

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts new §305.539, Additional Requirements for Shrimp Aquaculture Facilities Within the Coastal Zone, *with changes* to the proposed text as published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 3918).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The new section is adopted to implement Senate Bill (SB) 873, which became law as an act of the 76th Texas Legislature, 1999. The specific requirements of that statute which are embodied in this rule are listed in the STATUTORY AUTHORITY section of this preamble. Among other requirements, this new rule addresses the provisions of SB 873 by requiring a commercial aquaculture facility engaged in shrimp production and located within the coastal zone to obtain an individual Texas Pollutant Discharge Elimination System (TPDES) wastewater discharge permit if the facility will discharge into water in the state. Currently, all existing permitted commercial shrimp aquaculture facilities operate under individual permits. This rule would ensure that commercial shrimp aquaculture production facilities will not be eligible to operate under an aquaculture general permit or be permitted by rule.

Additionally, the rule would require a permit applicant to submit a site-assessment environmental report and an emergency plan, approved by Texas Parks and Wildlife Department (TPWD), with the permit application. The rule also requires that the TPDES wastewater discharge permit contain conditions related to suspended solids that prevent adverse impacts to aquatic organisms and plants, and prevent excessive sedimentation and changes to receiving water flow patterns.

#### SECTION BY SECTION DISCUSSION

New §305.539(a) sets requirements for commercial aquaculture facilities located within the coastal zone and engaged in the production of shrimp that will discharge into water in the state. Under §305.539(a)(1), each such facility, hereinafter referred to as “facility,” must submit an application for an individual TPDES permit which includes a copy of the site-assessment environmental report submitted to the Texas Department of Agriculture (TDA) and a copy of the emergency plan approved by TPWD, unless the application was submitted for an existing facility, as defined in §321.271 of this title, prior to January 26, 1998 as required under §321.272(m) of this title. Since SB 873 became effective on September 1, 1999, long after existing facilities submitted permit applications under Chapter 321, Subchapter O, the requirement in SB 873 that the permit application include a copy of the site-assessment environmental report approved by TDA and the emergency plan approved by TPWD does not apply to pending applications that were submitted by existing facilities prior to January 26, 1998 under §321.272(m) of this title.

New §305.539(a)(2) requires a facility to obtain an individual TPDES wastewater discharge permit prior to discharging into water in the state unless the facility is an existing facility, as defined in §321.271 of this title, that submitted an application for an individual permit prior to January 26, 1998, and the application has not been withdrawn by the applicant or denied by the commission. This allows an existing facility that submitted a timely permit application under the requirements of Chapter 321, Subchapter O, that is still pending before the commission, to continue discharging prior to issuance of the individual permit, as is currently allowed under Chapter 321, Subchapter O.

New §305.539(a)(3) requires a facility to obtain an amendment to an individual TPDES permit prior to an increase in the amount of discharge above the level allowed in the existing permit or a change in the nature of the discharge, unless the facility obtains a temporary or emergency order authorizing the discharge, under Chapter 35, Subchapter F.

New §305.539(a)(4) allows a facility, during times of flooding or other defined emergencies, to discharge wastewater in excess of permitted flow rates in order to prevent the release of exotic species or the violation of a quarantine condition imposed by the TPWD. Emergency discharges will be allowed only to the extent necessary to comply with the emergency plan approved by TPWD. The new rule also contains reporting requirements and other requirements related to discharges by a facility under an emergency plan approved by TPWD. For example, under §305.539(a)(4)(B), a facility must notify the appropriate TNRCC regional office at least 48 hours, or as soon as practicable, before initiating any action under an emergency plan in response to an emergency event. A follow-up report is required within 30 days following initiation of the emergency plan, according to the requirements of §305.539(a)(4)(D). New §305.539(a)(4)(C) requires the facility to control discharges made under an emergency plan in the most environmentally sound practicable manner. New §305.539(a)(4)(E) makes the facility responsible for demonstrating that the discharges were necessary and that conditions required initiation of the emergency plan.

New §305.539(a)(5) requires a facility to immediately report manifestations of disease in shrimp to the TNRCC regional office and Wastewater Permitting Section, and to TPWD. The facility must comply with 31 TAC §57.114 and §69.77, must immediately notify the executive director of the results of any

analyses by a shellfish disease specialist, and must act to prevent the transmission of the disease to aquatic life endemic to the state. The executive director may require suspension or termination of the discharge of effluent from infected portions of the facility in order to protect aquatic life.

New §305.539(a)(6) requires a facility to immediately notify the TNRCC regional office and Wastewater Permitting Section when TPWD places the facility under quarantine. This paragraph also prohibits any discharge from a facility under quarantine unless the discharge is approved by the executive director and TPWD under certain conditions, such as to allow implementation of the facility's emergency plan approved by TPWD.

New §305.539(a)(7) requires a facility to comply with the terms and conditions of their individual TPDES permit except as provided in paragraph (4), regarding discharge under an emergency plan approved by TPWD, discussed earlier in this preamble. The new rule also provides that the permit shall include conditions related to suspended solids based on levels and measures adequate to prevent a potential significant adverse response in aquatic organisms, changes in receiving waters flow patterns, excessive sedimentation of bays, and potential significant adverse responses in aquatic plants caused by reduction in light due to suspended solids in discharges.

New §305.539(b) provides that individual TPDES permits applications to which the requirements of this section apply are subject to review by a three-member application review committee comprised of one representative each from the executive director, TPWD, and the TDA.

New §305.539(c) requires the commission, when determining whether to approve an application for a TPDES permit for an aquaculture facility, to consider all relevant factors, including the applicant's site-assessment environmental report, any sensitive aquatic habitat guidelines established by TPWD, and comments by the three-member application review committee.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of 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. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rule is adopted with the specific intent of protecting the environment by requiring commercial aquaculture facilities located within the coastal zone and engaged in the production of shrimp that will discharge into water in the state to obtain an individual TPDES wastewater discharge permit that will include conditions relating to suspended solids as well as other environmentally protective requirements. However, the rulemaking is not a major environmental rule because it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rule is consistent with legislation enacted in SB 873, which expressly sets out in statute many of the requirements which were already being required of commercial aquaculture facilities under the commission's general authority in the TWC, Chapter 26.

Even if the rule is a major environmental rule, the rule is not subject to a full regulatory analysis under Texas Government Code, §2001.0225, because the rule does not meet one of the four threshold requirements in that statute. The rule does not exceed a standard set by federal law which is not specifically required by state law because each requirement set out in the rule is expressly required by SB 873. For the same reason, the rule does not exceed an express requirement of state law that is not specifically required by federal law. The rule does not exceed a requirement of a delegation agreement or contract between the state and federal government to implement a federal program. Rather, the rule is consistent with the September 14, 1998 Memorandum of Understanding (MOU) between the United States Environmental Protection Agency (EPA) and TNRCC, which authorizes the TNRCC to implement the NPDES program in Texas, because the MOU provides that the TNRCC will require a TPDES permit for facilities that will discharge wastewater into waters in the United States. Finally, the rule is not adopted under the general powers of the TNRCC, but rather, under SB 873.

#### TAKING IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for the new rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rule is to implement changes made by SB 873. The rule sets additional standards for commercial aquaculture facilities located within the coastal zone and engaged in the production of shrimp that will discharge into water in the state by requiring them to obtain an individual TPDES wastewater discharge permit. Promulgation and enforcement of the rule will not burden private real property which is the subject of the rule because the rulemaking is intended to make the current rules consistent with statutory language. This rulemaking does not constitute a taking of private property because a commercial shrimp

aquaculture facility located in the coastal zone which discharges into water in the state will still be able to operate, provided the facility obtains an individual TPDES permit from the commission.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed this rulemaking and found that this is a rulemaking subject to the Texas Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for this rule pursuant to 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies.

The following is a summary of that determination. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are those related to discharge of industrial wastewater to coastal waters in 31 TAC §501.14(f)(1). These policies require that commission rules comply with the requirements of the federal Clean Water Act and implementing regulations; provide for the assessment of water quality on a coastal watershed basis once every two years; to the greatest extent practicable, provide that all permits for the discharge of wastewater within a given watershed contain the same expiration date; identify and rank waters that are not attaining designated uses and establish total maximum daily loads according to the rankings; and require that increases in pollutant loads to coastal waters shall not impair designated uses of coastal waters or result in degradation of coastal waters that exceed swimmable/fishable quality except when necessary for important economic or social development. Promulgation and enforcement of this rule would be consistent with the applicable CMP goals and policies because the rule sets additional standards for commercial aquaculture facilities located within the coastal zone and engaged in the production of shrimp that will discharge into or water

in the state by requiring them to obtain an individual TPDES wastewater discharge permit that will include conditions relating to suspended solids as well as other environmentally protective requirements. This will protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs and is consistent with the applicable policies set out above. In addition, the rule does not violate any applicable provisions of the CMP's stated goals and policies.

#### HEARING AND COMMENTERS

The public comment period closed June 5, 2000. No public hearing was held. Written comments were received from: The Texas Parks and Wildlife Department (TPWD); and the Texas Aquaculture Association (TAA). TPWD generally supported the proposal but suggested changes as stated in the ANALYSIS OF TESTIMONY portion of this preamble. TAA requested an extension of time for submitting comments, a delay to the rulemaking pending further scientific studies, and suggested changes to the rulemaking as stated in the ANALYSIS OF TESTIMONY portion of this preamble.

#### ANALYSIS OF TESTIMONY

TPWD commented that the commission should clarify language under §305.539(a)(4)(B), on when a facility must notify the TNRCC regional office prior to initiating any action under an emergency plan. Under the proposed rule, a facility must notify the TNRCC regional office at least 48 hours prior to initiating action under an emergency plan. TPWD stated that the provision could potentially put the operator in the problematic position of having to either meet TNRCC requirements and wait 48 hours prior to discharging under an emergency plan or meeting TPWD requirements to lower pond levels

prior to the landfall of a hurricane. TPWD proposed that the rule allow notification to be provided “as soon as practicable” prior to initiation of an emergency plan.

**The commission agrees with this comment. Therefore, the rule has been modified to provide that operator shall notify the TNRCC regional office at least 48 hours or “as soon as practicable” prior to initiating an action under an emergency plan.**

TPWD commented that the proposed rule under §305.539(a)(4) and (6), could be read as allowing TNRCC to supersede TPWD’s authority in the areas of disease management and quarantines. In addition, TPWD requested that language be added to the rule in §305.539(a)(5), that specifically referred to TPWD rules defining disease and disease management requirements.

**The commission agrees with these comments. Therefore, §305.539(a)(4) has been modified to delete language that implied that the executive director could impose a quarantine condition, and §305.539(a)(6) has been modified to clarify that approval by both the executive director and TPWD is required in order to discharge during the quarantine period. In addition, the adopted rule has been modified in §305.539(a)(5) to include specific references to TPWD rules on disease management.**

TPWD commented that the powers of the Application Review Committee, established by SB 873 extend to all aquaculture permits, not just shrimp aquaculture facilities. TPWD requested that the commission

open this rulemaking up to define the duties of the Application Review Committee and its role in all aquaculture permitting activities.

**The commission agrees in part with this comment. However, the statutory provision in Texas Agriculture Code, §134.031(b), creating the Application Review Committee is contained within the section of the statute requiring TNRCC, TPWD, and TDA to enter into a MOU for the regulation of all matters related to aquaculture. As such, the commission believes that the duties of the Application Review Committee should be set out in the MOU rather than this rulemaking. An MOU between TNRCC, TPWD, and the TDA regarding the licensing and regulation of all aquaculture facilities and the role and responsibilities of the Application Review Committee is currently being negotiated between the agencies. The commission acknowledges that several issues, including the issues raised by TPWD, still need to be resolved. The commission anticipates resolving those issues within the MOU, not in additional rulemaking outside the MOU. The commission has made no changes to the rule language in response to this comment.**

TAA urged the commission to adopt a coastwide permit condition for suspended solids discharges from aquaculture facilities located within the coastal zone and engaged in shrimp production. TAA contends that the very purpose of including Texas Water Code, §26.0345, in SB 873, was to either require TNRCC to develop effluent limits or treatment practices that are protective.

**The commission disagrees with this comment. The commission believes that SB 873 requires the agency to develop individual permits for wastewater discharges from aquaculture facilities**

**engaged in shrimp production located in the coastal zone. Additionally, SB 873 specifically requires the TNRCC to regulate suspended solids from these facilities. The commission disagrees with TAA's statement that the intent of the legislation was to have the TNRCC develop a coastwide effluent standards or treatment practices. To do so would eliminate the need for individual permits, a requirement of SB 873, and allow for the issuance of general permits. Wastewater discharge permits for individual aquaculture facilities, like other TNRCC individual wastewater permits, will address all pollutants of concerns, including suspended solids, and will include limits that will ensure that the discharge meets the Texas Surface Water Quality Standards. Information and data from EPA and the stakeholders will be considered in the development and issuance of individual aquaculture permits. No change was made to the proposed rule in response to this comment.**

TAA argued that because TNRCC and EPA have not reached an agreement on the most appropriate manner of regulating suspended solids in wastewater discharge permits from aquaculture facilities, and studies of the effects of suspended solids on seagrasses are currently being conducted by the United States Army Corps of Engineers (COE), the commission should postpone rulemaking until TNRCC and EPA reach agreement and until the COE study is complete.

**The commission disagrees with this comment. The shrimp aquaculture industry in the United States and Texas is relatively new and scientific research evaluating the best management of solids is ongoing. The commission has not postponed this rulemaking to allow this research to conclude because this rulemaking will not include suspended solids requirements that will be included in all**

**permits. Instead, these requirements will be developed on a case-by-case basis for each permit application based on the data available. New information and data from EPA, the stakeholders, and others will be considered in the development and issuance of individual aquaculture permits. No extension of comment time was granted and no change was made to the proposed rule as a result of this comment.**

#### STATUTORY AUTHORITY

The new section is adopted under TWC, §5.102, which provides the commission with general powers to carry out duties under 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. The rule is also adopted under and implements TWC, §26.0345, which requires the commission to establish permit conditions relating to suspended solids in discharge permits for shrimp aquaculture facilities located in the coastal zone; Texas Agriculture Code, §134.013, which requires commercial shrimp aquaculture facilities located in the coastal zone to obtain an individual permit from the commission prior to discharging wastewater into water in the state and requires the applicant to provide an environmental site assessment report as part of its application for a permit; Texas Agriculture Code, §134.031, which requires the commission, TPWD, and TDA to enter into a memorandum of understanding related to regulation of aquaculture and the establishment of a three-member application review committee, comprised of one member each appointed by the commission, TPWD, and TDA, to review permit applications to ensure that the proposed discharge will not adversely affect water in the state; Texas Parks and Wildlife Code, §66.007(j), which provides that an aquaculture facility placed

under quarantine condition by TPWD may not discharge wastewater from the facility except with approval of the TPWD and authorization from the commission; and Texas Parks and Wildlife Code, §66.007(k), which provides that even if under a quarantine condition, an aquaculture facility shall discharge wastewater as necessary to comply with an emergency plan approved by TPWD and incorporated into a wastewater discharge authorization issued by the commission.

**SUBCHAPTER O: ADDITIONAL CONDITIONS AND PROCEDURES**  
**FOR WASTEWATER DISCHARGE PERMITS AND SEWAGE SLUDGE PERMITS**

**§305.539**

**§305.539. Additional Requirements for Shrimp Aquaculture Facilities Within the Coastal Zone.**

(a) A commercial aquaculture facility, located within the coastal zone as delineated under rules of the Coastal Coordination Council, 31 TAC §503.1, and engaged in the production of shrimp that will discharge into water in the state shall comply with the following requirements.

(1) The applicant shall apply to the executive director for an individual Texas pollutant discharge elimination system (TPDES) permit. Unless the application was submitted for an existing facility, as defined in §321.271 of this title, before January 26, 1998, the application, in addition to the information required by the application form, shall include:

(A) a copy of the site-assessment environmental report submitted to the Texas Department of Agriculture (TDA) as part of the application for an aquaculture license; and

(B) a copy of an emergency plan, approved by the Texas Parks and Wildlife Department (TPWD), for incorporation into the TPDES permit.

(2) The applicant shall obtain an individual TPDES wastewater discharge permit in accordance with the requirements of this chapter before discharging into water in the state, except for an existing facility, as defined in §321.271 of this title, that submitted an application for an individual permit before January 26, 1998 that has not been withdrawn by the applicant or denied by the commission.

(3) The applicant shall obtain an amendment to an individual TPDES permit prior to an increase in the amount of discharge above the levels allowed in the existing permit or a change in the nature of the discharge, except as otherwise provided by Chapter 35, Subchapter F of this title (relating to Water Quality Emergency and Temporary Orders).

(4) The facility shall comply with the terms and conditions of its individual TPDES permit, and any quarantine conditions imposed by TPWD, except in cases where the facility is in imminent danger of overflow, flooding, or similar conditions that could result in either the release of exotic species that are regulated by the TPWD or that would result in the violation of a quarantine condition imposed by the TPWD. In such cases, the facility may discharge effluent in excess of the permitted flow rates, but only to the extent necessary to comply with an emergency plan that is approved by the TPWD, and the following provisions shall also apply.

(A) The facility is not subject to effluent limitations, discharge flow limitations, and other effluent monitoring requirements in the permit for discharges that comply with an emergency plan approved by the TPWD.

(B) A facility shall notify the appropriate TNRCC regional office at least 48 hours, or as soon as practicable, prior to initiating any action under an emergency plan in response to an emergency event, such as landfall of a hurricane, and shall notify the regional office as soon as practicable following initiation of the emergency plan.

(C) The facility shall control discharges made under an emergency plan in the most environmentally sound manner that is practicable.

(D) Within 30 days following initiation of the emergency plan, the facility shall submit a written report to the appropriate TNRCC regional office that includes the following information:

- (i) the reason for initiation of the plan;
- (ii) actions taken to prevent or mitigate impacts of the discharge to the receiving stream;
- (iii) volumes of wastewater discharged;
- (iv) the dates that discharges occurred; and

(v) a general summary of receiving stream conditions at the time of the discharges.

(E) The facility is responsible for demonstrating that the discharges were necessary and that conditions required initiation of the emergency plan.

(5) A facility engaged in the propagation or rearing of shrimp which exhibit one or more manifestations of disease as defined by TPWD in 31 TAC §57.111 and §69.75 shall immediately report the apparent disease to the TNRCC regional office and Wastewater Permitting Section, and to TPWD, and shall comply with 31 TAC §57.114 and §69.77. The executive director shall be immediately notified of the results of any analyses by a shellfish disease specialist. Any actions which are deemed necessary by the discharger to prevent transmission of the disease to aquatic life endemic to waters in the state shall be implemented as soon as possible. The executive director may require suspension or termination of the discharge of effluent from infected portions of the facility as is necessary to protect aquatic life in the receiving stream from potential adverse effects.

(6) A facility required to hold a permit from TPWD regulating the possession and sale of exotic fish and shellfish shall immediately notify the TNRCC regional office and Wastewater Permitting Section if the TPWD places the facility under quarantine condition. There shall be no discharge during the quarantine period, except upon approval by the executive director and TPWD. The executive director and TPWD may suspend or terminate the prohibition on discharge to allow for

implementation of the facility's emergency plan approved by TPWD, following the lifting of the quarantine condition by TPWD, or based on other relevant factors.

(7) Except as provided in paragraph (4) of this subsection, a facility shall comply with the terms and conditions in its individual TPDES permit, which shall include conditions related to suspended solids based on levels and measures adequate to prevent:

(A) a potential significant adverse response in aquatic organisms, changes in flow patterns of receiving waters, or excessive sedimentation of bays; and

(B) a potential significant adverse response in aquatic plants caused by reduction of light due to suspended solids in discharges.

(b) All new, amendment, or renewal applications for an individual TPDES permits to which the requirements of this section apply are subject to review by a three-member application review committee comprised of one representative each from the executive director, TPWD, and TDA.

(c) In considering whether to approve an application for a new, amended, or renewed individual TPDES permit for a commercial aquaculture facility located within the coastal zone and engaged in the production of shrimp, the commission shall consider all relevant factors, including:

- (1) the site-assessment environmental report provided by the applicant under subsection (a)(1)(A) of this section;
- (2) any sensitive aquatic habitat guidelines established by TPWD; and
- (3) any comments on the application provided by the three-member application review committee referred to in subsection (b) of this section.