

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to Chapter 205, §205.1, Definitions; §205.2, Purpose and Applicability; §205.3, Public Notice, Public Meetings, and Public Comment; §205.4, Authorizations and Notices of Intent; §205.5, Permit Duration, Amendment, and Renewal; §205.6, Annual Fee Assessments; and new §205.7, Additional Characteristics and Conditions for General Permits. Sections 205.1 - 205.4 and 205.6 are adopted *with changes* to the proposed text as published in the June 2, 2000 issue of the *Texas Register* (25 TexReg 5139). Sections 205.5 and 205.7 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The new and amended sections of Chapter 205 are adopted to implement House Bill (HB) 1283, which amended Texas Water Code (TWC), §26.040, and became law as an act of the 76th Texas Legislature, 1999. Among other changes, this adoption addresses the provisions of HB 1283 by removing the limitation that general permits cannot authorize discharges of more than 500,000 gallons in any 24-hour period; by providing that the commission may issue a general permit for storm water discharges without having to make the findings required by TWC, §26.040(a)(1) - (5) for other categories of discharges; and by adding a requirement that the commission deny or suspend a discharger's authority under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations. The new and amended sections also simplify the rule language, change the term "commission" to "executive director" or "agency," as appropriate, and clarify the requirements and procedures for issuing a general permit and obtaining authorization for

discharge under a general permit.

SECTION BY SECTION DISCUSSION

Adopted §205.1, concerning Definitions, is amended to add a definition for “compliance history,” which is a term used in §205.4(e), relating to the implementation of the HB 1283 changes to TWC, §26.040. Adopted §205.1 is also amended to add definitions for “notice of change or NOC” and “notice of termination or NOT,” which are terms used in §205.4(h), relating to the certain procedures regarding general permits. The amendments also include the deletion of certain terms used in §205.2, because these terms are self-explanatory, and they are the same as those found in the United States Environmental Protection Agency’s (EPA) regulations for general permits found in 40 Code of Federal Regulations (CFR) §122.28. The commission believes that definitions for these terms are not needed, and their inclusion could possibly be confusing to the public. The terms so deleted are “same or similar monitoring requirements,” “same or substantially similar types of operations,” “same requirements regarding operating conditions,” and “same types of waste.” Also, statutory references have been reformatted for consistency throughout the section.

Section 205.1(1) is amended to define “compliance history” because under TWC, §26.040(h), the commission must deny or suspend a discharger’s authority under a general permit if the commission determines that the discharger operates any facility for which the discharger’s compliance history contains violations constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process. The commission adopts the definition of “compliance history,” as follows: “The record of all notices from the commission, including notices of violation from the

executive director; and of all orders of the commission, of any other agency or political subdivision of the State of Texas and of the United States Environmental Protection Agency (USEPA) pertaining to an applicant's adherence to environmental laws and rules of the State of Texas or the United States; with the terms of any permit, compliance agreement or order issued by the commission or the USEPA; and with any final judicial decision or settlement addressing the applicant's adherence to such environmental laws and rules. The history shall be for the five-year period before the date on which the NOI is filed or, if an NOI is not required, the five-year period before the permittee begins operating under the general permit. It shall not include any order that is precluded by its terms or by law from becoming part of the applicant's compliance history." This definition is adopted without changes to the proposed.

Section 205.1(4) is amended to add a definition for "notice of change or NOC," as follows: "A written submittal to the executive director from a discharger authorized under a general permit providing changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the discharge." This definition provides clarification of the requirement under §205.4(h) that general permits require a person authorized to discharge waste under a general permit to submit up-to-date information to the executive director in a notice of change within a specified period of time prior to a change in previous information provided to the agency or any other change with respect to the nature or operations of the facility or the characteristics of the discharge. In a change from proposal, two extraneous words "information on" have been deleted.

Section 205.1(6) is amended to add a definition for "notice of termination or NOT," as follows: "A written submittal to the executive director from a discharger authorized under a general permit

requesting termination of coverage.” This definition provides clarification of the requirement under §205.4(h) that general permits require when the ownership of the facility changes or is transferred, a notice of termination must be submitted by the present owner, and the new owner must submit a new NOI not later than ten days prior to the change in ownership. This definition is adopted without changes to the proposed text.

Adopted §205.2, concerning Purpose and Applicability, is amended to eliminate the 500,000-gallon per day cap on discharges that may be authorized by a general permit, in accordance with HB 1283. The changes also provide that the commission may issue a general permit for storm water discharges without having to make the findings required by TWC, §26.040(1) - (5), for other categories of discharges, along with other clarifications. Under adopted §205.2(a), the wording is amended to read as follows: “The commission may issue a general permit to authorize the discharge of waste into or adjacent to water in the state by category if the commission finds the discharges in the category are storm water or the dischargers in the category: (1) engage in the same or substantially similar types of operations; (2) discharge the same types of waste; (3) are subject to the same requirements regarding effluent limitations or operating conditions; (4) are subject to the same or similar monitoring requirements; and (5) are more appropriately regulated under a general permit than under individual permits, on the basis that both: (A) the general permit can be readily enforced and the executive director can adequately monitor compliance with the terms of the general permit; this requirement being satisfied if the provisions of the general permit are clear and unambiguous and it requires adequate monitoring, record keeping, and reporting, appropriate to the type of activity authorized; and (B) the category of discharges covered by the general permit will not include a discharge of pollutants that will

cause significant adverse effects to surface or groundwater quality.”

Adopted §205.2(b) is reformatted for clarity by dividing existing portions of this subsection into paragraphs (1) and (2), and by deleting the superfluous sentence “For example, certain dischargers of the same type of waste may be covered under one statewide general permit.” As noted at proposal, the commission intends for the descriptions under proposed §205(b)(1) and (2) to be examples, and are not intended to be limiting conditions.

Section 205.2(c) is adopted as proposed, stating “Authorization to discharge under a general permit does not confer a vested right.”

Adopted §205.3, concerning Public Notice, Public Meetings, and Public Comment, is amended to clarify and simplify the rules, as well as to update references to certain notice requirements. Also, changes are made to the requirements for newspaper notice, to be consistent with the revisions made by HB 1283, which states that “For a statewide general permit, the commission shall designate one or more newspapers of statewide or regional circulation and shall publish notice of the proposed statewide general permit in each designated newspaper in addition to the *Texas Register*.” In this regard, adopted §205.3(a)(1) retains the previously existing requirement for *Texas Register* publication for each draft general permit and clarifies that this paragraph applies to draft general permits that will not have statewide applicability. The adopted amendments under §205.3(a)(2) change the requirement of publication for draft general permits with statewide applicability from the previous requirement for publication in the daily newspaper of largest general circulation in eleven required metropolitan areas to

the adopted requirement for publication in “the *Texas Register* and in at least one newspaper of statewide or regional circulation,” which is in accordance with the aforementioned requirements of HB 1283. Section §205.3(a) is adopted without changes to the proposed text.

Adopted §205.3(b) is also adopted without changes to the proposed text. Adopted §205.3(b)(2) is amended to replace the phrase “state and federal agencies” with the term “persons,” and paragraph (3) is deleted, as proposed. Adopted §205.3(c) is amended by reformatting the previously existing requirements into paragraphs (1) - (4), and by clarifying the rule language, as proposed. Adopted §205.3(d) is amended to change the heading, and to clarify the wording under paragraphs (1) - (5), as proposed. Adopted §205.3(e) and (f) is also amended for clarification purposes, as proposed.

Adopted §205.3(g) is amended to account for the types of minor revisions to general permits in accordance with §305.62, concerning Amendment. Thus, the phrase “or minor modification” is added to amend this subsection. In addition, subsection (g) is amended to correct the typographical error in the proposal, “§395.62(c),” which is changed to “§305.62(c).”

Adopted §205.4, concerning Authorizations and Notices of Intent, is amended to implement new requirements of HB 1283 that allow authorization under a general permit to be obtained without submitting an NOI, to clarify when the executive director will deny or suspend a discharger’s authority under a general permit, to add an additional circumstance for denying or suspending authorization due to a history of “egregious conduct” on the part of the discharger, to clarify the rule by revising language and by reformatting this section.

Adopted §205.4(a) is amended to cover certain requirements relating to general permits. This subsection is adopted, as proposed, to begin as follows: “A qualified discharger may obtain authorization to operate under a general permit by complying with the general permit’s conditions for gaining coverage.” Then, under paragraphs (1) - (5), certain requirements, allowances, and limitations are spelled out. In a change from proposal, §205.4(a)(5) is revised to add more flexibility, and is adopted to read as follows: “An NOI shall be submitted to the executive director in a form or format that is specified in the general permit or otherwise set out in commission rules.”

Adopted §205.4(b) is amended to cover certain general permits requirements relating to individual permittees. This subsection is adopted, as proposed, to begin as follows: “The following requirements apply to existing individual permittees.” This subsection essentially rewrites the previously existing rule language under current §205.4(b)(1) from the perspective of what the general permit must require or can allow, whereas the previous language was written from the perspective of what a discharger must or can do. As noted at proposal, the reason for this shift in perspective is that Chapter 205 is not an actual general permit, but rather includes procedures for adopting a general permit, and what should be included in general permits. Adopted §205.4(b)(1) is “rounded out” with the minimum requirements of the general permit needed for individual permit dischargers to “convert” to general permits, with a clarifying change to the proposed text adopted under §205.4(b)(1)(B) by adding the phrase “or amended, as appropriate.” Adopted §205.4(b)(2) is basically a reformatted previously existing §205.4(b)(4) with additional language which “fleshes out” what the general permit shall require the discharger who is covered by an individual permit to do in order to obtain authorization to discharge waste from a new outfall. Adopted §205.4(b)(3) is a reformatted and more complete version of

previously existing §205.4(b)(2). Section 205.4(b) is adopted without changes to the proposed text.

Adopted §205.4(c) is amended to spell out the requirements that apply to denial of an authorization or NOI, by reformatting and, to a certain extent, “fleshing out” requirements from portions of the previously existing rules. In a change from proposal, revisions have been adopted under §205.4(c)(2)(C) and (3)(E) that make the denial of authorizations to discharge under an existing general permit discretionary for discharges that contain pollutants that cause significant adverse effects to water quality. In the proposal, the denial of authorizations to discharge under an existing general permit was mandatory for discharges that are significant contributors of pollutants impairing the quality of surface or groundwater in the state. Also under §205.4(c)(2)(C), the commission has clarified that denial is mandatory for any discharge which causes a violation of the Texas Surface Water Quality Standards. Revisions have also been adopted under §205.4(c)(2)(E) and (3)(F) that make the denial of authorizations to discharge under an existing general permit discretionary if the discharger or facility is the subject of an unresolved agency enforcement action in which the executive director has issued written notice that enforcement has been initiated. In the proposal, such denial was mandatory.

Adopted §205.4(d) is amended to spell out the requirements that apply to suspensions of authorizations or NOIs of intent, by reformatting and, to a certain extent, “fleshing out” requirements from portions of the existing rules. Changes from proposal include the addition of the clarifying phrase “, or unless the executive director has required the discharger to immediately cease the discharge” under §205.4(d)(1)(D); and the addition of a phrase under §205.4(d)(2) exempting discharges of storm water from the requirement to immediately cease the discharge when authorization to discharge has been

suspended under §205.4(d)(5)(F). The commission believes that this revision is necessary because it is impractical to immediately cease most storm water discharges. Additional changes from proposal are revisions under §205.4(d)(4)(B) and (5)(F) that make the suspension of authorizations to discharge under an existing general permit discretionary for discharges that contain pollutants that cause significant adverse effects to water quality. In the proposal, the suspension was mandatory for discharges that are significant contributors of pollutants impairing the quality of surface or groundwater in the state. Also under §205.4(d)(4)(B), the commission has clarified that suspension is mandatory for any discharge which causes a violation of the Texas Surface Water Quality Standards. Revisions have also been adopted under §205.4(d)(4)(C) and (5)(G) that make the suspension of authorizations to discharge under an existing general permit discretionary if the discharger or facility is the subject of an unresolved agency enforcement action in which the executive director has issued written notice that enforcement has been initiated. In the proposal, such suspension was mandatory. Finally, the language from proposed §205.4(d)(6) has been moved for organizational purposes to adopted §205.4(j), because the referenced 30 TAC §50.139, relating to Motion to Overturn Executive Director's Decision, applies to more than suspensions. Since the original proposal placed this reference under a subsection dealing with only suspensions, it is clearer to remove this language and place it in a separate subsection.

Adopted §205.4(e) implements TWC, §26.040(h), which requires the commission to deny or revoke an NOI if, after a hearing, it finds that the discharger has a history of violations that constitutes a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process. Under the adopted rule, the history of violations that could be considered by the commission will include all violations of Texas environmental laws administered by TNRCC that have been documented by the

executive director during the preceding five years. These include NOV's, NOE's, and all administrative and judicial orders entered with regard to TNRCC or EPA permits and rules. Agreed orders entered into by the commission which contain the limitation that they are not intended to become part of the respondent's compliance history will be considered only if the executive director has documented failure to comply with the terms of the order. The commission's experience indicates that if an applicant has a history that reflects a disregard for the regulatory process, that person is more likely to present future compliance problems. In the past, the commission has included special conditions in permits, designed to address past compliance problems at the permitted facility. This adoption will further that policy by requiring that an operator or owner with a very poor compliance history seek and obtain an individually tailored permit.

Such a pattern of conduct exhibited at the applicant facility and in regard to wastewater discharge statutes and rules would clearly be the most relevant portion of a discharger's compliance history and given the greatest weight in the commission's deliberations. Violations by the same applicant in other media and at other facilities may also be relevant, however. To the extent that the facts surrounding them indicate a pattern of violation, or a management structure or other uniform factors exist, they may indicate the same attitude or practices are likely to occur at the facility seeking the NOI. Consequently, the adoption allows the commission to consider these violations as well, granting them the weight appropriate to their relative degree of similarity or remoteness to the facility or the activity that is the subject of the general permit.

Section §205.4(e) is adopted without changes to the proposed text, stating "The commission, after

hearing, shall deny or suspend a discharger's authority to discharge under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations. A hearing under this subsection is not subject to Texas Government Code, Chapter 2001." The commission is adopting the definition of "compliance history," as discussed earlier in this preamble.

Adopted §205.4(f) is amended to add the opening phrase "The general permit shall describe," consistent with the aforementioned approach of changing the perspective of the rules toward what the general permit must require or can allow; and to clarify this subsection, as proposed.

Adopted §205.4(g) is amended to replace the words "shall" and "will" with the word "may," which changes the rules from prescriptive to permissive, with regard to application fees for general permits; and to make other clarifying changes, as proposed. In addition, the wording has been revised in response to comment, as discussed later in this preamble, to read as follows: "Unless otherwise provided in the general permit or in §305.53 of this title (relating to Application Fee), a person seeking authorization by general permit shall submit a \$100 application fee payable to the agency at the time of filing an NOI. If a person is denied coverage under the general permit in accordance with subsection (c) or (e) of this section, any application fee will be applied to the application fee required for an individual permit application for the same discharge."

Adopted §205.4(h) is amended to add the opening phrase “The general permit shall require a” and to replace the phrase “new NOI” with the phrase “notice of change,” as proposed. This subsection is adopted with other clarifying changes, and is adopted with the following change to the proposed text: replacement of the phrase “not later than ten days” with the phrase “within a specified period of time.” The commission notes that the new terms “notice of change” and “notice of termination” are defined under adopted §205.1, as discussed earlier in this preamble.

Section 205.4(i) is adopted with the clarifying amendments that were proposed, with no change to the proposed text.

Adopted §205.4(j) is language which has been moved for organizational purposes from proposed §205.4(d)(6).

Adopted §205.5, concerning Permit Duration, Amendment, and Renewal, is amended under subsection (b) to allow the commission to continue to authorize dischargers under an expired general permit in cases where the commission has proposed to renew the general permit before the expiration date. In such cases, the general permit shall remain in effect for these dischargers until the date on which the commission takes final action on the proposed permit renewal. Section 205.5(c) is amended to add two clarifying phrases. Section 205.5(d) is amended to add more details to the requirements concerning submittal of applications for individual permits when a general permit is about to expire. Section 205.5(f) is amended to clarify the requirements concerning consistency of general permits with the Texas Coastal Management Plan (CMP). The changes to §205.5 are adopted without changes to the

proposed text.

Adopted §205.6, concerning Annual Fee Assessments, is amended to correct a reference that has changed since the rules were initially adopted, and to clarify that the commission has the authority to charge an annual watershed monitoring and assessment fee, but is not necessarily required to do so. In a change from proposal, as discussed later in this preamble, the phrase “or as specified in the general permit” is added for flexibility, so that the rule reads as follows: “A person authorized by a general permit shall pay an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291, consistent with §§305.501 - 305.507 of this title (relating to the Waste Treatment Inspection Fee Program) or as specified in the general permit; and may be subject to an annual watershed monitoring and assessment fee under TWC, §26.0135(h), consistent with §220.21 of this title (relating to Water Quality Assessment Fees) or as specified in the general permit.”

New adopted §205.7, concerning Additional Characteristics and Conditions for General Permits, is taken from §321.141, in anticipation of the future repeal of Chapter 321, and is also adopted without changes to the proposed text.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The rule will not adversely effect in a material way on the economy, a section of the economy,

productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state for two reasons. The rules will result in overall economic savings, while protecting the public health and safety and environment. There are economic savings because many of the entities that would otherwise be required to obtain an individual permit will be able to obtain coverage under one standard permit, a general permit. This improves efficiency in the permitting process which results in overall economic savings. The general permits issued under these rules will ensure the protection of public health and safety and the environment. Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement HB 1283, 76th Legislature, 1999, and clarify the requirements and procedures for issuing a general permit and obtaining authorization for discharge under a general permit. The rules will substantially advance this stated purpose by amending Chapter 205 to remove the limitation that general permits cannot authorize discharges of more than 500,000 gallons in any 24-hour period; by providing that the commission may issue a general permit for storm water discharges without having to make the findings required by TWC, §26.040(a)(1) - (5), for other categories of discharges; by adding a requirement that the commission deny or suspend a discharger's authority under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct; and by clarifying the language and organizational structure of the rules. Promulgation and

enforcement of these rules will not burden private real property which is the subject of the rules because the rules remove a restriction and merely clarify other portions of the rules. The subject regulations do not affect a landowner's rights in private real property because this rulemaking does not restrict or limit the owner's right to property that would otherwise exist in the absence of the regulations. In other words, because these rules broaden the applicability of general permits, which provide a less burdensome avenue for gaining authorization for discharges than do alternative permitting schemes, and because these rules clarify the requirements and procedures for issuing a general permit and obtaining authorization for discharge under a general permit, they do not restrict the owner's right to property. Therefore, these rules do not constitute a takings under the Texas Government Code, §2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that it is identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the CMP, or will affect an action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11.

The commission has prepared a consistency determination for the rules pursuant to 31 TAC §505.22, and has found the rulemaking consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the rules are the protection, preservation, restoration and enhancement of the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the rules include the requirement that discharges of municipal and industrial wastewater in the coastal zone shall comply with water-quality-based effluent

limits. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the rules will result in more efficient and cost-effective use of public resources regulating wastewater facilities, while maintaining protection of the quality of the surface water resources of the state. Dischargers will be subject to requirements in the permit. In addition, the rules specifically require the executive director to deny authorization under an existing general permit if the discharge is located where it poses or could pose an adverse impact upon a critical area, and it is practicable to locate the discharge in a more suitable location.

HEARINGS AND COMMENTERS

A public hearing on the proposal was held in Austin on June 29, 2000. The public comment period closed at 5:00 p.m., June 19, 2000. Eight commenters provided oral testimony and/or submitted written testimony. Each of the eight commenters suggested changes to the proposal as stated in the ANALYSIS OF TESTIMONY section of the preamble. In general, most of the comments were directed at the issues of compliance history, fees, public notice, notifications, suspension or denial of general permits, and applicability. Oral comments were presented by Shawn Glacken, TXU Business Services. Written comments were submitted by American Electric Power Company (AEP); Bexar County; Lloyd, Gosselink, Blevins, Rochelle, Baldwin & Townsend, P.C. (Lloyd, Gosselink); the National Wildlife Federation; Tarrant County; Texas Cities Coalition on Stormwater (TCCOS); Texas Counties Storm Water Coalition; Texas Parks and Wildlife Department (TPWD); and TXU Business Services (TXU).

ANALYSIS OF TESTIMONY

Lloyd, Gosselink commented that the fiscal note is inadequate because it failed to consider significant additional costs, from the proposed application fees and watershed monitoring and assessment fees, to small businesses or to local governments who as a result of the proposed Chapter 205 rule changes may be able to utilize general permits adopted by the commission for storm water permit coverage. The commenter noted that since EPA general permits had no fees associated with permit coverage the proposed fees represent significant additional costs to small businesses and local governments and these costs have not been properly calculated or analyzed by the agency.

The commission disagrees with this comment. The purpose of the fiscal note is to analyze the fiscal impacts the proposed new rule or amended rule will have on the state and local governments and on persons required to comply with the rule. Chapter 205 was originally adopted by the commission in 1998 and is being amended in this rulemaking to implement HB 1283, which amended TWC, §26.040. The only substantive changes made to Chapter 205 regarding application fees, in §205.4(g), and watershed monitoring and assessment fees, in §205.6, are to make the assessment of such fees on persons operating under a general permit discretionary rather than mandatory. These changes will clearly not have an adverse impact on persons required to comply with the rule because under the adopted rules it is possible that they may not be assessed an application fee or watershed monitoring and assessment fees whereas previously the assessment of such fees were mandatory under Chapter 205. Other changes made to Chapter 205 to implement HB 1283, most notably the deletion of the 500,000 gallon per 24-hour cap, have the practical effect of allowing storm water discharges to be authorized under a general permit. Without this change, storm water discharges regulated by the commission would have to be

authorized by an individual permit. If coverage under an individual permit was the only option, the regulated entity would incur not only the application and watershed monitoring and assessment fees that they may have been assessed if they were authorized under a general permit, but also the costs associated with preparing a complete permit application, rather than an NOI, and potentially the costs associated with a contested case hearing. Additionally, authorizations through general permit coverage may be obtained in a matter of days, while coverage under an individual permit may take 180 days or more. Clearly the availability to small businesses and local governments of a general permit to authorize storm water discharges will allow those entities to avoid costs that they would otherwise incur through individual permitting. Even though these entities may not have been assessed fees by EPA for coverage under EPA storm water general permit, under the Memorandum of Agreement (MOA) dated September 14, 1998 between EPA and the commission authorizing the commission to administer the Texas Pollutant Discharge Elimination System (TPDES), the commission now has jurisdiction to regulate storm water discharges under TPDES. Any fiscal impact associated with the difference in fees assessed by the commission and fees assessed by EPA to entities regulated by a storm water general permit are not the result of this rulemaking but rather the result of the commission obtaining TPDES authorization.

TCCOS commented that the commission should exclude general permits for municipal separate storm sewer (MS4) discharges from the scope of the adopted rule. The commenter notes that the general permits for MS4 discharges will be unprecedented in the commission's history because they will cover a vast number of outfalls and will raise a number of significant legal and practical issues. The

commenter is concerned that the proposed rules are intended to be applied to general permits for MS4 discharges as if they are any other discharge. The commenter notes that commission has until December 2002 to adopt a general permit for MS4 discharges and should avoid prejudging how general permits for MS4 discharges will be addressed by excluding them from the scope of the proposed rules.

The commission disagrees with this comment. Chapter 205 sets out the procedural requirements for the commission to issue a new general permit, for a discharger to request authorization under a general permit, and for the executive director to determine whether a discharger request for authorization under a general permit should be approved, denied, or suspended. These are procedural requirements that should apply to all general permits, regardless of the type of discharge. The substantive operational, monitoring, and other requirements that must be complied with by dischargers operating under a general permit will be set out in detail in each general permit and will be subject to notice and opportunity for comment prior to issuance by the commission. These substantive requirements will vary depending on the type of discharge and the geographical scope of the general permit. The issues noted by the commenter that will be associated with the MS4 general permit do not justify excluding the MS4 permit from scope of the general permit procedural rules set out in Chapter 205 because these issues are not affected by these rules and will be appropriately addressed by the commission prior to the issuance of the MS4 general permit.

The National Wildlife Federation commented that the adopted rules, in order to comply with §305.538 and 40 CFR §122.4(i), should specifically prohibit authorization of discharges into streams listed as

impaired pursuant to Section 303(d) of the Clean Water Act unless there is a showing that the types of discharges being authorized do not have the potential to contribute to the impairment.

The commission disagrees with this comment. The blanket prohibition, proposed by the commenter, of authorization through a general permit of any discharges into streams listed as impaired pursuant to Section 303(d) of the Clean Water Act unless there is a showing that the types of discharges being authorized do not have the potential to contribute to the impairment, is not required by either 30 TAC §305.538 or 40 CFR §122.4(i) because those regulations only apply to “new sources” or “new dischargers.” The commission will address the requirements of 30 TAC §305.538 and 40 CFR §122.4(i) when it issues each general permit by limiting the scope of coverage to ensure that the requirements of these regulations are met when it issues the general permit.

AEP and TXU commented that notices of violation (NOVs) should not be included in the definition of “compliance history,” under proposed §205.1(1), primarily because NOVs are alleged violations rather than findings of violations. AEP expressed the belief that the proposed definition is more broad than is allowed by the relevant statutory provisions, and TXU commented that the proposed definition appears to exceed the legislative intent of HB 1283. TXU commented that the rule should incorporate the statutory language in HB 1283, “that the compliance history contains violations constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations.” TXU also noted that other state agencies may handle NOVs in a different manner than current TNRCC practices.

The commission disagrees with these comments. The commission notes that the rule does not propose that NOV's from other state agencies will be part of the compliance history considered by the commission. The commission believes it is appropriate to include commission NOV's in the definition of "compliance history," because such an approach is clearly within the scope of TWC, §26.040 and; therefore, consistent with the legislative intent. Under TWC, §26.040(h), the commission is required to "deny or suspend a discharger's authority to discharge under a general permit if the commission determines that the discharger operates any facility for which the discharger's *compliance history contains violations* constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, *including a failure to make a timely and substantial attempt to correct the violations.*" (Emphasis added). Based upon the use of the word "violations" of the statute, as emphasized above, it is clear, based upon the statutory language, that the violations to be included in the compliance history may include violations that have been the subject of an NOV but have not yet been the subject of a commission order finding that the violation occurred. Under the commission's inspection and enforcement procedures, for many types of violations, a regulated entity that has been inspected and found by the inspector to be in violation has a designated timeframe, which in many cases is 30 days, from the inspection and NOV to make a timely and substantial attempt to correct the violation. Because, under commission procedures, the time to make a timely and substantial attempt to correct the violation occurs long before there could be a commission order finding that a violation occurred, the compliance history should not be limited to violations that have resulted in a commission order finding that the violation occurred but should also include violations that have been subject to an NOV. With regard to the comment that the rule should incorporate the

statutory language concerning egregious conduct, the commission believes that this language more properly belongs under §205.4(e), where it is included in this adoption. Therefore, no changes to the proposed text are adopted in response to these comments.

TXU commented that it supported the TNRCC's view that the definition of "compliance history" should apply only to a company's operations in the State of Texas, and not those operations they may own or operate in other states.

The commission disagrees with this comment. The definition of "compliance history" is not limited to a company's operations in the State of Texas. For example, the definition includes, in part, the record of all orders of the EPA pertaining to an applicant's adherence to environmental laws and rules of the United States; with the terms of any permit, compliance agreement or order issued by the EPA; and with any final judicial decision or settlement addressing the applicant's adherence to such environmental laws and rules. Thus, the definition includes an applicant's compliance history outside the State of Texas, insofar as it pertains to the aforementioned EPA orders. Therefore, no changes to the proposed text are adopted in response to this comment.

AEP commented that the definition of "compliance history" should not include Senate Bill 1660, or so-called "no findings," orders, and suggested clarifying language to the proposed language. The commenter suggested that the proposed sentence "It shall not include any order that is precluded by its terms or by law from becoming part of the applicant's compliance history." be adopted as follows: "It shall not include any order that by its terms or by law is not intended to become part of the applicant's

compliance history.”

The commission agrees in part with this comment, in that the definition of “compliance history” does not include “no findings” orders. However, the commission does not agree with the substitute language, because the phrase “...any order that is precluded by its terms or by law from becoming part of the applicant’s compliance history,” as proposed, is more precise than the phrase suggested by the commenter. Therefore, no changes to the proposed text are adopted in response to this comment.

The National Wildlife Federation commented that the definition of “compliance history” should be refined to provide clearly that orders issued by a local government regarding failure to comply with local ordinances or regulations are included in this definition.

The commission disagrees with this comment. The commission does not believe that the definition should be expanded to include adherence to local ordinances or regulations, because due to the great variety of local environmental ordinances or regulations and the lack of uniformity in the degree to which local governments enact and enforce these local ordinances or regulations, the number of violations of local government ordinances or regulations may not be truly representative of a regulated entity’s compliance history. For example, an entity located in a part of the state where local government is aggressive in enacting and enforcing local environmental ordinances and regulations may have been cited for many local violations. Whereas, a similar entity with the same operational practices but located in an area of the state where the local

government is not aggressive in enacting and enforcing local environmental ordinances and regulations may not have any local violations. For the same reason, the commission has chosen not to consider violations of other states' environmental laws as part of the compliance history. By limiting violations to Texas state environmental laws and federal environmental laws, the commission is creating a level playing field whereby regulated entities will be judged on their record of violations of Texas state environmental laws or federal environmental laws. Therefore, no changes to the proposed text are adopted in response to this comment.

The National Wildlife Federation commented that the definition of "compliance history" is unduly narrow because it fails to include violations of laws of other states. The commenter stated that the language of TWC, §26.040, is not limited to facilities within Texas, and that the scope of the rules may not be more narrow than the statute in this regard.

The commission agrees in part with this comment. The commission agrees that the definition of "compliance history" should not be limited to a company's operations in the State of Texas. In fact, the definition includes, in part, the record of all orders of the EPA pertaining to an applicant's adherence to environmental laws and rules of the United States; with the terms of any permit, compliance agreement or order issued by the EPA; and with any final judicial decision or settlement addressing the applicant's adherence to such environmental laws and rules. Thus, the definition includes an applicant's compliance history outside the State of Texas, insofar as it pertains to the aforementioned EPA orders and any final judicial decision or settlement addressing the applicant's adherence to federal environmental laws and rules. However, the commission does

not agree that the definition should include the record of an applicant's adherence to laws of other states. As with consideration of violations of local ordinances and rules, the commission believes that due the great variety of state environmental laws enacted throughout the 50 states and the lack of uniformity in enforcement of these laws from one state to another, consideration of violations of environmental laws from other states may not be truly representative of a regulated entities compliance history. Therefore, no changes to the proposed text are adopted in response to this comment.

TPWD commented that the definition of "compliance history" should be slightly revised to account for both notices and orders from other agencies.

The commission disagrees with this comment. The definition of compliance history does include orders from other state agencies and EPA. With respect to NOV's, the adopted rule defining compliance history includes commission NOV's, and does not include NOV's from other agencies, because the commission has developed and implemented a specific policy governing facility inspections and the procedures for issuing an NOV. Because of this procedure, the commission is confident that when an NOV is issued by the commission, the site inspector has properly documented the violation and there is a firm basis for believing that a violation occurred. Therefore, there is a firm basis for including these NOV's within the compliance history notwithstanding there not being a final commission order finding that a violation occurred. The commission cannot make the same judgment regarding NOV's issued by other agencies because the procedures followed by other agencies in issuing NOV's are not within the commission's control.

Therefore, no changes to the proposed text are adopted in response to this comment.

TPWD commented that the language under §205.1(4), “providing information on changes to information previously provided to the agency” is confusing.

The commission agrees with this comment and adopts the phrase as follows: “providing changes to information previously provided to the agency.”

The National Wildlife Federation commented that the proposed deletion of the definitions for the statutory terms that create limitations on the scope of authority for issuance of general permits is inappropriate, but also commented that the terms proposed for deletions were circular definitions that failed to make them meaningful. The commenter stated that the commission must acknowledge in the rules that there are limitations on categories that may be approved by general permit and must explain how those limitations will be respected.

The commission disagrees with this comment. As stated earlier in this preamble, §205.1(4) - (7) is proposed to be deleted because the commission believes that these terms are self-explanatory and unnecessary, and because they are the same as those found in the EPA’s regulations for general permits found under 40 CFR §122.28. Therefore, the deletions of the terms “same or similar monitoring requirements,” “same or substantially similar types of operations,” “same requirements regarding operating conditions,” and “same types of waste” are adopted without changes to the proposal in response to this comment.

The National Wildlife Federation commented that, under §205.2, although TWC, §26.040, does not mandate a commission finding that the category of storm water discharges covered by the general permit will not include a discharge of pollutants that will cause significant adverse effects to water quality, the rules should make clear that the commission will not issue a general permit for storm water discharges without making such a finding.

The commission disagrees with this comment. The statutory provisions clearly exempt storm water discharges from the findings set forth under TWC, §26.040(a)(1) - (5). Nevertheless, under adopted §205.4(c)(3)(E), the executive director may deny authorization to discharge under an existing general permit if the discharge contains pollutants that will cause significant adverse effects to water quality. Also, the commission notes that, under adopted §205.4(c)(2)(C), the executive director shall deny authorization to discharge under an existing general permit if the discharge causes a violation of the Texas Surface Water Quality Standards.

The National Wildlife Federation commented that the rule should make clear that a discharge must consist solely of storm water before it can be authorized by general permit that is not supported by the findings set out under TWC, §26.040(a)(1) - (5).

The commission disagrees with this comment. The commission believes that the phrase “if the commission finds the discharges in the category are storm water” under §205.2(a) is sufficiently clear to ensure that storm water is the only category of discharge that does not require the commission to make the findings required by TWC, §26.040(a)(1) - (5). In other words, the

commission does not believe that storm water needs to be defined because its meaning is sufficiently clear. Furthermore, the commission believes that it can issue a general permit which authorizes storm water discharges, which does not require the commission to make the findings required by TWC, §26.040(a)(1) - (5), and which also authorizes other types of discharges for which the commission has made the findings required by TWC, §26.040(a)(1) - (5). Therefore, no change to the proposed text is adopted in response to this comment.

The National Wildlife Federation and TPWD commented that the word “affects” under proposed §205.2(a)(5)(B) should be replaced with the word “effects.”

The commission agrees with this comment, and adopts the aforementioned change which corrects the typographical error in the proposal.

TPWD commented that the public notice which would be provided under proposed §205.3 is inadequate, basically because there would be no effective means for the general public, regulated community, or environmental groups to learn of proposed general permits unless they follow the *Texas Register* or see a newspaper notice. The commenter suggested that the TNRCC develop a mechanism for effectively providing notice to all these groups, and that such a procedure should include a requirement to notify stakeholders that a general permit is being considered for development, providing the opportunity for participation in the development of the general permit. Furthermore, the commenter stated that the procedure should also include notice of a proposed general permit and opportunity for comment. The commenter suggested a mailing list of interested parties, who would

receive a notice of intent to develop a general permit and a notice of the proposed general permit.

The commission disagrees with this comment, with regard to proposed §205.3 being inadequate.

The commission notes that under adopted §205.3(a), notice of each draft general permit is required to be published in the *Texas Register*. In addition, for draft general permits without statewide applicability, the agency shall publish notice in a daily or weekly newspaper of general circulation in the area affected by the activity that is the subject of the proposed general permit, under adopted §205.3(a)(1). For draft general permits with statewide applicability, notice shall also be published in at least one newspaper of statewide or regional circulation. The commission further notes that under adopted §205.3(b), for TPDES general permits, mailed notice of the draft general permit must also be provided to the county judge of the county or counties in which the dischargers under the general permit could be located; persons on a mailing list that has been developed by including those who request in writing to be on the list, soliciting persons for “area lists” from participants in past permit proceedings in that area, and notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and state funded newsletters, environmental bulletins, or state law journals; and any other person the executive director or chief clerk may elect to include. The commission believes that these requirements provide for adequate notice of draft general permits. Therefore, no changes to the proposed text are adopted in response to this comment.

The National Wildlife Federation commented that, under proposed §205.3(a), the TNRCC should

provide the option of requiring that notice of permits which do not have statewide applicability must be published in more than one newspaper. The commenter stated that, depending on the area of applicability, it often may be true that no single newspaper adequately covers the region to be affected.

The commission agrees in part with this comment. The commission believes that adopted §205.3(a) requires that notice of a draft general permit which will not have statewide applicability be published in more than one newspaper under some circumstances. The commission notes that the requirement is for publication “...in a daily or weekly newspaper of general circulation in the area affected by the activity that is the subject of the proposed general permit.” In cases where there is not a single daily or weekly newspaper that is of general circulation in the area affected by the activity that is the subject of the proposed general permit, then the rule clearly requires that more than one newspaper be used, to the extent that the affected area is covered. Therefore, no changes to the proposed text are adopted in response to this comment.

The National Wildlife Federation commented that, under proposed §205.3(a), for permits of statewide applicability, it would be far more effective for the rule to establish a general requirement of publication in a major newspaper in each region of the state unless TNRCC determines that the activity being authorized does not occur a significant level in one or more of the regions. The commenter stated that, at a minimum, the rules should describe the approach the commission will use in determining where notice will be published.

The commission disagrees with this comment. Adopted §205.3(a)(2) implements the statutory

requirement, under TWC, §26.040(b), to publish notice of each statewide general permit in one or more newspapers of statewide or regional circulation, which will ensure that the statutory requirement is met. The commission does not believe that rulemaking is the appropriate mechanism for setting out detailed procedures describing the approach the agency will take in determining where notice will be published. Instead, such procedures may be described in an implementation procedures document. Therefore, no changes to the proposed text are adopted in response to this comment.

The National Wildlife Federation commented that, under §205.3(a), mailed notice should be provided for all general permits to persons who have requested to receive notice of TNRCC permit actions, and that mailed notice should be available to any person who has requested to be included on the list maintained under §39.7.

The commission agrees in part with this comment. The commission believes that the adopted procedures for public notice, as discussed previously in this preamble, provide adequate public notice for general permits. These procedures include, under §205.3(b)(2), that for TPDES general permits, mailed notice will be provided to those persons on a mailing list that has been developed in part by including those who request in writing to be on the list. In addition, the commission intends to address notice requirements under issued general permits. Therefore, no changes to the proposed text are adopted in response to this comment.

The National Wildlife Federation commented that copies of the executive director's response to written

comments should be mailed to the commenting parties as soon as they are filed with the chief clerk's office. The commenter did not suggest that any particular rule be revised to implement this comment.

The commission agrees in part with this comment. The commission notes that, under adopted §205.3(e), the executive director's written response shall be made available to the public and filed with the chief clerk at least ten days before the commission considers the approval of the general permit. The commission believes that the requirement that the executive director's response to written comment be made available to the public at least ten days prior to commission consideration of the general permit provides adequate opportunity for commenters to review the executive director's written response well before the commission considers the approval of the general permit. Therefore, no changes to the proposed text are adopted in response to this comment.

TPWD provided a comment under §205.4(a)(2) questioning whether the word "is" in the phrase "after a general permit is expired" should be "has."

The commission agrees with this comment. Adopted §205.4(a)(2) reads as follows: "No new discharge under the authority of a general permit may commence after a general permit has expired."

The National Wildlife Federation commented that, under §205.4, the rules do not seem to protect against antibacksliding or inconsistency with the Water Quality Management Plan in instances when an

NOI is not required because there is no mechanism to ensure that a general permit will not be allowed to replace an individual permit that had more stringent effluent limitations.

The commission agrees that authorization to discharge under a general permit, as an alternative to an individual permit, may not be allowable where an individual permit contains more stringent requirements and effluent limitations. The commission believes that provisions to address this issue, and other similarly related issues, should be included in general permits as they are developed for consideration. Therefore, no changes to the proposed text are adopted in response to this comment.

The National Wildlife Federation commented that, under §205.4, the rules appear to ignore the limitation of TWC, §26.040 that general permits cannot authorize discharges covered by individual permits, by allowing discharges to be shunted to new outfalls.

The commission disagrees with this comment. The commission believes that the statute does not preclude an existing discharger from changing to a general permit. The commission believes that an individual permittee may request that the individual permit be cancelled or amended, as appropriate, and obtain authorization to discharge under a general permit. Therefore, the commission adopts a revision under §205.4(b)(1)(B) to cover such amendments, by adding the following phrase at the end of this subparagraph “or amended, as appropriate.”

The National Wildlife Federation commented that, under §205.4(c), the language should provide for

denial of an NOI and suspension of authority to discharge when the pollutants being discharged are determined to have the potential to impair water quality. The commenter stated that actual impairment of water quality should not be a prerequisite to taking action to prevent or stop a discharge that has significant potential to degrade water quality.

The commission disagrees with this comment. The commission believes that providing for denial of an NOI or suspension of authority to discharge when there is only a potential to impair water quality is not consistent with TWC, §26.040(a)(5)(B), which provides that the category of discharges covered by the general permit will not include a discharge of pollutants that will cause significant adverse effects to water quality. Therefore, no changes to the proposed text are adopted in response to this comment.

TCCOS commented that, under proposed §205.4(c)(2) and (d)(4), the executive director must deny or suspend authorization to discharge under a general permit because the discharge is a significant contributor of pollutants impairing the quality of surface or groundwater in the state, and expressed the belief that such a provision could be interpreted to prevent many of the MS4s in the state from using general permits. The TCCOS recommended that the commission modify this provision to make the eligibility condition discretionary.

The commission agrees with this comment. The commission believes that the types of discharges that affect surface or groundwater should be divided into two categories for the purposes of this rule. One category is made up of discharges which contain pollutants that cause significant

adverse effects to water quality, while the other category is made up of discharges which cause a violation of the Texas Surface Water Quality Standards. The commission considers the latter category to pose a more serious threat to the surface or groundwater in the state. Consequently, the commission adopts the rule to make the denial or suspension of authorization to discharge under an existing general permit mandatory in cases where the discharge causes a violation of the Texas Surface Water Quality Standards, by adding this category of discharge to §205.4(c)(2)(C) and (d)(4)(B). The commission also adopts the rule to make the denial or suspension of authorization under a general permit discretionary, for discharges which contain pollutants that cause significant adverse effects to water quality, by adding this category of discharge to §205.4(c)(3)(E) and (d)(5)(F). In addition, the commission adopts a revision to §205.4(d)(2) to except from the requirement to immediately cease the discharge, when the discharge is storm water for which authorization to discharge has been suspended under §205.4(d)(5)(F). The commission believes that this revision is necessary because it is impractical to immediately cease most storm water discharges.

TCCOS commented that, under proposed §205.4(c)(2) and (d)(4), the executive director must deny or suspend authorization to discharge under a general permit if the discharger has failed to pay any portion of a delinquent fee or charge assessed by the executive director, or is the subject of an unresolved agency enforcement action in which the executive director has issued written notice that enforcement has been initiated, and expressed the belief that these provisions will have the effect of depriving local governments of their statutory and due process rights to contest decisions made by the executive director and to have these issues addressed by the commission. The commenter stated that under the

proposed rule, a local government that disagrees with the executive director's determination on a fee issue would be denied the opportunity to use a general permit merely for contesting the executive director's decision. The commenter recommended that proposed §205.4(c)(2)(E)(i) and (d)(4)(C) be deleted, and that if these rules were not modified, then the rules should define "delinquent fee or charge" and "assessed by the executive director," since these terms have varying interpretations.

The commission disagrees with this comment. With regard to failing to pay any portion of a delinquent fee or charge assessed by the executive director, the commission believes that persons who fail to pay, in a timely manner, fees or charges assessed by the executive director should not be able to obtain authorization to discharge unless and until the fee or charge is fully paid. Furthermore, the commission does not believe that the terms "delinquent fee or charge" or "assessed by the executive director" need to be defined in the rules. The commission notes that an assessed fee or charge is one that has been imposed in writing, and a delinquent fee or charge is one that has not been fully paid by the due date. Therefore, no changes to the proposed text are adopted in response to this comment.

TCCOS commented that, under the proposed rules, a local government would be denied the opportunity to use a general permit merely for exercising its right to have the commission review the executive director's allegations. The commenter stated that this provision creates an untenable dilemma that if the executive director commences an enforcement action against any operation of a local government, the local government will have to choose between contesting the executive director's allegations or continuing to discharge storm water. The commenter stated that the commission should not create such

a Hobson's choice by rule. The commenter went on to state that, given the presence of the provisions under §205.4(e), it does not see the need for §205.4(c)(2)(E), (3)(D), and (d)(4)(C) and (d)(5)(E), and requests that these provisions not be included in the final rule. Finally, the commenter stated that if the proposed provisions are not modified, it is essential that the rules better clarify what specific actions of the executive director will justify the automatic suspension of use of a general permit, and asked if "an unresolved agency enforcement action in which the executive director has issued written notice that enforcement has been initiated" mean a notice of violation, or is it an executive director's preliminary report?

The commission agrees in part with this comment. The commission agrees that a discharger should not be automatically prohibited from obtaining authorization under a general permit if there is an unresolved enforcement because the circumstances of each individual case should be weighed to determine whether denial or suspension of the NOI by the executive director is justified. Instead, the commission believes that denial or suspension of authorization to discharge under a general permit if the discharger or facility is the subject of an unresolved enforcement action in which the executive director has issued written notice that enforcement has been initiated should be discretionary, and that discretion should be used based on the severity of the violation or violations. Therefore, such denials and suspensions have been transferred in the rules from §205.4(c)(2)(E) and (d)(4)(C) to §205.4(c)(3)(F) and (d)(5)(G), respectively. The commission notes that the requirements under §205.4(e) concerning egregious conduct are adopted under a separate basis for denial or suspension, in accordance with TWC, §26.040(h). Finally, the commission notes that a notice of enforcement letter is the "written notice that enforcement has been

initiated.”

TPWD commented concerning discretionary authority to deny or suspend authorizations that the reasons should include “Other reasons as required by law or as are justified by the commission in the reasonable exercise of its discretion,” under §205.4(c)(3) and (d)(5).

The commission disagrees with this comment. The commission believes that the proposed language, as adopted under §205.4(c)(3)(D) and (d)(5)(E), which includes as a reason for discretionary authority to deny or suspend authorizations that “the discharger has been determined by the executive director to have been out of compliance with any rule, order, or permit of the commission, including non-payment of fees assessed by the executive director” provides the executive director with sufficient discretionary authority, in conjunction with the more specific reasons under adopted §205.4(c)(3)(A) - (C) and (d)(5)(A) - (D). Therefore, no changes to the proposed text are adopted in response to this comment.

The National Wildlife Federation commented that §205.4(d)(1)(B) and (D) seem to be inconsistent, in that subparagraph (B) requires the written notice that the executive director intends to suspend a discharger’s authority to include a statement of whether the discharger shall immediately cease the discharge, whereas subparagraph (D) seems to indicate that authorization to discharge will not be suspended prior to commission action on an individual permit application. The commenter suggested that subparagraph (D) should be qualified by adding language that it applies only if immediate cessation of discharge has not been required by the executive director.

The commission agrees with this comment. Therefore, the following phrase had been included at the end of adopted §205.4(d)(1)(D): “, or unless the executive director has required the discharger to immediately cease the discharge.”

Lloyd, Gosselink and TCCOS commented that, under §205.4(g), the commission lacks the statutory authority to require application fees for general permits. Both commenters cite TWC, §5.235, which authorizes the commission to collect fees, but only fees “prescribed by law,” and TWC, §26.040(k), which allows the commission to impose a reasonable and necessary fee under TWC, §26.0291 on a discharge covered by a general permit. The commenters point out that TWC, §26.0291 authorizes only waste treatment inspection fees. TCCOS recommended that the commission either delete §205.4(g) in its entirety or should exclude local governments from the scope of the provision.

The commission disagrees with this comment. Under TWC, §5.235(b), “except as otherwise provided by law, the fee for filing an application or petition is \$100 plus the cost of any required notice.” Under §3.2(4), an “application” is defined as “a petition or written request to the commission for an order, permit, license, registration, standard exemption, or other approval.” Submittal of an NOI is an application subject to an application fee under TWC, §5.235(b), because it is a written request to the commission for approval to discharge under a general permit. Texas Water Code, §26.040 does not provide that the commission may not charge an application fee under TWC, §5.235. Therefore, the commission’s authority under TWC, §5.235(a) and (b), applies to applications for NOIs. Furthermore, the commission notes that Rider 5 to the 1999/2000 Appropriations Act sets the “maximum rate for fees” authorized by

TWC, §5.235(b) and (c), at \$2000. Therefore, the proposed language under §205.4(g) is adopted to read as follows: “Unless otherwise provided in the general permit or in §305.53 of this title (relating to Application Fee), a person seeking authorization by general permit shall submit a \$100 application fee payable to the agency at the time of filing an NOI. If a person is denied coverage under the general permit in accordance with subsection (c) or (e) of this section, any application fee will be applied to the application fee required for an individual permit application for the same discharge.” The commission notes that the \$100 fee is the minimum fee for an application, as required by TWC, §5.235(b).

TCCOS commented that, under proposed §205.4(h), given the scope of the storm water management programs that will be required by MS4 general permits, and the workings of internal municipal government, it questioned whether it will be practical for a local government to give the TNRCC notice of changes in the program at least ten days before the change is made as would be required by the proposal. The commenter recommended that the specific provisions regarding notice of changes be addressed in the MS4 general permit rather than in this general permit rule.

The commission agrees with this comment. The commission appreciates that it may be difficult to ensure that the requirement to submit a notice of change not later than ten days prior to the change would be reasonable in all instances. Therefore, §205.4(h) is adopted with the phrase “not later than ten days” replaced with the phrase “within a specified period of time.”

TCCOS commented that, under proposed §205.4(i), the provision allowing the commission to establish

a provision in a general permit for notifications by dischargers to county judges and mayors should be a mandatory requirement for all general permits.

The commission disagrees with this comment. The commission notes that making the notification requirement under §205.4(i) mandatory would result in a veritable flood of notifications to county judges and mayors, because there will be possibly thousands of NOIs, such as the anticipated storm water construction general permits for sites one acre or larger. The commission believes that it is more appropriate to retain the discretionary notification requirement in order to ensure that the significant NOIs will be able to be noticed, without overloading the system with notices concerning relatively insignificant discharges. Therefore, no changes to the proposed text are adopted in response to this comment.

TXU commented that, under §205.5(c), there should not be a requirement that a new NOI be submitted for a renewed general permit if there has been no change in the activities authorized by the general permit. The commenter also noted that if a new NOI is required for discharges which are already permitted by a general permit, the proposed rule would create a gap in coverage between the date a renewed or amended general permit is issued and the date discharges are authorized by the new NOI. The commenter proposed the following language: “Upon issuance of an amended general permit, discharges previously covered under the expired general permit, will have coverage extended to the date authorization is granted under the new NOI, if one is required by the general permit.”

The commission disagrees with this comment. The commission believes that it is appropriate that

a permittee submit an NOI for continued coverage if the renewed general permit requires an NOI, even if there has been no change in the activities authorized by the general permit. The commission notes that submission of an NOI for permit coverage is an acknowledgment by the applicant that the permit is applicable and that the applicant agrees to comply with the conditions of the general permit. Additionally, renewed general permits may include substantial revisions to the expiring permit. Therefore, no change to the proposed text is adopted in response to this comment.

TCCOS commented that, under proposed §205.5(d), the commission should modify the provision to exempt MS4 permits from the 90-day limitation. The proposal states that if the commission has not proposed to renew a general permit at least 90 days before its expiration date, dischargers authorized under a general permit must submit an individual permit application before the expiration of the general permit.

The commission disagrees with this comment. TCCOS refers to the “existing individual MS4 applications that were required by EPA for the National Pollutant Discharge Elimination System (NPDES) Phase I MS4 permits. These applications contained extensive requirements that took up to two years to complete. The commission will reissue each of these permits as individual TPDES permits as they expire. The commission does not intend to require an application that contains the extensive requirements of the existing NPDES MS4 application for renewal of these permits. Similarly, any MS4 system covered under a general permit that must meet the proposed §205.5(d) requirements would submit an application for an individual permit that is similar to other TPDES

discharge permits. The 90-day time frame will provide an appropriate amount of time for applicants to prepare and submit a TPDES individual permit application form. Therefore, no change to the proposed text is adopted in response to this comment.

Lloyd, Gosselink and TCCOS commented that, under §205.6, the commission lacks the statutory authority to require watershed monitoring and assessment fees for general permits. Both commenters cite TWC, §5.235, which authorizes the commission to collect fees, but only fees “prescribed by law,” and TWC, §26.040(k), which allows the commission to impose a reasonable and necessary fee under TWC, §26.0291, on a discharge covered by a general permit. The commenters point out that TWC, §26.0291 authorizes only waste treatment inspection fees. TCCOS recommended that the commission either delete the language in proposed §205.4(g) relating to annual watershed monitoring and assessment fees or should exclude local governments from the scope of the provision.

The commission disagrees with this comment. Under TWC, §26.0135(h) the commission shall assess watershed monitoring and assessment fees to “users of water and wastewater permit holders in the watershed according to the records of the commission generally in proportion to their right, through permit or contract, to use water from and discharge wastewater in the watershed.” Persons authorized to discharge wastewater under a general permit are holders of a permit, albeit a general rather than individual permit, who have a right to discharge wastewater by virtue of their coverage under a general permit. Therefore, persons discharging under a general permit fall within the scope of the persons who are assessed a watershed monitoring and assessment fee under TWC, §26.0135. Texas Water Code, §26.040, does not state that the

commission may not assess watershed monitoring and assessment fees on persons discharging under a general permit; therefore, the commission's statutory authority under TWC, §26.0135, applies to dischargers authorized under general permits. Therefore, no changes to the proposed text are adopted in response to this comment.

Lloyd, Gosselink commented, under §205.6, that even if TWC, §26.040, did authorize the commission to collect watershed monitoring and assessment fees, which it did not, municipalities having a population of greater than 10,000 may not be charged such fees because TWC, §26.0135(h), provides that no municipality shall be assessed costs for the water quality management activities of TWC, §26.177. The commenter stated that under this provision cities subject to the water pollution abatement plan requirements of TWC, §26.177, would not be required to pay the watershed monitoring and assessment fees.

The commission agrees in part with this comment. The commenter is correct that TWC, §26.0135(h), provides, with respect to watershed monitoring and assessment fees, that no municipality shall be assessed cost for any efforts that duplicate water quality management activities described in TWC, §26.177. However, the commission disagrees that municipalities having a population greater than 10,000 may not be charged watershed monitoring and assessment fees. In order to qualify for the exemption for assessment of costs that duplicate water quality management activities, the municipality must have established and implemented a water pollution control and abatement program under TWC, §26.177(a), that includes, at a minimum, the services and functions described in TWC, §26.177(b)(1) - (6), and the program must have been

submitted to and approved by the commission under TWC, §26.177(c).

TCCOS commented that, under §205.6, cities should not be required to submit waste treatment inspection fees for MS4s authorized by a general permit. The commenter expressed the belief that this issue in particular is premature because the resolution of this issue will depend upon how the general permits for MS4 discharges are ultimately structured. The commenter stated that, given the uncertainty relating to the structure of the general permits for MS4 discharges, the commission should consider changing the language in the rule from the mandatory “shall” to the discretionary “may.”

Alternatively, the commenter suggested that the rule should state that such fees may be charged for MS4 permits and shall be charged for all other general permits.

The commission agrees in part with this comment. Given that the structure of the MS4 general permit is uncertain at this time, the commission believes that by adding the phrase “or as specified in the general permit,” needed flexibility will be added to the rules. Therefore, §205.6 is adopted to read in part as follows: “A person authorized by a general permit shall pay an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291, consistent with §§305.501 - 305.507 of this title (relating to the Waste Treatment Inspection Fee Program) or as specified in the general permit.” Accordingly, when the general permit is proposed, this fee issue will be considered and the public will have the opportunity to provide comment.

TCCOS commented that, under §205.6, the amount of annual waste treatment fee that a small MS4 would be required to pay is unclear because existing §305.503(g)(2) is not clear on whether payment of

\$900 per permit or \$900 per outfall is required. Because each city will have numerous storm water outfalls if the fee will be \$900 per outfall each city subject to storm water permits will have to pay the maximum \$25,000 fee for the luxury of receiving rainfall.

Again, the commission agrees in part with this comment. The commission believes that by adding the phrase “or as specified in the general permit,” needed flexibility will be added to the rules.

Therefore, §205.6 is adopted to read in part as follows: “A person authorized by a general permit shall pay an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291, consistent with §§305.501 - 305.507 of this title (relating to the Waste Treatment Inspection Fee Program) or as specified in the general permit.” When the general permit is proposed, it will clearly specify whether the annual waste treatment inspection fee applies per permit or per outfall. The commission notes that the public will have the opportunity to comment on this issue at the time the general permit is proposed.

TCCOS commented that, under §205.6, the commission lacks statutory authority to assess municipalities for costs of efforts that duplicate water quality management activities described in TWC, §26.177. The commenter notes that if the general permits for MS4 discharges contain activities that resemble activities described in TWC, §26.177, the commission will lack authority to assess fees for such costs against municipalities.

The commission agrees in part with this comment. The commenter is correct that, under TWC, §26.0135(h), the commission does not have the authority to assess a municipality for the cost of

any efforts that duplicate water quality management activities described in TWC, §26.177.

However, the commission disagrees that if the general permits for MS4 discharges contain activities that resemble activities described in TWC, §26.177, the commission lacks the authority to assess fees for such costs against municipalities. In order to qualify for the exemption for assessment of costs that duplicate water quality management activities described in TWC, §26.177, the municipality must have established and implemented a water pollution control and abatement program under TWC, §26.177(a), that includes, at a minimum, the services and functions described in TWC, §26.177(b)(1) - (6), and the program must have been submitted to and approved by the commission under TWC, §26.177(c). The mere inclusion of activities in the MS4 general permits that resemble activities described in TWC, §26.177, does not trigger the exemption for assessment of costs absent the establishment and implementation of an approved water pollution abatement program by a municipality because the exemption is limited to costs for any efforts that duplicate the water quality management activities described in TWC, §26.177. In order for there to be duplication of such activities, the municipality must have previously implemented these activities under its approved water pollution abatement program.

TCCOS commented that, under §205.6, the commission should not assess water treatment fees against municipal discharges associated with industrial activity that are also discharges from the MS4 because the commission would otherwise be recovering double fees for the same discharge.

The commission disagrees with this comment. The commission notes discharges of storm water from MS4s and discharges of storm water from industrial facilities to MS4s must be authorized

under two distinctly separate permits. Nevertheless, the commission believes that some flexibility in establishing annual fees is warranted. By adding the phrase “or as specified in the general permit,” needed flexibility will be added to the rules. Therefore, §205.6 is adopted to read in part as follows: “A person authorized by a general permit shall pay an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291, consistent with §§305.501 - 305.507 of this title (relating to the Waste Treatment Inspection Fee Program) or as specified in the general permit.” Again, the commission notes that the public will have the opportunity to comment on this issue at the time general permits are proposed.

TCCOS commented that, under §205.6, the rule should include language that acknowledges that the commission may share fees with local governments with MS4 permits. The commenter notes TWC, §26.0291, requires the commission to use the fees generated by the waste treatment fund to pay its expenses in inspecting waste treatment facilities and enforcing the provisions of TWC, Chapter 26. The commenter also notes that TWC, §26.175, provides that the commission may transfer money or property to a local government for the purpose of water quality management, inspection, enforcement, technical aid and education, and the construction, ownership, purchase, maintenance, and operation of disposal systems. If the MS4 general permits require that local governments carry out some of the water quality management, inspection, education and enforcement functions that the commission would otherwise have to perform, those municipalities will be eligible for funds collected by the commission under TWC, §26.0291, and the commission should expressly recognize through this rule that such transfers may take place.

The commission agrees in part with this comment. TWC, §26.175, does provide that a local government may execute cooperative agreements with the commission for the transfer of money or property from any party to the agreement to another party to the agreement for the purpose of water quality management, inspection, enforcement, technical aid and education, and the construction, ownership, purchase, maintenance, and operation of disposal systems. The commission notes that, on a case-by-case basis, the provisions of TWC, §26.175, may come into play. The commission believes that no rule changes are necessary for implementation of these statutory provisions. Therefore, no changes to the proposed text are adopted in response to this comment.

Bexar County and the Texas Counties Storm Water Coalition expressed opposition to the assessment of any fees on counties associated with “Phase II” storm water general permitting and commented that, under §205.6, the assessment of the waste treatment inspection fee should be discretionary rather than mandatory. The commenters suggested the following language for §205.6: “The agency may impose reasonable and necessary fees under Texas Water Code, §26.0291, consistent with sections 305.501 - 305.507 of this title (relating to Waste Treatment Inspection Fee Program) on a discharger covered by a general permit, and may impose an annual watershed monitoring and assessment fee under Texas Water Code §26.0135(h), consistent with section 220.21 of this title (relating to Water Quality Assessment Fees).”

The commission disagrees with this comment. Nevertheless, the commission believes that by adding the phrase “or as specified in the general permit,” needed flexibility will be added to the

rules, as to the specific amount of the waste treatment inspection fee. Therefore, §205.6 is adopted to read in part as follows: “A person authorized by a general permit shall pay an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291, consistent with §§305.501 - 305.507 of this title (relating to the Waste Treatment Inspection Fee Program) or as specified in the general permit.” In this way, the public will have the opportunity to comment on this issue at the time general permits are proposed.

TPWD commented that, under §205.6, the proposed rule should be revised to read: “A person authorized by a general permit shall pay an annual waste treatment inspection fee under Texas Water Code (TWC) §26.0291, as specified in the general permit or consistent with §§305.501 - 305.507 of this title (relating to the Waste Treatment Inspection Fee Program); and may be subject to an annual watershed monitoring and assessment fee under TWC, §26.0135(h), as specified in the general permit or consistent with §220.21 of this title (relating to Water Quality Assessment Fees).” The commenter stated that the recommended change would track the language proposed for application fees by giving the commission the option of collecting fees in accordance with Chapter 305 and Chapter 220 or establishing them in the general permit. The commenter recommends that the rule should provide for flexibility in establishing the fee structure because fees established according to Chapter 305 may be inappropriately high for some classes of dischargers and it is difficult to anticipate all the types of general permits that the commission may wish to develop.

The commission agrees with this comment. The commission believes that by adding the phrase “or as specified in the general permit,” needed flexibility will be added to the rules without

diminishing its enforceability. Therefore, §205.6 is adopted to read as follows: “A person authorized by a general permit shall pay an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291, consistent with §§305.501 - 305.507 of this title (relating to the Waste Treatment Inspection Fee Program) or as specified in the general permit; and may be subject to an annual watershed monitoring and assessment fee under TWC, §26.0135(h), consistent with §220.21 of this title (relating to Water Quality Assessment Fees) or as specified in the general permit.”

TXU commented that although fees are not part of the proposed rule, the commission should provide an opportunity for the public to comment on any additional fees that would be placed on the regulated community as a result of moving storm water discharges into the general permitting process.

The commission agrees with this comment. The commission notes that the public will have the opportunity to comment on any fees assessed under a general permit at the time the general permit is proposed.

The National Wildlife Federation commented that, regarding consistency with the CMP, the provisions of the rules requiring denial of authorization to discharge for discharges adversely affecting critical areas do not provide protection in the case of general permits that do not require the filing of a notice of intent. The commenter stated that critical areas are not adequately protected by these rules to make them consistent with the CMP.

The commission disagrees with this comment. The commission notes that general permits must be developed with conditions and limitations that are protective of water quality and human health. Whether or not an NOI is required to be filed does not diminish the level of protection provided by the general permit. Since persons who discharge under a general permit must abide by its conditions and limitations, whether or not an NOI is required to be filed, the general permit and these rules are consistent with the CMP. Therefore, no changes to the proposed text are adopted in response to this comment.

STATUTORY AUTHORITY

The amendments are adopted under and implement TWC, §26.040, which provides the commission with the authority to regulate certain waste discharges by general permit, and TWC, §26.040(m), which authorizes the commission to adopt rules as necessary to implement TWC, §26.040.

These amendments are also adopted under the TWC, §5.102, which provides the commission with general powers to carry out duties under the TWC, §§5.103, 5.105, and 5.120, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state and to establish and approve all general policies of the commission.

SUBCHAPTER A : GENERAL PERMITS FOR WASTE DISCHARGES

§§205.1-205.7

§205.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) **Compliance history** - The record of all notices from the commission, including notices of violation from the executive director; and of all orders of the commission, of any other agency or political subdivision of the State of Texas and of the United States Environmental Protection Agency (EPA) pertaining to an applicant's adherence to environmental laws and rules of the State of Texas or the United States; with the terms of any permit, compliance agreement or order issued by the commission or the USEPA; and with any final judicial decision or settlement addressing the applicant's adherence to such environmental laws and rules. The history shall be for the five-year period before the date on which the NOI is filed or, if an NOI is not required, the five-year period before the permittee begins operating under the general permit. It shall not include any order that is precluded by its terms or by law from becoming part of the applicant's compliance history.

(2) **General permit** - A permit issued under the provisions of this chapter authorizing the discharge of waste into or adjacent to water in the state for one or more categories of waste

discharge within a geographical area of the state or the entire state as provided by Texas Water Code (TWC), §26.040.

(3) **Individual permit** - A permit, as defined in the TWC, §26.001, issued by the commission or the executive director to a specific person or persons in accordance with the procedures prescribed in the TWC, Chapter 26, (other than TWC, §26.040).

(4) **Notice of change or NOC** - A written submittal to the executive director from a discharger authorized under a general permit providing changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the discharge.

(5) **Notice of intent or NOI** - A written submittal to the executive director from a discharger requesting coverage under the terms of a general permit.

(6) **Notice of termination or NOT** - A written submittal to the executive director from a discharger authorized under a general permit requesting termination of coverage.

(7) **Texas Pollutant Discharge Elimination System (TPDES)** - The state program authorized under Clean Water Act, §§307, 318, 402, and 405 for issuing, amending, terminating, monitoring, and enforcing permits, and imposing and enforcing pretreatment requirements under the Texas Water Code and Texas Administrative Code regulations.

§205.2. Purpose and Applicability.

(a) The commission may issue a general permit to authorize the discharge of waste into or adjacent to water in the state by category if the commission finds the discharges in the category are storm water or the dischargers in the category:

(1) engage in the same or substantially similar types of operations;

(2) discharge the same types of waste;

(3) are subject to the same requirements regarding effluent limitations or operating conditions;

(4) are subject to the same or similar monitoring requirements; and

(5) are more appropriately regulated under a general permit than under individual permits, on the basis that both:

(A) the general permit can be readily enforced and the executive director can adequately monitor compliance with the terms of the general permit; this requirement being satisfied if the provisions of the general permit are clear and unambiguous and it requires adequate monitoring, record keeping, and reporting, appropriate to the type of activity authorized; and

(B) the category of discharges covered by the general permit will not include a discharge of pollutants that will cause significant adverse effects to surface or groundwater quality.

(b) The commission may issue a general permit to authorize the discharge of waste by categories of dischargers designated under subsection (a) of this section either within the entire state or within a discrete geographical area identified by an appropriate division or combination of geographic or political boundaries.

(1) General permits granted for discrete geographical areas may be based upon, but not limited to, factors such as related water quality standards, climatological conditions, and watershed specific standards in accordance with Chapter 311 of this title (relating to Watershed Protection).

(2) Discharges to be regulated with effluent limitations specific to a particular water body may be covered under a general permit limited to a particular watershed or geographical area.

(c) Authorization to discharge under a general permit does not confer a vested right.

§205.3. Public Notice, Public Meetings, and Public Comment.

(a) Notice shall be published as follows.

(1) If the draft general permit will not have statewide applicability, the agency shall

publish notice of each draft general permit in the *Texas Register* and in a daily or weekly newspaper of general circulation in the area affected by the activity that is the subject of the proposed general permit.

(2) For draft general permits with statewide applicability, notice shall be published in the *Texas Register* and in at least one newspaper of statewide or regional circulation.

(3) The public notice shall be published not later than the 30th day before the commission considers the approval of a general permit.

(b) For Texas Pollutant Discharge Elimination System general permits, mailed notice of the draft general permit will also be provided to the following:

(1) the county judge of the county or counties in which the dischargers under the general permit could be located;

(2) if applicable, persons for which notice is required in 40 Code of Federal Regulations (CFR), §124.10(c); and

(3) any other person the executive director or chief clerk may elect to include.

(c) The contents of a public notice of a draft general permit shall:

(1) include the applicable information described in §39.11 of this title (relating to Text of Public Notice);

(2) include an invitation for written comments by the public regarding the draft general permit;

(3) specify a comment period of at least 30 days; and

(4) include either a map or description of the permit area.

(d) Requirements relating to public meetings are as follows.

(1) The agency may hold a public meeting to provide an additional opportunity for public comment and shall hold such a public meeting when the executive director determines, on the basis of requests, that a significant degree of public interest in a draft general permit exists.

(2) Notice of a public meeting shall be by publication in the *Texas Register* not later than the 30th day before the date of the meeting.

(3) Notice of the public meeting shall be mailed to the following:

(A) the county judge of the county or counties in which the dischargers under

the general permit could be located;

(B) if applicable, persons for which notice is required in 40 CFR, §124.10(c);

(C) any other person the executive director or chief clerk may elect to include;

and

(D) persons who filed public comment or request for a public meeting on or before the deadline for filing public comment or request for a public meeting.

(4) The contents of a public notice of a public meeting shall include the applicable information described in §39.11 of this title (relating to Text of Public Notice). Each notice must include an invitation for written or oral comments by the public regarding the draft general permit.

(5) The public comment period shall automatically be extended to the close of any public meeting held by the agency on the proposed general permit.

(e) If the agency receives public comment during the comment period relating to issuance of a general permit, the executive director shall respond in writing to these comments, and this response shall be made available to the public and filed with the chief clerk at least ten days before the commission considers the approval of the general permit. The response shall address written comments received during the comment period and oral or written comments received during any public meeting

held by the agency. The commission shall consider all public comment in making its decision and shall either adopt the executive director's response to public comment or prepare its own response.

(1) The commission shall issue its written response to comments on the general permit at the same time the commission issues or denies the general permit.

(2) A copy of any issued general permit and response to comments shall be made available to the public for inspection at the agency's Austin office and also in the appropriate regional offices.

(3) A notice of the commission's action on the proposed general permit and a copy of its response to comments shall be mailed to each person who made a comment.

(4) A notice of the commission's action on the proposed general permit and the text of its response to comments shall be published in the *Texas Register*.

(f) Except as specified in subsection (g) of this section, the requirements of subsections (a) - (e) of this section apply to processing of a new general permit, an amendment, renewal, revocation, or cancellation of a general permit.

(g) A general permit may be proposed for minor amendment or minor modification, as described in §305.62(c) of this title (relating to Amendment), without newspaper publication.

§205.4. Authorizations and Notices of Intent.

(a) A qualified discharger may obtain authorization to operate under a general permit by complying with the general permit's conditions for gaining coverage.

(1) A general permit shall specify either an applicable deadline for filing the notice of intent (NOI), or that an NOI is not required prior to commencement of a qualifying discharge.

(2) No new discharge under the authority of a general permit may commence after a general permit has expired.

(3) For those general permits requiring an NOI, a discharger may begin discharging under the general permit after the date or period of time specified in the general permit unless the executive director or commission before that time notifies the discharger pursuant to subsections (c) or (e) of this section that the discharger is not eligible for authorization under the general permit.

(4) The executive director shall provide written notice to a discharger if the executive director determines that the discharger is not eligible for authorization under the general permit. The content of the notice is described in subsections (c) and (d) of this section.

(5) An NOI shall be submitted to the executive director in a form or format that is specified in the general permit or otherwise set out in commission rules.

(b) The following requirements apply to existing individual permittees.

(1) The general permit shall specify how a discharger covered by an individual permit may substitute authorization to discharge waste under the general permit. At a minimum, the general permit shall provide that coverage under the general permit shall not commence until:

(A) the permittee has submitted an NOI, if one is required by the general permit, as specified by subsection (f) of this section; and

(B) the executive director has received the discharger's written request that the individual permit be canceled or amended, as appropriate.

(2) The general permit may allow a discharger who is covered by an individual permit to obtain authorization to discharge waste from a new outfall under a general permit. Agency action on a new discharge does not affect the status of the discharger's existing individual permit. The general permit shall describe how to obtain authorization to discharge waste from a new outfall. Authorization under the general permit shall not commence until the discharger:

(A) submits an NOI, if one is required by the general permit, as specified in subsection (f) of this section; and

(B) requests and receives written approval from the executive director of a

minor modification to their individual permit exempting the new outfall from coverage under the individual permit.

(3) Except as provided under subsection (b)(2) of this section, the commission shall cancel an individual permit if the executive director or commission does not deny the NOI or authorization under subsection (c) or (e) of this section.

(c) The following requirements apply to denial of an authorization or notice of intent.

(1) The executive director shall provide written notice to a discharger if the executive director denies the discharger's NOI or authorization to discharge under a general permit, including, at a minimum, a brief statement of the basis for this decision.

(2) The executive director shall deny authorization to discharge under an existing general permit for the following reasons:

(A) the quantity of discharge, the type of waste, or the type of operation does not comply with the general permit;

(B) the discharge is required to be authorized under the Texas Pollutant Discharge Elimination System (TPDES), and discharging under the general permit would result in backsliding prohibited under 40 Code of Federal Regulations §122.44(l), as amended and adopted under

§305.531(3) of this title (relating to Establishing and Calculating Additional Conditions and Limitations for TPDES Permits);

(C) the discharge causes a violation of the Texas Surface Water Quality Standards;

(D) the discharge is located where it causes or could cause an adverse impact upon a critical area, as defined in 31 TAC §501.3 (relating to Definitions and Abbreviations), and there is a suitable location that is available and capable of being used in light of cost, technology, and logistics;

(E) the discharger or facility:

(i) has failed to pay any portion of a delinquent fee or charge assessed by the executive director;

(ii) is not in compliance with all requirements, conditions, and time frames specified in an unexpired commission final enforcement order relating to the activity regulated by the general permit; or

(iii) is subject to an unexpired enforcement order that requires the facility to comply with operating conditions different from or additional to the requirements of the

general permit;

(F) the discharge would be inconsistent with the state water quality management plan (WQMP).

(3) The executive director may deny authorization to discharge under an existing general permit for reasons including, but not limited to, the following:

(A) a change has occurred in the availability of demonstrated technology or practices for the prevention, control, or abatement of pollutants applicable to the discharge necessary to be implemented to meet applicable federal or state standards;

(B) specific effluent limitation guidelines are promulgated for a discharge covered by the general TPDES permit, but the general permit has not yet been amended to incorporate the new effluent limitation guidelines;

(C) the owner and/or the operator of the facility has not filed an NOI in accordance with §305.43 of this title (relating to Who Applies);

(D) the discharger has been determined by the executive director to have been out of compliance with any rule, order, or permit of the commission, including non-payment of fees assessed by the executive director;

(E) the discharge contains pollutants that cause significant adverse effects to water quality. In making this determination, the executive director shall consider the following factors:

(i) the location of the discharge;

(ii) the size of the discharge;

(iii) the quantity and nature of pollutants discharged;

(iv) whether the discharge would adversely affect groundwater quality, inconsistent with the policy specified in the Texas Water Code (TWC), §26.401; and

(v) other factors relating to the protection of water quality standards;

and

(F) the discharger or facility is the subject of an unresolved agency enforcement action in which the executive director has issued written notice that enforcement has been initiated.

(4) If authorization to discharge is denied under this subsection, the executive director may require the person whose authorization is denied to apply for and obtain an individual permit. If the discharger is seeking to replace its individual permit with general permit coverage, but the

discharger's general permit authorization is denied, the discharger shall apply for renewal of the individual permit prior to the expiration date of its individual permit to maintain authorization to discharge, in accordance with §305.63 of this title (relating to Renewal).

(d) The following requirements apply to suspensions of authorizations and NOIs.

(1) The general permit shall describe the procedures for suspension of authorization and NOIs under a general permit. The general permit shall require the executive director to provide written notice to a discharger that the executive director intends to suspend a discharger's authority to discharge under a general permit, including:

(A) a brief statement of the basis for this decision under this subsection;

(B) a statement of whether the discharger shall immediately cease the discharge;

(C) a statement setting the deadline for filing the application for an individual permit; and

(D) a statement that the person's discharge authorization under the general permit shall be suspended on the effective date of the commission's action on the individual permit application unless the commission expressly provides otherwise, or unless the executive director has

required the discharger to immediately cease the discharge;

(2) Except for suspensions under paragraph (5)(F) of this subsection relating to storm water discharges, if a discharger's authorization under a general permit is suspended, the discharger shall immediately cease the discharge.

(3) The executive director may require the person whose authorization to discharge is suspended to apply for and obtain an individual permit.

(4) After providing written notice to the discharger, the executive director shall suspend authorization to discharge under an existing general permit for the following reasons:

(A) the quantity of discharge, the type of waste, or the type of operation does not comply with the general permit;

(B) the discharge causes a violation of the Texas Surface Water Quality Standards;

(C) the discharger or facility:

(i) has failed to pay any portion of a delinquent fee or charge assessed by the executive director;

(ii) is not in compliance with all requirements, conditions, and timeframes specified in an unexpired commission final enforcement order relating to the activity regulated by the general permit, or

(iii) is subject to an unexpired enforcement order that requires the facility to comply with operating conditions different from or additional to the requirements of the general permit;

(D) the discharge is inconsistent with the state WQMP;

(E) an application is not received by the deadline specified by rule or in the general permit.

(5) After providing written notice to the discharger, the executive director may suspend authorization to discharge under an existing general permit for reasons including, but not limited to, the following:

(A) a change has occurred in the availability of demonstrated technology or practices for the prevention, control, or abatement of pollutants applicable to the discharge necessary to be implemented to meet applicable federal or state standards;

(B) specific effluent limitation guidelines are promulgated for a discharge

covered by the general TPDES permit, but the general permit has not yet been amended to incorporate the new effluent limitation guidelines;

(C) the owner and/or the operator of the facility has not filed an NOI in accordance with §305.43 of this title;

(D) circumstances have changed since the time of the NOI so that the discharge is no longer appropriately controlled to meet applicable water quality standards under the general permit, or either a temporary or permanent reduction, or elimination of the authorized discharge is necessary;

(E) the discharger has been determined by the executive director to have been out of compliance with any rule, order, or permit of the commission, including non-payment of fees assessed by the executive director;

(F) the discharge contains pollutants that cause significant adverse effects to water quality. In making this determination, the executive director shall consider the following factors:

(i) the location of the discharge;

(ii) the size of the discharge;

(iii) the quantity and nature of pollutants discharged;

(iv) whether the discharge would adversely affect groundwater quality, inconsistent with the policy specified in the TWC, §26.401; and

(v) other factors relating to the protection of water quality standards;

and

(G) the discharger or facility is the subject of an unresolved agency enforcement action in which the executive director has issued written notice that enforcement has been initiated.

(e) The commission, after hearing, shall deny or suspend a discharger's authority to discharge under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations. A hearing under this subsection is not subject to Texas Government Code, Chapter 2001.

(f) The general permit shall describe the content of the NOI, if one is required by the general

permit. At a minimum, the NOI shall require the submission of information necessary for adequate program implementation including, at a minimum, the legal name and address of the owner and operator, the facility name and address, specific description of its location, type of facility or discharges, and the receiving water(s). An NOI shall be signed in accordance with §305.44 of this title (relating to Signatories to Applications).

(g) Unless otherwise provided in the general permit or in §305.53 of this title (relating to Application Fee), a person seeking authorization by general permit shall submit a \$100 application fee payable to the agency at the time of filing an NOI. If a person is denied coverage under the general permit in accordance with subsection (c) or (e) of this section, any application fee will be applied to the application fee required for an individual permit application for the same discharge.

(h) The general permit shall require a person authorized to discharge waste under a general permit to submit up-to-date information to the executive director in a notice of change within a specified period of time prior to a change in previous information provided to the agency or any other change with respect to the nature or operations of the facility or the characteristics of the discharge. In cases where the general permit requires that an NOI be submitted, the general permit shall require that when the ownership of the facility changes or is transferred, a notice of termination be submitted by the present owner, and a new NOI be submitted by the new owner, not later than ten days prior to the change in ownership.

(i) When requested by a county or municipality, the commission may establish a provision in a

general permit for notification by the discharger to a county judge or mayor of a municipality of NOIs that would allow discharges within their respective jurisdiction. If the executive director or commission denies authorization for a proposed discharge in the county or municipality, the executive director shall notify the county judge or mayor.

(j) The executive director's decisions on NOIs under this chapter are subject to §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

§205.5. Permit Duration, Amendment, and Renewal.

(a) A general permit may be issued for a term not to exceed five years. After notice and comment as provided by §205.3 of this title (relating to Public Notice, Public Meetings, and Public Comment), a general permit may be amended, revoked, or canceled by the commission or renewed by the commission for an additional term or terms not to exceed five years each.

(b) A general permit remains in effect until amended, revoked, or canceled by the commission or, unless renewed by the commission, until it expires. If before its expiration, the commission proposes to renew a general permit, the general permit shall remain in effect after the expiration date for those existing discharges covered by the general permit. The general permit shall remain in effect for these dischargers until the date on which the commission takes final action on the proposed permit renewal. No new notices of intent (NOIs) will be accepted or new authorizations honored for authorization under the general permit after the expiration date.

(c) Upon issuance of a renewed or amended general permit, all facilities, including those covered under the expired general permit, shall submit an NOI, if one is required by the general permit, in accordance with the requirements of the new permit.

(d) If the commission has not proposed to renew a general permit at least 90 days before its expiration date, dischargers authorized under the general permit shall submit an application for an individual permit before the general permit's expiration. If an application for an individual permit is submitted before the general permit's expiration, authorization under the expired general permit remains in effect until the issuance or denial of an individual permit.

(e) The commission may, through renewal or amendment of a general permit, add or delete requirements or limitations to the permit. The commission may provide in the general permit a reasonable time to allow existing dischargers covered by the general permit to make the changes necessary to comply with any additional requirements deemed substantive by the commission.

(f) Before issuing a general permit, the commission shall review the general permit for consistency with the Texas Coastal Management Plan (CMP). The commission must find that the general permit is consistent with the applicable CMP goals and policies and that it will not adversely affect any applicable coastal natural resource areas as identified in the CMP before the commission may issue the general permit.

§205.6. Annual Fee Assessments.

A person authorized by a general permit shall pay an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291, consistent with §§305.501-305.507 of this title (relating to the Waste Treatment Inspection Fee Program) or as specified in the general permit; and may be subject to an annual watershed monitoring and assessment fee under TWC, §26.0135(h), consistent with §220.21 of this title (relating to Water Quality Assessment Fees) or as specified in the general permit.

§205.7. Additional Characteristics and Conditions for General Permits.

40 Code of Federal Regulations (CFR) §122.28, as amended through April 2, 1992, at 57 FedReg 11413, is adopted by reference, except 40 CFR §122.28(b)(3)(ii) and (c), and except as follows: where 40 CFR §122.28 refers to an "NPDES permit," the references are more properly made, for state law purposes, to a "TPDES permit," as applicable; and where 40 CFR §122.28(b)(3)(iii) refers to 40 CFR §122.21, the reference is more properly made, for state law purposes, to applicable sections of this chapter, Chapter 281 of this title (relating to Application Processing), and Chapter 305 of this title (relating to Consolidated Permits).