain water quality permits under Chapter 26 of the Texas Water Code, including generalized discharges of waste that are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater." COC commented that the definition for "Permitted sources" should be changed to "A source that discharges into or adjacent to waters." TCCOSW commented that the definition suffers from a number of serious problems and makes no sense at all. TCCOSW commented

that Chapter 26 of the Water Code generally regulates the discharge of "waste" or "pollutants" not the discharge of "pollution." TCCOSW further commented that the definition does not make clear whether sources that are required to have permits, but do not, are considered "permitted sources."

The commission disagrees with the comments. Chapter 26 of the Texas Water Code, and specifically, §26.121, may relate to either a point or non-point source of water pollution. Therefore, a non-point source other than agricultural and silvacultural activities managed by the State Soil and Water Conservation Board may be required to obtain a permit under Chapter 26 of the Water Code. The commission responds that non-permitted source means a source for which there is no permit and over which a the city has jurisdiction to control. To reflect this, the commission has added a definition for non-permitted sources which explicitly states that the definition does not include discharges authorized by an NPDES or TPDES permit for municipal stormwater discharges ~~non-point source which also includes~~ but does include non-point sources of pollution, as those sources are defined in ~~references to~~ Chapter 220 of this title (relating to Regional Assessments of Water Quality), the federal Clean Water Act, and the Coastal Zone Act Reauthorization Amendments of 1990. These same references have been deleted from the definition of "Pollution" to avoid redundancy.

COC commented that the definition of "Pollution" should spell out whether the effects of agricultural runoff from farm fields, pastures, and other agricultural practices are to be included in this rule. TCCOSW objected to the definition and stated that although the definition tracks the Texas Water Code definition, the definition should either be deleted or refined for purposes of this rule. TCCOSW stated

that the determination of whether water pollution exists should be made in reference to the surface water quality standards, which require a minimum amount of robustness in the assessment of water quality data in order to define pollution. TCCOSW recommended that if the TNRCC is to define "pollution" in the rules they should use the following: "Pollution: an excursion or numeric surface water quality criteria as established in Chapter 307 of this title (relating to Water Surface Quality Standards)."

The commission disagrees with the comments. Texas Water Code, §26.001 defines the terms used in Chapter 26 of the Code, including the term "Pollution" as it used in Texas Water Code, §26.177. For this reason, the rule tracks the statutory language.

COFW, COC, and COA commented that the definition of "Significant waste discharge" is too vague and broad. COFW also commented that the broadness of the definition could include an enforcement audit by the commission. COFW and COA also commented that prioritization criteria need to be established for determining what discharges are considered significant. COC also commented that the definition would make it difficult for a city to develop a method for identifying all of the significant waste discharges within a city. TCCOSW also objected to the definition because it is too vague. The term controls the scope of most of the substantive requirements imposed on cities, but yet provides no objectives test so that cities will know whether they are in compliance. Defining the term as in the proposed rule could extend the term to such things as runoff from residential yards and parking lots making identifying, monitoring, sampling, and controlling such a broad array of discharges unduly burdensome. The TCCOSW believes that the Legislature did not intend to include generalized

discharges of waste, and so suggested that the term be limited to point sources that have been specifically identified as significant by a Watershed Action Plan.

The commission has reviewed the statutory language with attention being given to the comments on "Significant waste discharge." Although the term is not specifically defined in the statute, the commission has determined that the intent of the statute was to have this section relate to point sources, and that the inventory and monitoring required by the statute should relate to point source waste discharges that have or could have a significant impact in the quality or amount of total discharge into a receiving water. The definition has been changed, and the suggested definition provided by the TCCOSW has been used. The definition for "Significant waste discharge" will read: "Significant waste discharge-Point source discharges of waste or pollutants to a receiving water that have been identified to cause pollution without regard to whether or not the discharges are authorized by the commission."

TCCOSW objected to the definition of "water pollution control and abatement programs," since it does not track the statutory language describing a water pollution control and abatement program. The definition goes beyond the requirements of the statute and requires cities to "prevent or correct water pollution problems." The scope of the required program is adequately described in proposed §216.27. The definition should be deleted.

The commission agrees with the comment and has deleted the definition of "Water pollution control and abatement program" from the final rule.

§216.24. WATER QUALITY ASSESSMENTS AND STUDIES COMMENTS

COFW and COA commented that atmospheric deposition of pollutants needs to be evaluated before cities are required to develop specific constituent programs, that it is important that the complexities of non-point water pollution are addressed in the rule, and that cities have the problems accurately defined prior to investing large amounts of time and money to solve problems. COA commented that water quality assessments and studies should produce accurate and sufficient data that will justify requiring a city to implement a WPCAP.

The commission agrees with the comments. The commission will utilize available scientific information, such as that cited in the comments, to identify instances of pollution and to make determinations as to the causes and sources of pollution.

CONRH commented that the rules do not adequately describe the conditions that would trigger a city to implement a WPCAP.

The commission disagrees with the comment. The conditions which could require a city to develop and implement a water pollution control and abatement program depend on the circumstances that are present in the city. The commission will rely on the definition of pollution as set forth by the Texas Legislature. The commission will utilize available scientific methods to identify instances of pollution and to make determinations as to the causes and sources of pollution.

TCCOSW objected to §216.24 because the proposed rule fails to appropriately limit the studies that can be used to trigger the WPCAP requirement. TCCOSW believes that only high quality, peer-reviewed, quantitative studies that focus a link between urban non-point source runoff and instream pollution such as a load allocation performed under 40 CFR §130.7 should be used to trigger the requirement. The rule should clearly point out that the studies must be quality assured and must link observed water quality impairment to non-permitted sources within a city. TCCOSW recommended that the TNRCC only use studies that serve as the basis for Watershed Action Plans, or other studies that establish TMDLs as the basis for triggering applicability.

The commission disagrees with the comment in part. The rule identifies specific commission programs and certain criteria that will be used by the executive director as the basis for requiring cities to develop and implement water pollution control and abatement programs. The commission believes that using TMDLs as the sole basis for §26.177 is inconsistent with the statute. The commission agrees that high-quality, quality assured studies should be used as the basis for §26.177.

The alternative rule proposed by TCCOSW recommended deleting provisions for including assessments and studies performed under the commission's State Water Quality Inventory, State Nonpoint Source Assessment, and TMDL programs to be used by the executive director to identify water pollution that is attributable to non-permitted sources in a city.

The commission disagrees with the comment. The programs omitted by the TCCOSW provide valuable information to support decisions by the executive director pertaining to §26.177. The TMDL program in particular has as its objective the generation of information on pollutant sources necessary to identify water pollution that is attributable to non-permitted sources in a city.

§216.25. NOTICE COMMENTS

TCCOSW commented that the heading of §216.25 should be changed from "Notice" to "Notice of Initial Determination"; such a heading would better describe the executive director's action. The TCCOSW also objected to §216.25(a)(4), which limits to five years the time period in which a city has to correct the problem. TCCOSW believes that the executive director's discretion to allow for a longer period of time should not be limited by regulation, and that voluntarily implemented programs will far surpass any requirement forced on cities by the commission. The TCCOSW recommended that a minimum time frame of at least five years be established by the rule.

The commission agrees with the comment, in part, and will change the heading as suggested to better describe the executive director's action of the notice. However, the executive director maintains that the five-year time period in which a city has to correct the problem on its own was established to be consistent with the commission's five-year basin cycle approach to water quality management that includes permitting, monitoring, and studying of water quality in water basins across the state provided under Texas Water Code, §26.0285, relating to Expiration of Permits Within Same Watershed, as well as a reasonable amount of time for any affected city to address non-permitted sources of pollution. The five-year basin cycle has been accepted by permittees in

river basins as the method for best using the commission's resources for gathering information and data for processing permits in specific river basins. This cycle will also allow the commission to gather further information for determining whether the problems continue to exist or whether the city's actions have improved the situation. The executive director does recognize that certain case-by-case conditions may exist that my require an extension of time such as city's actions that are producing an improvement in water quality or the development of a TMDL in the water segment. In order to provide for this flexibility and clarify its intent, the commission has changed the wording in the second sentence of §216.25(a)(4) to read: The executive director may "extend" this time period when new or additional information or circumstances warrant such an "extension."

COC commented that additional water quality assessments to determine that a WPCAP is needed should fall on the state.

The additional water quality assessments and studies noted in §216.25(a)(3) are voluntary and performed by the impacted party at its own discretion. These studies--as long as they meet the executive director's approved quality assurance requirements that are common for all commission water quality studies--can be used by a city to demonstrate its position that a water pollution control and abatement program is not needed for the city. The executive director may undertake additional studies on its own as authorized by §216.25(a)(3). The commission has made no change in response to this comment.

§216.26. PUBLIC MEETING HELD BY THE COMMISSION COMMENTS

TCCOSW commented that the heading of §216.26 should be changed from "Public Meeting Held by Commission" to "Final Determination of Applicability." TCCOSW also objected to §216.26(a) because the commission should require the executive director to only use studies conducted after the city has taken steps to correct the water quality problem

The commission agrees that the heading of §216.26 should be changed to "Final Determination of Applicability." Regarding the comment that the commission should require the executive director to only use studies conducted after the city has taken steps to correct the water quality problem, the commission believes that the rule accommodates this concern. Section 216.26(a) provides that the determination that a city still meets the criteria in §216.22(a) will be based on studies performed subsequent to the initial studies undertaken and from which the initial notice of pollution was generated. Logically, the commission would use subsequent studies to ensure that any efforts made by the city to ameliorate the problem would be evident. Moreover, the executive director will consider any measures taken by the city, but that may not be readily apparent or revealed in the subsequent studies performed. This will likely require a case-by-case analysis of a city's effort under the rule, but the commission believes the rules allow for this.

The alternative rule proposed by TCCOSW specifies considerations to be used by the executive director in determining if a city meets the criteria for developing and implementing a water pollution control and abatement program.

The commission disagrees with the comment. Considerations to be used by the executive director in determining if a city meets the criteria for developing and implementing a water pollution control and abatement program will depend upon the circumstances that are present in a particular city. In individual circumstances, the commission will rely on the definition of pollution as set forth by the Texas Legislature. The commission will utilize available scientific methods to identify instances of pollution and to make determinations as to the causes and sources of pollution.

TCCOSW suggested that the TNRCC consider its version of proposed §216.26 as an alternative to the rule proposed by the commission. Under the TCCOSW version, §216.26(a) would require the commission to give consideration to improvements that have resulted and that will result from the full implementation of the steps taken by the city after the initial determination of applicability to correct the problem; §216.26(d) would require that the executive director bear the burden of demonstrating that the city meets the criteria set forth in §216.22(a); and §216.26(f) would require the commission to enter an order specifying the pollutants and non-permitted sources of concern and the deadline for the submission of a Water Pollution Control and Abatement Program.

The commission agrees with the commenter in part and has changed the adopted version to reflect: that the commission will consider any improvements that have resulted or will result from allowing full implementation of steps taken by the city in its efforts to correct the problem; that the executive director shall bear the burden of demonstrating that the city meets the criteria set forth in §216.22(a); and that any order issued by the commission pursuant to §216.26 shall be

specific as to the pollutants and non-permitted sources of concern and the deadline for the submission of a water pollution control and abatement program.

TCCOSW and COC commented that §216.26(d), which requires the city to publish notice of the TNRCC's public meeting, should be changed to require the commission to prepare and publish the notice. Also, that commission rules in 30 TAC §39.5 and §39.7 should not apply because the city is not an applicant in this situation.

The commission agrees that the TNRCC should bear the responsibility of publishing notice of the public meeting and has changed the rule to reflect that the notice will be published in the *Texas Register*. The reference to §39.5 and §39.7 has also been removed because the city is not an applicant in these proceedings.

TML urged the commission to change the wording of the rule to reflect that a public hearing shall be held and states that the commission has unilateral authority to refer the question of whether a water pollution control and abatement program should be required to SOAH, but does not grant authority to a city to contest the factual basis for the executive director's determination. TML also stated that the Texas Administrative Procedure Act (APA) requires that the city be given the opportunity to have this matter adjudicated by SOAH and that failure to conduct a contested case hearing would result in inadequate administrative record for any judicial review.

TCCOSW expressed the same concerns as the TML and believes that Texas law demands that cities be given an opportunity for a hearing because the rights of a city are being determined by an administrative agency based on specific factual determinations. TCCOSW echoed TML's concern regarding the lack of an administrative record available for judicial review.

CONRH is concerned that the city is deprived of an opportunity to request a contested case hearing.

~~**The APA defines a contested case hearing as "a proceeding…in which the legal rights, duties, or privileges of a party are to be determined by a state agency after opportunity for adjudicative hearing." The threshold issue that must be addressed before the APA applies is whether there is an opportunity for an adjudicative or contested case hearing. If there is an opportunity for a contested case hearing, §2001.051, which allows parties to the contested case hearing to respond and to present evidence and argument on each issue involved in the case, applies. The commission has determined that the term "public hearing" as used in Texas Water Code, §26.177 does not mean a contested case hearing. Thus, there is no opportunity for a contested case hearing and the APA does not apply.**~~

~~**The term "public hearing" is used throughout the Texas Water Code in Chapters 5, 11, 16, 18, and 26 to name a few. In many cases it is clear that a statutory reference to "public hearing" means a contested case hearing. For example, under §§11.132 and 11.143, 26.028, and 27.018, the commission is required to hold a public hearing on an application at the request of an affected person. There is little ambiguity in the language of these statutes and the use of the terms**~~

~~"application" and "affected person" have been interpreted by the commission to mean that a contested case hearing must be afforded to affected persons who submit a reasonable hearing request protesting a particular application under one of these chapters. Similarly, 30 TAC Chapter 55, entitled "Contested Case Hearings" applies. In contrast, under §§18.081, 26.024, 26.037, and 26.045, the term "public hearing," does not mean contested case hearing. For example, §18.081 requires the commission to hold a "public hearing," but the statute also uses language such as "if one is requested by at least 25 persons" and "the commission shall…hold at least one public hearing in the area where the operation is to be conducted…." Thus, the commission does not interpret term "public hearing" to mean "contested case hearing." Section 26.024 requires the commission to hold public hearings prior to setting or amending water quality standards. Again, the statutory language implies that the "public hearings" contemplated are not contested case hearings. Section 26.037, applicable to water quality management plans, also uses the term "public hearing" which must be held to determine whether the water quality management plan should be approved. The commission believes that the context of §26.037 makes it clear that "public hearing" is not a contested case hearing. Section 26.045 states "[A]fter a public hearing…the commission may enter an order requiring the establishment of boat pump-out stations by a local government…." The context of §26.045 implies a public meeting.~~

~~These examples illustrate that the term "public hearing" does not always mean "contested case hearing" and that at times can mean "public meeting."~~ Section 26.177, on its face, does not provide any guidance as to whether the public hearing mentioned is a contested case hearing. However, after reviewing the comments submitted by TML, TCCOSW, and CONRH, the

commission believes that the use of the term "public meeting" in the rule is imprecise. The commission believes that the intent of the statute is to provide the city with the opportunity to appear before the commission at a commission agenda and have this matter considered by the commissioners of the TNRCC. To that end, the commission has changed the adopted version to reflect that the commission can, at a regularly scheduled meeting, upon its own motion or at the request of a party, conduct a contested proceeding and consider evidence and hear oral argument of the parties or refer the issue to SOAH for a contested case hearing conducted pursuant to the APA. ~~the consideration of the matter will be at a regularly scheduled meeting of the commission.~~ The need for and the extent of information taken into consideration by the commissioners will be determined on a case-by-case basis by the Office of General Counsel.

~~There is no documented legislative history which evidences that the intent of this statute was to provide a contested case hearing pursuant to the APA. The commission believes that the opportunity to appear before the commissioners and the subsequent right to appeal their decision to District Court satisfies the intent of the statute. The commissioners render many final decisions at regularly scheduled meetings and as a matter of law, as in the case where a motion for reconsideration or rehearing is filed with the commission and overruled by operation of law.~~

All final decisions of the commissioners are appealable to District Court under Texas Water Code, §5.351, but §5.351 does not restrict these appeals to SOAH proceedings. There is not always an administrative record stemming from a SOAH proceeding to accompany the appeal. This ~~The fact that there will be no contested case hearings afforded matters under Chapter 216~~ does not

preclude an adequate record from being developed such that meaningful judicial review would be impossible.

TCCOSW objected to the provision of proposed §216.27(b) that states "or as may be reasonably required by the commission." This does not provide sufficient notice of what these additional requirements may be. TCCOSW further commented that reasonable requirements should be part of the rule.

The commission disagrees with the comment. The language in the rule is consistent with the statutory language. The requirements of a water pollution control and abatement program in a particular city will depend on the circumstances that are present in that city and what is necessary to address non-permitted sources of pollution. The statute imposes a test of "reasonableness" on the actions of the commission. Accordingly, the requirements specified by the commission will have to be "reasonably" related to the services and functions specified in the statute to be included in a water pollution control and abatement program for a city.

COFW commented that each city should be primarily responsible for determining which dischargers are placed in the inventory, and that the responsibility needs to be spelled out in the regulations. COA commented that cities should be primarily responsible for determining the inventory. COC commented that cities should not be required to take over the responsibilities of the state with regard to state or federally issued discharge permits or programs as would be required by this section requiring the development of an inventory.

The commission disagrees with the comment. The language in the rule is consistent with the statutory language in giving both the city and the commission a role in the development of the inventory of significant waste dischargers.

COFW and COA commented that each city should be primarily responsible for determining which dischargers are to be monitored. COA further commented that cities should also be primarily responsible for determining the nature and frequency of the monitoring. COC commented that the rule should specify how often and how monitoring should be done and what types of parameters should be monitored.

The commission disagrees with the comment. The language in the rule is consistent with the statutory language in giving both the city and the commission a role in determining which dischargers are to be monitored. The frequency of monitoring and the parameters to be monitored by a city implementing a water pollution control and abatement program will depend on the nature of the discharge. The magnitude of the discharge and the variability of the discharge will be considered in determining the frequency of the monitoring. Flow rates and constituent concentrations in the discharge will be considered in determining the types of parameters to be monitored.

COP argued that the requirement of cities to monitor sites "without regard to whether or not the discharges were authorized by the commission" will put the cities in a position to deal with dischargers that the commission has authorized, creating a double jeopardy situation for dischargers. COP

continues that the rule ignores the issue of inadvertent or illegal wastewater dischargers. COP requested that the rules either exempt wastewater discharges from monitoring and sampling and from anything associated with a water pollution abatement plan or for the commission to clearly state its intent to mirror the EPA position and let the cities provide water quality protection from wastewater treatment plants that do not meet the requirements of their discharge permits.

The commission disagrees with the comment. The language in the rule is consistent with the statutory language in requiring cities implementing water pollution control and abatement programs to monitor significant waste discharges within their jurisdiction.

COC commented that the commission should take the responsibility for determining permit requirements and coverage. COC continued that the rule does not specify what types of tests must be done. COA commented that cities should have authority to classify dischargers and to define "periodic" inspections for each class.

The commission disagrees with the comment. The language in the rule is consistent with the statutory language in giving both the commission and cities implementing water pollution control and abatement programs a role in determining the sampling, inspecting, and testing requirements for significant waste discharges within the jurisdiction of the affected city.

TCCOSW objected to provisions in §216.27(b)(4) which exceed the requirements set out in the statute requiring cities to cooperate with the commission in developing procedures to obtain compliance.

The commission agrees with the comment. Section 216.27(b)(4) has been modified to be more consistent with the language in the statute.

TCCOSW commented that clarification is needed on how much cooperation will be achieved.

The commission disagrees with the comment. The cooperation needed to obtain compliance by significant waste discharges will depend on the circumstances that are present in a particular city. The commission and affected cities will cooperate to the extent necessary to obtain compliance by the discharger using available scientific and administrative procedures.

TCCOSW believes that "cooperation" referenced in Texas Water Code, §26.177 is a reference to §26.175 (Cooperative Agreements) and to §26.0136 (Water Quality Management).

The commission disagrees with the comment. The commission believes that the reference to "cooperation" in §26.177 refers to the provisions in a water pollution control and abatement program for a city.

TCCOSW believes that the primary responsibility for investigating and obtaining compliance rests with the commission and not the city. COC commented that enforcement should remain the responsibility of the state.

The commission disagrees with the comment. The language in the rule is consistent with the statutory language in giving both the commission and cities implementing water pollution control and abatement programs a role in obtaining compliance for significant waste discharges.

COC commented that "reasonable and realistic plans" are too vague and that an approved method for developing plans with the commission is desirable.

The commission disagrees with the comment. Methods for developing plans to control and abate pollution from generalized discharges in a city will depend on the circumstances that are present in that city and that are necessary to abate non-permitted sources in accordance with §26.177. Cities should consider available scientific and engineering methods in the development of these plans. Cities would be expected to utilize available technical literature and relevant regulatory guidance in the development of these plans.

TCCOSW objected to §216.27(b)(6), which states that the TNRCC may impose "other requirements as may be prescribed by commission rule," as this is the rule in which TNRCC should be imposing requirements. COA commented that the powers of commission are not defined.

Section 216.27(b)(6) tracks the language of the statute with the exception of the added words "to effectuate the purposes of the subchapter." The commission interprets the statutory language to be a general provision clause which acknowledges that there are other commission rules which may overlap or at some point affect persons complying with Chapter 216. For example,

§216.26(d) of the proposed rule mentioned commission rules in §39.5 and §39.7. While the reference to those sections has been removed from §216.26(d), it illustrates that there may be other commission rules that are applicable to persons which may not be identified here.

COFW, COC, and COA asked why a WPCAP had to be signed and sealed by a registered professional engineer. COC asked how an engineer could certify that the plan is designed to abate and prevent water pollution. COC further commented that the requirement of having an engineer seal the program implied that cities will have to develop structural controls to storm water pollution prevention or abatement, and that unless structural controls are needed, an engineer's expertise may not be needed to develop a program. TCCOSW objected to the requirement that a registered professional engineer certify a city's program and recommended that this requirement be deleted from the rules or at least changed to a certification that the rules have been developed in accordance with the applicable rules. COC commented that the commission should provide a method to review the program with the city to confirm that the program is sufficient. COC continued that §216.27(b)(5) leaves too much room for interpretation by individual regulator and commented that a review and approval of a city program should be performed by the commission. COC also commented that a process for reviewing proposed "reasonable and realistic plans" plans for controlling generalized discharges with the commission would be desirable. TCCOSW commented that the heading for §216.8 should be changed from "Submittal of Water Pollution Control and Abatement Programs" to "Review and Approval of Water Pollution Control and Abatement Programs." TCCOSW objected to §216.28 because the rule does not provide for a review and approval process as required by §26.177(c). TCCOSW recommended a procedure similar to the review and approval of permit applications that addresses what happens if the executive

director determines that a program is deficient and the city's recourse if it disagrees with the executive director's determination. TCCOSW continued that §216.8 should have the standards by which the executive director will judge a program.

The commission responds that a seal is required in order to accommodate the need to expedite the review and approval of the plans with limited agency resources and ensure that the plan is designed to meet applicable performance standards. The seal also ensures that the plan has been reviewed at a proper level of expertise, and that such expertise is evidenced by the state's licensing board. The rule has been clarified that the seal is applicable to only those engineering designs to abate water pollution. Cities that have professional engineering staff design their plans may indicate this and avoid hiring outside consultants.

§216.29. AMENDMENT PROCEDURES FOR WATER POLLUTION CONTROL AND ABATEMENT COMMENTS

TCCOSW objected to the amendment procedures. It further commented that cities should be given flexibility to change programs quickly and efficiently and that rules should spell out the procedure that the executive director must use to force a city to amend it's program. TCCOSW suggested that an amendment procedure similar to TNRCC's current procedure for a TNRCC initiated amendment to a water quality permit be developed for the rules.

The commission agrees that a city must be allowed flexibility in amending its program so that changing pollution problems and local budgetary constraints can be accommodated. The

commission's proposed rule allows a city to amend its water pollution control and abatement program at any time by submitting an amended program to the executive director.

However, the commission also believes that the proposed rule is correct in stating that the executive director may require a city to amend its water pollution control and abatement plan if it is not adequately addressing non-permitted sources of pollution within the scope of the program. An order to amend would likely be the result of a petition filed by the executive director based on new or additional information or circumstances warranting an amendment. The rule has been changed to accommodate some TCCOSW's suggestions and to clarify the amendment procedures.

§216.30. APPEALS COMMENTS

Upon staff review of the proposed rule, the appeal provisions have been clarified to better identify who can appeal a city's action. The adopted version of §216.30 clarifies that persons affected by any ruling, order, decision, program, resolution, or other act of a city are those persons outside the corporate limits but limited to the extraterritorial jurisdiction of a city.

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103 and §26.011, which provide the commission with the 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.

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 attributable to non-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. An unauthorized discharge relates to a discharge of waste and pollutants as it is defined in the Texas Water Code. 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 attributable to non-permitted sources, excluding sources over which a municipality does not have regulatory jurisdiction. 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 of Initial Determination).

(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) **Non-permitted sources** - Sources of water pollution that are not authorized to discharge pollution into or adjacent to waters in the state by a valid permit, general permit, or rule pursuant to Texas Water Code, Chapter 26, the federal Clean Water Act, or other applicable state or federal law. This definition includes, but is not limited to, non-point 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 Zone Act Reauthorization Amendments of 1990, §6217, and other applicable state and federal statutes, regulations, policies, and guidance. This definition does not include discharges authorized by an NPDES or TPDES permit for municipal stormwater discharges.

~~(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.~~ Point source discharges of waste or pollutants to receiving water that have been identified to cause pollution without regard to whether or not the discharges are authorized by the commission.

~~(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 attributable to non-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), states are required to develop total maximum daily loads for waters within the state for which the effluent limitations required by the Clean Water Act, §301(b)(1)(A) and (B) are not stringent enough to implement any water quality standard applicable to such waters.

(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~~ Notice of Initial Determination.

(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; 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~~ extend this time period when new or additional information or circumstances warrant such an ~~amendment~~ extension.

§216.26. ~~Public Meeting Held by the Commission~~ Final Determination of Applicability.

(a) After expiration of the time period specified in §216.25(a)(4) of this title (relating to Notice of Initial Determination) ~~subchapter~~, the executive director shall determine whether a city still meets the criteria set forth in §216.22(a) of this title (relating to Applicability) ~~subchapter~~ based on water quality assessments and studies set out in §216.24 of this title (relating to Water Quality Assessments and Studies) performed subsequent to the initial determination, taking into consideration any measures taken and improvements that have resulted or that will result from allowing full implementation of the ~~by the~~ city's efforts 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 title ~~subchapter~~, the executive director at a regularly scheduled ~~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) Consideration at a regularly scheduled meeting of the commission ~~No public meeting~~ shall not be required if the executive director and the city agree that the city ~~should be required to~~ will 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 of this title (relating to Water Pollution Control and Abatement Programs) or an amendment to an existing Program as described in §216.29 of this title (relating to Amendment Procedures for Water Pollution Control and Abatement Programs).

(d) The burden of demonstrating that the city meets the criteria set forth in §216.22(a) of this title shall rest on the executive director.

(e)~~(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)~~ The executive director shall cause notice of the regularly scheduled meeting to be published in the *Texas Register* informing the public of the meeting and that the public has ~~thirty (30)~~ days prior to the regularly scheduled commission meeting ~~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.

(f)~~(e)~~ ~~After consideration of~~ In considering the matter at the regularly scheduled ~~public~~ meeting, the commission may:

(1) upon its own motion or upon the request of a party, conduct a contested case proceeding and consider evidence and hear oral argument of the parties, or 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) of this title;

(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 title ~~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.

(g) Should the commission determine under subsection (f)(3) of this section that a Water Pollution Control and Abatement Program is required, the commission order shall specify the pollutants

and non-permitted sources of concern and the deadline for the submission of a Water Pollution Control and Abatement Program.

(h)~~(f)~~ The ~~public~~ regularly scheduled meeting held by the commission pursuant to this section shall satisfy the requirement of the public hearing mandated by Texas Water Code, §26.177.

(i)~~(g)~~ A commission order issued pursuant to subsection ~~e)~~ (f) 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 to address water pollution attributable to non-permitted sources, 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 paragraph (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) in cooperation with the commission, 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~~ Final Determination of Applicability). Those elements requiring engineering design in the ~~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 attributable to non-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. Those elements requiring engineering design in the ~~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 attributable to non-permitted sources located within the city.

(b) The ~~executive director~~ commission, upon its own motion or in response to a petition filed by 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 provisions for notice of initial determination under §216.25(a) of this title (relating to Notice of Initial Determination) and final determination of applicability under §216.26 of this title (relating to Final Determination of Applicability) ~~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, within the extraterritorial jurisdiction 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.