EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENT ON GENERAL PERMIT NO. TXR040000

The executive director of the Texas Commission on Environmental Quality (commission or TCEQ) files this Response to Public Comment (Response) on Texas Pollutant Discharge Elimination System (TPDES) General Permit No. TXR040000. As required by Texas Water Code (TWC), §26.040(d) and 30 Texas Administrative Code (TAC) §205.3(c), before a general permit is issued, the executive director must prepare a response to all timely, relevant and material, or significant comments. The response must be made available to the public and filed with the Office of the Chief Clerk at least ten days before the commission considers the approval of the general permit. This response addresses all timely received public comments, whether or not withdrawn. Timely public comments were received from the following persons:

Cameron County Drainage District No. 3, Cameron County Drainage District No. 5, Galveston County Consolidated Drainage District, Jefferson County, City of Groves, Jefferson County Drainage District No. 7, City of Nederland, City of Port Arthur, and City of Port Neches (Group 1); Texas Cities Coalition on Storm water, City of Longview, and City of Grapevine (TCCOS); Bexar County Environmental Services (BCES), Carroll & Blackman, Inc. (Carroll & Blackman), Carter & Burgess, City of Austin (Austin), City of Bunker Hill Village (Bunker Hill), City of Cedar Hill Public Works Department (Cedar Hill), City of Cleburne (Cleburne), CTS Environmental (CTS), Dallas Area Rapid Transit (DART), Department of the U.S. Army at Fort Hood (Fort Hood), Dyess Airforce Base (DAFB), Dallas/Fort Worth International Airport (DFW), Dodson & Associates, Inc. (Dodson), Environmental Integrated Services, Inc. (EIS), City of Euless (Euless), City of Farmers Branch (Farmers Branch), Freese and Nichols, Inc. (Freese & Nichols), City of Grand Prairie (Grand Prairie), City of Grapevine (Grapevine), Galveston County Health District (GCHD), City of Houston (Houston), Houston Builders Association (HBA), Houston Council of Engineering Companies, Inc. (HCEC), Harris County Flood Control District (HCFCD), Harris County Storm Water Quality Section (Harris County), Lloyd, Gosselink, Blevins, Rochelle, Baldwin & Townsend, P.C. (Lloyd Gosselink), City of Lubbock (Lubbock), Mathews & Freeland, L.L.P. (Mathews & Freeland), City of Missouri City (Missouri City), Russell, Moorman & Rodriguez, L.L.P. (Russell Moorman), National Aeronautics and Space Administration (NASA), North Central Texas Council of Governments (NCTCOG), North Central Texas Regional Storm Water Management Coordinating Council (NCTRSW), Save Our Springs Alliance (SOS), Sunland Group (Sunland), Tarrant County, Texas Association of Counties (TAOC), City of Tyler (Tyler), Texas Department of Criminal Justice (TDCJ), Texas Conference of Urban Counties (TCUC), Texas Department of Transportation (TxDOT), Texas

Department of Transportation - Houston District (TxDOT-Houston), Texas Department of Transportation, Lubbock District (TxDOT-Lubbock), Bob Tome (Tome), Travis County, United States Department of the Interior, Fish and Wildlife Service (FWS), City of Universal City (Universal City), and Vinson & Elkins (V&E).

Background

This general permit would authorize discharges of storm water and certain non-storm water discharges from small municipal separate storm sewer systems (MS4s). Federal Phase II storm water regulations adopted by TCEQ extend storm water permitting requirements to small MS4s located in urbanized areas and issuing this permit provides initial coverage for regulated small MS4s. Under the permit, small MS4s will only be authorized to discharge following the development and implementation of a comprehensive storm water management program (SWMP). Each regulated small MS4 operator must develop the six minimum control measures (MCMs) according to the provisions of the permit.

The permit is proposed under the statutory authority of: 1) TWC, §26.121, which makes it unlawful to discharge pollutants into or adjacent to water in the state except as authorized by a rule, permit, or order issued by the commission; 2) TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state; and 3) TWC, §26.040, which provides the commission with authority to amend rules to authorize waste discharges by general permit.

On September 14, 1998, the TCEQ received authority from the United States Environmental Protection Agency (EPA) to administer the Texas Pollutant Discharge Elimination System (TPDES) program. TCEQ and the EPA have a Memorandum of Agreement (MOA) which authorizes the administration of the National Pollutant Discharge Elimination System (NPDES) program by the TCEQ as it applies to the State of Texas.

The federal Phase II storm water regulations were published on December 8, 1999 in the *Federal Register*, requiring regulated small MS4s to obtain permit coverage by March 10, 2003. The Phase II small MS4 regulations are in the federal rules at 40 Code of Federal Regulations (C.F.R.) §§122.30 through 122.37, which were adopted by reference as amended by TCEQ at 30 TAC §281.25(b). TCEQ did not adopt by reference the guidance in 40 C.F.R. §122.33 and §122.34.

Storm water and certain non-storm water discharges from medium and large MS4s, those operated within cities with a population of 100,000 or more, are currently authorized under NPDES individual storm water permits. These permits were issued by EPA according to the federal requirements for Phase I of the NPDES storm water regulations, for terms not to exceed five years. These permits are being reissued as TPDES individual storm water permits as they expire.

Notice of availability and an announcement of public meetings for this permit were published in the *Dallas Morning News*, *El Paso Times*, *The Monitor* (McAllen), *Amarillo Globe News*, *Houston Chronicle*, and *San Antonio Express News* on September 27, 2002. Public meetings were held in Arlington on October 28, 2002; Houston on October 29, 2002; and San Antonio on November 4, 2002. The original comment period ended on November 15, 2002.

On September 15, 2003, the U.S. 9th Circuit Court of Appeals (Court) in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir., 2003) issued a revised panel decision, which denied all petitions for rehearing and remanded portions of the Phase II rules affecting small MS4s to EPA. The Court found that portions of the federal regulations were not consistent with the Clean Water Act (CWA) because the Phase II rules did not address permitting authority review of notices of intent (NOIs), public participation in the permitting process, and public availability of NOIs. The EPA, by memorandum dated April 16, 2004, provided guidance for permitting authorities to issue general permits consistent with the panel decision. TCEQ revised the draft permit in accordance with the EPA memorandum. Notice of the proposed permit and an announcement of a public meeting on the revised permit were published in the *Dallas Morning News*, *El Paso Times*, *The Monitor* (McAllen), *Amarillo Globe News*, *Houston Chronicle*, *San Antonio Express News*, and *Waco Tribune Herald* on August 22, 2005, and in the *Abilene Reporter-News*, *Beaumont Enterprise*, *San Angelo Standard-Times*, and *Tyler Morning Telegraph* on August 26, 2005. A public meeting was held in Austin on September 29, 2005, and the comment period ended at the close of the public meeting.

Comments and responses are organized by section with general comments first. Some comments have resulted in changes to the permit. Those comments resulting in changes were identified in the respective responses. All other comments resulted in no changes. Changes made to the re-noticed permit based on 2002 comments are addressed by section after those comments that were received in either 2002 or 2005 that resulted in no changes or changes to the re-noticed permit. Due to the large number of comments received, some separate comments are combined with other related comments.

General Comments

Comment 1:

FWS comments that the permit does not contain adequate procedures to determine if storm water management programs (SWMPs) that were developed and implemented under the requirements of the permit will minimize harm to listed endangered species and critical habitats. FWS comments that the permit does not specifically identify the aquatic and water dependent, federally listed species as a part of TCEQ review process for authorizing permits. Additionally, FWS comments that the permit does not specifically address the potential for discharges to adversely affect listed species.

Response 1:

The permit was previously submitted to FWS for evaluation and they did not request changes to the permit to address the potential impact on any endangered species. The permit does not specifically identify the federally listed species that the permit may impact. An applicant must meet the minimum SWMP permit requirements regardless of whether the discharge of storm water is to a receiving water that serves as habitat for a listed species. The permit requires compliance with water quality standards approved by EPA for all areas of the state. These water quality standards are established in accordance with 30 TAC Chapter 307 to protect both aquatic and aquatic dependent species. Water quality standards approved by EPA are reviewed and analyzed by FWS for consistency with Endangered Species Act (ESA) mandates. Additionally, Part II.E.2. of the permit allows the executive director to require MS4 operators to apply for an individual permit if the activity is determined to cause a violation of water quality standards. FWS was given the opportunity during discussions with both the EPA and TCEQ to make recommendations and clarify any specific objections after submitting their formal comments. They have indicated in correspondence to both parties that they have no specific objections to the issuance of this permit.

Comment 2:

FWS comments that EPA and TCEQ should address the concerns provided in the FWS comments on the proposed permit during EPA review of the TPDES permit.

Response 2:

Accompanying the MOA between TCEQ and EPA delegating the federal NPDES to Texas was a Biological Opinion prepared for the delegation by FWS and required by the ESA for activities that constitute an “agency action” as defined by the ESA. The Biological Opinion contains FWS’s evaluation

of the potential impact to protected species by Texas' assumption of the NPDES program, specifically including the storm water program. In its opinion, FWS states:

"{I}t is the Service's biological opinion that the action of EPA's approval of the State of Texas' assumption of the NPDES permitting program, as proposed, is not likely to jeopardize the continued existence of all of the listed species considered in this opinion, and is not likely to destroy or adversely modify the designated critical habitat considered in this opinion."

In addition, the MOA states that "endangered species concerns will be addressed through interagency coordination" and sets out specific procedures to accomplish this coordination. The procedures specify that if FWS has concerns with the permit, TCEQ will work with FWS to resolve relevant issues. Should TCEQ not change the permit in response to FWS concerns, EPA is notified and provided the opportunity to review the draft permit. As noted in the previous response, TCEQ worked together with FWS and with input from EPA to ensure that FWS's questions were addressed in the permitting process. Based on this process, no changes to the permit were necessary based on FWS's review and there are no outstanding ESA issues.

Comment 3:
SOS comments that TCEQ has not tried to analyze the effects of discharges authorized by the permit on the propagation of aquatic species as required by the CWA.

Response 3:
The permit has controls to protect aquatic and water dependent species wherever they are located in the state. TCEQ has followed the procedures set out in the MOA with EPA on NPDES delegation, including consultation with FWS.

Comment 4:
SOS comments that any analysis by TCEQ on the likely effects of the permitting activities on water quality in the Barton Springs watershed must start with an estimate of the number of acres that will likely be developed in the watershed over the five-year term of the permit. SOS comments that absent such an estimate it becomes impossible to make the subsequent estimates of likely discharges of pollution from construction, post-construction, and increased stream bank erosion.

Response 4:

This permit is designed for statewide applicability and is not based on watershed-specific evaluations. Additionally, the permit authorizes discharges of storm water runoff from construction activities conducted by MS4 operators commencing with the initial disturbance of the site and lasting until the site is stabilized and construction activities have ceased.

The potential for erosion in receiving waters is very site-specific, dependant on local topography, soils, rainfall, and other factors. This permit requires that MS4s develop SWMPs that address post-construction runoff in areas of new development and redevelopment and better address this potential problem at a more site-specific local level.

Comment 5:
SOS comments that TCEQ must determine that issuing this permit will not cause or contribute to a violation of water quality standards before issuing a permit. SOS asserts that there is nothing in the record, such as modeling or scientific studies, to predict discharges that would likely be authorized during the life of the permit in any particular watershed or indicate that TCEQ has undertaken adequate analysis to make this determination. SOS points out that "when individual applicants seek permission to discharge into waters of the State of Texas, extensive modeling is done of the discharges they will be allowed to put into state waters." Volume and concentration of key pollutants is analyzed and compared with specific watersheds to determine whether the discharges from a particular facility will cause a violation of water quality standards. SOS believes the same type of analysis should be done for this permit, such that TCEQ looks beyond numerical standards for particular pollutants, and also looks at particular watersheds and the discharges predicted for those watersheds.

Response 5:
The development of individual wastewater discharge permit conditions includes consideration of a known discharge rate, predictable pollutant parameters and concentrations, instream "low flow" or "worst case" conditions, and instream receiving water uses, and often includes modeling to ensure protection of instream dissolved oxygen standards. This approach is consistent with the Texas Surface Water Quality Standards, found at 30 TAC §307.8.

However, storm water discharges are intermittent and highly flow-variable and do not occur during instream low flow conditions. Therefore, procedures similar to those previously described have not been developed to set chemical-specific numeric effluent limits for storm water discharges, even in individual TPDES storm water permits. Instead, best management practices (BMPs) and technology-based controls

are required to regulate the quality of storm water discharges. This approach is consistent with EPA's Interim Permitting Approach. This approach is consistent with the Texas Surface Water Quality Standards found at 30 TAC §307.8(e).

Comment 6:
SOS comments that this permit would, if adopted, violate state and federal anti-degradation requirements. SOS contends that under the anti-degradation standards for "Tier 2" waters as defined in 30 TAC §307.5, there is sufficient information available to demonstrate that additional protections are needed to avoid further violations of anti-degradation standards.

Response 6:
The antidegradation reviews required under state law for Tier 2 waters are to ensure that where water quality exceeds the normal range of fishable/swimmable criteria, such water quality will be maintained, unless lowering the criteria is necessary for important economic or social development. 30 TAC §307.5 and the Procedures to Implement Texas Surface Water Quality Standards, which are approved by EPA, set out TCEQ's process for accomplishing such review. In accordance with these procedures, TCEQ undertook an antidegradation review of this general permit and concluded that where the permit requirements and SWMPs are properly implemented no significant degradation is expected and existing uses will be maintained and protected.

Comment 7:
SOS comments that they had "recently submitted comments and information to TCEQ demonstrating that Barton Creek and Barton Springs should be included on the State's §303(d) list of impaired waters such that no permit may be issued that increases discharges of pollutant of concern."

Response 7:
Barton Creek (Stream Segment No. 1430) was listed on the 2000 §303(d) list as impaired because of elevated concentrations of fecal coliform bacteria. However, the 2004 §303(d) list of impaired water bodies, approved by EPA, and the draft 2006 §303(d) list do not include Barton Creek for any parameters. MS4 operators must develop an MCM to identify and eliminate any illicit discharges to the system such as cross-connected sanitary sewers that might contribute fecal coliform bacteria.

Comment 8:

SOS comments that issuing this permit will violate aesthetic water quality standards set forth in 30 TAC §307.4(b). Specifically, SOS cites as examples discharges of sediment in Barton Springs and Eliza Springs.

Response 8:
The permit requires that small MS4 operators develop and implement an SWMP to prevent pollution in storm water to the maximum extent practicable (MEP). The permit also requires the operator of these small, previously unregulated MS4s to develop a comprehensive SWMP. The SWMP is developed based on the six MCMs. The applicant must identify measurable goals and determine the effectiveness of the program by comparing implementation of the program to the measurable goals.

The permit requirements are consistent with EPA and TCEQ surface water quality standards. TCEQ Surface Water Quality Standards address aesthetics of water quality by requiring that "surface water shall be essentially free of floating debris and suspended solids that are conducive to producing adverse responses in aquatic organisms or putrescible sludge deposits or sediment layers which adversely affect benthic biota or any lawful uses" and "surface waters shall be essentially free of settleable solids conducive to changes in flow characteristics of stream channels or the untimely filling of reservoirs, lakes, and bays." (30 TAC §307.4(b)(2) and (3)).

Comment 9:
SOS comments that a statewide permit is inappropriate because it does not recognize that conditions differ among watersheds throughout the state and that some watersheds are more sensitive and threatened than others to pollutant loading from sediments. SOS further notes that FWS has determined that some Texas watersheds are more sensitive than others and require more protective permits issued in those areas.

Response 9:
This permit is intended for statewide applicability and does not require different levels of storm water management programs based on specific receiving water qualities because MS4 operators must implement controls to reduce the discharge of pollutants to the MEP. Instead, the permit has controls to protect aquatic and water dependent species wherever they are located in the state. The requirements of this permit are designed so they are effective in all watersheds.

Where water quality standards are not met in a stream segment, TCEQ will evaluate potential sources of the contaminant of concern in developing the Total Maximum Daily Load (TMDL) for that segment. If

storm water is a source of that contaminant, it will be addressed in the TMDL and the TMDL implementation plan that is developed for that segment.

Comment 10:
SOS comments that the Edwards Aquifer Rules found in 30 TAC Chapter 213 are a “superficial and inadequate assurance that a general permit is protective of the sensitive Edwards Aquifer and Barton Springs Watershed.” SOS contends the Edwards Aquifer Rules are “vague and lack enforceable requirements” and that its provisions do not adequately address the wide range of issues necessary to protect the aquifer. In addition, SOS attached their comments on the Edwards Aquifer rules and “ask that these comments be considered and addressed in the context of the proposed” permit.

Response 10:
Compliance with the applicable conditions of the Edwards Aquifer rules is in addition to compliance with the requirements of this permit. Comments on the Edwards Aquifer rules are outside the scope of this permit.

Comment 11:
SOS comments that the permitting activities will result in a "take" of the Barton Springs Salamander in violation of the ESA. SOS suggests that TCEQ either modify the permit to adopt conditions that will limit the effects of discharges so that no "take" of the Barton Springs salamander will be authorized or apply for an incidental "take" permit from FWS to administer this specific program in the Barton Springs watershed.

Response 11:
The permit does not authorize the taking of any listed species under the ESA. The permit was drafted in accordance with 30 TAC Chapter 307, which states that surface waters cannot be made toxic to any aquatic or terrestrial organisms. As such, the permit contains adequate safeguards to ensure that permitting activities authorized by TCEQ do not result in the "take" of any listed species and no specific provision is needed to address endangered species. Noncompliance with any provisions of the permit would fall within TCEQ's jurisdiction. However, as a federally delegated program, it is also EPA's responsibility to review the permit before it is issued. TCEQ provided EPA with the draft permit for review and to ensure that the terms and conditions are compliant with the CWA and the ESA. In addition, this concern was addressed in the Biological Opinion by FWS where it states:

“Any take associated with these permits is anticipated by the incidental take statement in the Biological Opinion on authorization of the TPDES program and, therefore, is covered, unless the Service submits a written concern to EPA on a draft TPDES permit due to potential adverse impacts to listed species that are more than minor and such concerns remains unresolved at the time of permit issuance, or where the Service believes that the permit is likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat.”

Furthermore, this permit does not remove takings liabilities under the ESA for the MS4 operators. Section 9 of the ESA generally prohibits any person from "taking" a listed animal species, unless the take is authorized by the ESA. Section 10 of the ESA allows persons to “take” listed animal species, though otherwise prohibited, through the issuance of an “incidental take” permit. An “incidental take” permit requires development of a habitat conservation plan to ensure there is adequate minimizing and mitigating of the effects of the authorized “incidental take.” These procedures were developed to allow non-federal entities to alter habitat without incurring takings liability where the “take” is minimized to the extent practicable.

Comment 12:
EIS comments that without any type of enforcement being written into TCEQ storm water program the purpose of the program is invalidated because businesses, municipalities, and other entities will not have consequences for noncompliance. EIS states that EPA has a standard daily fine and that TCEQ should also have financial penalties in place to make this program viable.

Response 12:

This permit is issued under the authority of TWC, §26.040 and thus is subject to the same enforcement provisions in TWC, Chapter 7, as any other TPDES permit issued under TWC, Chapter 26, including the penalty provision in §7.052(c), which allows for a penalty up to $10,000 a day for each violation.

Comment 13:
EIS comments that the permit makes no provision for compliance auditing by disinterested third parties to verify that MS4 operators are in compliance with the permit. EIS states that self-auditing through the annual reporting process was demonstrated by private companies to be ineffective. EIS also comments that TCEQ should have a 1-800 service with 24/7 reporting for the general public to report illicit discharges. In addition, EIS believes that TCEQ must put in place an immediate response system for

illicit discharge reports, so that, for example, calls made on Friday evening are responded to before the following week.

Response 13:
Neither EPA Phase II storm water regulations nor the permit provide for compliance auditing by disinterested third parties. However, TCEQ has a number of methods for reporting environmental concerns. Persons may report environmental problems and complaints to TCEQ 24 hours a day by calling 1-888-777-3186 or by e-mailing *cmplaint@tceq.state.tx.us*. Persons may also report complaints to any of the 16 regional offices located throughout Texas. The location and contact information for these offices is on the TCEQ Web page at: *http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-002.html* (TCEQ Publication Number GI-002). Persons may report spills and other similar emergency situations through TCEQ's Environmental Release Hotline at 1-800-832-8224.

Comment 14:
Group 1 states that it is their conclusion that the permit goes beyond the federally mandated requirements as promulgated by EPA. Carroll & Blackman comments that TCEQ should only adopt regulation requirements and not elevate EPA recommendations contained in 40 Code of Federal Regulations (C.F.R.) to requirements in the permit. Group 1 comments that TCEQ should make every effort for consistency with the SWMP requirements in 40 C.F.R. because slight changes in wording or interpretation can and will cause unnecessary, large economic impacts to municipalities in the state.

Response 14:
The permit is based on the regulatory requirements of the federal NPDES program delineated in 40 C.F.R. Part 122. Specific comments regarding whether or not particular provisions of the permit exceed minimum federal requirements are addressed in separate comments throughout the response to comments.

Comment 15:
Dodson asks how TCEQ will inform the different MS4s of their requirements under the permit. Dodson notes there are many state universities, municipal utility districts (MUDs), and other districts that operate MS4s that may not consider themselves "municipalities." Dodson also comments that TCEQ should establish a training program to teach small MS4 personnel how to conduct inspections and about other permit requirements.

Response 15:

TCEQ has not established a training program that specifically teaches procedures of inspecting a small MS4. However, TCEQ continues to focus on an outreach effort that provides information on Phase II MS4 permit requirements and on other TPDES permitting requirements for other storm water discharges. TCEQ's Small Business and Environmental Assistance Division, the Field Operations Division, with staff located throughout the state in the 16 regional offices, and TCEQ's Water Quality Division have provided information to the regulated community on storm water permitting requirements through presentations, development of informational materials and resources, and site visits. Additionally, EPA has conducted a number of outreach efforts since finalizing the Phase II federal storm water regulations in December 1999, many of which are focused on reaching the operators of small MS4s. For example, EPA Region 6 has sponsored several annual conferences on MS4 permitting.

Comment 16:
Tome asks whether TCEQ will provide a model SWMP that cities can use to prepare their own SWMP.

Response 16:
A model Phase II SWMP was developed in 2001 for the TCEQ's Policy and Regulations Division - Galveston Bay Estuary Program. This document is available at: *http://gbic.tamug.edu/locgov/swmp.html*.

Comment 17:
HBA is concerned that the federal storm water program is being duplicated, instead of being delegated.

Response 17:
EPA delegated the NPDES permitting program, including the federal storm water program to TCEQ in 1998. In the case of the Phase II storm water regulations, EPA had not previously regulated small MS4s, therefore, this permit does not duplicate or replace a federal permit.

Comment 18:
HBA requests that TCEQ conduct a cost benefit analysis for the specific rules applicable to storm water and to follow the same guidelines as the federal government.

Response 18:
The federal storm water rules at 40 C.F.R. §122.26 and those additional provisions applicable to small MS4s at 40 C.F.R. §§122.30 - 122.37 were adopted by reference by TCEQ in 30 TAC §281.25, excluding

guidance in §122.33 and §122.34. At that time, TCEQ determined that the adopted rules would not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. TCEQ does not conduct a cost benefit analysis when considering whether to adopt a general permit.

Comment 19:
TCCOS and Mathews & Freeland believe TCEQ should adopt an alternative approach to regulating municipal storm water discharges other than permitting. The commenters state that TCEQ's approach is duplicative and inefficient and would be economically burdensome to the affected municipalities. Also, the commenters state that TCEQ has existing statewide programs that satisfy one or more of the MCMs and could expressly recognize its role in the terms of the general permit. In situations where a municipality wants to implement and enforce a storm water regulatory program, TCEQ could enter into a cooperative agreement with the municipality, pursuant to TWC, §26.175.

Response 19:
40 C.F.R. §122.32 states that, unless you meet one of the waivers, a small MS4 is regulated if located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census. 40 C.F.R. §122.33(a) states that if you operate a regulated small MS4 "you must seek coverage under a NPDES permit issued by your NPDES permitting authority." The NPDES program was delegated to Texas in 1998 via a memorandum of agreement with EPA. Therefore, an alternative non-permitting approach to regulating small MS4s is not allowed by TCEQ rules.

Title Page

Comment 20:
Group 1 states that the cover page uses the term "surface water in the state," which is inconsistent with the remainder of the document that uses the term "waters of the United States" to describe the receiving stream.

Response 20:
The title page of the permit states that the discharges eligible for coverage under the permit are those to surface water in the state. Such authorization is consistent with TCEQ's general permitting authority in TWC, §26.040. The permit requires the MS4 operator to develop an SWMP and other controls for

discharges that reach waters of the United States. This requirement is consistent with the federal storm water regulations delineated in 40 C.F.R. Part 122 and adopted by TCEQ in 30 TAC §281.25.

Comment 21:
HCFCD comments that the permit authorization language on the title page states that small MS4s may discharge directly to surface water in the state only according to the monitoring requirements and other conditions set forth in this general permit. HCFCD suggests revising the permit as follows because there are no monitoring requirements in the permit: ". . . only according to the conditions set forth in this general permit."

Response 21:
The permit does require monitoring of storm water discharges from concrete batch plants supporting construction activities and operated by MS4 operators authorized under this permit. Therefore, this revision is not necessary. However, some MS4 operators may choose storm water discharge monitoring as a method for determining the effectiveness of MCMs, for assessing attainment of measurable goals, and to assist TCEQ in monitoring compliance with the terms of the general permit.

Comment 22:
HCFCD asks that TCEQ clarify on the title page whether discharges from a small MS4 directly discharging into a large MS4 before entering surface water in the state is authorized by this permit. HCFCD suggests adding language to the title page that states that the permit authorizes discharges directly into surface water in the state or discharges directly into a Phase I MS4 before entering surface water in the state.

Response 22:
Authorization for discharges from a small MS4 where the MS4 operator is the construction site operator is required whether the discharge is directly or indirectly to surface water in the state. Discharges from a small MS4 to a separate MS4 will ultimately result in a discharge to a surface water in the state. Thus, TCEQ does not agree that this clarification is necessary.

Comment 23:
DAFB comments on the sentence in the title page stating that issuing the permit does not grant MS4 operators the right to use private or public property for conveyance of storm water. DAFB comments that the sentence seems to state that it is impermissible to convey storm water, as well as some undefined non-

storm water discharges, on any property. DAFB suggest changing the sentence to: "The issuance of this general permit does not grant the permittee the right to use private or public property belonging to others for conveyance of storm water and permitted non-storm water discharge along the discharge route."

Response 23:
The language in this permit is the same as language included on the title page of all TPDES individual wastewater permits and clearly states that the "right to conveyance" is not authorized under the permit. If permission is necessary in order to convey the discharge across or along unowned property, it remains the MS4 operator's responsibility to obtain that permission.

Comment 24:
NCTRSW, Harris County, Houston, Missouri City, and HCFCD support the 2005 revision of the title page from "General Permit to Discharge Waste" to "General Permit to Discharge Under the Texas Pollutant Discharge Elimination System."

Response 24:
TCEQ agrees with this comment and this change was made to the general permit.

Definitions

Comment 25:
Cedar Hill requests providing a list of acronyms in Part I before the definitions. NCTRSW comments that the general permit or fact sheet should include a list of commonly used acronyms.

Response 25:
TCEQ agrees that this information is helpful and modified the permit to include 22 common acronyms following the definitions in Part I of the permit. Part I was divided into two sections, I.A., "Definitions," and I.B., "Commonly Used Acronyms."

Comment 26:
Sunland and NCTRSW request the addition of a definition for "classified segment" in order to comply with Part II.D.4.B.(8) of the permit. Grapevine requests a definition of the term "classified receiving waters" that appears in Section II.D.12.(c)(iv) of the permit.

Response 26:
In response to the comments, TCEQ added the following definition of "classified segment" to the permit: "refers to a water body that is listed and described in Appendix A or Appendix C of the Texas Surface Water Quality Standards, at 30 TAC §307.10."

Comment 27:
Euless asks whether formal consideration of a "common plan of development or sale" is needed or whether a common plan is assumed based on certain activities taking place at the site. Euless notes that "developments are not always presented as a common plan, even though it appears that a tract will be developed in parts," and that if a tract is developed in phases, a formal plan is submitted to the city for consideration.

Response 27:
In determining what is a "common plan of development" for purposes of the storm water permitting requirements under this general permit, the MS4 operator must consider all planned phases of a project and obtain the necessary authorization for each phase prior to commencing the initial construction. There is no specific requirement to formally consider a common plan, but any documentation regarding the overall project plan, such as plats or documentation describing separate phases, must be considered when determining the size of the construction site for purposes of determining the required level of regulation.

Comment 28:
Carroll & Blackman comments that the definition of "common plan of development" does not include language describing "in-fill development" issues, such as linear projects that are not contiguous but that are part of a master plan (e.g., water line construction). Carroll & Blackman states that noncontiguous projects are typically not considered to fit the definition of a "common plan of development."

Response 28:
TCEQ agrees that it is beneficial to clarify when related projects that are not contiguous are performed by an MS4 operator. In response to this comment, Part IV.C.2.d. of the fact sheet for the general permit was revised to include the following language at the end of the first paragraph. This language is based in part on existing guidance from EPA guidance on a similar question:
"Where discrete construction projects within a larger common plan of development or sale are located greater than or equal to 1/4 mile apart, and the area between the projects is not being disturbed, each individual project can be treated as a separate plan of development or sale, provided that any

interconnecting road, pipeline or utility project that is part of the same "common plan" is not concurrently being disturbed. For example, if a utility company was constructing new trunk lines off an existing transmission line to serve separate residential subdivisions located more than 1/4 mile apart, the two trunk line projects could be considered to be separate projects. If separate construction projects occur that are part of the same overall project and are less than 1/4 mile apart, then it would be appropriate to consider the combined acreage in determining the larger common plan."

Comment 29:
NCTCOG and Farmers Branch request changing the term "construction site operator," to something such as "municipal construction activities operator." NCTCOG and Farmers Branch comment that this change and additional language or guidance regarding construction vendors would help avoid confusion. Farmers Branch comments that this definition needs to include representatives of the MS4 and that the definition needs to substitute "one" for "all" of the following criteria.

Response 29:
The permit provides authorization for certain activities that are performed by the MS4 operator. Only operators of small MS4s are eligible for coverage under the permit. Therefore, only the MS4 operator may develop the seventh MCM for construction activities. The optional seventh MCM may authorize only the construction activities performed by the MS4 operator or activities performed by contractors for the small MS4 where the small MS4 continues to meet the definition of construction site operator. Contractors that meet the definition of a construction site operator must obtain separate authorization under the TPDES general permit for construction activities, TXR150000.

Comment 30:
NCTRSW comments that the definition for "construction site operator" may be read as offering the option of operator to either of the two categories of persons, while relieving the other category of persons of any responsibilities for permit compliance. NCTRSW states that clarification in a guidance document is appropriate.

Response 30:
The optional seventh MCM allows an MS4 operator to obtain coverage for construction activities in lieu of regulation under the TPDES Construction General Permit (CGP), TXR150000. Part III.A.7. of the general permit states that where the MS4 operator can meet the definition of construction site operator, the MS4 operator may obtain construction authorization under this general permit. Part III.A.7. also does

not require contractors who work for the MS4 operator and do not meet the definition of construction site operator to obtain coverage for their work on construction sites under the TPDES CGP. The current definition of "construction site operator" matches the definition of "construction site operator" in the TPDES CGP and TCEQ believes that it is appropriate to keep these definitions the same.

If a construction site operator does not obtain coverage under this general permit via the seventh MCM, then the provisions of TXR150000 apply, which include permitting requirements for operators of small and large construction activities. The language in Part III.A.7. of the general permit and Part III.F. of the fact sheet describe when a regulated MS4 operator that is also a construction site operator may obtain coverage under the TPDES CGP.

Comment 31:
Grapevine comments that it supports the additional definition for "construction site operator," which will allow for more effective application of the regulation. Cedar Hill suggests providing examples of each type of construction site operator.

Response 31:
TCEQ declines to revise the permit language, because the existing language meets the federal storm water rules and is consistent with the existing TPDES CGP. In some cases, the examples listed previously may include a regulated MS4; however, there may be cases where a city or general contractor meets both definitions. In most cases, the MS4 operator will not meet the examples listed previously, which would more commonly apply to the CGP.

Comment 32:
Harris County, V&E, and Missouri City request clarification on the limits and jurisdiction of the terms "conveyance," "small MS4," and "surface water in the state." The commenters state that both MS4s and surface water in the state include man-made conveyances and ask whether an MS4 stops at the point that it discharges to surface water in the state. If not, the commenters ask whether it would affect existing structural controls that provide treatment if an MS4 locates the structural controls in surface water in the state. Harris County continues to support limiting TPDES storm water discharge general permits to discharges to "waters of the United States."

Response 32:

As defined in the permit, an MS4 is generally a publicly owned system, designed and used for collecting and conveying storm water, which may include roads and streets with drainage systems, catch basins, curbs, gutters, man-made channels, storm drains, and ditches. Surface water in the state as defined in the permit is generally any of a number of bodies of surface water (with the exception of waste treatment systems), fresh or salt, navigable or non navigable that are wholly or partially inside or bordering the state and subject to the jurisdiction of the State of Texas. There are instances where water may be both a surface water in the state and part of an MS4 though it is not possible to articulate all scenarios where it is one, the other, or both. For example, portions of an MS4 system, including ditches, may be a surface water in the state. As pointed out by EPA in the preamble to its Phase II storm water rules (64 FR 68722, 68757, December 8, 1999), a ditch may be part of an MS4. However, as with other jurisdictional provisions of the CWA, that determination requires case-specific evaluations of fact. Once a body of water is identified as a surface water in the state, it remains a surface water in the state downstream from that point.

Structural controls and treatment facilities cannot be constructed in surface water in the state for the purpose of treating discharges and meeting water quality standards. However, structures placed in surface waters for other purposes, such as flood control, can be designed, operated, and maintained in a manner using BMPs to reduce pollution. BMPs to operate and maintain these types of structures in such a manner can be used to satisfy certain requirements of the general permit.

Comment 33:

TCCOS and Mathews & Freeland comment that the definition of "discharge" is unnecessarily narrow and its use could create substantial ambiguity and uncertainty. The prohibition contained in TWC, §26.121 is a prohibition on the discharge of wastes and pollutants, not the type of liquid. By artificially narrowing the scope of the authorization to storm water and certain non-storm water discharges, TCEQ is expressly failing to address the discharge of wastes and pollutants that it knows are present in storm water runoff and in discharges from MS4s. TCCOS and Mathews & Freeland also ask whether the authorization to discharge only storm water includes the authorization to discharge all pollutants or wastes transported by the storm water. TCCOS and Mathews & Freeland request deleting the definition or changing the definition to the one used by EPA in its model general permit.

Response 33:

The authority for TCEQ to prohibit unauthorized, e.g., unpermitted discharges is found in TWC, §26.121. It states that except where authorized by rule, permit, or order issued by the commission, no person may

discharge sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste into or adjacent to any water in the state. "Waste" is defined in TWC, §26.001(6) as "sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste as defined in this section." Storm water discharges are considered an "other waste" under the TWC and such discharges may be authorized under a general permit as allowed by TWC, §26.040. TCEQ acknowledges that storm water discharges may contain pollutants and the requirements of the permit were developed to eliminate or minimize these pollutants to the MEP.

Comment 34:
Cedar Hill requests that TCEQ clarify in the definition of "discharge" that a discharge is not allowable to the extent that it violates surface water quality standards.

Response 34:
Part II.C.3. of the general permit and III.D.2. of the fact sheet specify that the general permit does not authorize any discharges to surface water in the state that would cause or contribute to a violation of water quality standards or that would fail to protect and maintain existing designated uses.

Comment 35:
DAFB requests a definition of the term "Edwards Aquifer Recharge Zone."

Response 35:
The permit references 30 TAC Chapter 213 (relating to Edwards Aquifer). The definition of the Edwards Aquifer Recharge Zone, including a map delineating this area, is found in 30 TAC §213.22. TAC rules are accessible on the Texas Secretary of State Web site at: *http://www.sos.state.tx.us/tac/*.

Comment 36:
NCTRSW requests clarification of the definition of "final stabilization," possibly in a guidance document, regarding builder responsibilities. NCTRSW notes that the option allowing a homebuilder to meet final stabilization by providing information to the home buyer at the time of sale could produce a significant burden for maintenance and inspection of temporary control measures while a large number of homes are awaiting sale. NCTRSW suggests establishing a time limit for sale of a property. Cedar Hill requests removal of subsection (b)(2) from this definition.

Response 36:

The general permit allows a homebuilder to submit a notice of termination (NOT) before final stabilization is reached, provided that the homebuilder has established temporary stabilization and informed the home buyer of the need for final stabilization. If a large period of time elapses between the completion of the home and the sale, it may be more appropriate to establish final stabilization and submit an NOT prior to sale of the home. TCEQ recognizes that there may be very few periods of time when an MS4 operator will actually meet the role of homebuilder as construction site operator, but the occurrence of this situation is possible, therefore the definition was not changed.

Comment 37:
Harris County states that the term "native" is widely used to identify vegetation that existed before European settlement, but that nearly all construction activities wind up using ground covers such as St. Augustine, bermuda grass, and others, which are not "native" in the traditional sense. Harris County requests removing the term "native" from the definition.

Response 37:
The permit was not changed, as the definition is consistent with the existing TPDES CGP as well as EPA's CGP. For the purposes of this permit, "native" refers to the amount of vegetation that was present prior to construction, not the type of vegetation. It is not necessary to select a type of vegetation that is native to the site for stabilization.

Comment 38:
NASA comments that the definition of "groundwater infiltration" refers to groundwater entering a sanitary sewer system, but comments that for the purposes of this permit, the definition should refer to "groundwater that enters a storm sewer system." NCTRSW, Harris County, Missouri City, Carroll & Blackman, HCFCD, HCEC, Houston, and TxDOT-Houston also request changing "sanitary sewer system" to "storm sewer system" in this definition. Carter & Burgess requests changing it to "MS4." Cedar Hill comments that the definition sounds like the definition that is used for infiltration as it relates to the sanitary sewer system and requests clarification of "storm sewer system."

Response 38:
In response to the comments the definition was revised as follows: "Ground Water Infiltration - For the purposes of this permit, groundwater that enters a municipal separate storm sewer system (including sewer service connections and foundation drains) through such means as defective pipes, pipe joints, connections, or manholes."

Comment 39:

Cleburne comments that the current definition of "illicit discharge" will make it difficult and unrealistic to determine techniques for finding and eliminating illicit discharges. Illicit connections can be identified and controlled, but many other types of materials enter the storm sewer from non-point sources.

Response 39:

The definition in the permit is from the federal storm water regulation at 40 C.F.R. §122.26(b)(2), which was incorporated by reference in 30 TAC §281.25. The description of what is an illicit discharge should not limit the MS4 operator's ability to develop an MCM to identify and limit these discharges. The permit requires development of an SWMP that is almost entirely based on pollution prevention. For compliance with the requirements of the permit, the MS4 operator must develop and implement an illicit discharge detection and elimination MCM that reduces these discharges to the MEP. MS4 operators are allowed latitude to develop and focus the program so that it is centered on local issues, site-specific conditions, and water quality concerns. The MS4 operator may have limited control over some contributions to the system; some prohibited materials may remain in a discharge from an MS4 that is otherwise in compliance with the permit.

Comment 40:

Grapevine comments that the phrase "or a separate authorization" in the definition of "illicit discharge" may raise some concern. However, Grapevine acknowledges that the phrase would not jeopardize protection of human health or the environment and added that the statement can be used as an additional management tool by regulatory authorities.

Response 40:

The permit includes the general phrase "or a separate authorization" so that any TPDES or other authorized discharge is not necessarily considered illicit. While most direct discharges only occur under a TPDES permit, it is possible that a discharger may have a state-only discharge authorization and an NPDES permit from the EPA.

Comment 41:

Carroll & Blackman recommends replacing the phrase "is not entirely composed of storm water," in the definition of "illicit discharge" with the following phrase: "is composed of significantly polluted storm water." Carroll & Blackman states that the current definition assumes that storm water runoff will not

contain naturally occurring constituents as a result of normal runoff conditions, but that storm water pollutants are naturally occurring and should not constitute an illicit discharge.

Response 41:
The definition was retained, as it is consistent with the federal definition of "illicit discharge at 40 C.F.R. §122.26(b)(2), with the exception of the reference to NPDES permits. The definition in this general permit includes more general terminology in order to ensure that any discharge that is otherwise authorized under an appropriate permit or rule mechanism would not necessarily be considered illicit.

Comment 42:
DAFB requests including the definition of "impaired waters" given in Part II.C.4. in Part I of the permit.

Response 42:
As stated in Part II.C.4., "impaired waters" are those that do not meet applicable water quality standards and are listed on the CWA, §303(d) list. The current EPA-approved 2004 and draft 2006 Texas CWA §303(d) lists of impaired water bodies, as well as information on how these waters are identified and listed, is available at:
http://www.tceq.state.tx.us/compliance/monitoring/water/quality/data/wqm/305_303.html#y2004. TCEQ declines to also include the definition in Part I of the permit.

Comment 43:
Tarrant County suggests using language from the multi-sector general permit (MSGP), TXR050000, to avoid confusion with nonregulated local government activities and notes that the term "industrial activities" is used in the permit at Part III.A.4.(e), related to Municipal Operations and Industrial Activities. NCTRSW comments that Part I of the permit should include a definition of those industrial activities that meet the applicability requirements for TCEQ industrial storm water discharge permits. NCTRSW states that there is a potential for confusion regarding regulated and nonregulated industrial activities and believes that a definition, or guidance within the fact sheet, would assist MS4s in developing a list of industrial activities required at Part III.A.4.(e). of the permit.

Response 43:
TCEQ agrees it is beneficial to add a definition for "industrial activities," since the term is used in the general permit. In response to the comments, the following definition was added to Part I of the permit: "Industrial activities - manufacturing, processing, material storage, and waste material disposal areas (and

similar areas where storm water can contact industrial pollutants related to the industrial activity) at an industrial facility described by the TPDES Multi Sector General Permit, TXR050000 or by another TCEQ or TPDES permit."

Comment 44:
GCHD asks what constitutes a land disturbance.

Response 44:
Land disturbance includes, but is not limited to, the common activities of clearing, grading, and excavating a site. Other activities may also occur and result in soil disturbance such as: construction vehicle/equipment traffic and storage; on-site storage of construction materials; demolition; and other activities that result or lead to a land disturbance.

Comment 45:
Houston comments that the definition of "large construction activity" appears to include only activities such as "clearing, grading, and excavating." Houston asks whether areas disturbed by concrete batch plants, asphalt batch plants, equipment staging areas, material storage yards, material borrow areas, excavated material disposal, and other industrial activities are counted when determining whether a "construction activity" will disturb the required amount of area.

Response 45:
Areas disturbed by supporting activities, such as those listed in the comment, must be included in the total number of acres disturbed if the support activity solely supports the construction activity and is located within one mile of the construction site, or if the support activity is authorized to discharge storm water under this permit.

Comment 46:
Grapevine expressed its support for the revisions to the definition of "large construction activity" that lists activities that are not considered construction activities (e.g., routine grading of existing roads).

Response 46:
In response to the comments the definition of "large construction activity" was changed to help clarify what activities were not considered activities that require storm water permit coverage. The following sentence was added to the definition: "Large construction activity does not include the routine grading of

existing dirt roads, asphalt overlays of existing roads, the routine clearing of existing right-of-ways, and similar maintenance activities."

Comment 47:
Cedar Hill requests including the following sentence in the definition of MEP: Implementation of BMPs consistent with the provisions of the Storm Water Management Plan (SWMP) developed in accordance with the TPDES TXR040000 General Permit.

Response 47:
The definition was not revised because it is consistent with the description of MEP in the federal CWA and federal rules at 40 C.F.R. §122.34. The fact sheet includes the following sentence at Part IX: "TCEQ believes that the requirements of the permit, if properly implemented, will meet the MEP standard required in the federal rules at 40 C.F.R. §122.34."

Comment 48:
Universal City, HCEC, and TxDOT-Houston request replacing the term "MS4 Operator" with the federal definition of "owner or operator" at 40 C.F.R. §122.2 because the permit definition appears to impose inappropriate compliance obligations on contracted entities and moves significantly beyond federal requirements regarding who must obtain permit authorization. The commenters also believe that this definition may inadvertently restrict an operator's ability to outsource compliance activities if those contractors could be subjected to permit enforcement actions. The commenters state that TCEQ should address third party failures in the context of interlocal agreements or contracts because this will allow more flexibility in outsourcing services.

Russell Moorman and Carter & Burgess state that the current definition of "MS4 Operator" includes the phrase "entity contracted by the public entity" but that the permit does not clarify that phrase. Russell Moorman notes that this part of the definition appears very broad and may require multiple entities to submit NOIs for the same regulated MS4. Russell Moorman requests clarification regarding who must submit an NOI if two MS4s have an interlocal agreement such that each MS4 operator has the responsibility to implement one or more MCM for the other MS4 operator. For example, are both operators required to submit NOIs for each MS4 area where they implemented any part of the SWMP. Russell Moorman asks a similar question with respect to private companies that are contracted to implement part or all of an SWMP for an MS4, i.e., whether the private company is considered an MS4 operator. Russell Moorman suggests revising the definition of "MS4 Operator" to include only the small

MS4 itself, and indicated that the SWMP could identify any additional existing contractual relationships that could affect the operation of the MS4. Grapevine comments that the addition of the statement "and/or the entity contracted by the public entity" will allow for more effective application of the regulation.

Carter & Burgess asks for clarification of the definition so that the contracted entity is only responsible for the portions of the SWMP that it has a contract to implement. Carter & Burgess requests replacing the definition with the following description: "The public entity responsible for the operation and maintenance of the MS4 that is subject to the terms of this permit, and any entity contracted by that public entity to implement a portion of the SWMP." Carroll & Blackman comments that the definition could be misinterpreted to mean that a consultant working for a municipality or a contractor performing maintenance on the MS4 would need to obtain permit coverage. Carroll & Blackman suggests finding another mechanism for requiring permit coverage for those specific contractors TCEQ intends to include in this definition. Cedar Hill requests revising the definition to include examples, such as "municipality, city manager, and/or mayor.

Response 48:
TCEQ recognizes that MS4 operators may utilize contracted entities to implement a portion of the SWMP; however, the intent of this permit is to require compliance of the MS4 operator. There may be some circumstances where the MS4 completely delegates authority to operate the MS4 to another entity, including operations that are not specifically related to the SWMP. Where the contracted entity has sole control over the MS4, including the SWMP, the contracted entity must obtain permit coverage, and the public entity may also require coverage. However, if the MS4 owner retains operational authority over the MS4, then any contracted entity hired to implement portions of the SWMP is considered a subcontractor and is not expected to obtain coverage.

Comment 49:
Harris County requests revising the definition of "notice of intent" to differentiate it from other NOIs required for other storm water and wastewater general permits.

Response 49:
The definition included in the permit is consistent with the definition in 30 TAC Chapter 205 (relating to General Permits for Waste Discharge). 30 TAC §205.1(5) defines an NOI as "a written submittal to the executive director from a discharger requesting coverage under the terms of a general permit."

Comment 50:

Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston request revision of the definition of "outfall" by replacing the term "surface water in the state" with "waters of the United States" for consistency with the EPA's definition of "outfall" in 40 C.F.R. §122.26(b)(9). Harris County notes that the definition, as written, presumes that there is a difference between an MS4 and surface water in the state and states that substantial case law has demonstrated that storm sewers are water in the state. According to Harris County, the current definition in the permit undermines the authority that environmental enforcement agencies have in protecting against pollution through the solid waste and water pollution regulations.

Response 50:

TCEQ rules at 30 TAC §305.2(25) define an outfall as being where an MS4 discharges into or adjacent to surface water in the state. TCEQ recognizes that there may be cases where a drainage ditch that is part of an MS4 is considered surface water in the state. The requirement of the general permit that relates to outfalls is the Illicit Discharge Detection and Elimination Minimum Control Measure (MCM), which requires an MS4 operator to map all outfalls from the MS4. The MCMs are part of the SWMP and the MS4 operator must implement the SWMP where discharges reach waters of the U.S. Therefore, in order to clarify the intent of this general permit, the definition was revised to replace the term "surface water in the state" with "waters of the U.S." TCEQ also added the phrase "for the purpose of this permit," to the beginning of the definition, to differentiate between outfalls that are specific to this permit and other outfalls defined in the TPDES program. The definition now is as follows: "Outfall - For the purpose of this permit, a point source at the point where a municipal separate storm sewer discharges to waters of the United States (U.S.) and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels, or other conveyances that connect segments of the same stream or other waters of the U.S. and are used to convey waters of the U.S."

Comment 51:

TxDOT asks for clarification regarding whether the definition of "outfall" includes discharges to ephemeral drainage channels that carry water only during and shortly after rainfall events.

Response 51:

Waters of the U.S. may include intermittent streams as described in the definition for "waters of the U.S." found in the general permit.

Comment 52:

NCTRSW comments that the definition of "outfall" was simplified from the original draft permit, but also notes that there is not always a clear point of discharge from a municipal drainage system. NCTRSW requests clarification regarding municipal and state responsibilities for determining the point of discharge into surface water in the state and states that the guidance should include consideration of the requirements for system mapping in Part III.A.3.(c.) of the general permit. Tarrant County comments that the definition in the permit is sufficient if TCEQ designates a map to help MS4 operators identify surface water in the state or waters of the U.S.

Lloyd Gosselink requests revising the definition of "outfall" to specify that an outfall is related to the conveyances of an MS4 (i.e., storm sewer pipes, ditches, and conveyances owned by the MS4) into surface water in the state. Lloyd Gosselink believes the definition is overly broad and could be interpreted to include the point of discharge from any regulated area, regardless of whether such runoff is conveyed through an MS4.

Response 52:

Outfalls that discharge from facilities that are otherwise regulated under the TPDES program, such as a TPDES wastewater outfall, may be a direct discharge into water in the state or a discharge into an MS4. These are not MS4 outfalls, but if they discharge to an MS4, then the MS4 operator could address them as part of their Illicit Discharge Detection and Elimination Program. The general permit requires the MS4 operator to develop its outfall map using existing information such as federal or state maps and publications.

MS4 operators can locate information regarding the classified segment(s) receiving discharges from the MS4 in the "Atlas of Texas Surface Waters" at the following TCEQ Web address. This document includes identification numbers, descriptions, and maps:
http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-316/index.html

MS4 operators can find the latest EPA-approved list of impaired water bodies (the Texas §303(d) List) at the following TCEQ Web address:
http://www.tceq.state.tx.us/compliance/monitoring/water/quality/data/wqm/305_303.html#y2004.

Persons may find information on unnamed receiving waters that are not listed as impaired on United States Geological Survey topographic maps or TxDOT County Maps, which are used in the TPDES

program to delineate the discharge route of a particular facility (see 30 TAC §305.45(a)(6)). The EPA's web site contains current information on the definition and rulings regarding "waters of the U.S." at: *http://www.epa.gov/owow/wetlands/guidance/SWANCC/*.

This information may also help develop the outfall map.

Comment 53:
Cedar Hill comments that it is not clear when a conveyance is not surface water in the state and requests clarification so it can better determine outfall locations. Cedar Hill asks for revision of the definition to clarify when a conveyance is not surface water in the state.

Response 53:
MS4 operators will determine what portion of the conveyance system is part of the MS4 and there may be cases where a drainage ditch or similar intermittent channel may also be considered water in the state. As discussed previously, the definition for "outfall" was revised to require mapping only for those point sources that discharge into waters of the U.S.

Comment 54:
TxDOT asks whether the phrase "does not include open conveyances connecting two MS4s" includes two underground MS4 connections. TxDOT requests clarification in the fact sheet or permit as to whether an underground connection is an outfall. Carroll & Blackman comments that the purpose for identifying outfalls is to support detection of illicit discharges and believes that locations where one MS4 drains to another MS4 are important locations to include. TxDOT states that it is common for one MS4, such as a city, to drain to another MS4, such as TxDOT, but that these connections are not considered outfalls based on the current definition in the permit. TxDOT states that the permit should specifically refer to crossings or siphons of a drainage system feature under or through a highway feature if the intent is to describe them in this section.

Response 54:
The outfall map does not have to show connections from one MS4 to another because the definition only pertains to discharges directly into waters of the U.S. If an MS4 operator receiving a discharge from an adjacent, unregulated MS4 believes that the adjacent MS4 is substantially contributing pollutants into the downstream MS4, then they may petition TCEQ to require permit coverage for the unpermitted MS4. EPA developed an "Illicit Discharge Detection and Elmination" guidance manual (October 2004) and

Chapter 11 of that document includes guidance on mapping outfalls that discharge into stream segments. This document is available online at: *http://www.cwp.org/IDDE/IDDE.htm*.

Comment 55:
Carter & Burgess comments that the replacement of the original definition for "major outfall" (36-inch diameter pipe or draining more than 50 acres) with this definition will result in a tremendous amount of work for each regulated MS4, if they have to map points of any size. Carter & Burgess states that this effort is not practicable and that compliance with this new definition would exceed the requirement to meet MEP.

Response 55:
The definition for "outfall" was included because the requirement to map all outfalls, rather than only major outfalls, was changed in the general permit. This change was made for consistency with the federal rules that require small MS4 operators to map all outfalls (40 C.F.R. §122.34(b)(3)(ii)(A)).

Comment 56:
Carter & Burgess notes that the definition of "outfall" includes by reference the full definition of "point source" as defined in the federal rules in 40 C.F.R. §122.22. Carter & Burgess notes that the definition in the permit includes vessels and floating crafts, which are difficult for a regulated MS4 to map as an outfall and request that the definition simply begin with "The point at which . . .."

Response 56:
While there may be no circumstances where an MS4 discharges from a floating vessel, or from other facilities listed in this definition, this wording is consistent with the federal definition for "outfall" and was not revised.

Comment 57:
Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston request revising the definition of "point source" to include the following wording from 40 C.F.R. §122.22, which the commenters believe was omitted from the second line: ". . . including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated . . .."

Response 57:
In response to the comments, this change was made in the permit.

Comment 58:
Universal City, HCEC, and TxDOT request adding the definition of "pollutant" from 40 C.F.R. §122.2 to the permit.

Response 58:
TCEQ declines to add the definition, but notes that Texas Water Code, §26.001(13) includes a definition for "pollutant," which applies to water quality permits issued by the TCEQ.

Comment 59:
Sunland requests adding a definition of "population" in the permit or that TCEQ clarify how "population" is defined for nonresidential MS4s in evaluating the possibility of obtaining a waiver under Part II.F. of the general permit. Sunland points out that MS4s such as transportation agencies, airports, and universities may not have a residential population and further notes that federal rules at 40 C.F.R. §122.32(a) appear to indicate that these entities are regulated, unless they qualify for a waiver.

Response 59:
TCEQ declines to add a definition for "population." For the purposes of determining a "very discrete system," the term "population" refers to those people who work at an office, study/take classes at a school, or otherwise visit a building or office complex. For the purpose of determining the population served by an MS4 seeking a waiver, an MS4 operated by a city or other public body that has a residential population would use the residential population that is located within the regulated area. EPA provides a population list for some MS4s in Texas at the following web address: *http://www/epalgov/npdes/pubs/texas.pdf*.

For MS4s without a residential population, the population served within an urbanized area may include persons who live outside of the urbanized area, including visitors and employees. For example, if the MS4 is a transportation district within an urbanized area, then the "population served" would include the number of daily users as well as the employees of the system.

Comment 60:
DAFB requests defining the term "footprint" in the permit because that term is used in the definition of "redevelopment."

Response 60:

The term “footprint” is used to describe the outline and area occupied by an existing site, and may include such things as buildings and parking lots. If the structure is further developed, then it is the change in the area of the “footprint” that must be considered in determining if an acre or more of land will be disturbed and whether it must be addressed in the redevelopment MCM. Remodeling the interior, remodeling the exterior facade of the building, or repaving the parking lot would not increase the “footprint” and would not trigger permitting requirements related to the redevelopment MCM, regardless of the magnitude of the project.

Comment 61:
Houston comments that the definition of “small construction activity” appears to include only activities such as “clearing, grading, and excavating.” Houston asks whether areas disturbed by concrete batch plants, asphalt batch plants, equipment staging areas, material storage yards, material borrow areas, excavated material disposal, and other industrial activities are counted when determining whether a construction activity will disturb the required amount of area.

Response 61:
The total number of acres disturbed must include the related support activities, such as those listed in the comment, if the support activity solely supports the construction activity and is located within one mile of the construction site or if the support activity is authorized to discharge storm water under this permit.

Comment 62:
Grapevine expressed its support for the revisions to the definition, which lists activities that are not considered construction activities (e.g., routine grading of existing roads).

Response 62:
The revised definition was changed following the original public comment period and is now consistent with the TPDES CGP, TXR150000.

Comment 63:
TxDOT requests clarification of the definition of “small MS4" in regard to streets and roads. TxDOT believes that not all of the street or road is part of an MS4. For example, the crown of a road and most roadway lanes are not designed to convey flow. Usually, only curbs, gutters, roadside ditches, or underground storm sewers are used to convey flow. Cedar Hill requests revising the definition to include culverts with curbs, gutters, ditches, etc.

Response 63:

As stated in the definition, a small MS4 refers to "a conveyance or a system of conveyances . . . designed or used for collecting or conveying storm water; . . .." The definition of conveyance specifically includes curbs and gutters, plus other structures that are designed and maintained to carry storm water runoff. Roads are designed and constructed to transport vehicles, with an element of the design used for prevention of flooding and pooling of water. For MS4s that include roads, it is appropriate to consider as the MS4 only those parts that are specifically designed and used primarily for conveying storm water.

Comment 64:

NASA and Mathews & Freeland comment that the definition of "small MS4" is vague and ambiguous regarding the exclusion of "very discrete systems such as those serving individual buildings." NASA notes that the definition does not include a size of office or education complexes that could meet the criteria of "very discreet system." As such, the definition could be understood to exclude a large federal government complex that does not serve a residential population. NASA notes that in its preamble to the NPDES Phase II storm water rules (64 FR page 68749), the EPA specifically addressed including federal facilities in the rules when the federal facility is similar to other regulated MS4s. However, NASA states that a large federal government complex with no residential population is unlike other regulated MS4s that serve significant residential populations whose uncontrolled activities may contribute to storm water pollution. NASA notes that these types of activities are either prohibited or controlled on these government complexes. Further, NASA states that the term "transient" does not accurately describe most office and education complexes, because the workers and students, while "non-residential," are also "non-transient" because they are present on a recurring and routine schedule over an extended period of time. NASA requests revising the definition of "small MS4" to remove the ambiguity with respect to "very discrete systems" and to clarify who must apply for coverage under the permit. Mathews & Freeland comments that the permit uses the term "discrete" in the exclusion as if it means limited in geopraphic extent. However, the exclusion fails to convey any sense of the limiting geographic scope. Mathews & Freeland recommend modifying the definition to state that all federal or state entities that own or control land are subject to the permit requirements. Additionally, TCEQ should modify the definition to state: *(iv) Which does not include systems owned by MS4 operators whose systems throughout the state serve less than one acre.* Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston recommend changing the word "discreet" to "discrete" in the definition of "Small MS4."

Response 64:

Use of the term “transient” in describing a very discrete system could be interpreted to mean that only those public entities that serve tourists and visitors are exempted. However, the intent is to clarify that certain facilities such as office buildings and secondary schools are not required to obtain permit coverage just because they operate storm drains, so long as the drains do not function as a “system.” The intent is to require any drainage conveyances that truly operate as a “system” to obtain coverage, regardless of whether residents are present at the site. Accordingly, the term “transient” was removed from the definition, and the parentheses were removed from the term “nonresidential.” The federal definition of “MS4" specifically includes systems that are similar to large hospital or prison complexes, and the definition in this permit was revised to include those larger complexes. Similarly, it is appropriate to consider that certain smaller complexes may not act as “systems,” and so the definition was further revised to replace the term “municipal” with “certain.” The revised portion of the definition reads as follows:

(iv) Which is not part of a publicly owned treatment works (POTW) as defined at 40 C.F.R. §122.2; and (v) Which was not previously authorized under a NPDES or TPDES individual permit as a medium or large municipal separate storm sewer system. This term includes systems similar to separate storm sewer systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. This term does not include separate storm sewers in very discrete areas, such as individual buildings. For the purpose of this permit, a very discrete system also includes storm drains associated with certain municipal offices and education facilities serving a nonresidential population, where those storm drains do not function as a system, and where the buildings are not physically interconnected to an MS4 that is also operated by that public entity.

Comment 65:
Universal City, HCEC, and TxDOT-Houston request adding a definition of “medium MS4” and “large MS4." HCEC comments that the addition would provide clarification and recommends either adding an explicit definition or including by reference the federal definition.

Response 65:
These terms are both used in the definition of “small MS4.” Therefore, it is appropriate to reference the federal definitions in the general permit. The phrase “as defined at 40 C.F.R. §§122.26(b)(4) and (b)(7)” was added to the definition of “small MS4" as follows: *(v) Which was not previously authorized under a NPDES or TPDES individual permit as a medium or large municipal separate storm sewer system, as defined at 40 C.F.R. §§122.26(b)(4) and (b)(7) . . ..*

Comment 66:

V&E comments that the phrase “surface runoff and drainage” within the definition of “storm water” is not limited to storm water and snow melt. Substances other than storm water and snow melt may result in surface runoff and drainage. V&E recommends adding the word “thereof” at the end of the sentence of this definition to clarify the kinds of surface runoff and drainage that are addressed.

Response 66:

The phrase “surface runoff and drainage” could be interpreted to occur as a result of something other than rainfall, snowfall, and other types of atmospheric precipitation. For example, additional sources may include runoff resulting from pavement washing or runoff resulting from natural springs. This phrase in the definition of “storm water” is used the same way as in the federal definition of “storm water” and adopted by reference in the state regulations (40 C.F.R. §122.26(b)(13) and 30 TAC §281.25). Therefore, to maintain consistency, this change was not made to the definition.

Comment 67:

Cedar Hill requests redefining the term “storm water” to “precipitation that drains offsite” and comments that it currently sounds like the definition is being defined with a definition.

Response 67:

The definition was taken from the federal definition for “storm water.” However, it may be confusing since the term is included in the definition. TCEQ is revising the definition for consistency with the existing TPDES MSGP and the Texas Surface Water Quality Standards at 30 TAC §307.3(a)(54). The definition of “storm water” in the permit was changed to: “Rainfall runoff, snow melt runoff, and surface runoff and drainage.”

Comment 68:

Cedar Hill requests revising the definition of “storm water associated with construction activity” as follows: “Discharge from an area where there is either a large or small construction activity.”

Response 68:

TCEQ declines to revise the definition, because the term “storm water” is defined in the permit.

Comment 69:

TxDOT requests revising the definition of “structural control (or practice)” to include vegetative lined ditches or vegetative filter strips in the list of examples and comments that these controls are more common than some of the others that are listed.

Response 69:
In response to the comment, the definition of “structural control (or practice)”was revised to include vegetative lined ditches and vegetative filter strips to the list of examples.

Comment 70:
V&E requests practical guidance on how “surface water in the state” and “waters of the U.S.” differ and asks that a couple of concrete, practical examples where a discharge into surface water in the state would not ultimately reach waters of the U.S. TxDOT-Lubbock asks whether TCEQ considers playa lakes under its jurisdiction for TPDES purposes in light of the Solid Waste Agency of Northern Cook County (SWANCC) decision that ruled that isolated waters of the U.S. whose only nexus to interstate commerce is migratory birds are not under the jurisdiction of the U.S. Corps of Engineers.

Response 70:
Surface water in the state includes certain playa lakes and isolated wetlands that may not be waters of the United States. Thus, TCEQ considers playa lakes under its jurisdiction for TPDES purposes. Also, storm water that infiltrates or is absorbed into soil, and does not run off, is not considered a discharge to surface water in the state or a discharge to waters of the United States.

Comment 71:
Tarrant County requests that TCEQ designate a map to help identify “surface water in the state” or “waters of the U.S.” so that MS4 operators can appropriately map the locations of all outfalls discharging from the MS4. Grapevine comments that the terms “surface water in the state” and “waters of the U.S.” need clarification and further description and suggests that TCEQ use a map displaying these designated waters. HCEC states that the definition for “surface water in the state” must exclude man-made or artificial systems, and comments that leaving the terms in the permit would result in the regulation of discharges to retention ponds and storm water quality wetlands, when the permit should regulate discharge from those structures.

Response 71:

The definition in the general permit for "surface water in the state" is taken directly from the definition of "water in the state" at TWC, §26.005(5), except leaving out "groundwater, percolating or otherwise. . .." However, no changes were made to the definition because it is consistent with TCEQ's authority to regulate unauthorized discharges under TWC, §26.121 and its permitting and general permitting authority under TWC, §26.077 and §26.040.

TCEQ Publication Number GI-316, "Atlas of Texas Surface Waters," provides information and maps of various surface waters in Texas. An electronic version of the document can be found on TCEQ's Web site at: *www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-316/index.html*.

Comment 72:
TxDOT requests revising the definition or fact sheet to clarify whether ephemeral creeks are considered surface water in the state.

Response 72:
The term "water in the state" does include intermittent streams. Both intermittent streams and intermittent streams with perennial pools are included in the Texas Surface Water Quality Standards at 30 TAC Chapter 307 and no further clarification was made to the permit or fact sheet.

Comment 73:
HCFCD and Universal City comment that for clarity, the definition of "total maximum daily load (TMDL)" should reference the precise regulatory definition as well as the brief definition provided in the permit. HCED and TxDOT-Houston comment that the definition of TMDL should reference the precise federal regulatory definition. Harris County, Houston, Missouri City, and HCFCD request revision of the definition to TMDL to: "Total Maximum Daily Load (TMDL) - a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet the Texas Surface Water Quality Standards." Carter & Burgess asks why the definition was changed from "maximum amount of a pollutant" to "total amount of a substance," and asks whether TMDLs are developed for substances other than pollutants.

Response 73:
The definition of TMDL in the permit is identical to the definition found in the Texas Surface Water Quality Standards at 30 TAC §307.3(a)(61), which references substances rather than pollutants. Though TMDLs are established for pollutants, it is appropriate to use the more general term, "substance" that is already included in TCEQ rules. The federal definition of TMDL is found in the federal rules at 40

C.F.R. §130.2(i). The description of the TMDL Program, guidance, and information related to assessing water quality is provided on TCEQ's Web site at: *http://www.tceq.state.tx.us/implementation/water/tmdl/index.html/*.

Permit Applicability and Coverage

Comment 74:
DAFB requests revising the introductory paragraph in Part II. to: "discharges from small municipal separate storm sewer systems (SMS4) to surface" and throughout the permit using the abbreviation SMS4 for small municipal separate storm sewer systems.

Response 74:
TCEQ declines to adopt the acronym suggested by DAFB. The definition in the permit for the small MS4 includes as acceptable acronyms "small MS4," "MS4,"or "System" for the term small MS4, unless otherwise stated.

Comment 75:
TDCJ asks whether agricultural operations are exempt within an MS4.

Response 75:
The CWA contains an exemption for agricultural operations that meet certain requirements from being considered a point source discharge. Where agricultural operations meet the statutory definition they are not subject to TPDES storm water permitting requirements. The definition of "point source" in the permit specifies that discharges from return flows from irrigated agriculture or agricultural storm water runoff are not considered point sources if they meet the applicable requirements in the CWA.

Comment 76:
Harris County asks if private, gated communities located in unincorporated areas of the county or urbanized area need to apply for coverage under the permit.

Response 76:
The permit affects certain publicly owned separate storm sewer systems located within urbanized areas. If the storm sewer system is privately owned and operated, these permit requirements would not apply regardless of location.

Comment 77:
Harris County asks for clarification regarding how MUDs and private communities may obtain coverage under the permit.

Response 77:
Privately owned and operated MS4s are not subject to the NPDES storm water regulations and are therefore not eligible for coverage under the permit. MUDs that operate MS4s and that are located within an urbanized area may obtain coverage by submitting an NOI, an SWMP, and a $100 application fee. After the permit is issued, a description of the process will be available at: *http://www.tceq.state.tx.us/permitting/water_quality/stormwater/storm-water-navigation/ms4.html*.

Comment 78:
Travis County requests information on the responsibilities of special water districts such as MUDs and water control improvement districts (WCIDs) within an MS4 under the general permit, and asks whether an MS4 operator has the authority to require these districts within an MS4 to perform some of the MCMs within the district's boundaries.

Response 78:
The definition of small MS4 includes systems that are owned or operated by districts that have jurisdiction over storm water. Any MUD or WCID that operates a drainage system in Texas that is located wholly or partially within an urbanized area is subject to the small MS4 general permit requirements. The permit does not provide authority for other municipalities to require districts within their boundaries to implement BMPs for a surrounding municipality. However, within an urbanized area, districts must develop and implement a SWMP and apply for permit coverage on their own.

Comment 79:
Lloyd Gosselink expressed concerns on behalf of several MUDs located in Harris County regarding the applicability of the permit to MS4s operated by MUDs in a regulated area. Lloyd Gosselink points out that Harris County currently maintains the storm sewer system for many of these MUDs and that it is not necessary to burden the MUDs with obtaining coverage under the general permit, because Harris County is capable of managing those MS4s and providing an overall SWMP for the area. Based on the definition for "MS4 Operator," which currently includes the phrase "the public entity and/or the entity contracted with the public entity, responsible for the management and operation of," Lloyd Gosselink requests that TCEQ confirm that small MS4s located within urbanized areas are not responsible for obtaining coverage

under the permit if they are contracted with a Phase I MS4 to assume operational control of the small MS4. Lloyd Gosselink also suggests that TCEQ include a specific exemption from Phase II MS4 permit coverage for such situations.

Response 79:
If a MUD does not operate the storm drain system, then it would not need permit coverage. However, a MUD is considered a municipality in the TPDES program and would need to apply for permit coverage if it is located in an urbanized area (or is designated by TCEQ) and it retains any operational control over the storm drainage system. If the MUD contracts one or more of the SWMP elements, then it should include that information in its SWMP. If Harris County operates the MS4 that is located within the boundaries of a MUD, then Harris County would be responsible for permit coverage and would include those areas in the SWMP that it developed under its individual MS4 permit.

Comment 80:
Lloyd Gosselink comments that certain permit requirements are redundant for those Phase II MS4s operating within the boundary of a permitted Phase I MS4, who do not enter into an agreement for the Phase I entity to assume operational control over the Phase II MS4s. Lloyd Gosselink states that the permit, as currently written, would require construction site operators within Harris County to submit information to small MS4s operating MS4s in Harris County and the small MS4 operators would be required to review and regulate operations at such construction sites. In addition, construction site operators within Harris County are also required to obtain a storm water permit by submitting site plans for review by Harris County, if the site is located in an unincorporated area. Lloyd Gosselink requests that TCEQ include an exemption from the construction site runoff control requirements for small MS4s located within the boundaries of a Phase I MS4 when the Phase I entity provides for the regulations and review of construction site operations.

Response 80:
Dischargers of regulated storm water runoff from construction sites must notify an MS4 operator if the discharge is into an MS4, as required in TPDES CGP TXR150000. Construction site operators that are permitted under the CGP, as well as municipal construction site operators that are permitted under this general permit, are required to submit the required documentation to an MS4 operator receiving their discharge. If the storm drain system is operated by a MUD, then the construction site operator must notify the MUD. The MUD, if regulated under this general permit, must develop and implement a construction site run off MCM, which may include specific requirements for discharges from construction

sites. A Phase I municipality may have additional requirements for construction activities that occur within its regulated area. If the MUD relies on a Phase I MS4 or other entity to perform some of the requirements related to the MCM, then the MUD must include that information in its SWMP.

Comment 81:
Universal City, HCEC, and TxDOT-Houston request revision of the introductory paragraph to Part II to more precisely indicate that only certain MS4s are regulated under the permit. HCEC added that the change will also indicate that permit coverage is only available for those MS4 operators meeting the criteria. The commenters suggest the following language: "This general permit provides authorization for storm water and certain non-storm water discharges from portions of small municipal separate storm sewer systems (MS4) located inside urbanized areas, or designated small MS4's, to surface water in the state."

Response 81:
TCEQ declines to revise the permit language because the information in Part II.A.1. and A.2 following the introductory paragraph adequately states which MS4s are required to obtain permit coverage.

Comment 82:
HCFCD comments that the language in Part II appears to address only small MS4s that discharge into surface water in the state, and appears to exclude MS4s that discharge into another MS4, such as a Phase I (large or medium) MS4 or another small MS4. HCFCD recommends revising the permit for consistency with discharge permits for Phase I MS4s and to include a provision requiring notification to the MS4 receiving the discharge from an adjacent regulated small MS4.

Response 82:
If an MS4 located within an urbanized area or designated by TCEQ discharges directly into surface water in the state or indirectly through another MS4 conveyance, then permit coverage is required. TCEQ declines to add a requirement to notify an adjacent MS4 because the permit includes a comprehensive public participation program that ensures any adjacent MS4s will have an opportunity to review the application and provide public comments.

Comment 83:
TCCOS and Mathews & Freeland recommend revising the permit to provide authorization for all discharges from regulated MS4s. TCCOS and Mathews & Freeland believe this is appropriate because of

the open nature of these municipal systems and because the permit seeks to control the quality of all discharges. TCCOS and Mathews & Freeland comment that because TCEQ has failed to authorize these discharges, operators of these small MS4s are in the untenable position of discharging these flows without the legal protection of a permit as required by the CWA and TWC. TCCOS and Mathews & Freeland request revising the opening paragraph of Part II. as follows: "This general permit provides authorization for discharges from small municipal separate storm sewer systems (MS4) to surface water in the state. The permit contains requirements applicable to all MS4s that are eligible for coverage under this general permit."

Response 83:
Issuing this permit implements federal storm water permit requirements in the State of Texas and would not affect the requirements for other dischargers to an MS4 to obtain permit coverage. TWC, §26.121 prohibits the discharge of certain wastes except as authorized by a rule, permit, or order issued by the commission. The minimum responsibility of the MS4 operator regarding illicit discharges to their system is to comply with the SWMP requirements of this permit to identify and eliminate illicit discharges to their MS4.

Comment 84:
NCTRSW notes that "small MS4" and "MS4" are used interchangeably and requests that "small MS4" be used throughout the permit for consistency.

Response 84:
The definition for "MS4 operator" was revised to clarify that where the permit refers to "MS4 operator," it is referring to an operator of a small MS4 regulated by the permit. Therefore, the term "MS4 operator" was retained in the permit language. Where the term "small MS4 operator" occurred it was revised to "MS4 operator" because, by definition in the permit, this term is referring to a small MS4 operator.

Small MS4s Eligible for Authorization by General Permit

Comment 85:
TxDOT comments that in the preamble to the federal Phase II rules (64 FR 68749), EPA states that "state DOTs that are already regulated under Phase I are not required to comply with Phase II." TxDOT requests that TCEQ consider allowing TxDOT districts with existing Phase I permits the option of incorporating the Phase II areas into their existing Phase I permits. TxDOT notes that this would

eliminate duplicate permits for the same general area coverage under existing Phase I permits by the same TxDOT district.

Response 85:
Existing Phase I MS4s in Texas currently operate under individual NPDES or TPDES permits. The MS4 operators regulated under an individual permit may include Phase II areas in an individual permit by submitting a permit application for a major amendment to the existing permit. Adding previously unregulated areas to an individual TPDES permit is considered a substantive change; therefore, a major amendment application is required.

MS4s Located in an Urbanized Area

Comment 86:
TCCOS, Mathews & Freeland, Farmers Branch, Tarrant County, Cleburne, V&E, NCTCOG, Harris County, Freese & Nichols, Dodson, and TAOC request the permit clarify that when an MS4 is partially located within an urbanized area, only the portion within the urbanized area is subject to regulation.

Response 86:
Only the portion of a small MS4 located within the boundaries of urbanized areas are regulated under the Phase II regulations. For example, if a county operates a small MS4 that serves the whole county, but only one half of the MS4 falls within an urbanized area, then the county must obtain permit coverage only for the portion of the MS4 within the urbanized area. Part III of the fact sheet and Part II.A. of the permit describe the requirements for this situation; therefore, no additional changes were made. TCEQ also revised the permit (see Parts III.A.7., first paragraph of Part VI, and Part VI.A.) to indicate that MS4 operators could implement the optional seventh minimum control measure, related to municipal construction activities, for activities that are located outside of the regulated area, provided that the MS4 operator also implements all other MCMs in those additional areas.

Comment 87:
TCCOS and Mathews & Freeland comment that the provision requiring an MS4 that is fully or partially located within an urbanized area to obtain permit authorization is a statement of general applicability that implements or prescribes law or policy. Therefore, it is a rule that must be adopted using the full rulemaking procedures set out in the Texas Administrative Procedure Act. TCCOS and Mathews & Freeland state that this is a statement of what entities must obtain permit coverage, not a statement of

what entities are eligible for coverage. TCEQ should determine what MS4s are required to obtain a permit using full rulemaking procedures to allow for public input.

Response 87:
The requirement regarding what small MS4s are regulated was subject to TCEQ rulemaking when the federal rules were adopted by reference in 30 TAC §281.25. One of the rules adopted was 40 C.F.R. §122.32(a)(1), which states that a small MS4 is regulated if the small MS4 is "located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census."

Designated MS4s and Part II.G. - Designation Criteria

Comment 88:
TCCOS and Mathews & Freeland recommend "that TCEQ use the same criteria and process as used for triggering the development of a water pollution control and abatement plan under TWC §26.177." TCCOS and Mathews & Freeland request revising the permit language in this part to state the following: "The Executive Director may designate additional small MS4 operators as being required to submit applications for authorization to discharge storm water only pursuant to Subchapter B of 30 TAC Chapter 216 (relating to Municipal Water Pollution Control and Abatement)." Cleburne recommends designation criteria that is the same as the criteria triggering the development of a water pollution control and abatement plan under TWC, §26.177 and 30 TAC §216.26. Cleburne suggests the following triggering language: "Any city required to submit a Water Pollution Control and Abatement Program pursuant to 30 TAC §216.26(f)(3) shall be required to submit an application for a TPDES permit for its municipal separate storm sewer system within 180 days after notice of the Commission's action." Cleburne comments that Texas law envisions that municipalities can be forced to regulate the activities of third persons that add pollutants to storm water (such as required by the EPA's Phase II rules) only in the manner specified in TWC, §26.177. The statute, as fleshed out by the rule, sets out the criteria and the procedures used by TCEQ to require municipalities to adopt a program under TWC, §26.177. Cleburne believes that the use of TWC, §26.177 does not appear inconsistent with the requirements of 40 C.F.R. §122.35(b). Cleburne states that if TCEQ chooses to ignore the already legislated designation criteria of TWC, §26.177, then Cleburne suggests the following modifications or clarifications to the language:

The Executive Director may designate any small MS4 operator with a population greater than 10,000 and a population density of 1,000 people per square mile or greater as being required to submit an application for authorization to discharge storm water from the system. Following designation and

notification, operators of the small MS4s must obtain authorization under an individual TPDES storm water permit within 180 days. The designation of a small MS4 must occur following a finding that controls of MS4 discharges that do not have an agricultural exemption or coverage under another individual, MSGP, or Construction permit are necessary to protect water quality with consideration for the following factors: 1. Controls for MS4 discharges are determined as necessary for source water protection of public drinking water resources based on the results of source water assessments by TCEQ. 2. Controls for MS4 discharges are necessary to protect sea grass areas of Texas bays as delineated by the Texas Parks & Wildlife Department. 3. Controls for MS4 discharges are necessary to protect receiving waters designated as having an exceptional aquatic life use. 4. Controls are required for pollutants of concern shown to be present in MS4 discharges to a receiving water listed on the Clean Water Act Section 303(d) list based on an approved total maximum daily loading plan.

Response 88:

TCEQ disagrees that TWC, §26.177 as implemented in 30 TAC Chapter 216 is a substitute for developing designation criteria and procedures prescribed in EPA's Phase II storm water rules. The preamble to the adoption of Chapter 216 states that the rules do not apply to those entities covered under the Phase I and Phase II storm water programs, which include "designated" small MS4s. The preamble states that discharges covered by the Chapter 216 rules "address non-permitted sources of water pollution." It further states that NPDES permits and Phase I or Phase II storm water permits "seek to address permitted sources and therefore, would not be duplicated by the §26.177 program" and that the program "seeks to address pollution not covered by a permitting program." (24 TexReg 1622, 1625 (1999)). The final version of Chapter 216 adopted the phrase "pollution attributable to non-permitted sources" to refer to those sources covered by §26.177 and to distinguish them from NPDES and Phase I and Phase II storm water permits, which it specifically notes seek "to address permitted sources." *Id.* at 1626.

Comment 89:

Russell Moorman and Carter & Burgess state that Part II.A.2. does not identify how TCEQ will identify designation criteria as required by 40 C.F.R. §122.35, nor how TCEQ will apply such criteria. Russell Moorman notes that the fact sheet outlines the specific criteria, but that the criteria was not established through a rulemaking process pursuant to Texas Government Code, Chapter 2001. Russell Moorman states that a requirement of general applicability, such as the establishment of designation criteria to identify small MS4s who will be required to obtain permit coverage, can only be obtained through the Chapter 2001 rulemaking process. Russell Moorman states that it is inappropriate for TCEQ to adopt

designation criteria through the general permit or in the fact sheet for the permit. Carter & Burgess comments that the federal references at 40 CFR §122.32(a)(2) and 40 CFR §122.26(a)(1)(v) do not actually identify the evaluation criteria to use, rather that 40 CFR §122.32(a)(2) states that a small MS4 can be regulated if it is designated by the permitting authority. Carter & Burgess further notes that 40 CFR §122.26(a)(1)(v) states that certain discharges will be regulated if the discharge contributes to a violation of water quality standards or is a significant contributor of pollutants to waters of the U.S. Carter & Burgess comments that these sections do not address how TCEQ will actually set designation criteria or identify MS4s that will be regulated pursuant to designation criteria. Mathews & Freeland comments that TCEQ's attempt to specify EPA rules as standards is misguided because EPA's rules do not specify any standards or procedures TCEQ could adopt by reference. Mathews & Freeland notes that under EPA's rules, TCEQ has a specific obligation to develop a process, as well as criteria to evaluate whether a storm water discharge results or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

Response 89:

TCEQ has the authority to require permitting for any discharge into or adjacent to water in the state that in itself or in conjunction with any other discharge or activity that causes, continues to cause, or will cause pollution of any water in the state (TWC, §26.121). Under TWC, §5.122, a party affected by a permitting decision by the executive director may appeal the decision to the commission. So, the regulatory framework is already in place for TCEQ to regulate a small MS4 that falls outside an urbanized area and who discharges into or adjacent to water in the state with or without any specific designation criteria being specified by TCEQ rules. 40 C.F.R. §122.32(a)(2), which was adopted by reference in 30 TAC §281.25, states that a small MS4 may be regulated if "{y}ou are designated by the TPDES permitting authority . . .." To meet the requirement in §122.32(a)(2), TCEQ developed designation criteria to apply to small MS4s that are not located in urbanized areas and where it was determined that controls were necessary to protect water quality. TCEQ applied the criteria to small MS4s located outside of urbanized areas and determined that no additional small MS4s were "designated" at this time. The criteria used for making a determination whether TCEQ would designate any additional MS4s were:

1. Whether controls for discharges were determined to be necessary for source water protection of public drinking water resources based on the results of source water assessments by TCEQ;

2. Whether controls for discharges were necessary to protect sea grass areas of Texas bays as delineated by the Texas Parks and Wildlife Department;

3. Whether controls for discharges were necessary to protect receiving waters designated as having an exceptional aquatic life use;

4. Whether controls are required for pollutants of concern expected to be present in discharges to a receiving water listed on CWA, §303(d) list based on an approved TMDL plan;

5. If requested by a regulated MS4 operator, that discharges from an adjacent small MS4 were determined by TCEQ to be significant contributors of pollutants to the regulated MS4;

6. Additional factors relative to the environmental sensitivity of receiving watersheds.

EPA did not specify what criteria must be used nor that the criteria be included in the permit. EPA specified only that criteria be developed "to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts." (40 C.F.R. §123.35(b)(1)(i)).

Therefore, TCEQ decided not to include specific designation criteria in the permit language. TCEQ evaluated those small MS4s that have a population of at least 10,000 and that are located outside of an urbanized area, and did not designate any additional MS4s based on the results of that evaluation.

Comment 90:
Carter & Burgess asks whether the "portions of the MS4 that are located within the urbanized area..." applies to only the geographic area or to outfalls receiving drainage from those areas. Carter & Burgess notes that an MS4 outfall located within an urbanized area may receive most of its drainage from an area that is not within the urbanized area; or an MS4 outfall could be located outside of an urbanized area and receive drainage from the urbanized area.

Response 90:
The permit regulates those portions of an MS4 that are located within an urbanized area or are otherwise designated by TCEQ. The requirements of the SWMP, including mapping all outfalls, only refer to areas

located within an urbanized area. Therefore, it is possible that there are outfalls receiving large discharges that do not require mapping and inclusion in the SWMP. However, the elements of the SWMP, including all MCMs, must be implemented for the portion of the MS4 that is located within an urbanized area. At this time, TCEQ has not designated any additional areas for regulation under this permit.

Comment 91:
Cleburne asks if source water assessments currently evaluate storm water runoff from non-agricultural, non-industrial areas to determine if storm water is affecting the drinking water resource. If not, Cleburne believes TCEQ should require these evaluations before designating an MS4 under the justification of protecting public drinking water resources.

Response 91:
Source water assessments do not currently include consideration for storm water discharges. However, before the executive director would designate an MS4 under this criteria, an assessment would be conducted and the results would have to indicate that discharges from the MS4 are contributing to a violation of a water quality standard or is a significant contributor of pollutants in a public drinking water resource to the extent that controls on that discharge are necessary to support and protect that resource.

Comment 92:
Cleburne asks if sea grass areas and exceptional aquatic life use is defined and protected under other federal or state law. Cleburne asks TCEQ to explain how these determinations are made and where they may find information regarding the areas that have been designated. Cleburne states that if "these areas/uses have no protected status then much more information should be included so that MS4 operators clearly understand what information is used in delineating these areas, how determinations will be made on whether MS4 discharges need control, what potential pollutants of concern from an MS4 could cause an MS4 to be designated, and how the MS4 operator can comply with protection of these resources."

Response 92:
Exceptional aquatic life use is a designated use for certain surface waters in Texas that meet the definition in 30 TAC Chapter 307, Texas Surface Water Quality Standards. Discharges authorized under TCEQ and TPDES permits to exceptional aquatic life use designated waters must contain controls and limitations such that this use is maintained and protected. In the proposed 2000 revisions to the Texas Surface Water Quality Standards, TCEQ proposed "sea grass propagation" as a basic use that must be maintained. This

revision of the Texas Surface Water Quality Standards was adopted by TCEQ on July 26, 2000; however, portions of the rule are still under review by EPA and FWS. The portion of the rules that was approved includes the definition of "sea grass propagation" as a basic use, but 30 TAC §307.7(b)(5), which relates to the protection of additional uses (including sea grass propagation) has not been approved. The U.S. Army Corps of Engineers, under authority of CWA, §404, may also issue permits that protect sea grass areas. Provisions to protect sea grasses can be developed through the Coastal Zone Management Plan, authorized by the Coastal Zone Management Act of 1972, and administered at the federal level by the National Oceanographic and Atmospheric Administration. Texas Parks and Wildlife Department defines certain areas of Texas bays as "scientific areas" and has developed voluntary "no prop zones" to discourage the use of motorboats in areas that could cause damage to sea grasses. Before the executive director would designate an MS4 operator to require a storm water discharge permit under this criteria, the executive director would conduct an assessment and the results would have to indicate that discharges from the MS4 are contributing to a violation of a water quality standard or is a significant contributor of pollutants to this resource.

Comment 93:
Cleburne comments that TCEQ should have to demonstrate that the pollutant(s) of concern are present in MS4 storm water runoff to a §303(d) listed water body and that the runoff is not already under the control of another TPDES permit in order to designate the MS4.

Response 93:
Designation would only occur under this criterion following development of an approved TMDL. Development and implementation of the TMDL would include assessment of sources for the pollutant(s) of concern and also describe the controls necessary in order to restrict that particular pollutant(s) as necessary to attain and maintain the appropriate water quality standards. Designation of small MS4s could occur under this criteria if the TMDL identifies them as a source that requires controls in order to restore the quality of the receiving water.

Allowable Non-Storm Water Discharges

NOTE: This section of the general permit was inconsistently indexed with the rest of the permit. Letters (a) through (r) in the proposed permit should have been numbered 1 through 18. Therefore, this change was made to the permit and the comments that originally referred to a letter were changed to reference the

appropriate number. For example, a comment that referred to (e) was changed to match the new indexing number 5.

Comment 94:

TxDOT requests modifying the statement “The following incidental non-storm water sources may be discharged from the MS4 and are not required to be addressed in the MS4s Illicit Discharge Detection and . . .” to “may be discharged into and from the MS4" in the introductory paragraph to Part II.B. in order to establish what discharges are subject to the illicit discharge and detection MCM.

Response 94:

The permit does not authorize discharges into the MS4, but rather discharges from the MS4. However, the permit recognizes that there are non-storm water discharges combined within the system and allows the MS4 operator to discharge those non-storm water discharges without additional requirements, so long as they are not determined by the MS4 operator or the TCEQ to not be a significant contributor of pollutants to the MS4.

Comment 95:

Lloyd Gosselink requests revising the list of allowable non-storm water discharges to include those non-storm water discharges that are expressly allowed under the TPDES MSGP, TXR050000 as well as the TPDES CGP, TXR150000; and TxDOT requests revising the permit to include the same allowable non-storm water discharges as the CGP in order to avoid inconsistencies and conflicts. Lloyd Gosselink states that both the MSGP and the CGP are storm water discharge general permits that include a list of non-storm water discharges that may be included without additional authorization, and both Lloyd Gosselink and TxDOT state those permits include lists of non-storm water discharges that are included, such as fire hydrant flushings, water from the routine external washing of buildings (conducted without the use of detergents or other chemicals), water used to control dust, compressor condensate, and condensate that externally forms on steam lines. Lloyd Gosselink requests that the general permit include a provision that would allow “additional sources of non-storm water that may be listed in 40 C.F.R. §122.26(d)(2)(iv)(B)(1),” which would address any possible additions that are made to the federal rules.

Response 95:

TCEQ agrees that it is appropriate to include non-storm water discharges that are listed in TCEQ's MSGP and CGP, as well as those that are included in the federal rules at 40 C.F.R. §122.26(d)(2)(iv)(B)(1). The permit was revised to include the non-storm water discharges listed in the MSGP, TXR050000, the CGP,

TXR150000, and 40 C.F.R. §122.26(d)(2)(iv)(B)(1), on the list of discharges that a small MS4 is not required to address as illicit.

Comment 96:

Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston request adding fire hydrant flushing to the list of allowable non-storm water discharges, alongside "water line flushing" in Part II.B.1. Harris County adds that potable water flushed from lines is often hyperchlorinated, and notes that the flushed water is then discharged to a storm sewer system or other water in the state. Harris County states that acute toxicity in many aquatic animals can occur at concentrations of chlorine of 2.0 milligrams per liter (mg/l) or greater, and requests that the general permit restrict fire hydrant and water line flushings to those that are determined to contain less than 4.0 mg/l, similar to most small wastewater treatment plants. Fort Hood asks whether Part II.B.1., "water line flushing" includes the discharge of super-chlorinated water used for water line disinfection. If not, then Fort Hood requests revising the permit to include a standard that must be met to discharge this type of water. For example, Fort Hood indicated that the permit could require a chlorine residual of less than or equal to 4 parts per million (ppm) in order to allow for a discharge of this type of water into the MS4.

Grand Prairie comments that Part II.B.15. should not exclude test water from fire suppression systems, because doing so would place an undue burden on the community and the regulatory authority. Grand Prairie states that the Uniform Plumbing Code does not require that fire lines drain to a sanitary sewer drain, and that the resultant discharge would result in less than 25 gallons per year, making it infeasible to retrofit the existing systems (estimated cost of $5,000 per facility). Fort Hood also comments that test water from fire suppression systems was excluded, and asks whether those discharges could occur under Part II.B.3., related to discharges from potable water sources, since most tests of fire suppression deluge systems, fire pumps, and even fire trucks discharge potable water.

Response 96:

Because uncontaminated fire hydrant flushing is included in both the MSGP and the CGP, and discharges listed in those permits were added to the list in this permit, it is not necessary to specifically list fire hydrant flushing in this section. TCEQ recognizes that discharges containing chlorine, particularly at levels over 4.0 mg/l, may cause a water quality problem; however, no specific discharge limits were established. No discharge under this permit may cause or contribute to a violation of water quality standards and this provision is not meant to authorize the involuntary discharge of chlorinated water, e.g., from a broken water line. A regulated MS4 operator may need to establish controls to address the

discharge of potentially elevated levels of chlorine from these water sources. In addition, while the general permit does include discharges from water line and fire hydrant flushing, it does not include hyperchlorinated water, unless the water is first dechlorinated. Completely dechlorinated water is generally considered to contain less than 0.1 mg/l of chlorine. In response to the comments, the permit was revised to specify that hyperchlorinated water must be dechlorinated prior to discharge.

Comment 97:
DAFB comments that the term "rising ground waters" used in Part II.B.5. is open to individual interpretations and requests a definition of this term.

Response 97:
The term would generally refer to the upward movement of the water table resulting from recharge to an elevation that would potentially contribute to the flow from the MS4. TCEQ decided not to add a definition of "rising ground waters" to the permit.

Comment 98:
Harris County, Houston, Missouri City, Carter & Burgess, and HCFCD comment that the inclusion of "uncontaminated ground water infiltration" in Part II.B.6. appears to conflict with the definition of "ground water infiltration" and notes that in earlier comments they suggested a revision to the definition that would correct the conflict.

Response 98:
As noted in an earlier comment, the definition of "ground water infiltration" was revised in response to comments to state: "For the purposes of this permit, groundwater that enters a municipal separate storm sewer system (including sewer service connections and foundation drains) through such means as defective pipes, pipe joints, connections, or manholes." Therefore, additional changes are not required to this definition.

Comment 99:
NCTCOG requests clarification whether it is the intent of TCEQ to require the prohibition of individual residential car washing under the permit listed in Part II.B.11. NCTCOG notes that the only mention of an individual non-storm water discharge in the NPDES draft general permit is "individual residential car washing," which is included in the list of allowable non-storm water discharges. NCTCOG requests that

the permit include a specific provision prohibiting any individual non-storm water discharge determined to contribute significant amounts of pollutants to the MS4.

Response 99:
Contributions to the permitted MS4 resulting from residential vehicle washing are allowable and are included in the list of allowable non-storm water discharges in Part II.B. of the permit. The MS4 operator would be required to prohibit this contribution to the storm sewer system only if the MS4 operator determines it is a significant source of pollutants to the permitted MS4.

Comment 100:
DAFB requests a definition of the term "dechlorinated" as used in Part II.B.13., referring to "dechlorinated swimming pool discharges." DAFB asks what concentration of chlorine is required in order to achieve dechlorination and if a technology-based standard for treatment is used, DAFB asks what technology is appropriate. GCHD comments that many municipalities forbid dechlorinated swimming pool discharges by local ordinance and testing is required for enforcement. Fort Hood recommends that the permit include a standard for chlorine residual, such as a maximum of 4 ppm, rather than require total dechlorination of all swimming pool discharges.

Response 100:
Water is generally considered dechlorinated if it contains less than 0.1 mg/l of chlorine. It is possible to measure this level of concentration with relatively inexpensive test kits and it is commonly included as the standard in TPDES wastewater permits for discharges of dechlorinated effluent from municipal treatment works. This provision of the permit would allow dechlorinated swimming pool discharges to occur and not require the MS4 to address the activity in the illicit discharge and detection MCM of the SWMP, provided that the MS4 determines it is not a significant source of pollutants. However, the MS4 may also develop requirements or ordinances that forbid swimming pool discharges to the MS4. For example, the MS4 could require that swimming pool water register "non-detect" for chlorine utilizing a common pool chemical test kit or that the water must be held a minimum of 48 hours prior to discharge. TCEQ declines to add chlorine residual discharge limits to the permit.

Comment 101:
DAFB requests a definition of "swimming pool" as used in Part II.B.13. and wants to know whether the term include children's wading pools.

Response 101:

TCEQ declines to add a definition for "swimming pool," and notes that for purposes of this permit, the term "swimming pool" may include a pool primarily used for wading.

Comment 102:

Carroll & Blackman comments that Part II.B.11. should include charity vehicle washing, which is allowed under Phase I MS4 permits. Fort Hood asks whether the permit allows the discharge of wash water from charity, fund raising, or other organized car washing events if they are reviewed by the MS4 operator and deemed an insignificant source of pollutants into the MS4. Dodson asks whether charity car washes at local grocery stores are considered an illicit non-storm water discharge.

Response 102:

TCEQ recognizes that some Phase I MS4 permits may include charity car washes in the list of non-storm water discharges that a Phase I MS4 operator may not have to consider as illicit. However, charity car washes are not specifically listed in the federal regulations or in existing storm water general permits, and TCEQ declines to revise the list to include such discharges. The example of charity car wash activities might be included in this category and then listed under Part III.A.3.(b), where the MS4 operator is able to identify and require controls that are protective of receiving water quality. However, based on local water quality concerns, this also might be an activity that the MS4 operator would either encourage or require to occur with the cooperative assistance of local commercial car wash enterprises where the wastes are routed to a treatment works. Charity car washes are not included in the list of non-storm water discharges; therefore, the MS4 operator would need to determine whether it could be included under item (r) related to similar discharges and then listed and considered under Part III.A.2.(b).

Comment 103:

Harris County, Houston, Missouri City, HCFCD, HCEC, and TxDOT-Houston comment that an earlier draft permit contained the following item, which was removed in the current version: "(n) {14} pavement and exterior building wash water conducted without the use of detergents or other chemicals." The commenters request adding this section back to the permit because this category is listed in Part VI.B.3.

Response 103:

Pavement and exterior building wash water was removed from the original draft permit because they are not specifically listed in the federal rules as a non-storm water discharge that do not require consideration as an illicit discharge. However, since the non-storm water lists from the TPDES CGP and MSGP are

now incorporated into the permit, certain pavement and other wash water are included in Part V.B.3. for consistency with the other storm water general permits. Accordingly, no additional revisions were made to the Part II.B. of the permit.

Comment 104:
Fort Hood requests clarification of the term "street wash water" and specifically asks whether the term applies only to street sweepers that use water, or to any kind of street, sidewalk, or parking lot washing. Fort Hood also asks whether the term includes other methods of washing, such as pressure washing or using a potable water hose. Grapevine notes that it supported the changes to Part II.B.14., and states that the addition of "street wash water" will provide for more effective and efficient routine maintenance and cleanup of street surfaces.

Response 104:
Street wash water applies to the use of water to rinse off streets, and may also include residual water that is not vacuumed into a street sweeper. As discussed in previous responses, the permit was revised to include other wash waters that are listed in the MSGP and the CGP; therefore, other pavement wash waters may also be discharged under this provision. Pressure washing could be included as an authorized non-storm water discharge in accordance with Part II.B.18., unless it is determined to contribute significant levels of pollutants to the MS4.

Comment 105:
GCHD comments that pavement washing at gas stations, for example, is a substantial source of pollutants to the MS4 and MS4 operators are responsible for determining these sources and controlling the discharge of pollutants to their MS4. GCHD comments that the permit should address these sources individually and not cover them under a blanket category of pavement washing.

Response 105:
The permit allows certain pavement washing to occur if it is conducted without the use of detergents and other chemicals. This is also allowed in the MSGP and the CGP. If an MS4 operator determines that pavement washing activities at gas stations are a significant contributor of pollutants, then the MS4 operator should address pavement washing when developing their SWMP and, to the extent possible, through local ordinances or other methods to control those activities. Conversely, the permit does not require an MS4 operator to address an activity as an illicit discharge and detection control measure if the MS4 operator determines it is not a significant contributor of pollutants.

Comment 106:

Part II.B.15. states that fire fighting water does not include washing of trucks. Grand Prairie states that its fire stations were built in the 1970s, and are not equipped with wash bays, which would cost approximately $250,000 each. Grand Prairie states that it does not have the option to wash the trucks in grassy areas due to weight, and that it cannot move the trucks to another location for washing due to safety concerns with having the trucks unavailable for emergencies. Fort Hood comments that most fire stations do not have a vehicle washing facility with a grit trap or oil-water separator that drains to the sanitary sewer system and adds that it may take vehicles out of their districts for vehicle maintenance, which would increase response time. Fort Hood suggests allowing the discharge of water from the external rinsing of trucks, using potable water only, with no detergents or cleaners. Fort Hood agrees that cleaning heavily soiled trucks should be done at an appropriate facility permitted to discharge wash water.

Response 106:

The only vehicle washing water that is specifically included in the federal storm water rules related to non-storm water discharges is individual residential vehicle washing. The only wastewater related to fire protection activities included in the federal MS4 rules are discharges related to actual fire fighting activities. TCEQ declines to revise the list to include truck wash water. However, based on local water quality concerns, washing fire trucks may be an activity that the MS4 operator determines is not a contributor of significant pollutants based on the nature of the discharge being similar to those on the list, or based on controls that are placed on the discharge to ensure that it is protective of receiving water quality.

Comment 107:

Fort Hood asks whether runoff from fire fighting training activities that only use potable water, which are excluded under Part II.B.18, are allowed as a discharge from potable water sources under Part II.B.3. If the discharges are not allowed, then Fort Hood requests guidance regarding how to handle the water and notes that fire fighting training could be a high volume activity that is not economically feasible to dispose of in any other way than a direct discharge.

Response 107:

The permit does not authorize runoff from fire fighting training activities as an incidental non-storm water discharge. Where these activities occur without the use of chemicals, an MS4 may evaluate the discharge and determine that it qualifies as an incidental non-storm water discharge under Part II.B.18. If any chemicals are included in the fire training activities or if the MS4 operator has not identified runoff from

fire training activities under Part II.B.18., then the water must be disposed in a sanitary sewer system or other authorized means.

Comment 108:
Regarding Part II.B.15., Fort Hood comments that National Fire Protection Agency guidelines require quarterly testing of foam systems on vehicles, plus requiring testing every ten years on fixed fire suppression systems on vehicles that use foam. Fort Hood asks whether TCEQ expects MS4 operators to collect and dispose of this water (which contains foam additives such as Aqeuous Fire Fighting Foam, or AFFF) and asks about the proper disposal method if such discharges are not allowed. Fort Hood states that publically owned treatment works may not accept AFFF into their systems because of potential foaming or possible toxicity to microorganisms in their wastewater treatment facilities.

Response 108:
An MS4 operator may not discharge a non-storm water that contains chemicals under this provision. If the operator of a sanitary sewer system will not accept this waste, then the discharger must insure proper disposal consistent with solid waste disposal regulations.

Comment 109:
Group 1 requests that TCEQ add an item Part II.B.16. to the list of allowable non-storm water discharges that reads: "Other discharges as determined by the permittee to not contribute significant pollutants to the MS4 or waters of the United States." Group 1 also comments that this is consistent with Phase I individual MS4 permits and allows flexibility for MS4s to determine additional non-storm water sources that do not represent a contribution of pollutants to the system. TxDOT requests adding "other similar occasional incidental non-storm water discharges" to the list of acceptable discharges in order to agree with Part III.A.3(c) of this permit and to expand the language in Part II.B.14. to include not only pavement and exterior building wash water, but also "other impervious surfaces." Harris County requests the addition of a new subsection for "noncommercial car washing" to allow non-storm water discharges related to fund-raising car washes in small MS4s.

Response 109:
The allowable non-storm water discharges listed in this permit are consistent with 40 C.F.R. §122.34(b)(3)(iii). The only vehicle washing water that is specifically included in the federal storm water rules related to non-storm water discharges is individual residential vehicle washing. As discussed in a preceding response, the language regarding non-storm water discharges was revised to include non-storm

water discharges that are listed in the TPDES MSGP, TXR050000, and the TPDES CGP, TXR150000. TCEQ declines to add additional items to the list of allowable storm water discharges because this would potentially allow discharges that have an adverse impact on water quality. Part III.A.3.c. of the permit, Incidental Non-Storm Water Discharges, allows the MS4 operator to develop a list of occasional incidental non-storm water discharges that are not addressed as illicit discharges.

In developing an incidental non-storm water list, the MS4 operator will determine that the nature of the listed discharges are not reasonably expected to be a significant source of pollutants due to the nature of the discharge or the conditions that are established for allowing the discharges. Alternatively, the MS4 operator may determine that the discharge is not a significant source of contaminants if certain conditions are met. In the latter case, the requirements for the activity are included in the SWMP. For example, the MS4 operator could determine that a certain activity is not a significant source of pollutants if the use of detergents is prohibited. The MS4 operator would then list the activity and requirements for its use in their SWMP as an occasional incidental non-storm water discharge that is not addressed as an illicit discharge.

Comment 110:
Carter & Burgess comments that the permit does not define "similar occasional non-storm water discharges," and Fort Hood requests a definition or further explanation of the term. Grapevine notes its support of the changes to Part II.B.16. and states that the changes will allow for more effective local and state control in addressing specific discharges, because this section will now allow entities to respond to unforseen issues.

Response 110:
The list of discharges in Part II.B.18. does not include discharges that contain detergents, soaps, or other chemicals (except as typical of residential vehicle washing), discharges that are hyperchlorinated, and discharges that contain elevated levels of pollutants, including temperature. The purpose of this list is to allow the discharge into the MS4 of relatively common discharges with low levels of pollutants without the MS4 operator addressing them in an illicit discharge program.

Comment 111:
Lubbock comments that agricultural storm water runoff is not included in the list of allowable non-storm water discharges.

Response 111:
Agricultural storm water discharges are exempted by the CWA from NPDES permitting. Therefore, those discharges are not considered illicit discharges and it was not necessary to regulate or authorize agricultural storm water discharges under this permit.

Limitations on Permit Coverage

Comment 112:
Lloyd Gosselink comments that the permit does not provide a release of liability for spills or events that are beyond the control of a regulated MS4, including spills caused by third parties, intentional spills to prevent the loss of life, personal injury or severe property damage, and any spills attributable to *force majeure*. Lloyd Gosselink notes that a *force majeure* defense is provided for in TCEQ rules at 30 TAC §70.7, when an event occurs that is otherwise a violation of a permit if the event was caused solely by an act of God, war, strike, riot, or other catastrophe. Lloyd Gosselink requests that the permit include language similar to the language that is included in Phase I individual MS4 permits, and also requests that the general permit specify that MS4 operators are not liable for spills caused by third parties or intentional spills to prevent the loss of life, personal injury, or severe property damage.

Response 112:
In response to the comment, a new Part II.C.9. was added to the permit. It reads:

9. Other

Nothing in Part II. of the general permit is intended to negate any persons ability to assert the force majeure (act of God, war, strike, riot, or other catastrophe) defenses found in 30 TAC §70.7.

This permit does not transfer liability for the act of discharging without, or in violation of, a NPDES or a TPDES permit from the operator of the discharge to the permittee(s).

Discharges Authorized by Another TPDES Permit

Comment 113:
NCTCOG and Farmers Branch comment that the "NPDES permit requires that an MS4 covered by an individual permit provide the total square miles of the system if seeking coverage under the general

permit and this permit does not." NCTCOG and Farmers Branch want to know whether that difference is intentional.

Response 113:
The federal storm water rules adopted by TCEQ in 30 TAC Chapter 281 require the operator of a regulated small MS4 who is applying for an individual permit and "wishes to implement a program under §122.34" to provide an estimate of the total square mileage served by the MS4 (40 C.F.R. §122.33(b)(2)(i)). Those small MS4 operators applying for coverage under a general permit are not required to estimate the square mileage of their MS4 (40 C.F.R. §122.33(b)(1)). TCEQ is following the federal requirements and is not requiring this information in NOIs for coverage under this permit. However, if applying for an individual permit, an MS4 operator is required to provide the square mileage of its MS4.

Comment 114:
Harris County requests that TCEQ provide examples of discharges that are normally authorized under another TPDES permit that this permit may authorize. As an example, Harris County asks if wastewater treatment plants can be authorized. Harris County also asks how any applicable effluent limitations or other permit provisions are incorporated to ensure that the discharges are protective of human health and the environment. Harris County recommends removing the broad language of this provision and revising the general permit to include more specific language regarding what TPDES permits can be "rolled" into this MS4 permit.

Response 114:
This permit authorizes discharges from certain small MS4s and includes a list of certain non-storm water discharges that are not necessarily considered illicit. No discharge of any other wastewater or storm water other than those listed are authorized by this permit. This section of the general permit would allow the authorization of discharges from small MS4s that are authorized by another general permit (if one is available) or by an individual permit.

Discharges of Storm Water Mixed with Non-Storm Water

Comment 115:
Group 1, TCCOS, and Mathews & Freeland comment that the introduction of non-storm water to storm water runoff occurs in virtually every storm sewer collection system, but the permit language deems these

discharges as non-authorized discharges that are automatically violations of the CWA by the MS4 operator. The prohibition of illicit discharges is clearly identified within the SWMP requirements and it is clear that the MS4 operator has a legal responsibility to identify and eliminate these types of discharges to the MEP as a part of implementation of the SWMP. They request deletion of this paragraph in Part II.C.2.

Response 115:
The language of this section does not automatically place the MS4 operator in violation of the CWA. It is the non-storm water discharger who is responsible for compliance with the CWA, while the small MS4 operator is responsible for reducing pollutant discharge to the MEP.

Compliance with Water Quality Standards

Comment 116:
Carter & Burgess comments that there is no time frame in Part II.C.3. for revising the SWMP to comply with any future changes in the Texas Surface Water Quality Standards or future TMDLs.

Response 116:
TMDLs that require action by storm water dischargers will either contain information in the TMDL regarding a time line to revise the SWMP or TCEQ will initiate an amendment to the general permit or to an individual authorization to require additional controls. If the Texas Surface Water Quality Standards in 30 TAC Chapter 307 are revised, then TCEQ may amend this general permit if necessary to comply with any new provisions in the rule and any supporting implementation procedures.

Discharges to Water Quality Impaired Receiving Waters

Comment 117:
V&E requests revising the last sentence in Part II.C.4. to replace the word "constituents" with "pollutants." Carter & Burgess comments that this provision should refer to “constituents of concern” rather than just “constituents.”

Response 117:
A “constituent of concern” is the specific pollutant that may cause listing of a body of water on the CWA, §303(d) list because it does not meet applicable water quality standards. In response to the comments, the

first sentence of the second paragraph, the term “constituent(s)” was replaced with “constituent(s) of concern.”

Comment 118:

Lloyd Gosselink and Carter & Burgess request clarification regarding what types of discharges of constituents of concern to impaired waters are not authorized by the permit and ask whether the permit is referring to discharges of constituents of concern to impaired waters that begin after the effective date of the permit. TCCOS and Mathews & Freeland believe that TCEQ should either allow operators of small MS4s that discharge pollutants of concern to CWA, §303(d) listed segments to use the permit or clearly state that they are not eligible. TCCOS and Mathews & Freeland request deleting or modifying this provision to clearly identify the class of small MS4s that may not be eligible for coverage and include a requirement for these small MS4s to demonstrate that their selected BMPs are designed to control discharges of pollutants of concern. TCCOS and Mathews & Freeland recommend the use of the following language: “Operators of small MS4s that discharge constituent(s) of concern to impaired waters are not authorized by this permit unless the SWMP documents how discharges of pollutants of concern are controlled. Impaired waters are those that do not meet applicable water quality standard(s) and are listed on the CWA §303(d) list. Constituents of concern are those for which the water body is listed as impaired.”

Universal City, HCEC, and TxDOT-Houston comment that the permit does not authorize new discharges containing constituents of impairment to CWA, §303(d) listed waters. They comment that this provision inappropriately forces small MS4 operators that may discharge constituents of concern to impaired water bodies to apply for individual permit coverage to avoid an automatic violation provision. Universal City recommends including a provision in the general permit prior to the completion of a TMDL Implementation Plan, allowing new discharges to impaired water bodies, providing the SWMP acknowledges the impairment and outlines BMPs to address the pollutant(s). HCEC and TxDOT-Houston and Universal City added that the permit should include a stepped approach, or a compliance schedule, so that new discharges could be authorized if the operator’s SWMP addresses the impairment and discusses measures that will be taken to address the pollutant(s) of concern. HCEC, TxDOT-Houston, and Universal City added that following completion of a TMDL implementation plan, the provisions in the second paragraph are appropriate, as long as the operator is allowed 90 days to conform to the implementation plan requirements.

Universal City, Carter & Burgess, HCEC, and TxDOT-Houston comment that the second paragraph does not include a timeline for SWMP modification after completion of any future TMDLs. Universal City and TxDOT-Houston suggest allowing 90 days and HCEC suggests allowing 180 days to modify the SWMP to comply with the TMDL implementation plan. Universal City, HCEC, and TxDOT-Houston want to require MS4 operators discharging to waters with existing implementation plans to comply immediately. Travis County asks whether this provision would require Travis County to apply for and obtain an individual permit for any new MS4 discharges in the urbanized areas that drain to impaired waters in the area, such as Gilleland Creek, Onion Creek, Eanes Creek, Slaughter Creek, and Bull Creek.

Response 118:

40 C.F.R. §122.4(i) prohibits issuing a permit "to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." Existing discharges from small MS4s otherwise eligible for authorization under the conditions of the permit would not constitute a new source or a new discharger to a currently listed water body and therefore are eligible for coverage. When a TMDL is developed for a listed receiving water, existing sources may continue with discharge authorizations. New sources may be authorized if the discharge falls within the provisions of the approved TMDL and TMDL implementation plan for the listed receiving water. If the TMDL or implementation plan contains provisions or conditions specific to the discharges otherwise eligible for coverage under the permit, MS4s may then either include those provisions or conditions as a part of the SWMP and remain authorized under this permit or apply for authorization under an individual TPDES permit. A timeline was not added to the permit, but may be included in a TMDL and TMDL Implementation Plan.

Comment 119:

TCCOS, Mathews & Freeland, Lloyd Gosselink, Carter, Russell Moorman, and Carter & Burgess comment that the permit does not define "new sources" or "new discharges" and therefore makes the applicability of this provision unclear due to the ambiguity of the terms. Lloyd Gosselink and Russell Moorman note that the TAC does not contain a definition for "new discharges," but that 30 TAC §305.2(23) does define "new source" and, based on that definition, the term does not apply to storm water discharges. Lloyd Gosselink and Carter & Burgess further state that discharges from MS4s should not be considered either "new sources" or "new discharges" because storm water was discharging from these MS4s long before storm water permitting requirements existed. Lloyd Gosselink and Russell Moorman comment that, while the EPA has promulgated standards for multiple categories of sources, it has not promulgated standards pursuant to CWA, Chapter 306 for storm water discharges from MS4s, and

therefore, the term “new source,” as defined in 30 TAC Chapter 305, would not apply to storm water discharges from the small MS4s regulated under this general permit. Lloyd Gosselink requests that TCEQ clarify the applicability of this section to regulated small MS4s. TCCOS and Mathews & Freeland believe these terms would apply to discharges from new outfalls constructed during the permit term and may not authorize outfalls constructed after 1979. Carter & Burgess comments that the permit does not make clear what types of discharges of constituents of concern to impaired waters are not authorized by the permit, and asks whether the permit is referring to discharges of constituents of concern to impaired waters that begin after the effective date of the permit.

Response 119:

TCEQ rules at 30 TAC §305.2(22) and (23) define “new discharger” and “new source.” As discussed in the preceding response, existing discharges from small MS4s otherwise eligible for authorization under the conditions of the permit would not constitute a new source or a new discharger, and therefore are eligible for coverage under the general permit. The language in the permit regarding discharges to impaired waters is consistent with the procedures developed and conditionally approved by EPA to implement Texas Surface Water Quality Standards for discharges to impaired waters (2002 *Procedures to Implement the Texas Surface Water Quality Standards, Publication Number RG-194,* developed by the TCEQ Water Quality Division).

Comment 120:

Carroll & Blackman comments that there is confusion regarding how TMDL Implementation Plans and the MS4 general permit will work together, especially after an implementation plan is approved. Carroll & Blackman states that if a TMDL implementation plan indicates that storm water or non-point sources are contributing sources to the impairment and the approved TMDL implementation plan requires storm water sampling, will the requirement to sample storm water become a requirement of the SWMP or the Phase II MS4 general permit. Carroll & Blackman asks whether this sampling requirement would automatically become a permit condition, or would sampling remain only a TMDL implementation plan requirement. Carroll & Blackman also asks whether the sampling is a reportable activity under the general permit.

Response 120:

If a TMDL or TMDL implementation plan have specific sampling requirements for storm water covered by this permit, a discharger could retain coverage under this permit and meet the terms and conditions of the TMDL by incorporating the requirements into its SWMP. This would also include requirements to

sample discharges from the MS4 if that were a specific condition of the TMDL or TMDL implementation plan. A violation of the TMDL and implementation plan would then be considered a violation of the SWMP. It is also possible that TCEQ could determines that meeting the requirements of the TMDL or TMDL implementation plan would not be appropriately addressed under a general permit and require individual TPDES permit coverage. It is also possible that after allowing incorporation of the requirements into the SWMP continued violations by an MS4 operator of those requirements could trigger TCEQ to require the MS4 operator to apply for coverage under an individual TPDES permit.

Discharges to the Edwards Aquifer Recharge Zone

Comment 121:
Carroll & Blackman asks whether the requirement to include copies of the water pollution abatement plans (WPAPs) refer only to WPAPs owned or controlled by the MS4 operator, or does it refer to all WPAPs within the city's MS4 or urbanized area. Carroll & Blackman states that requiring the submission of all WPAPs would result in a significant amount of effort by the MS4 operator and would require TCEQ assistance in identifying all of the WPAPs within a regulated area.

Response 121:
The requirement to attach or reference the WPAP refers to any that are under the responsibility of the MS4 operator.

Discharges to the Edwards Aquifer Recharge Zone and Discharges to Specific Watersheds and Water Quality Areas

Comment 122:
TCCOS and Mathews & Freeland comment that it is unclear how the permit and the provisions of 30 TAC Chapters 213 and 311 interact. TCCOS and Mathews & Freeland believe that TCEQ should strive for clarity in the permit, particularly with regard to eligibility. TCCOS and Mathews & Freeland state that these separate water quality programs will be impaired if TCEQ adopts a general permit that does not expressly recognize their existence. TCCOS and Mathews & Freeland request the deletion of these provisions from the permit, or that TCEQ develop specific general permits for MS4s located in these regions that better address their unique requirements.

Response 122:

The requirements of 30 TAC Chapter 213 (relating to the Edwards Aquifer) and of 30 TAC Chapter 311 (relating to Watershed Protection) are separate from the provisions and requirements of this permit. However, because both rules regulate discharges that are common to operators of MS4s, they are referenced in the permit. Operators must review these regulations to determine if any restrictions or prohibitions would affect planned discharges. Additionally, programs established to comply with the storm water discharge requirements from 30 TAC Chapter 213 may be referenced in the SWMP of a small MS4 and utilized to satisfy certain requirements of this permit.

Comment 123:
Travis County asks whether discharges in the Edwards Aquifer Recharge Zone must meet both the requirements of the general permit as well as the requirements of 30 TAC Chapter 213.

Response 123:
The Edwards Aquifer Rules at 30 TAC Chapter 213 are state-only rules specific to TCEQ and are separate from TPDES permitting requirements. However, both the Edwards rules and TPDES permitting requirements must be met for discharges in the Edwards Aquifer Recharge Zone.

Obtaining Authorization

Comment 124:
V&E and Harris County request the opportunity to review and comment on the NOI for the MS4 general permit before the permit is issued.

Response 124:
The NOI form is not part of the permit and is not subject to public notice requirements and the formal comment period.

Application for Coverage

Comment 125:
NCTCOG and Farmers Branch ask if the SWMP is approved during the period of provisional authorization immediately after the NOI is submitted and whether implementation of the SWMP is compliance with the permit. Grapevine expressed concern over when the discharge authorization will begin for regulated MS4s and states that discharges may be considered unauthorized during the time

frame between submitting an NOI and TCEQ approval. Mathews & Freeland comment that it appears that operators of regulated small MS4s will not obtain coverage under the permit until after the applicant: 1) receives notice from TCEQ that the NOI and SWMP have been administratively and technically reviewed, and 2) the public participation requirements are complete.

Response 125:
To address a partial remand of the Phase II rules by the 9th Circuit Court of Appeals, in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), several changes were made to the permit, including TCEQ review of the SWMP. The 9th Circuit held that the SWMP should be reviewed by the permitting authority, so TCEQ is conducting a technical review of the NOI and SWMP, prior to authorizing a discharge under the permit. Therefore, the permit was revised to eliminate provisional authorization within a fixed time frame after the NOI is submitted. The permit establishes a deadline of 180 days to submit an NOI and SWMP, and authorization to discharge under the terms of the permit will begin when TCEQ provides written notification to the MS4 operator that the NOI and SWMP are approved.

During the NOI and SWMP review process, TCEQ may determine that revisions or additions are required. Because full implementation of the SWMP is expected within five years after the permit is issued, any required changes will likely be established as part of the five-year period. If the MS4 operator meets the deadlines required in the general permit, then enforcement actions are not anticipated. However, if the MS4 operator did not submit an NOI and SWMP within the specified time frame, if the SWMP lacks any of the required MCMs, or if the SWMP does not contain a reasonable schedule for full implementation, then it is possible that violations could be issued before TCEQ completes full review of the SWMP. Implementation of the SWMP is required upon receipt of written approval from TCEQ. In response to the comments, a sentence was added to the end of the first paragraph of Part II.D.3., which states: "Implementation of the SWMP is required immediately following receipt of written authorization from the TCEQ."

Comment 126:
Harris County, Houston, Missouri City, Carter & Burgess, and HCFCD comment that Part II.D.1. does not contain a time frame for TCEQ to conduct review of the application. Harris County, Houston, and Missouri City request revising the permit to state that, unless denied by the executive director within 60 days, an NOI and/or SWMP is considered acceptable and deemed approved by the commission. Carter & Burgess suggests a 60-day time frame for making the determination. Euless asks how long the administrative and technical review will take, and whether there will be any compliance requirements

during this time for the regulated MS4s. Harris County, Houston, Missouri City, and HCFCD make a similar comment with regards to Part II.D.12.(a) of the permit, and specifically request adding the following sentence to the general permit in Part II.D.12.(a): "The Executive Director has 60 days to review and respond to the applicant."

Response 126:
TCEQ declines to place an automatic approval deadline in the permit because the remand of a portion of the Phase II rules by the 9th Circuit in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) mandated that the permitting authority review the NOI and SWMP prior to authorization. TCEQ will strive to review and respond to applications within 60 days of receipt, provided there are no issues with the NOIs and SWMPs that require additional information from the regulated MS4s.

Comment 127:
Mathews & Freeland comment that the permit does not clearly indicate that TCEQ will be reviewing and determining if the SWMP submitted by the operator of the small MS4 meets the MEP standard and effectively prohibits non-storm water discharges. Mathews & Freeland notes that the 9th Circuit in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) held that the permitting authority must review all SWMPs and expressly determine whether the SWMP meets the permitting standards. The draft permit states that TCEQ will review both the NOI and the SWMP, but will only determine the "completeness" of the NOI and does not commit TCEQ to determine whether the SWMP also meets the permitting standards.

Response 127:
Part II.D.1. states that TCEQ will technically review the SWMP prior to authorizing discharges under the permit. The introductory paragraph of Part III added language in response to comments to more accurately reflect the requirements in the federal rules and now states that a regulated small MS4 must develop an SWMP "to reduce the discharge of pollutants from the MS4 to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act and the Texas Water Code." Since the permit explicitly requires the SWMP to meet the MEP standard, TCEQ authorization of the discharge after technical review constitutes a finding by TCEQ that the SWMP meets the MEP standard.

Comment 128:

V&E requests confirmation that an MS4 operator who operates multiple discontinuous (i.e., not interconnected) MS4s is required to submit only one NOI for MS4 general permit coverage and prepare only one SWMP that addresses these multiple MS4s.

Response 128:
The permit requires each MS4 operator within an urbanized area to submit a separate NOI. If an MS4 extends over more than one urbanized area, then the MS4 operator is required to submit only one NOI. For example, the operator of an MS4 associated with state highways and roads is the applicable district office of TxDOT. In this case, it is appropriate for each TxDOT district office to submit one NOI to TCEQ for each of the regulated portions of the MS4 located in the district.

Comment 129:
Carter & Burgess comments that item 2), in the middle of the second paragraph of Part II.D.1., should include "and SWMP" so that the item reads as follows: "2) determine the NOI and SWMP are incomplete and deny coverage . . .."

Response 129:
In response to the comment, item 2) in Part II.D.1 was revised as follows: "2) determine the NOI and/or SWMP are incomplete and deny coverage until a complete NOI and/or SWMP are submitted . . .."

Comment 130:
TxDOT requests that the permit include an address for submitting NOIs and that the permit specify whether to send the NOI to TCEQ's central or applicable regional office. TxDOT also notes that the permit does include similar information for the WPAPs associated with the Edwards Aquifer.

Response 130:
In response to the comment, the following sentence was added to Part II.D.1.: "The applicant must submit the original and one copy of the NOI and SWMP to the TCEQ Water Quality Division at the address specified on the NOI form."

WPAPs required by the Edwards Aquifer Protection Program may be either submitted with the NOI and SWMP or referenced in the SWMP. TCEQ recognizes that some information in the WPAP may be similar to the requirements of the SWMP, but the documents originate from different programs and both

must be developed if the MS4 is located in an area that is regulated under TCEQ's Edwards Aquifer rules at 30 TAC Chapter 213.

Comment 131:
NCTRSW and Grapevine note their support of the revised application deadline from 90 days to 180 days, and note that it will provide regulated small MS4s more time to comply with the added public notification requirements. Mathews & Freeland thinks the 180-day time frame is achievable for most regulated small MS4s and comments that TCEQ should provide additional assistance to regulated small MS4s if help is needed to achieve this deadline.

Response 131:
This change was made following the 2002 public notice period and receipt of EPA guidance regarding new public participation requirements for the Phase II MS4 program.

Comment 132:
Fort Hood asks whether this permit would apply to leased, residential areas within an urbanized area, where the storm drain system is operated and maintained by a partnership between a federal agency and a private business, and whether the entities are required to submit an NOI and SWMP.

Response 132:
In the case of shared operational control, all public entities with operational control over the storm sewer system must submit an NOI and SWMP. Because operators of MS4s must obtain coverage, there may be cases where a private entity that actually shares operational control or ownership of a small MS4 would also have to apply for separate coverage. In this case, it is expected that some or all of the SWMP will be identical to the other entity, and TCEQ encourages shared elements be utilized where possible.

Comment 133:
Mathews & Freeland note that an applicant must follow the public notice and availability requirements in the permit and that TCEQ lacks the authority to impose these requirements through a general permit. Mathews & Freeland state that such provisions may only be implemented by formal rulemaking and recommend deleting the introductory provision in Part II.D.1.

Response 133:

TCEQ disagrees that a general permit may not include public notice and availability provisions. The general permit rule provisions in 30 TAC Chapter 205 allow flexibility in what requirements may be included for coverage under a general permit. 30 TAC §205.4(a) states that a "qualified discharger may obtain authorization to operate under a general permit by complying with the general permit's conditions for gaining coverage." These conditions are presumed to include public notice and availability provisions at the discretion of TCEQ. For example, see the concentrated animal feeding operation general permit, TXG920000, issued in July 2004, which contains similar public notice and availability provisions for new and significantly expanding operations.

Application For Coverage and Storm Water Management Program (SWMP)

Comment 134:
Lloyd Gosselink and Carter & Burgess comment that the federal storm water rules do not require regulated small MS4s to submit their SWMP, and state that the requirement discussed in Part II.D.1. and II.D.3. of the general permit is more stringent and more burdensome to the regulated small MS4s. The commenters request revising the provision for consistency with the federal regulations at 40 C.F.R. §122.33(b)(1) that only require submitting an NOI and information on BMPs and measurable goals.

Response 134:
The requirement to submit the SWMP is consistent with the federal regulations. If seeking coverage under a general permit, 40 C.F.R. §122.33(b)(1) requires submitting an NOI "that includes the information on your best management practices and measurable goals required by §122.34(d)." The referenced section requires BMPs for each of the six MCMs, the measurable goals and milestones for each BMP, and identification of the person or persons responsible for developing and implementing the plan. These requirements are a general description of the SWMP. Finally, 40 C.F.R. §122.33(b)(1) concludes with the statement that the general permit will explain any other steps necessary to obtain permit authorization, and this permit requires that the actual SWMP be submitted in order to facilitate a detailed review of the program prior to approval of authorization under the permit. TCEQ elected to require the MS4 operator to submit the SWMP when the NOI is submitted. TCEQ recognizes MS4 operators will continue making revisions and additions throughout the permit term. These changes must be included in the required annual report and proposed according to the requirements of the permit.

Comment 135:

Carroll & Blackman requests that TCEQ provide information regarding how TCEQ will review and approve SWMPs.

Response 135:
TCEQ will perform an initial review on the information contained in the NOI form to determine receipt of all administrative information required on the NOI form. Following this administrative review, the application will be routed for technical review of the SWMP elements. TCEQ staff will review each MCM to determine compliance with the general permit. If TCEQ staff determines that all information is provided, then the application will be approved. If the SWMP lacks significant information in the SWMP, then TCEQ may deny authorization and require that the applicant submit additional information for review. Alternatively, TCEQ may determine that a specific element of an MCM must be revised, and TCEQ may approve the NOI with the added requirement to revise the SWMP. In response to the comment, the following language was added to the first paragraph of Part II.D.1. in order to clarify that TCEQ may approve the SWMP with changes: ". . . 3) approve the NOI and SWMP with revisions and/or provide a written description of the required revisions along with any compliance schedule(s), or 4) . . .."

Designated MS4s

Comment 136:
TCCOS and Mathews & Freeland comment that any designation of a small MS4 must provide the designee with the opportunity for a contested case hearing prior to designation. The permit assumes that the designation is final once a "written" notice is sent by TCEQ. TCCOS and Mathews & Freeland request modifying the language as follows: "Operators of MS4s described in Part II.A.2. must submit an NOI within 180 days of being notified in writing of a final decision of TCEQ regarding the need to obtain permit coverage."

Response 136:
A small MS4 operator who is designated by the executive director as requiring general permit coverage and wishes to contest that designation can file a motion to overturn and ask TCEQ's commissioners to set aside the executive director's designation. See 30 TAC §50.139.

Storm Water Management Program (SWMP)

Comment 137:

Group 1 comments that the schedule for implementation is an element of the SWMP that is fully described in Part III and requests deleting the following sentence in Part II.D.3.: "The SWMP must include a time line that demonstrates a schedule for implementation of the program throughout the permit term."

Response 137:
Part II of the permit describes the general permitting requirements, including a requirement to develop an SWMP according to the provisions of Part III. Part III of the permit is a detailed description of what must be contained in the SWMP and does not duplicate the requirements of Part II.D.3.

Comment 138:
Carter & Burgess asks whether the general permit regulates discharges to "surface waters in the State" or "Waters of the U.S." Carter & Burgess states that based on the definition of outfall, the permit appears to regulate discharges to "surface waters in the State," but that this section refers to "Waters of the U.S." and requests that TCEQ retain consistency throughout the permit. Lubbock comments that this permit is for discharges directly to "surface waters in the state," but that Part II.D.3. requires submitting an NOI and SWMP for discharges that will reach waters of the U.S.

Response 138:
The permit provides authorization for regulated discharges into surface water in the state. The permit requires the MS4 operator to develop an SWMP and other controls for discharges that reach waters of the United States. This requirement is consistent with the federal storm water regulations in 40 C.F.R. Part 122 and adopted by TCEQ in 30 TAC §281.25. Also, the definition for "outfall" was changed to reference "waters in the U.S.," because the SWMP must be implemented where discharges reach waters of the U.S., rather than water in the state.

Comment 139:
TxDOT requests revising the timeline to implement the SWMP from five years after the permit is issued to five years after the executive director has approved a small MS4's NOI. Otherwise, the MS4 operators will have to start implementing an SWMP before the NOI is approved and authorization is obtained.

Response 139:
Implementation of the SWMP is required when the NOI and SWMP are approved by TCEQ. TCEQ may require revisions to the SWMP, and will provide a compliance period, if necessary, to implement any

changes. 40 C.F.R. §122.34(a), excluding the guidance portion of that rule, was adopted by reference at 30 TAC §281.25(b)(5) and specifies that a permitting authority may provide up to five years from the date the permit is issued to develop and implement an SWMP.

Comment 140:
Lloyd Gosselink requests adding the following language to the permit in order to provide a process for amending the SWMP and BMPs adopted by regulated MS4s. Lloyd Gosselink states that the permit does not appear to allow MS4 operators a procedure for making formal amendments to the SWMP and the following language is more consistent with existing Phase I MS4 individual permits:

"Necessary changes replacing less effective or infeasible best management practices specifically identified in the SWMP, or changes to any provision of the SWMP itself, may be requested at any time. Unless denied in writing by TCEQ, the change shall be considered approved and may be implemented by the permittee 60 days from submittal of the request."

Response 140:
The original draft permit did not require a review of the SWMP so it was appropriate to only require updates to the annual report. However, because the permit now includes a technical review of the NOI and SWMP, the requirements related to SWMP updates was revised for consistency with the Phase I MS4 storm water permits. This is especially important where revisions are substantive and were not considered by TCEQ in the original approval of the NOI and SWMP. In response to the comment, the last sentence in the first paragraph of Part II.D.3. was deleted and the following language was added after the first paragraph to describe the requirements to implement changes to the SWMP. This language is similar to the language used in individual Phase I MS4 permits:

Changes may be made to the SWMP during the permit term. Changes that are made to the SWMP before the NOI is approved by the TCEQ must be submitted in a letter providing supplemental information to the NOI. Changes to the SWMP that are made after TCEQ approval of the NOI and SWMP may be made following written approval of the changes from the TCEQ, except that written approval is not required for the following changes:

(a) Adding components, controls, or requirements to the SWMP; or replacing a BMP with an equivalent BMP, may be made by the permittee at any time upon submittal of a notice of change (NOC) form to the address specified on the form.

(b) Replacing a less effective or infeasible BMP specifically identified in the SWMP with an alternate BMP may be requested at any time. Changes must be submitted on an NOC form to the address specified on the form. Unless denied in writing by TCEQ, the change shall be considered approved and may be implemented by the permittee 60 days from submitting the request. Such requests must include the following:

(i) an explanation of why the BMP was eliminated;

(ii) an explanation of the effectiveness of the replacement BMP; and

(iii) an explanation of why the replacement BMP is expected to achieve the goals of the replaced BMP.

The fact sheet was also revised to include a discussion of changes to the SWMP (see Parts IV.C.2.(c)(2) and VIII.E. of the fact sheet). As indicated in the revised language, certain changes will still be allowed without notifying TCEQ, provided the changes are equal to or more stringent than the original SWMP. This will allow regulated MS4s the opportunity to implement the SWMP with as much flexibility as possible, while allowing TCEQ the opportunity to review significant changes.

Contents of the NOI

Comment 141:
TCUC and BCES ask why MS4 operators are required to provide the latitude and longitude of the approximate center of the MS4. Cleburne, Tarrant County, TAOC, Farmers Branch, Harris County, and NCTCOG comment that the requirement in item (1) to provide "the name, physical description, and latitude and longitude of the approximate center of the MS4" is impractical because "urban counties are not likely to have a contiguous boundary to define the urbanized area." Cleburne suggests that if latitude and longitude are required, then the use of the physical address of the SWMP is more readily available and consistent. If the latitude and longitude are necessary to attach Geographic Information System (GIS) information, NCTCOG, Farmers Branch, and Tarrant County suggest that the MS4 operator specify a generic location for data purposes. As an alternative, NCTCOG and Farmers Branch suggest TCEQ select a point from the urbanized area map. If no change to the permit is made regarding this point, NCTCOG and Farmers Branch request TCEQ issue a guidance document on how to make this

determination. TCCOS, Mathews & Freeland, and Harris County request deleting this information because it is unnecessary.

Response 141:
Latitude and longitude are considered "core" information by TCEQ on permitted facilities and are captured in TCEQ's Central Registry Database. The NOI asks for the latitude and longitude of the approximate center of the storm sewer system, and not the center of the urbanized area or the center of the county. The latitude and longitude of the physical location of the SWMP is not an appropriate alternative as the SWMP may not be kept "on site" and could be located outside of the urbanized area. If the MS4 within the urbanized area is a long linear system, such as a roadside ditch along a publicly owned road within the urbanized area, the position approximately mid way along the length of the system is appropriate. If the MS4 is a more traditional system, such as the storm sewer system of a small town, the point in the approximate center of that system is appropriate.

Comment 142:
Tarrant County requests some clarification regarding Part II.D.4.(b)(1), related to Site Information. Tarrant County notes that some MS4s, such as counties, may not have a contiguous boundary; therefore, there is not a single center of the county. Tarrant County suggests that if TCEQ requires latitude and longitude, then allow the MS4 operator to specify a general location; alternatively, TCEQ could select a point off of the urbanized area map. NCTRSW also comments that the structure of county systems would make finding the geographic center difficult and asks TCEQ to provide clarification regarding this requirement.

Response 142:
The purpose of requesting the location of the approximate center of the MS4 is to provide information on entities that are permitted by the agency. TCEQ recognizes that regulated portions of urbanized areas are irregular and it is not easy to determine an exact center of the regulated area, particularly where regulated areas are not contiguous. After the permit is issued, TCEQ will make an NOI form available that includes instructions for determining the approximate center of the MS4. For a county or other entity where the regulated areas are not contiguous, it may be most accurate to choose the approximate center of the largest contiguous regulated area.

Comment 143:

Cleburne asks that if a municipal MS4 operator uses the corporate or extra territorial jurisdiction boundary would it require detailing on a map and updating through a notice of change (NOC) each time annexation occurs, or could they define it as the current corporate limit or extra territorial jurisdiction boundary.

Response 143:
The urbanized area that defines the minimum area within the MS4 that must be authorized will not change prior to the 2010 census. It is this area that must be described in the NOI, which may only be a portion of the MS4. However, the MS4 operator may decide to implement the SWMP and other pollution prevention controls throughout all of their MS4 even if portions are not within an urbanized area, but doing so would not trigger a need to submit an NOC, unless the MS4 operator also seeks to add authorization for municipal construction activities located outside of the regulated area.

Comment 144:
Universal City, HCEC, and TxDOT-Houston state that the requirement in Part II.D.4.(b)(1) to include a "physical description" of the MS4 in the NOI is unclear and exceeds the federal requirement for what is contained in the NOI. They request limiting NOI information to federal rules at 40 C.F.R. §122.33(b)(1) and §122.34(d). If TCEQ keeps the requirement, then the commenters request that TCEQ more precisely define what is required and limit the information to a brief statement describing the most common conveyance type, typical conveyance sizes, and approximate size of service area.

Response 144:
TCEQ requires information on either the physical address or physical description of all regulated entities. Because an MS4 is not adequately described by a single address, providing the physical description is necessary in order to obtain an adequate location of the MS4. The purpose of this description is to establish the location rather than to list physical characteristics. In response to comments, the term "physical description" was revised to "physical location description" in Part II.D.4.(b)(1).

Comment 145:
Sunland requests revising Part II.D.4.b.(4), related to the description of the area that is proposed for coverage under the optional seventh MCM, to add language similar to Part III.A.7.a.(ii). Currently, Part II.D.4.b.(4) requires that the NOI include "the boundary within which those activities will occur," and Sunland requests replacing the current language with the following: "a description of the area that this MCM will address and where the permittee's construction activities are covered (e.g. within the boundary

of the urbanized area, the corporate boundary, a special district boundary, an extra territorial jurisdiction, or other similar jurisdictional boundary)." NCTRSW suggests using language similar to Part III.A.7.(a)(ii) to describe requirements for the geographic area where construction activities are conducted. NCTRSW suggests the change would avoid confusion with the requirement to include the specific construction site limits in the Storm Water Pollution Prevention Plan required in Part VI.J.1. of the permit.

Response 145:
This item refers to the general description of the location of this optional MCM, while the requirements in Part III.A.7.a.(ii) relate to more specific information that is included in the SWMP related to the MCM. Part VI.J.1. deals with the requirements for each particular site, so while location information will differ for each project, each project must be located within the general area described in the NOI and in the MCM. No changes were made to the permit language, but the NOI form will include instructions to help clarify the intent of this requirement to applicants once the permit is issued.

Comment 146:
Cleburne asks who is authorized to certify the SWMP and how is that authorization done. Cleburne also asks if the certification statement will be in the NOI or in the SWMP. Cleburne asks TCEQ to provide certification language if it is included in the SWMP.

Response 146:
The certification language will be included in the NOI. However, the NOI is not part of the permit and will not be finalized until after adoption of the permit, so the exact language is not available at this time. The certification must be signed in accordance with 30 TAC §305.44 (Part II.D.8 of the permit).

Comment 147:
Lloyd Gosselink comments that there is no need for the MS4 operator to identify a physical address for the location of the SWMP in the NOI and in the public participation requirements and requests removal of that requirement in Part II.D.4.(b)(6).

Response 147:
In response to the comments, the requirement in Part II.D.4.(b)(6), related to the NOI, was deleted because the SWMP is available to TCEQ and to interested persons as part of the permit application that is submitted. The applicant is required to include contact information for one person responsible for

coordinating activities related to the SWMP and is also required to meet the public participation requirements in order to obtain authorization. TCEQ will have access to the original SWMP and all of the required annual reports that contain revisions to the SWMP, and the public can access these documents through the agency's Central Records office.

Comment 148:

Tarrant County, NCTRSW, Russell Moorman, Carter & Burgess, and TxDOT recommend revising the wording in Part II.D.4.(b)(7) related to the certification statement to clarify the required sequence of events related to certification of public participation requirements. The commenters note that the public participation requirements listed in Part II.D.12. of the permit are conducted following the required certification on the NOI. Tarrant County, Russell Moorman, and Carter & Burgess note that an MS4 operator cannot sign such a statement when some portion of the process occurs after the original certification is mailed to TCEQ. Sunland also comments that it is not feasible for the applicant to include with the NOI a certification that the applicant has met the public participation requirements, when Part III.D.12. of the permit states that the NOI must be submitted before the public participation requirements listed in Parts II.D.12.(b) through (j) are met. Carter & Burgess asks whether an NOC is required for every NOI once Part II.D.12. is completed.

Response 148:

In response to the comments, Part II.D.4.(b)(7) (now Part II.D.4.(b)(6)) was revised to include only information regarding the SWMP, and a new Part II.D.4.(b)(7) was added that states: *(7) a statement that the applicant will comply with the Public Participation requirements described in Part II.D.12.;. . ..*

Comment 149:

Carter & Burgess requests clarification in Part II.D.4.(b)(8) regarding how a classified segment can "indirectly receive" a discharge. Carter & Burgess states that an outfall "is either in a watershed or it isn't."

Response 149:

Part II.D.4.(b)(8) refers to discharges to unclassified waters that will eventually reach a classified water. The MS4 operator should trace the discharge route until reaching the first classified segment. As discussed in the newly added definition for "classified," this refers to specific waters that are listed in the Texas Surface Water Quality Standards, 30 TAC Chapter 307.

Comment 150:

TCCOS and Mathews & Freeland ask whether the reference in Part II.D.4.(b)(10) to the "latest CWA §303(d) list of impaired waters" includes those that were approved by EPA or whether it also refers to draft lists. Carter & Burgess comments that it is often a lengthy time period before EPA approves the CWA, §303(d) list, and asks whether it is wise to refer to the "latest" list in this permit. TCCOS and Mathews & Freeland comment that MS4 operators will have a problem determining the geographic reach of the segments listed. TCCOS and Mathews & Freeland recommend deleting this provision because it serves no useful purpose and because many of the small MS4s subject to this permit lack the resources to thoroughly understand the CWA, §303(d) list.

Response 150:

The applicable CWA, §303(d) list is the latest approved by EPA. Currently, EPA has approved the 2004 CWA, §303(d) list and it is the applicable list to TPDES permits. The list of impaired waters is available on the TCEQ Web site at: *http://www.tceq.state.tx.us/compliance/monitoring/water/quality/data/wqm/305_303.html#y2004*. The receiving water information will assist TCEQ in identifying those small MS4s that are affected by a TMDL or implementation plan.

Comment 151:

Universal City, HCEC, and TxDOT-Houston request deleting the requirement to list the impaired waters receiving discharges from the MS4 in Part II.D.4.(b)(10) because it exceeds the NOI requirements in the federal regulations.

Response 151:

TCEQ declines to make any changes to this requirement. Information regarding the receiving waters may be used by TCEQ to identify MS4s that are located in areas with water quality concerns or TMDLs that are in development.

Notice of Change (NOC)

Comment 152:

Carter & Burgess comments that an MS4 operator is required to submit an NOC if "any information" provided in the NOI changes, but that the original draft permit stated that an NOC was required if "any relevant information" provided in the NOI changes.

Response 152:
Information contained in the NOI is considered relevant to TCEQ's processing of applications under this general permit; therefore, TCEQ must receive written notification of any changes to information contained in the original NOI. Because TCEQ must conduct a review of the SWMP along with the NOI, any changes made to the SWMP before the NOI is approved are an addendum to the application. If changes are made to the SWMP after the NOI is approved, then notification must be made on an NOC form according to Part II.D.3. of the permit. Language was added to this section and to Part II.D.3. describing these requirements.

Change in Operational Control of an MS4

Comment 153:
DFW asks whether a notice of termination (NOT) and an NOI are required if the elected official or designated signatory on the NOI changes.

Response 153:
A change in the staffing for the position of authority that signed the NOI consistent with 30 TAC §305.44 for permit coverage would not require the MS4 operator to reapply for permit coverage.

Comment 154:
Travis County asks whether an NOT must be submitted every time a city annexes an area that includes part of a county's MS4, since the authority and responsibility for streets and drainage shift from the county to the city when annexation occurs.

Response 154:
An NOT is only required if an MS4 operator no longer is in operational control over any regulated or designated portion of the MS4. TCEQ recognizes that actual boundaries of MS4s change and that the SWMP will be updated to include new information. If significant areas changed such that information included on the NOI changes, then an NOC is required.

Signatory Requirement for NOI, NOT, and NOC Forms

Comment 155:

Tarrant County and NCTRSW suggest including the regulatory language from TCEQ rules at 30 TAC §305.44 in Part II.D.8., and note that it may simplify the preparation of these documents for MS4 operators not familiar with the specific legal language. The commenters add that including the language would stress the importance of complying with SWMP provisions. Euless suggests making these rules easily accessible on the internet.

Response 155:
TCEQ agrees that including information regarding the signatory rules for applications may be helpful to MS4 operators, and added information to the end of the first paragraph of Part VIII.B. of the fact sheet to include the specific Web address for finding the current rule language. Language was also added to the fact sheet to clarify that the NOI, NOT, and NOC forms must be signed according to this rule. The permit was not revised to include the specific language in §305.44 because, though unlikely, the rule is subject to change during the permit term.

Fees

Comment 156:
Houston, Missouri City, and HCFCD request removing the reference to 30 TAC Chapter 205 (relating to General Permits for Waste Discharges) because the general permit is not a general permit for waste discharges. Carter & Burgess comments that tying the annual water quality fee of $100 to an existing authority, Texas Water Code, §26.0291 and 30 TAC Chapter 205, or Texas Water Code, §26.0135(h) and 30 TAC §220.21, is an unnecessary connection to this permit with state law. Carter & Burgess suggests requiring a $100 submission fee with the annual report.

Response 156:
The authority to issue TPDES permits stems from the TWC. “Waste” is defined at TWC, §26.001(6) as “sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste as defined in this section.” Storm water discharges are considered an “other waste” under the TWC and as regulated in the TPDES permit program. 30 TAC §205.6 specifically states that a person authorized by a general permit will 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 case, the permit includes a provision that charges persons authorized under the general permit the annual water quality fee. No changes were made to the permit based on the comments.

Permit Expiration

Comment 157:
Carroll & Blackman comments that the language in Item II.D.10.b. is confusing and recommends more specific language referring to each of the referenced permits.

Response 157:
TCEQ declines to revise the permit language, which indicates that existing dischargers regulated under the general permit could continue to operate under the terms and conditions of the general permit until a new permit is reissued, provided that TCEQ in a timely manner proposes to renew the general permit. Small MS4s which did not obtain coverage during the five-year permit term may not apply for coverage under an expired permit, and must either apply for an individual permit or wait until the general permit is reissued.

Public Participation

Comment 158:
Houston, Missouri City, and HCFCD comment that the public participation requirements in Parts II.D.12.(c) through (j), which were added to the permit appear more consistent with individual wastewater permits rather than general permit authorization. The commenters state that the additional requirements to publish notice, provide for public comments, and conducting public meetings, will significantly increase the permit application burden and cost for regulated MS4s. The commenters ask whether TCEQ would revise this section to meet the requirements of public notice by TCEQ publication of the applicants under the general permit in the *Texas Register*.

Response 158:
TCEQ determined that a public notice process with an opportunity for a public meeting is consistent with the 9th Circuit Court decision in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), which found that the public should have the opportunity to comment and request a public meeting on a general permit NOI submitted by a regulated small MS4.

Comment 159:
Mathews & Freeland comment that the notice, comment, and meeting requirement is inconsistent with TCEQ permit rules in 30 TAC Chapter 305, TCEQ's general permit rules in 30 TAC Chapter 205, and

the terms of the MOA with EPA delegating the TPDES program to TCEQ. Mathews & Freeland comments that the Part II.D.12. are statements of general applicability that must be implemented as a rule, using statutorily imposed rulemaking procedures. Mathews & Freeland state that this provision is inconsistent with the 9th Circuits holding in *Environmental Defense Center v. EPA* because their reading of the case is that "the NOI and SWMP must be subject to the same opportunity for public notice and review as any other application for a NPDES permit." Mathews & Freeland state that TCEQ can use a general permit to establish permit terms, but not the processes to be used to obtain a permit and recommend that Part II.D.12. be deleted from the permit.

Response 159:

TCEQ disagrees that a general permit may not include public participation provisions. The general permit rule provisions in 30 TAC Chapter 205 allow flexibility in what requirements may be included for coverage under a general permit. 30 TAC §205.4(a) states that a "qualified discharger may obtain authorization to operate under a general permit by complying with the general permit's conditions for gaining coverage." These conditions are presumed to include public participation provisions at the discretion of TCEQ. For example, the concentrated animal feeding operation general permit, TXG920000, issued in July, 2004 contains similar public participation provisions for new and significantly expanding operations.

Additionally, TCEQ does not agree that the public participation requirements are in conflict with the holdings of the 9th Circuit in *Environmental Defense Center v. EPA*. On the issue of public participation the 9th Circuit stated that NOIs are subject to public availability and public hearings requirements. However, in the very next sentence of the opinion they specifically identify the applicable provisions in the CWA. The 9th Circuit stated: "The Clean Water Act requires that '[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public,' 33 USC, §1342(j), and that the public shall have an opportunity for a hearing before an [sic] permit application is approved, 33 USC, §1342(a)(1)" (see *Environmental Defense Center v. EPA*, 344 F.3d at 856). The provisions in Part II.D.12. are consistent with these specific CWA provisions because they require an applicant to publish notice that identifies the public location where copies of the NOI, SWMP, and TCEQ's general permit may be reviewed by the public, and if there is significant public interest, the requirement to hold a public meeting.

Comment 160:

Carter & Burgess asks how the executive director will determine that a public meeting is required before the end of the 30-day comment period, "at which point he knows if significant public interest exists?"

Response 160:
The provision to include public meeting information in Part II.D.12(c) only applies to those applications that generate significant public interest expressed after the NOI and SWMP are submitted, but before the executive director makes a preliminary determination on the NOI and SWMP. It allows a small MS4 to publish a combined notice for both the permit and public meeting and does away with the necessity of a second notice for the public meeting as described in Part II.D.12.(f). However, in most cases the executive director cannot determine if there is sufficient public interest in the NOI and SWMP until after the initial published notice of the executive director's preliminary decision. If the executive director determines that sufficient public interest exists, a second notice for the public meeting must be published and the executive director will direct the applicant to publish notice as described in Part II.D.12.(f).

Comment 161:
Grapevine expresses a general concern on how public participation requirements in Part II.D.12. will affect the established time line as it relates to authorization of discharges.

Response 161:
Authorization will begin after TCEQ issues written confirmation that the NOI and SWMP are approved. This authorization will occur following review of the NOI and SWMP, and completion of the public notice requirements. Obviously, if significant public interest exists, a delay of two or three months can be expected, depending on how quickly a public meeting can be scheduled and notice of the meeting published. As discussed in a previous response, no provisional authorizations are allowed under the permit.

Comment 162:
Lloyd Gosselink comments that there is no need for a permittee to identify a physical address where the SWMP may be viewed. Lloyd Gosselink states that the availability of the SWMP should be determined pursuant to the Texas Public Information Act and that the requirement to provide a physical address for the SWMP should be removed.

Response 162:

TCEQ disagrees with the request to remove the requirement to list in the public notice where the public will have an opportunity to view the NOI and SWMP during the public comment period in Part II.D.12.(c)(vi), because it is important that an interested person may easily find and review the application to facilitate meaningful public involvement.

Comment 163:
NCTRSW comments that the permit requirement in Part II.D.12.(d) should allow an MS4 to make publication in a newspaper with the greatest circulation within the actual MS4, and requests clarification of such. NCTRSW also requests that the permit clarify whether an MS4 that is located within two counties is required to publish in two newspapers. Cedar Hill requests the permit clarify whether publication is in a newspaper with the general circulation of the entire county or counties or whether it is sufficient if the publication is the "official" newspaper of the city. Cedar Hill notes that this may be an issue for a city that is located in two separate counties.

Carter & Burgess requests that the permit state that notice should be published in the official newspaper of the community (municipality or county), and also asks that this clarification be made to Part II.D.12.(b) of the permit.

Response 163:
In response to the comments, the first sentence of Part II.D.12(d) was changed and an additional sentence added to clarify where notice must be published: "This notice must be published at least once in the newspaper of largest circulation in the county where the small MS4 is located. If the small MS4 is located in multiple counties, the notice must be published at least once in the newspaper of largest circulation in the county containing the largest resident population."

Comment 164:
Carroll & Blackman asks TCEQ to clarify what period of time the public notice must run in a newspaper of local circulation.

Response 164:
Publication in a newspaper is required for one day, which will begin the 30-day public comment period. The instructions for public notice to each applicant will also include this information.

Comment 165:

Tarrant County and NCTRSW request addition of the italicized text in item Part II.D.12.(i): The executive director, after considering public comment, shall approve, *approve with conditions*, or deny the NOI based on whether the NOI and SWMP meet the requirements of this general permit.

Response 165:
In response to the comments, this revision was made. This change is also consistent with the revised permit language at Part II.D.1.

Comment 166:
Harris County, Houston, Missouri City, and HCFCD request that TCEQ clarify the authorization status for applicants during the period between submitting the NOI and/or SWMP and TCEQ's approval or denial. The commenters suggest that the permit include language stating that compliance with the SWMP during the review period meets permit requirements.

Response 166:
Authorization under this general permit, as well as the requirement to implement the SWMP, begins after TCEQ provides written approval of the NOI and SWMP to the MS4 operator. As noted in Response 125, the following sentence was added to the end of the first paragraph of Part II.D.3., to clarify that the SWMP must be implemented after the applicant receives approval of the SWMP: "Implementation of the SWMP is required immediately following receipt of written authorization from the TCEQ."

Comment 167:
Harris County, Houston, Missouri City, and HCFCD request revising Part II.D.12.(j) to include language stating that the executive director's decision will also be provided to the applicant and to all MS4s receiving the applicant's discharges.

Response 167:
Records of permit actions are available to the public and any interested parties. TCEQ will send written notification to the applicant regarding the executive director's decision, but at this time does not anticipate mailing separate notifications to other MS4s receiving the discharge.

Permitting Options

Comment 168:

TAOC, Missouri City, and Cleburne comment that Part II.E. provides narrower provisions for co-permitting than are allowed in the federal rules. They also comment that the provisions are not cost-effective and that they discourage cooperative arrangements that could provide cost savings and benefits. Cleburne comments that co-permitting with a single shared SWMP and coordinated measures would provide taxpayers with the most cost-effective way to achieve compliance, reduce the amount of paperwork for each MS4 operator, and decrease the number of SWMPs and annual reports TCEQ must review. Cleburne also comments that these permitting options do not allow for co-permitting even though co-permitting is referred to in Part V.B.2.(h) of the permit.

Response 168:
An MS4 operator that requests authorization under the permit must submit an NOI with an attached SWMP. However, MS4 operators may share the development and implementation of an SWMP. TCEQ agrees that this approach is cost-effective and provides other additional benefits. For example, MS4 operators that share a single SWMP may develop a more coordinated management program that is more watershed based, rather than limited to the considerations of a single storm sewer system or receiving water body. This approach may also avoid the development of individual and separate SWMPs that either duplicate or ignore the efforts of neighboring MS4 operators. However, TCEQ is not proposing that multiple MS4 operators submit a single NOI for coverage as co-applicants because aside from avoiding the application fee, there is no additional benefit to a co-application process.

Comment 169:
Cleburne believes that in areas where small MS4 jurisdictions overlap and are interconnected, items such as public education and participation are not readily distinguishable between MS4s. This could pose documentation problems in areas where MUDs, cities, counties, universities or colleges, TxDOT, and other transportation authorities are all serving the same population.

Response 169:
MS4 operators are encouraged to work together with programs that may affect the public within multiple jurisdictions. A public education program that crosses many lines of jurisdiction can work in favor of each MS4 operator within a single urbanized area. Each MS4 operator may get credit for a program provided that permission is granted from the entity that implemented the program. Such an agreement is required under 40 C.F.R. §122.35 and adopted by reference in 30 TAC §281.25(b)(6).

Comment 170:

TCCOS and Mathews & Freeland comment that the first sentence of this subpart states which MS4 operators are required to obtain an MS4 storm water permit. TCCOS and Mathews & Freeland believe that the requirements for coverage under the permit must be implemented as a rule, using statutorily imposed rulemaking procedures required by the Texas Government Code. TCCOS and Mathews & Freeland request deleting the first sentence of the paragraph from the permit.

Response 170:
Identifying small MS4s that require authorization under the Phase II storm water regulations was subject to TCEQ rulemaking when the federal rules were adopted by reference in 30 TAC §281.25. 40 C.F.R. §122.32(a)(1) states that a small MS4 is regulated if the small MS4 is "located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census." 40 C.F.R. §122.32(a)(2) further states that an MS4 is subject to the storm water program if it is designated by the NPDES permitting authority. The permit language follows the adopted rules, which states an MS4 operator must be authorized if it is "located in an urbanized area or if it is designated by TCEQ." Information regarding who must obtain authorization is provided in the permit to assist applicants.

Comment 171:
Harris County and Missouri City ask whether, in accordance with the language at 30 TAC §205.2(b), MS4 operators may be authorized within a discrete geographical area identified by an appropriate or combination of geographic or political boundaries (i.e., not limited to a single watershed).

Response 171:
30 TAC §205.2(b) gives the agency the flexibility to tailor general permit requirements for specific areas within the state. For purposes of this permit, TCEQ chose to use a statewide approach and included permit requirements protective of water quality in all areas of the state.

Comment 172:
TxDOT requests the permit include a provision allowing TCEQ to recognize that a contractually bound governmental entity is responsible for implementing an MCM when there is a documented cooperative agreement between government entities in their SWMP. TxDOT notes that in the EPA's response to comments, it says "if a DOT does not have the necessary legal authority to implement any part of this measure, EPA encourages them to coordinate with their surrounding MS4s and other state agencies . . .. Under today's rule, DOTs can use any of the options of §122.35 to share their storm water management responsibilities." Furthermore, TxDOT comments that EPA intended to allow the NPDES

permitting authority to recognize when another governmental entity is responsible under an NPDES permit for implementing one or more of the MCMs, or alternatively, that the permitting authority itself is responsible. TxDOT states that, where the permitting authority is responsible, small MS4s are not required to include such MCM(s) in their SWMP.

Response 172:
TCEQ rules at 30 TAC §281.25 that adopt by reference 40 C.F.R. §122.35 allow the sharing or contractual sharing of responsibilities. Under §122.35(a), if an MS4 is relying on another governmental entity to satisfy its permit obligations it must note that fact in its NOI and SWMP. However, §122.35(a) further states that the MS4 operator remains "responsible for compliance with your permit obligations if the other entity fails to implement the control measure (or component thereof)" and that it encourages legally binding agreements with other entities to minimize uncertainty about compliance with the permit.

In its response to comments on the Phase II rules, EPA stated that state DOTs can use the options provided under 40 C.F.R. §122.35. However, 40 C.F.R. §122.35(b) requires that the permitting authority recognize in either an individual or general permit that another government entity is responsible "under an NPDES permit for implementing one or more of the MCMs for your small MS4 or that the permitting authority itself is responsible." This provision is intended to allow small MS4s to exclude MCMs from the SWMP if the permit specifically recognizes that another government entity is responsible for implementing the MCM. TCEQ has not undertaken statewide implementation of any of the MCMs such that small MS4s can exclude them from their SWMP.

Comment 173:
Carter & Burgess comment that Part II.E.1.(a) of this subpart mentions an "acknowledgment"; however, Part II.D.12. of the revised permit states that an applicant will receive either an approval or denial.

Response 173:
In response to the comment, Part II.E.1.(a) was revised to reference the "notification of approval" rather than "acknowledgment." Additionally, a reference to submitting the SWMP was added after "NOI," to clarify that both are part of the application requirements.

Comment 174:
NCTCOG and Farmers Branch comment that Part II.E.1.(b), "Responsibilities," may be misleading and may discourage cooperative efforts by implying that failure of a cooperative partner would necessitate

enforcement against an MS4 that expected to receive the benefit of a cooperative arrangement. NCTCOG and Farmers Branch suggest the following language: "Each permittee is entirely responsible for meeting SWMP requirements within the boundaries of their MS4, to include providing a schedule for alternative SWMP components if a cooperative partner fails to provide expected components."

Response 174:
It is the responsibility of each MS4 operator to meet the requirements of the permit. A shared SWMP is allowed to help reduce costs and to allow a more watershed-based approach to improving water quality. Although a cooperating MS4 operator may volunteer to satisfy a particular SWMP requirement for the other participating MS4 operators, it remains each MS4 operator's responsibility to ensure that the SWMP requirement is met. Participants in a shared SWMP may want to develop an element of the program that provides for a periodic evaluation of the program that is more frequent than the evaluation and annual report requirements established as a minimum in the permit.

Comment 175:
Grapevine requests that TCEQ consider and support any regionally directed initiatives (RDIs) created and introduced by the North Central Texas Council of Governments. Grapevine believes that RDIs will help regulated MS4s work together to manage storm water quality along jurisdictional boundaries. Grapevine notes both TCEQ and EPA have recognized the benefits of managing storm water quality from a regional perspective, and believes that TCEQ support of RDIs will more effectively protect human health, while also reducing bureaucracy.

Response 175:
TCEQ supports regional efforts to comply with water quality goals and recognizes that RDIs may provide an efficient mechanism for Phase II MS4s to comply with the permit. A regulated MS4 should include any regional efforts in the SWMP it proposes to utilize as well as information regarding the reasons how and why the initiative is appropriate for the discharger and meets the conditions of the permit.

Alternative Coverage Under an Individual TPDES Permit

Comment 176:
Carter & Burgess asks whether individual permit coverage is automatically required for an MS4 general permit holder once a TMDL is adopted for a "water of the U.S." within or downstream from the boundary of an MS4.

Response 176:

The development of a TMDL for an MS4 receiving stream does not automatically require the MS4 operator to apply for an individual permit. The purpose of a TMDL is to reduce the concentrations of the pollutants causing the impairment by limiting the amount being discharged to the water body. If it is determined that discharges from an MS4 are not a source of the impairment, or if the MS4 operator revises its SWMP for consistency with an approved TMDL and TMDL Implementation Plan, then an individual permit may not be warranted and authorization under the general permit may continue.

Comment 177:

Cleburne believes that the phrase "or other 30 TAC Chapter 205 considerations and requirements" in Part II.E.2. is too vague regarding how an MS4 operator may be required to obtain an individual permit. This language could be used to require an individual permit when there is no substantial information (such as water quality data showing impairment) that indicates the need for an individual permit. Cleburne recommends removing this phrase.

Response 177:

The provisions in 30 TAC §205.4 provide guidance on when the executive director may require an entity otherwise eligible for general permit coverage to instead apply for authorization under an individual permit. Applicants for authorization and MS4 operators with authorization under a TPDES permit are subject to this provision of the rules, regardless of whether or not the provision is referenced in the permit. Therefore, in order to provide this information to the regulated community, the reference is included in the permit.

Waivers

Comment 178:

Cleburne believes the second waiver option in Part II.F., cities, towns, counties, and areas with populations less than the EPA NPDES designated 10,000 population limit would have an extremely difficult time complying with TPDES MS4 permit requirements because they often do not have knowledgeable employees or a tax base large enough to support hiring employees.

Response 178:

This waiver option is identical to the waiver provisions in the final federal Phase II storm water regulations adopted by reference in 30 TAC §281.25. The requirements necessary to meet the conditions

of this second waiver option are very difficult to meet and, as a result, it is unlikely that a small MS4 will qualify. However, because the federal regulations allow for the waiver, the provision was included in the permit.

Comment 179:
TCCOS and Mathews & Freeland comment that this section pertaining to waivers from permitting is a statement of general applicability that must be adopted as a rule rather than as part of a permit. TCCOS and Mathews & Freeland state that TCEQ cannot promulgate criteria for applicability determinations, including criteria for granting waivers, through the promulgation of a general permit. TCCOS and Mathews & Freeland object that there is insufficient time for any operator of a small MS4 to develop the information needed to qualify for a waiver prior to the application deadline. TCCOS and Mathews & Freeland request that the commission "commence a rule making proceeding to establish waiver provisions, and should exempt potentially eligible operators of small MS4s (those serving populations less than 10,000) from needing a storm water permit until 180 days after that rule making is completed."

Response 179:
The waiver provisions found in the permit were subject to TCEQ rulemaking when 40 C.F.R. §§122.30 to 122.37 were adopted by reference in 30 TAC §281.25. 40 C.F.R. §122.32(d) and (e) contain the waiver provisions that are included in the permit.

Comment 180:
DART asks how non-municipal entities that are in transportation corridors or airports will determine their population. NCTRSW requests the permit clarify how non-residential MS4 entities would evaluate the waiver options and notes that 40 C.F.R. §122.32(a) appears to include such entities in the federal definition although the waiver criteria are unclear.

Response 180:
The phrase "serves a population of less than" is defined by the average daily population of the system. In the case of a transportation corridor or airport, the average number of daily users and the employees of the system would constitute the number of people the MS4 serves.

Comment 181:

Dodson asks how the waiver process will be implemented when the burden of all the work is on TCEQ. If an MS4 believes it meets the criteria for the waiver under Part II, it must develop an SWMP, obtain coverage under the permit, and then wait for TCEQ to determine its eligibility for a waiver.

Response 181:
The waiver available in the permit for systems that serve a population less than 1,000 and whose system is not contributing substantially to the pollutant loadings of a physically interconnected regulated MS4 is obtained through a waiver certification form. This form will be available once the permit is issued and will allow entities to certify they meet all of the waiver criteria. Operators of MS4s serving a population less than 10,000 seeking to waive permitting requirements through the second waiver option must coordinate their efforts with TCEQ, who will determine if they meet the eligibility requirements for the waiver.

Comment 182:
Lubbock comments that the word "substantially," in Part II.F.1.(a),Waiver Option 1, is vague.

Response 182:
The language used in the permit was taken directly from the federal rule at 40 C.F.R. §122.32(d). TCEQ has not made any changes to the permit language regarding the term "substantially," but encourages any regulated MS4 operator interested in obtaining this permit option to contact TCEQ to determine whether the option is feasible. It was noted that the draft permit referenced the incorrect federal rule, so the citation was changed to 40 C.F.R. §122.32(d).

Comment 183:
Lubbock asks whether TCEQ has evaluated all state waters where Waiver Option 2 (Part II.F.2.a.) is attainable.

Response 183:
TCEQ has not evaluated all waters related to Waiver Option 2 and does not expect many regulated MS4s will be able to qualify for this option. Any MS4 operator interested in pursuing this option should contact TCEQ to discuss the possibility of it qualifying for this waiver.

Storm Water Management Program (SWMP)

Comment 184:
Universal City, HCEC, and TxDOT-Houston request changing the second sentence of the first paragraph of Part III. to the following, which the commenters believe would more closely reflect the federal regulatory language (40 C.F.R. §122.34(a)) related to the purpose of the SWMP:

"The SWMP must be developed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act."

Carroll & Blackman states that an MS4 operator cannot develop an SWMP that can prevent pollution to storm water, because of the great variety of sources affecting storm water; however, the practices described in the SWMP may affect change in the behavior of groups controlling potential pollutant sources. Carroll & Blackman suggests revising the sentence as follows:

"The SWMP must be developed to include practices to reduce pollution in storm water to the maximum extent practicable (MEP) and to effectively prohibit illicit discharges to the system."

Response 184:
TCEQ agrees that revising the language more accurately reflects the requirements in the federal rules and replaced the existing sentence with the following language:

"The SWMP must be developed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act and the Texas Water Code."

Comment 185:
Lloyd Gosselink expresses significant concern over the applicability of numeric effluent limitations to storm water discharges based on 30 TAC §319.28 that states "every waste discharge permit which does not currently specify effluent limitations for any of the hazardous metals covered by this subchapter is hereby amended to incorporate the terms of this subchapter." Lloyd Gosselink proposes adding the following language to the permit in order to clarify that the numeric, concentration-based effluent limitations of 30 TAC Chapter 319 do not apply to the discharges from regulated MS4s. Lloyd Gosselink notes that similar language is used in TCEQ Phase I MS4 permits, and believes that adding the following

language will reflect that the BMPs established by the regulated MS4s are sufficient effluent limitations for the purposes of complying with this rule:

"The controls and Best Management Practices included in the Storm Water Management Program constitute effluent limitations for the purposes of compliance with the requirements of 30 TAC Chapter 319, Subchapter B, related to Hazardous Metals."

Lloyd Gosselink further requests that the commission clarify language in the fact sheet regarding the establishment of specific effluent limitations for discharges of the hazardous metals included in 30 TAC Chapter 319.

Response 185:
In response to the comments, a new paragraph was added to the end of the introductory section of Part III of the permit to include the requested language and the statement was also added to Part IX of the fact sheet. TCEQ agrees that these revisions help clarify that the permit is intended to require BMPs in lieu of numeric effluent limits.

Comment 186:
Grand Prairie requests reordering the six MCMs in the permit for consistency with the federal rules, where MCM Number 4 is Construction Site Storm Water Runoff Control, MCM 5 is Post Construction Storm Water Management in New Development, and MCM 6 is Pollution Prevention/Good Housekeeping for Municipal Operations. Grand Prairie states that many regulated MS4s have already initiated development of their SWMPs, and that the TPDES permit should reflect the federal language.

Response 186:
The permit was revised to reflect the order as stated in the federal rules. The fact sheet was not revised, as it already included the MCMs in the same order as listed in 40 C.F.R. §122.34.

Comment 187:
DAFB requests clarification on what the permit language "to the extent allowable under state and local law" means in the first sentence of Part III. DAFB is concerned that an MS4 operator may decide it does not have the authority to pass an appropriate ordinance to enforce its SWMP, when in fact, it has authority to do so. DAFB asks for identification of the applicable state laws and their limits so that MS4 operators know what laws apply.

Response 187:
The language "to the extent allowable under State and local law" was included in the permit to emphasize that MS4 operators are not required to regulate or enforce MCMs beyond their statutory and regulatory authority. The provisions of the permit must be implemented to the MEP but within the legal authority of the small MS4s. It is not possible to enumerate all state laws that might apply to all small MS4s. Different types of MS4s are subject to different state and local laws.

Comment 188:
TCUC, Harris County, Missouri City, TAOC, and BCES request revising the statement "to the extent allowable under state and local law . . ." at the beginning of each MCM section, since counties and some other regulated MS4s lack the statutory authority to carry out numerous provisions in the Phase II storm water program.

Response 188:
The phrase "to the extent allowable under state and local law" is stated in the preamble of Part III and applies to all elements of the SWMP, including each individual MCM.

Comment 189:
Group 1 comments that the last sentence in the preamble that states "existing programs or BMPs may be used to fulfill the requirements of this general permit" implies that only existing programs may be used, even though the SWMP is a combination of existing and new programs and request modifying the language to state: "A combination of existing and new programs (BMPs) . . .."

Response 189:
The language in the preamble does not limit the use of new programs to meet the requirements of the SWMP. It simply makes MS4 operators aware that programs developed for other reasons, prior to the MS4 regulations, may be included in the SWMP if they fulfill a permit requirement.

Comment 190:
Lloyd Gosselink and Carroll & Blackman comment that many of the provisions that address the requirements of the SWMP are very subjective and the permit does not contain guidance or even a template on implementing the minimum program components. Lloyd Gosselink and Carroll & Blackman state that TCEQ should provide such a template or guidance to clarify for MS4 operators what is needed to meet the subjective requirements of the permit.

Response 190:

TCEQ's Galveston Bay Estuary Program (GBEP) developed a model SWMP through an engineering agreement with Turner, Collie, and Braden, Inc. The resulting model SWMP contains an outline of Phase II regulatory requirements, an implementation plan to prepare for permitting, an SWMP shell that a regulated entity can complete to meet their individual needs, appendices with information and examples of BMPs for the six MCMs, and the draft SWMP that was completed for the City of Pearland. A copy of the model SWMP is available on the GBEP Web site *http://gbic.tamug.edu/locgov/swmp.html*. This SWMP model was developed before the draft TPDES permit was developed. This document may be used for guidance when developing an SWMP, although it also needs to include more recent TPDES permit changes. MS4 operators may develop a different format for the SWMP to best meet their needs, as long as the SWMP meets the requirements of the permit.

Comment 191:

TCCOS and Mathews & Freeland believe that TCEQ does not have the constitutional authority to compel local governments to regulate others. Thus, TCCOS and Mathews & Freeland state TCEQ "lacks the authority to impose many of the MCMs specified in this permit." TCCOS and Mathews & Freeland believe that TCEQ should ensure statewide application of the MCMs by implementing many of these measures at the state level.

Response 191:

TCEQ is the primary authority for regulating the discharge of waste into or adjacent to water in the state. Issuing this permit does not delegate that authority to the permitted MS4s. To comply with the conditions of the permit, MS4 operators must make certain that only eligible discharges are contributed to the MS4 and ultimately discharged from the permitted MS4. Therefore, MS4 operators must develop an illicit discharge detection and elimination MCM to identify and to remove illicit contributions to their systems. This control measure may include tracing dry weather flows to the source and determining if the wastewater contributors and storm water sources subject to TPDES permitting are properly authorized. Ordinances must be developed if it is within the ability of the operator that allow the operator to restrict illicit contributions to the MS4.

Comment 192:

TCCOS and Mathews & Freeland comment that the permit should state that compliance with the terms of an SWMP constitutes compliance with this part of the permit. TCCOS and Mathews & Freeland recommend that the permit contain express language addressing how TCEQ can request changes to an

SWMP at any time during the permit term. For these reasons, TCCOS and Mathews & Freeland request revising the permit to include the following language at the end of the introductory paragraph for Part III: "A discharger's compliance with its SWMP will be deemed compliance with Part III of this permit. If upon review, the Executive Director determines that a discharger's SWMP is deficient or inadequate, the Executive Director will provide notice of the deficiency or inadequacy, including an explanation of the basis for its determination and request that the discharger revise its SWMP. If the discharger fails to revise its SWMP in response to the Executive Director's request, the Executive Director may suspend authorization under this permit as stated in Part II.D. of this general permit."

Response 192:
In response to the comment, the end of the first paragraph of Part III. was revised to add the following sentence, which is similar to the requested first sentence except that the word "approved" was added before the term "SWMP." "A discharger's compliance with its approved SWMP will be deemed compliance with Part III of this permit." The second and third requested sentences were not added, since the TCEQ will review the SWMP for compliance with permit conditions before issuing authorization under the general permit.

Minimum Control Measures (MCM)

Comment 193:
Lloyd Gosselink requests that TCEQ develop a template or guidance that clarifies and addresses what is required, at a minimum, to meet the requirements of Part III of the permit because this section is very subjective. HCFCD comments that under 40 C.F.R. §123.35(g), TCEQ is obligated to issue a menu of BMPs to assist small MS4s and urges TCEQ to rapidly develop and issue this menu.

Response 193:
The permit outlines the minimum requirements required to meet each MCM. TCEQ recommends utilizing the menu of BMPs developed by EPA and adopted by TCEQ to help craft an SWMP. TCEQ expects that each municipality will have specific issues related to implementing their program and that each program will be different. The menu of BMPs may be accessed at: *http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm*. Additional MS4 resources from EPA are located at: *http://www.epa.gov/earth1r6/6wq/npdes/sw/MS4*. At this time, no additional guidance has been developed by TCEQ.

Comment 194:
DAFB requests a definition for the term “adverse impacts to water quality” or similar term that is used in Parts III.A.5(b)(2) and III.A.6 of the permit.

Response 194:
Adverse impacts to water quality are any actions that violate Texas Surface Water Quality Standards in 30 TAC Chapter 307.

Comment 195:
TCUC, BCES, and Harris County comment that throughout Part III.A. the permit uses the term “must” and “shall” that are more prescriptive than the EPA rule, which uses the terminology “may.” The examples given by EPA were meant as guidance and TCEQ has turned them into mandates. TCEQ must allow each individual MS4 to develop its own public education and involvement program.

Response 195:
TPDES permits must be written such that the measures necessary to meet minimum compliance are clear and the provisions are enforceable. The requirements in Part III.A. of the permit are based on the final federal storm water Phase II requirements in 40 C.F.R. Chapter 122 and adopted by reference in 30 TAC §281.25. 40 C.F.R. §122.34 states “Your storm water management program must include the minimum control measures described in paragraph (b) of this section . . .,” a reference to the six MCMs that are included in the permit. The federal regulations also offer guidance on what those MCMs may contain in order to comply with the federal regulations. Simply stating that each MCM be developed and implemented, without defining the minimum extent and level that satisfies the permit requirement, would not provide a clear set of permit requirements and would not create enforceable provisions. Therefore, TCEQ included many or most of the examples from the guidance as minimum permit requirements. However, these requirements form a broad-based outline of minimum requirements. Individual MS4 operators may develop their own public education program MCMs with a great amount of latitude and still meet the permit requirements.

Public Education and Outreach on Storm Water Impacts

Comment 196:
Universal City, HCEC, and TxDOT-Houston comment that the education requirements exceed federal requirements because the permit requires MS4 operators to explicitly consider population groups and to

provide justification for not including certain population groups. The commenters believe that TCEQ should provide flexibility for operators to design appropriate programs without imposing additional documentation requirements.

Lloyd Gosselink comments that the EPA Phase II regulations encourage small MS4s to structure their public education programs to target specific audiences, but does not limit the potential categories of those audiences, nor require justification for excluding certain categories. Lloyd Gosselink believes that the requirement to provide justification why a particular group was not included is unnecessary and too restricting, and requests deletion of the last two sentences in Part III.A.1.(a) and replacing them with the following sentence: "The MS4 operator should consider, but is not limited to, the following groups in developing a public education program." Carroll & Blackman recommends revising the final sentence in Part III.A.1.(a) as follows, for consistency with the EPA's Model Permit language, and to take into account non-traditional MS4s, where the groups may not be applicable: "The MS4 operator may consider the following groups."

Response 196:
The federal rules related to this MCM do not specifically list all of the groups to consider, but the listed groups are important to consider as the MS4 operator develops its public education program. No changes were made to the permit language, because the listed groups are appropriate to consider in developing an education and outreach program. It is not overly burdensome for an MS4 operator to provide information about these groups. Many MS4 operators may not need to consider all of these groups, based either on the nature of the community served or the type of MS4. In these cases, the SWMP should justify why each group was excluded.

Comment 197:
Universal City, HCEC, and TxDOT-Houston request that the last sentence of III.A.1.(a) be revised to change "pollution" to "pollutants," and comment that the term "pollution" does not adequately follow statutory and regulatory terminology and could lead to legal uncertainties.

Response 197:
In response to the comments, the final paragraph of Part III.A.1.(a) was revised for consistency with the language used in the federal rules at 40 C.F.R. §122.34(b)(1), related to public education and outreach. The section was changed to: "The outreach must inform the public about the impacts that storm water run-off can have on water quality, hazards associated with illegal discharges and improper disposal of

waste, and steps that they can take to reduce pollutants in storm water runoff." Additionally, the term "implemented" was added to the first sentence of the first paragraph of this item for consistency with the federal language.

Comment 198:
Cleburne believes that the State of Texas already has an extensive public education arm that receives federal as well as state funding and, since this infrastructure is already in place working through cooperative programs (Keep Texas Beautiful, Don't Mess With Texas, Texas Watch, River and Lake Clean Up, etc.), it seems that TCEQ and the state are very capable of providing the public education and outreach component of the MCMs. Cleburne comments that this would provide a more cost-effective, uniform, and complete education for the citizens of Texas. Therefore, Cleburne suggests that TCEQ commit to providing the public education component statewide and enroll voluntary assistance of MS4 operators to pass along information to their constituents that is provided by TCEQ.

Response 198:
The final federal Phase II storm water regulations at 40 C.F.R. §122.34 require that the operators of small MS4s subject to the permit requirements develop and implement a public outreach and education MCM. The permit allows small MS4s to use existing programs to fulfill SWMP permit requirements. Where programs are developed and implemented by a separate entity, the MS4 operator must describe how those programs meet each of the permit requirements and achieve the SWMP goals specific to its MS4.

For TCEQ to assume the public education component on a statewide basis, 40 C.F.R. §122.35(b) requires that the permitting authority recognize in either an individual or general permit that another government entity is responsible "under an NPDES permit for implementing one or more of the MCMs for your small MS4 or that the permitting authority itself is responsible." This provision is intended to allow small MS4s to exclude MCMs from the SWMP if the permit specifically recognizes that another government entity is responsible for implementing the MCM. At this time, TCEQ has not undertaken statewide implementation of any of the MCMs such that small MS4s can exclude them from their SWMP.

Comment 199:
V&E asks for clarification on who constitutes "public service employees." V&E requests revision of the list in this part to include reference to residents and governmental and commercial and industrial employees who are routinely situated in the MS4 service area.

Response 199:

The current list includes businesses, commercial, and industrial facilities, which means that the program should include the employees that work in these facilities. Similarly, public service employees are those employees that work for governmental agencies with facilities located within an MS4.

Comment 200:

Tarrant County, Freese & Nichols, Group 1, NCTRSW, Harris County, Grapevine, Lloyd Gosselink, NCTGOG, Grand Prairie, Cleburne, Carter & Burgess, Farmers Branch, and Carroll & Blackman recommend removing from Part III.A.1.(a), item (2), "visitors" from the public education MCM. Tarrant County and Grapevine state that this group was not included in EPA's draft Phase II permit. Tarrant County comments that visitors are not likely to produce pollutant discharges to the local MS4 except during special events such as fairs, when staff of the regulated MS4 would handle illicit discharges. Lubbock suggests that public education and outreach is more productive if operators could target educational institutions more than visitors. Harris County believes that the requirement for providing public education and outreach for visitors is unreasonable because visitors are generally short-term occupants who may be in town for a single event and it is not appropriate to expect concern or responsibility on the part of the visitor for the environmental, social, economic health and viability of the visited region. Harris County also states that small MS4s may have limited budgets and that it is unreasonable to expect them to spend resources on educating visitors, in part because any water quality benefits are insignificant. Harris County recognizes that visitors can and do impact water quality, but suggests addressing these impacts through other efforts, such as street sweeping during major events. Carter & Burgess states that the inclusion of "visitors" contradicts the exclusion of "transient (nonresidential) populations" in the definition of an MS4. Carter & Burgess states that it does not make sense to argue that some facilities do not meet the definition of MS4 because they serve only a transient (nonresidential) population, and then require an MS4 operator to consider a transient (nonresidential) population in their outreach. Lloyd Gosselink, NCTGOG, Farmers Branch, and Carroll & Blackman state that it removes the flexibility that the federal rules provide for Phase II MS4s to tailor public education programs to the local audience. Group 1 comments that "visitors" will be impossible to define and target and that it is likely that visitors from outside of the community will be exposed to this program in their home communities. Freese & Nichols comments that the term "visitors" is ambiguous. Lloyd Gosselink, NCTGOG, Farmers Branch, and Carroll & Blackman state that requiring public education for visitors may result in an impractical and inefficient use of resources as well as resulting in duplication of effort for small MS4 operators. Removing the term from the permit would allow MS4s to focus their education programs on the constituents that can be most affected by the educational program. Grand Prairie states

that visitors to the city are informed of storm water impacts through the municipality where they reside and the permit already requires the MS4 operator in Section III.A.1.(b) to ensure that all reasonable attempts are made to reach all constituents within the MS4. Cleburne comments that visitors are a difficult group to reach and, although some educational outreach may reach visitors, documenting this is difficult and that visitors should only have a limited impact on water quality discharges from an MS4. V&E requests clarification regarding how an MS4 operator is to accurately track and target all visitors that enter into the MS4 area of service.

Response 200:

Visitors may not always be a group that every small MS4 operator must target for public education and outreach, but TCEQ supports the existing requirement that each small MS4 operator consider each of the listed groups in Part III.A.1.(a) and provide written justification for any of the listed items they decide not to include. However, the MS4 operator may determine that they do not need to target visitors for public education and outreach, based in some cases, on the reasons discussed by several of the commenters. Some MS4s, for example, toll authorities and TxDOT, do not serve a resident population and therefore must develop programs that interact with "visitors" who use their systems. These systems can count the number of visitors as the number of users of those transportation systems. In this context, examples of "visitors" to a toll authority or TxDOT are drivers on the roadway within the MS4 or employees of those systems who work within their boundaries. In response to an earlier comment, TCEQ described changes to the definition of "small MS4" that removed the term "transient" and included further clarifications to the definition to meet the intent of recognizing that certain school buildings and office complexes may not meet the definition of "system."

Comment 201:

Group 1 comments that industrial monitoring and inspection programs are specifically not mandated for Phase II MS4s by the federal rules in order to ease the financial burden of the illicit discharge and elimination program. Since the municipality has no permit requirement to legally prohibit industrial discharges or perform industrial inspections, small municipalities should not be required to specifically target industrial facilities for public education and outreach. Group 1 requests deleting item (5) from Part III.A.1.(a), the public education and outreach MCM.

Response 201:

The public education and outreach MCM is not a program to monitor and inspect industrial facilities. 40 C.F.R. §122.34(b)(3) states that the MS4 operator must "inform public employees, businesses, and the

general public of hazards associated with illegal discharges and improper disposal of waste." This requirement is tied to the illicit discharge detection and elimination program in the rules and was moved to the public education and outreach MCM in order to group all educational requirements under one MCM. The term "businesses" includes "commercial and industrial facilities." This group was listed in the permit to clarify the intent of the rule. In addition, the education of commercial and industrial facilities can be considered the first step in implementing the illicit discharge detection and elimination MCM as such facilities may be discharging unauthorized waste streams.

Comment 202:
Cleburne comments that it is difficult to reach and document public information outreach to individuals working on construction sites that are inherently hazardous locations. However, providing information to the operators of construction sites for their employees is more attainable and practicable.

Response 202:
The permit does not require the education of construction site personnel to occur on the construction site. This education may be conducted through educational seminars, meetings, mailouts, or through some other mechanism that the MS4 operator determines appropriate.

Comment 203:
Universal City, HCEC, and TxDOT-Houston comment that Part III.A.1.(b) should not require documentation of public education activities, such as brochures and website content, in the annual report, but rather summarize the public education activities and achievement of associated measurable goals and deadlines in a tabular format. The commenters believe that the MS4 operator should maintain the supporting documentation, which will result in streamlined reporting, facilitation of TCEQ review, and avoidance of excessive materials sent to TCEQ. The commenters also note that the current requirement to provide this supporting documentation exceeds federal requirements in 40 C.F.R. §122.34(g)(3). Lubbock requests that TCEQ expand on the phrase "documentation shall be detailed enough . . .."

Response 203:
The permit language does not require an MS4 operator to include actual brochures and similar information in the annual report. The MS4 operator must provide enough information in the annual report to describe in detail the actions taken throughout the year to comply with the permit conditions. Some MS4 operators may elect to provide a short description of the type of paperwork that was provided to the public, along with a table showing how many and how often the documents were distributed. Other

MS4 operators may elect to include actual examples of information provided to the public. The information included must be detailed enough to demonstrate compliance with the public education and outreach MCM, while taking into consideration the need for the annual report to remain concise. The particular information included in the annual report is described at Part IV.B.2. of the permit.

Public Involvement/Participation

Comment 204:
TxDOT believes that this MCM is more applicable to entities that have a significant involvement with and multifaceted responsibilities to the local residents of the urbanized area where they operate than to a state agency that may control only a very small portion of a larger MS4. TxDOT requests that either the permit include only the public involvement requirements as described by the EPA in 40 C.F.R. §122.34(b)(2)(i) or less specific TPDES requirements.

Response 204:
The permit requires the development of a public education and outreach MCM because it is specifically required in the federal regulations at 40 C.F.R. §122.34(b)(2)(i) and as adopted by reference in 30 TAC §281.25. 40 C.F.R. §122.34(b)(2)(i) simply states that the MS4 operator must "at minimum, comply with State, Tribal, and local public notice requirements when implementing a public involvement/participation program." However, the extent of this program may vary greatly depending on the nature of the small MS4 and the interaction, or lack thereof, between the small MS4 operator and the public.

Comment 205:
DAFB notes that Part II.A.2.(b) requires MS4 operators to comply with state and local public notice requirements when implementing a public involvement/participation program and requests guidance regarding where one can find the State of Texas public notice requirements. Fort Hood asks for information regarding what state and local public notice requirements apply when implementing a public involvement/participation program.

Response 205:
State of Texas public notice requirements for government entities can be found in the Texas Government Code, Chapter 551 - Open Meetings.

Comment 206:

Grapevine notes that it supports the changes that were made to this section following the original draft permit and that the additional clarification will allow for more effective application of the regulations.

Response 206:
The revisions to this section were made as a response to several comments that were received following the 2002 publication of the draft permit.

Illicit Discharge Detection and Elimination

Comment 207:
TCCOS and Mathews & Freeland comment that TCEQ lacks the constitutional authority to require municipalities to regulate others through the illicit discharge detection and elimination MCM. TCCOS and Mathews & Freeland comment that the regulatory controls envisioned by this MCM are fully within TCEQ's regulatory jurisdiction. TCCOS and Mathews & Freeland contend that TCEQ should not pass these statutory obligations down to other governmental entities without providing funding for the implementation of these obligations.

Response 207:
The requirement to develop an illicit discharge detection and elimination MCM is found in 40 C.F.R. §122.34 and adopted by TCEQ by reference in 30 TAC §281.25. The rule requires that a small MS4 "develop, implement, and enforce a program to detect and eliminate illicit discharges." However, TCEQ does not require that municipalities regulate third parties beyond their authority. If a municipality lacks the authority to enforce a prohibition against illicit discharges when it identifies such discharges, it can request the entity causing the discharge to stop the discharge. If they will not voluntarily comply, the municipality may report suspected violations to TCEQ by calling the Environmental Violations Hotline at 1-888-777-3186 or their local regional office.

Comment 208:
Bunker Hill requests addressing the prohibition of non-storm water discharges in TWC Chapter 7 so that MS4 operators could incorporate them by reference.

Response 208:
TCEQ may not make changes to the TWC. Changes to the TWC must be made by the Texas Legislature.

Comment 209:
Travis County asks whether Part III.A.3.(a) is an adequate regulatory mechanism for a county to take enforcement action against illicit dischargers under TWC, §7.351, based on various statutes and TCEQ rules prohibiting pollution of water in the state.

Response 209:
TWC, §7.351 may not be an adequate regulatory mechanism in all cases, but the statute does give local governments the authority to bring a lawsuit in district court for violations under TWC, Chapters 16, 26, or 28 and Texas Health and Safety Code, Chapters 361, 371, 372, and 382. If a violation is occurring in the jurisdiction of a local government, the statute allows them to institute a civil suit in the same manner as TCEQ for injunctive relief and/or civil penalty against the person who committed, is committing, or is threatening to commit a violation.

Comment 210:
Lubbock questioned whether elimination of illicit discharges is an attainable goal and requests addressing this terminology.

Response 210:
The general permit requires implementing this MCM to the MEP. It may not be feasible to control every illicit discharge, but the MS4 operator is responsible for developing a program that most efficiently addresses the goal of eliminating illicit discharges to the MEP. The Center for Watershed Protection (CWP) has developed a guidance document that may be helpful in developing an Illicit Discharge Detection and Elimination Program, which can be found at: *http://www.cwp.org/IDDE/IDDE.htm*.

Comment 211:
Harris County notes that it supports the wording in this minimum measure requirement.

Response 211:
Several revisions were made to this section in response to comments received in 2002 following public notice of the original draft permit.

Comment 212:
Universal City, HCEC, and TxDOT-Houston state that the requirements in Part III.A.3.(1) and (2) to list techniques used for detecting illicit discharges in the SWMP, and to include appropriate actions to

remove the source of illicit discharges, exceeds federal requirements, which call for MS4 operators to "develop, implement, and enforce a program to detect and eliminate illicit discharges" during SWMP implementation. They state that it is inappropriate to list techniques and document actions prior to submitting an NOI when federal requirements and the permit allow a five-year implementation schedule, and when the process is very involved. The commenters request allowing MS4 operators to outline the overall approach to implementing all of the provisions of this MCM, but address the actual detection techniques in the MS4's accompanying illicit discharge detection plan.

Response 212:
The SWMP that is submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for developing them such that full implementation of the SWMP is accomplished within five years from the date the permit is issued. Therefore, the SWMP submitted with the NOI for authorization may address, for example, the lack of a list of techniques used to detect illicit discharges, or a lack of documentation of actions to remove illicit discharges, by providing a description of the types of information that will be considered, as well as a schedule for developing the required information.

Comment 213:
Carroll & Blackman requests revising the first sentence of Part III.A.3.(a)(2) for consistency with EPA's Model Permit, and notes that the change will also help to address non-traditional MS4s such as counties, certain districts, and transportation agencies which cannot develop or enforce a regulatory mechanism. Carroll & Blackman states that these MS4s would not be able to remove the source of the discharge, but will instead rely on another entity to do so. Carroll & Blackman requests revising the first sentence to replace the term "remove" with "effectively prohibit": "The SWMP must include appropriate actions and, to the extent allowable under State and local law, establish enforcement procedures for effectively prohibiting the source of an illicit discharge."

Response 213:
As explained in an earlier response, TCEQ does not require small MS4s to regulate third parties beyond their authority. If an MS4 operator lacks the authority to enforce a prohibition against illicit discharges when it identifies such discharges, it can request the entity causing the discharge to stop the discharge. If they will not voluntarily comply, the MS4 operator may report suspected violations to TCEQ by calling the Environmental Violations Hotline at 1-888-777-3186 or their local regional office.

Comment 214:

Grapevine requests additional clarification regarding the following sentence found in Part III.A.3.(a)(2): "Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, the information regarding the illicit discharge may be referred to TCEQ's regional field office." Grapevine asks that TCEQ provide specific direction about what is expected for local control and when issues can be referred to TCEQ. Grapevine asks for guidance regarding how much enforcement is considered enough for local authorities to implement. Finally, Grapevine states that without further clarification, TCEQ would likely receive a very large number of referrals of storm water enforcement concerns. TxDOT comments that it supports the inclusion of the final sentence of this section, and notes that TxDOT lacks authority to develop ordinances and implement enforcement actions; therefore, TxDOT relies on other entities to do so.

Response 214:

TCEQ deleted the noted sentence in Part III.A.3.(a)(2) and replaced it with language in the introductory section of Part III that it is using in the medium and large Phase I MS4 individual permits in order to address certain entities that do not have enforcement authority, such as TxDOT. The new language intends to ensure that the MS4 operator attempts to meet the SWMP MCMs to the extent that it has authority and the available resources, prior to notifying TCEQ. The new language states:

"Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, the permittee shall exert enforcement authority as required by this permit for its facilities, employees, and contractors. For discharges from third party actions, the permittee shall perform inspections and exert enforcement authority to the MEP. If the permittee does not have enforcement authority and is unable to meet the goals of this general permit through its own powers, then, unless otherwise stated in this general permit, the permittee shall perform the following actions in order to meet the goals of the general permit: Enter into interlocal agreements with municipalities where the MS4 is located. These interlocal agreements must state the extent to which the municipality will be responsible for inspections and enforcement authority in order to meet the conditions of this permit; or, if the permittee is unable to enter into inter-local agreements, it may notify TCEQ's Field Operations Division as needed to report discharges or incidents when it does not have enforcement authority."

In addition, language was added to the end of the second paragraph of Part IV.C.1. of the fact sheet to reflect the change.

Comment 215:
Carter & Burgess comments that it will be difficult for an SWMP to establish enforcement procedures with the 180-day time frame required in the permit, but that it would likely be feasible to include a "plan to establish enforcement procedures."

Response 215:
The requirements of the SWMP were not revised, but TCEQ notes that the MS4 operators will have five years from the date the permit is issued to fully implement each MCM. To the extent that enforcement procedures are known, the MS4 operator should include that information in its SWMP. Over the permit term, TCEQ expects that MS4 operators will enhance their SWMPs so that more specific information is included as knowledge is gained from the implementation process.

Comment 216:
Group 1 comments that industrial monitoring and inspection programs are not mandated by Phase II rules as part of the illicit discharge and detection MCM. Since municipalities have no permit requirements to legally prohibit industrial discharges or to perform industrial inspections, small MS4 operators should not be required to specifically include any industrial outfalls in the dry weather screening program.

Response 216:
Although many MS4 operators may elect to include inspections of major industrial contributors to their systems as a component of the illicit discharge detection and elimination MCM, they are not required to do so. If the MS4 develops a dry weather screening tool as a part of the illicit discharge and detection MCM, then the MS4 would necessarily have to trace all dry weather discharges to the source, industrial or otherwise, to establish if it is an illicit discharge or a non-storm water discharge with the proper authorization for discharge.

Comment 217:
DAFB requests clarification in Part III.A.3.(b) regarding what is an acceptable mechanism to show that the MS4 operator considered non-storm water flows. Also DAFB requests a definition for the term "significantly contribute."

Response 217:
One option the MS4 operator has is to incorporate the consideration of non-storm water discharges as a part of a dry weather screening program, which complies with the permit requirement for the illicit

discharge detection and elimination MCM. To implement this option the MS4 operator would screen the entire system within the five-year term of the permit for dry weather flows. When a flow is detected, it is traced to the source. If it is determined that the flow is a non-storm water source listed in Part II.B or Part VI.B, it is an allowable non-storm water discharge, unless the MS4 operator determines it is a significant source of pollutants. In making this determination, the MS4 operator may consider the conditions of the receiving water, noting any change that can be attributed to the dry weather flow, such as color, foam, changes in the aesthetic qualities, or obvious toxic effects to aquatic organisms and algal communities. The MS4 operator may also consider the physical character of the discharge itself. Finding the source as a potentially allowable non-storm water discharge and lacking indication of the presence of significant pollutants, the MS4 operator could conclude that the source is not a significant source of pollutants. Alternatively, if the discharge remains suspect, the MS4 operator can sample and conduct laboratory analyses for a range of suspected pollutants.

Comment 218:
EIS comments that if fire fighting activities may be excluded from consideration as an illicit discharge, unless they are a significant contributor of pollutants, why not require fire departments to use environmentally friendly soaps when washing their trucks. EIS states that it should be standard practice to use less damaging detergents.

Response 218:
This comment was received during the original comment period on the draft permit in 2002. The revised permit added language to state that fire fighting activities were those that resulted from the emergency response to a fire and the activities required to extinguish the fire and specifically states they do not include washing of trucks. However, the permit is sufficiently flexible to allow the introduction of a number of non-storm water discharges to the permitted storm sewer system where the MS4 operator determines that those discharges do not constitute a significant source of pollutants. The MS4 operator may decide to develop and enforce local ordinances to control contributions to the permitted systems based on the types of non-storm water contributions and based on local conditions and water quality concerns. These ordinances can include conditional controls, such as the use of “environmentally friendly” soaps, which satisfy the MS4 operator that the discharge is not a significant source of pollutants.

Comment 219:
Cleburne believes that under the definition of illicit discharge, non-storm water discharges would fall under Part III.A.3.(a), relating to illicit discharges and would require elimination from the MS4. Cleburne

states that many of the flows listed in Part II.B. are beyond the control of the MS4 operator and that under most instances these flows do not contribute pollutants. Cleburne comments the remainder of the allowable non-storm water discharges have little potential to adversely affect water quality and that it is more cost-effective for the operators to identify the contributing pollutant sources and eliminate them. Cleburne recommends deleting this language from Part III.A.3.(a). TCCOS, Mathews & Freeland, Tarrant, and NCTCOG ask whether the determination on the significance of the discharge is made by the MS4 operator or by TCEQ. Freese & Nichols comments that the permit should clearly state who makes the determination of what constitutes significant contributors of pollution to the MS4.

Response 219:
The introductory paragraph in Part II.B. states that non-storm water discharges listed in that part are not considered illicit discharges, unless the MS4 operator determines that they are substantial sources of pollutants to the MS4. Therefore, they must be eliminated as an illicit discharge only when it is determined by the MS4 operator that they are a significant source of pollutants (40 C.F.R. §122.34(b)(3)(iii)).

Comment 220:
TCCOS and Mathews & Freeland comment that the permit does not adequately explain what types of incidental non-storm water discharges are allowed by this provision. The EPA model general permit gives examples of allowable discharges, which include non-commercial or charity car washes. TCCOS and Mathews & Freeland request revising the first two sentences in Part III.A.3.(b) as follows, to include the italicized additional language: "A list of occasional incidental non-storm water discharges (*e.g., non-commercial or charity car washes, etc.*) that will not be addressed as illicit discharges may also be developed. If developed, the listed discharges must not be reasonably expected to be significant source of pollutants, based on information available to the MS4 operator, because of either the nature of the discharge or the conditions that were established for allowing these discharges to the MS4 (*e.g., a charity car wash with appropriate controls on frequency, proximity to sensitive waterbodies, BMPs on the wash water, etc.*)."

Response 220:
The language of the permit is adequately flexible to enable the MS4 operator to identify and allow a number of incidental non-storm water contributions to the permitted system. It is not feasible to provide a comprehensive list of non-storm water discharges that are considered incidental and not a significant source of pollutants by the MS4 operator. The example of charity car wash activities might be included

in this category where the MS4 operator is able to identify and require controls that are protective of receiving water quality. However, based on local water quality concerns, this also might be an activity that the MS4 operator would either encourage or require to occur with the cooperative assistance of local commercial car wash enterprises where the wastes are routed to a treatment works.

Comment 221:
TxDOT agrees that it is not necessary to address some incidental non-storm water discharges as illicit discharges. However, TxDOT believes that it is not possible to know, before an SWMP is implemented, which discharges will not be significant contributors of pollutants. Cleburne comments that a definition of incidental non-storm water discharges was not included in the permit and that most MS4 operators will not be able to develop a list of incidental non-storm water discharges prior to initial permitting.

Response 221:
It is likely that the universe of non-storm water contributions to the permitted system will not be apparent before the SWMP is developed and implemented. However, the SWMP can contain a list of the most common discharges that are apparent to the MS4 operator. As additional discharges to the system are identified during implementation of the illicit discharge detection and elimination MCM, those discharges may be added to the list. During the term of the permit the MS4 operator may identify a number of non-storm water discharges to eliminate or control because it is determined they are significant sources of pollutants.

Comment 222:
Universal City, HCEC, and TxDOT-Houston request that TCEQ modify the last sentence of Part III.A.3.(b) to clarify that the description of local controls to address non-storm water discharges in the SWMP is only required if the MS4 operator elects to develop a list of incidental non-storm water discharges.

Response 222:
In response to this comment, the last sentence of Part III.A.3.(b) was revised as follows:

“If this list is developed, then all local controls and conditions established for these listed discharges must be described in the SWMP and any changes to the SWMP must be included in the annual report described in Part IV.B.2. of this general permit, and must meet the requirements of Part II.D.3. of the general permit.”

Comment 223:

Cleburne comments that there is no reason to develop a list of incidental non-storm water discharges because if they are potential significant sources of pollutants then they are illicit discharges and handled as such. Cleburne comments that it appears that TCEQ is conveying permitting authority to the MS4 operator if special provisions for discharge must be established allowing certain incidental non-storm water discharges to the MS4. Cleburne states that, if that is not the intent, then TCEQ should delete the section relating to incidental non-storm water discharges from the permit. Cleburne states that, if it is the intent to convey permitting authority, then Cleburne is opposed to having this responsibility delegated to the MS4 operators. TxDOT comments that the intent of the illicit discharge MCM is to detect discharges that contribute significant pollutants, not to specifically rule out incidental non-storm water discharges that do not.

Response 223:

As the MS4 operator implements the illicit discharge detection and elimination MCM, a number of incidental and occasional non-storm water contributions to the system may be identified. If the MS4 operator determines these non-storm water discharges are not a significant source of pollutants, the MS4 operator may allow these discharges to their MS4. Developing and maintaining this list of allowable non-storm water discharges provides the MS4 operator a reference of their prior findings and a record that supports compliance with the permit requirements for this MCM. However, the permit does not require an MS4 operator to develop such a list.

In addition, TCEQ is not delegating permitting authority to MS4 operators. The illicit discharge MCM places on the MS4 operator the responsibility of determining whether non-storm water discharges are a significant source of pollutants and requires they prohibit this contribution to their storm sewer system only if it is significant. Maintaining a list of occasional incidental non-storm water discharges provides assistance to the MS4 to comply with the provisions of their storm water permit and is not a requirement to separately enforce the TWC or CWA.

Comment 224:

Tarrant County comments that identifying “waters of the U.S.” receiving discharges is difficult for purposes of the map required by Part III.A.3.(c) and requests some standardized means of identifying “waters of the U.S.,” such as United States Geological Survey (USGS) quad maps or FEMA maps. Tarrant County asks for a reference source where some form of these maps or their equivalent can be accessed to identify “waters of the U.S.”

Response 224:

MS4 operators may utilize maps such as a USGS quadrangle map or the Atlas of Texas Surface Waters (Publication Number GI-316), and refer to the first named receiving water on the map. If TCEQ develops a GIS-based map to assist in identifying receiving waters, this tool will be made available on the agency's Web site and the Web address identified in the NOI.

Comment 225:

Travis County requests information on the scope of the conveyances and structures contributing to each outfall location that they must identify on the storm sewer map required by Part III.A.3.(c). They ask whether all above-ground and below-ground conveyances must be located and mapped for each outfall, or just contributing surface drainage inlets and/or watershed areas.

Response 225:

At minimum, the storm sewer map must include all of the regulated outfalls, all waters of the U.S. receiving discharges from the outfalls, and any information required to implement the SWMP. The MS4 operator may need to develop more detailed maps of conveyances in order to adequately implement an illicit discharge detection and elimination program. The Center for Watershed Protection has developed a guidance manual for this MCM that may be helpful to MS4 operators. This manual is available online at: *http://www.cwp.org/IDDE/IDDE.htm*.

Comment 226:

Carter & Burgess notes that the requirement in Part III.A.3.(c)(1)(i) related to the storm sewer map was changed from "major outfalls" to "all outfalls." Carter & Burgess states that it is not practicable for the MS4 operator to develop a map of all outfalls and states that this requirement is beyond the MEP standard for most MS4s. Harris County asks whether TCEQ intends the mapping of all outfalls or just those of a certain type or above minimum size. Harris County comments that the current language would require MS4 operators to map every pipe, swale, or conduit of any size that is placed by any number of entities into the MS4, and suggest revising the permit for consistency with 40 C.F.R. §122.26(d)(1)(B)(1), which states that only municipal storm sewer outfalls discharging into waters of the U.S. must be mapped. Russell Moorman requests revising the permit to require cities to map "major outfalls" rather than "all outfalls," which is consistent with the previously published draft permit. Russell Moorman states that a significant amount of additional resources are required to map the additional outfalls, and may not result in a significant improvement to water quality.

Response 226:

In response to comments regarding the definition of "outfall" the definition was revised to help clarify that as discussed in this permit an "outfall" refers to a discharge point from an MS4 into waters of the U.S. Outfalls that discharge into the MS4, such as a wastewater outfall from an industrial facility, are not included in this definition. TCEQ declines to revise the language, which is consistent with the federal regulations at 40 C.F.R. §122.34(b)(3)(ii), which require mapping of "all outfalls."

Comment 227:

Tarrant County and NCTRSW request clarification regarding how to determine the point of discharge to surface water in the state. The commenters request that TCEQ provide applicants access to a state or federal map, specific to the general permit, which names specific streams and other water bodies in order to map locations of all outfalls to surface water in the state (as listed in definitions) or waters of the U.S. (as listed in III.A.3.(c)(1)(ii)). Tarrant County, NCTRSW, and Grapevine suggest that TCEQ provide a state or federal map, such as TCEQ's TMDL River Basin maps or USGS Quadrangle sheets. Tarrant County and Grapevine note that the TMDL maps could be posted or emailed to download into a GIS. These commenters also note that Phase I individual permits issued by EPA were approved using USGS maps to delineate the boundary between the MS4 and waters of the U.S. If such a map is not designated by TCEQ, Tarrant County and Grapevine request changing the language regarding what outfalls must be mapped from "all outfalls" to "outfall locations adequate to conduct MS4 conveyance surveillance and illicit discharge tracing." Tarrant County and Grapevine comment on the difficulty that MS4 operators will face determining compliance without knowing what waters are designated as receiving waters.

Response 227:

The permit requires the MS4 operator to develop its outfall map using existing information such as federal or state maps and publications. MS4 operators can locate information regarding classified segment(s) receiving the discharges from the MS4 in the "Atlas of Texas Surface Waters" at the following TCEQ web address. This document includes identification numbers, descriptions, and maps: *http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-316/index.html*.

Information on unnamed receiving waters that are not listed as impaired may be found on USGS topographic maps or TxDOT County Maps, which are used in the TPDES program to delineate the discharge route of a particular facility (see 30 TAC §305.45(a)(6)). The EPA's Web site contains current information on the definition and court rulings regarding "waters of the U.S.," at:

http://www.epa.gov/owow/wetlands/guidance/SWANCC/ and this may be helpful in developing the required outfall map.

Comment 228:
Mathews & Freeland comment that the permit should make it clear that the storm sewer map can be developed during the permit term. Carroll & Blackman comments that the language in Part III A.3.(c)(2) should reflect the future tense rather than the past tense, and suggests the following language:

The SWMP must include the source of information (that) will be used to develop the storm sewer map, including how the outfalls will be verified and how the map will be regularly updated.

Response 228:
TCEQ recognizes that many MS4 operators will not complete the storm sewer system map prior to submitting an NOI and believes that changing the word "were" to "are" will help address both those MS4 operators that have completed this measure and those that will implement it during the permit term. In response to the comment, Part III A.3.(c)(2) was changed to: "The SWMP must include the source of information used to develop the storm sewer map, including how the outfalls are verified and how the map will be regularly updated."

Comment 229:
Universal City, HCEC, and TxDOT-Houston comment that the requirement to include the "source of information" used to develop the storm sewer map in the SWMP exceeds the federal requirements and that these sources cannot be identified prior to submitting the NOI. The commenters state that federal intent was for MS4 operators to begin MCM implementation after submitting the NOI. The commenters also state that the requirement to include a map update method is inappropriate, as MS4 operators may defer map preparation until later in the five-year implementation period. Mathews & Freeland comment that including the source of information used to develop the map would result in massive amounts of information being contained in the SWMP and recommend deleting Part III.A.3.(c)(2).

Response 229:
The SWMP that is submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for developing them such that full implementation of the SWMP is accomplished within the initial five-year permit term. Therefore, the SWMP submitted with the NOI for

authorization may address the lack of including a source of information used to develop a storm sewer map, by providing a description of the types of information evaluated, as well as a schedule for developing the required information.

Pollution Prevention/Good Housekeeping For Municipal Operations (moved to Part III.A.6. of the permit)

Comment 230:
TCCOS and Mathews & Freeland comment that the permit uses the term "municipal" throughout Part III.A.4.(now Part III.A.6) and elsewhere. However, small MS4s may include many public entities who are not municipalities. TCCOS and Mathews & Freeland believe the permit creates the impression that small MS4s who are not municipalities will not be required to implement those activities that are directed at municipal operations, and that this could lead to preferential treatment of MS4s owned by federal and state governments.

Response 230:
The permit was developed using terms established by EPA during development of the NPDES storm water permitting program and that are currently used by most other states administering the NPDES program. The permit contains a definition for MS4 to make it clear that it includes a system that may be owned or operated "by the United States, a state, city, town, borough, county, district, association, or other public body . . .." Additionally, TCEQ, EPA, and other groups have conducted numerous workshops and conferences providing information on the permitting program, while using the term "municipal" to describe these systems.

Comment 231:
DFW comments that Part III.A.4.(a) (now Part III.A.6.) states that controls must be used to reduce or eliminate the discharge of pollutants from municipal operations and asks whether MS4s such as airports have to comply with the requirements listed in the MSGP for industrial activities (TXR050000) and this permit, or can these facilities comply solely under the requirements set forth in this permit.

Response 231:
TPDES general permit TXR050000 authorizes discharges of storm water associated with industrial activities. Some of the municipal operations conducted by an MS4 operator may also require coverage under this separate storm water permit, such as the operation of a steam electric power generating plant. Where a storm water pollution prevention plan (SWP3) is already developed to comply with TXR050000

for these activities, the SWMP can provide a reference to the SWP3 in order to meet the requirements of this permit. It is not necessary to develop a duplicate or additional set of controls for these operations.

Comment 232:
Carroll & Blackman recommends replacing the phrase "structural and non-structural controls" with "structural and/or non-structural controls" in Part III.A.4.(a) (now Part III.A.6.(a)) since structural controls are not always necessary.

Response 232:
In response to the comment, the applicable sentence was changed to: "Housekeeping measures and BMPs (which may include new or existing structural or non-structural controls) must be identified and either continued or implemented with the goal of preventing or reducing pollutant runoff from municipal operations."

Comment 233:
Group 1 comments that the language in Part III.A.4.(b) (now Part III.A.6.(b)) is not clear and requires the inclusion of training materials in the SWMP, even though the permit allows an implementation time frame for development of the training program. Group 1 further states it is not feasible to provide information that is still in the development stage. Freese & Nichols requests removing from the initial SWMP submission the requirement to include training materials for good housekeeping and BMPs.

Response 233:
The SWMP submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for developing them such that full implementation of the SWMP is accomplished within the initial five-year term of the permit. Therefore, the SWMP submitted with the NOI for authorization may address the lack of training materials by providing a description of the types of materials that are necessary and a schedule for developing those materials.

Comment 234:
Tarrant County comments that it appears that Parts III.A.4.(c), (d), and (e) (now Parts III.A.6.(c), (d), and (e)) are including requirements for the maintenance of structural controls, the disposal of waste associated with the maintenance of those controls, and a listing of all municipal operations subject to permitting requirements. Tarrant County and Grapevine comment that EPA only recommended these items in its

model MS4 permit and the commenters recommend that the permit not go beyond the conditions included in the EPA's model MS4 permit. TCCOS and Mathews & Freeland also believe that this MCM exceeds the requirements of the EPA Phase II rule. TCCOS and Mathews & Freeland comment that TCEQ should not implement EPA suggestions as if they were requirements of the federal rule. Group 1 comments that the language in Part III.A.4.(d) (now Part III.A.6.(d)) elevates an EPA recommendation to a requirement and that waste disposal will become part of this MCM implementation, but the actual disposal is likely covered under other permit programs for waste disposal. Group 1 also comments that it should be the operator's decision whether to include this sort of language in its SWMP and requests deletion of this language.

Response 234:
The final Phase II federal regulations do not require MS4 operators to include structural control maintenance and solid waste disposal elements as a part of this MCM. However, the preamble to the Phase II regulations notes: "Ultimately, the effective performance of the program measure depends on the proper maintenance of the BMPs, both structural and non-structural. Without proper maintenance, BMP performance declines significantly over time. Additionally, BMP neglect may produce health and safety threats, such as structural failure leading to flooding, undesirable animal and insect breeding, and odors." (64 FR 68721, 687562 (1999)). The permit, like the federal rules, does not require structural controls, but requires performing maintenance of controls only if this type of BMP is used to satisfy this MCM. Listing all municipal operations that are subject to TPDES storm water permitting requirements is an important step in identifying areas of concern related to this MCM. This list will assist in making a determination of which discharges must meet specific discharge requirements.

Comment 235:
Group 1 comments that Part III.A.4.(e) (now Part III.A.6.(e)) pertains to development of the program and the elements included in the documentation of the program. Group 1 states that it is clearly not feasible to provide information that is not developed and requests changing the language from "the SWMP must include a list of" to "the documentation must include a list of."

Response 235:
The SWMP submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for development such that full implementation of the SWMP is accomplished within the term of the permit. Therefore, the SWMP may simply "document" a schedule for developing

these activities and for implementing them as long as full implementation of the MCM is completed within the initial five-year term of the permit.

Comment 236:
Fort Hood asks what regulations apply to the disposal of accumulated sediment, dredge spoil, or floatables listed in Part III.A.4.(d) (now Part III.A.6.(d)). Fort Hood asks whether these materials are automatically designated as a special waste if they came from a storm water detention pond or could they be disposed of as a regular municipal solid waste.

Response 236:
Solid waste disposal must comply with applicable TCEQ rules in 30 TAC Chapters 330 and 335. An MS4 operator may need to contact TCEQ's Waste Permits Division for specific questions on the disposal of particular types of waste. General information on waste permitting may be accessed on TCEQ's Web site at: *http://www.tceq.state.tx.us/subject/subject_waste.html*. Additional information on special waste is available on TCEQ's Web site at:
http://www.tceq.state.tx.us/permitting/waste_permits/waste_planning/msw_specialwaste.html.

Comment 237:
Universal City, HCEC, and TxDOT-Houston state that the requirement in Part III.A.4.(d) (now Part III.A.6.(d)) to include procedures for waste disposal in the SWMP prior to submitting an NOI is inappropriate, as the federal intent was to begin MCM implementation after the NOI was submitted. Universal City, HCEC, and TxDOT-Houston state that operations and maintenance plans developed during SWMP implementation should contain these types of procedures.

Response 237:
The SWMP that is submitted with the NOI for permit coverage must include a description of all six MCMs (and potentially the optional seventh MCM). Where elements of an MCM are not yet developed, the SWMP must include a schedule for development such that full implementation of the SWMP is accomplished within the term of the permit. Therefore, the SWMP may simply “document” a schedule for developing these procedures and for implementing them, as long as full implementation of the MCM is completed within five years after the permit is issued.

Comment 238:

NCTCOG, Tarrant County, Cleburne, and Freese & Nichols request defining the term "industrial activity" as used in Part III.A.4.(e) (now Part III.A.6.(e)) in the permit. Tarrant County recommends using the language from the storm water MSGP to avoid confusion with non-regulated local government activities. Grapevine requests additional language in this section to further identify the industrial activities and specifically suggests inserting the word "industrial" after "TPDES" in order to better differentiate between the MS4 regulations and the existing industrial regulations.

Response 238:
In Part III.A.4.(e) (now Part III.A.6.(e)), the term "industrial activity" refers to industrial activities that are required to have storm water permit authorization according to 40 C.F.R. §122.26 under the Phase I storm water regulations. "Storm water discharge associated with industrial activity" is defined in 40 C.F.R. §122.26(b)(14) and adopted by reference in 30 TAC §281.25. The term includes discharges from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing, or raw material storage areas at an industrial site that falls into one of the listed standard industrial classification (SIC) codes. These industrial sites require coverage under the TPDES MSGP for storm water or under an individual TPDES permit. For clarity, TCEQ did revise the language to insert the term "industrial" after "TPDES."

Comment 239:
TxDOT comments that the NPDES CGP considers small and large construction activities as industrial activities and asks whether it is appropriate to assume that this section does not require the regulated community to report all CGP activities, whether large or small, that occur. TxDOT notes that these are often short term activities that may be completed before TCEQ reviews the NOI and requests clarification regarding what activities subject to TPDES regulations must be listed under Part III.A.4.(e) (now Part III.A.6.(e)) of the permit.

Response 239:
40 C.F.R. §122.26(b)(14)(x), includes large construction activities in its definition of storm water associated with industrial activity; however, the intent of this MCM is to address permanent facilities. Because the term "TPDES storm water regulations" was revised to "TPDES industrial storm water regulations," additional changes are not required, as the TPDES regulations differentiate between construction and industrial regulations. Part IV.B.2.(g) of the permit, related to the annual report, does require the MS4 operator to list the separate construction activities occurring within the regulated area.

Additionally, the MS4 operator will also need to address construction activities in the fourth MCM (based on revised numbering) related to discharges from construction site runoff.

Construction Site Storm Water Runoff Control (now Part III.A.4. of the permit)

Comment 240:
Mathews & Freeland comment that the words "local law" are unclear. Does it mean that if a municipal charter or a municipal ordinance, which are local laws, prohibit a municipality from regulating discharges from construction sites, then the municipality does not have to develop, implement, and enforce such a program? Mathews & Freeland state that the limitation "to the extent allowable under State and local law" is counterproductive because it will further exacerbate land development just beyond municipal boundaries. Counties and other operators of small MS4s may lack the authority to regulate construction site runoff. Thus, all other things being equal, new land development will be more likely to occur outside of municipal boundaries. Additionally, many general and special law districts (such as water districts, MUDs, etc.) have the authority to regulate such discharges, but traditionally have not exercised such authority, and may lack the appropriate funding mechanisms. Mathews & Freeland ask if TCEQ expects such districts to regulate in place of counties merely because they have some "theoretical" power.

Response 240:
The language "to the extent allowable under State and local law" was included in the permit to emphasize that MS4 operators are not required to regulate or enforce MCMs beyond their authority. The provisions of the permit must be implemented to the MEP, but within the legal authority of the small MS4s.

Comment 241:
Tarrant County and NCTRSW request adding the following statement to the end of the paragraph under Part III.A.5.(a) (now Part III.A.4.(a)): "Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, information regarding construction site violations may be referred to TCEQ's regional field office." TCUC, BCES, and Harris County comment that the permit should include specific information on how TCEQ will handle the program for counties that lack enforcement authority. TCUC and BCES request that this section include what is required in the way of notification between the county and TCEQ for small construction sites.

Response 241:

In response to earlier comments regarding Part III.A.3. of the permit, TCEQ added a second paragraph to Part III of the permit to address what MS4 operators must do if they lack the authority to enforce certain MCMs. That paragraph states that where the MS4 operator lacks the authority to develop ordinances or to implement enforcement actions, the MS4 operator must exert enforcement authority as required by the permit for its facilities, employees, and contractors. For discharges from third party actions, the MS4 operator must perform inspections and exert enforcement authority to the MEP. If the MS4 operator does not have enforcement authority and is unable to meet the goals of this permit through its own powers, then, unless otherwise stated in this permit, where possible, the MS4 operator should seek to enter into interlocal agreements with municipalities where the MS4 is located. These interlocal agreements would detail the extent the municipality will be responsible for inspections and enforcement authority in order to meet the conditions of the permit. If the MS4 operator is unable to enter into such inter-local agreements, and does not have enforcement authority, it may notify the TCEQ's Field Operations Division. No additional changes were made to specifically address the construction site runoff requirements, as TCEQ believes that the new language will address these concerns.

Comment 242:
Fort Hood asks what type of "sanctions to ensure compliance" listed in Part III.A.5.(a) (now Part III.A.4.(a)) are required for a federal facility.

Response 242:
The permit requires the MS4 operator to develop and implement the SWMP to the MEP. Federal facilities may have additional capabilities to enforce compliance with a permit condition that local governments do not have, but there may also be limitations that exist for a federal facility. Sanctions may include, issuing notices of violation, assessing fines for noncompliance, and requiring work to stop until the operator is in compliance. If an MS4 operator attempts to implement sanctions, but does not have the authority to initiate enforcement action, then the MS4 operator should attempt to enter into interlocal agreements with MS4s and where that is not possible, the MS4 operator may contact TCEQ's Field Operations Division to report noncompliance (see previous response).

Comment 243:
Part III.A.5.(b)(2) (now Part III.A.4.(b)(2)) requires controls on wastes at a construction site that may cause adverse impacts to water quality. DAFB asks what constitutes "adverse impacts to water quality."

Response 243:

An adverse impact to water quality includes the introduction of pollutants that cause or contribute to the violation of a water quality standard or degrade the quality of the receiving water. In the preamble to the final Phase II regulations EPA states: "Water quality impairment results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport, and delivery is the primary pathway for introducing key pollutants, such as nutrients (particularly phosphorus), metals, and organic compounds into aquatic systems." (64 FR 68721, 68728 (1999)).

Comment 244:
TCUC and BCES ask how, since TCEQ is not requiring the operators of small construction sites to submit an NOI, does TCEQ expect to track the number of these sites.

Response 244:
The permit authorizing the discharge of storm water associated with construction activities, general permit TXR150000, requires the operators of small construction activities to provide a copy of the signed construction site notice to the operator of any MS4 that receives the discharge. The annual report the small MS4 must prepare for this permit requires it to report the number of non-municipal construction activities that occurred within the MS4's jurisdiction. The annual report also requires that the MS4 operator provide the number of small and large construction activities it has undertaken under the authority of this permit.

Comment 245:
Harris County and TAOC ask how TCEQ will regulate small construction sites that are not required to submit an NOI.

Response 245:
The regulations for large and small construction sites to protect water quality through the development of a comprehensive SWP3 are largely identical. Small sites differ from larger sites in that they may qualify for a waiver from this requirement if construction occurs during defined periods of time when there is a low potential for erosion. Also, for a number of reasons, including the fact that these activities will commence and conclude in a short period of time relative to larger construction activities, a construction site notice is required rather than submission of an NOI. You may refer to the following TCEQ Web site to obtain a copy of this permit, supporting fact sheet, and TCEQ's response to comments that contain the

requirements and the supporting technical information: *http://www.tceq.state.tx.us/nav/permits/wq_construction.html*.

Comment 246:

Cleburne comments that the first paragraph of Part III.A.5. (now Part III.A.4.) suggests that the MS4 operator is required to take over TCEQ's responsibility for enforcement of the TPDES CGP. Cleburne comments that if this is the intent of the language it creates an unfunded mandate being passed down to the citizens of local communities to fund. Costs to enforce the permit should not be passed on to citizens because MS4 operators do not have the money available and will not receive any of the fees generated by the TPDES construction permit. Therefore, Cleburne recommends deleting this initial paragraph and keeping the responsibility for enforcing compliance with the CGP with TCEQ. Cleburne suggests that Part III.A.5.(a) (now Part III.A.4.(a)) begin with: "The MS4 operator's program must include the development and implementation of, at a minimum, an ordinance or other regulatory mechanism to require erosion and sediment and waste management plans, as well as sanctions to ensure compliance, to the extent allowable under State and local law." TCCOS and Mathews & Freeland believe TCEQ lacks the statutory and constitutional authority to force municipalities to regulate the conduct of third persons. Furthermore, the regulatory controls envisioned by the control measure are fully within TCEQ's regulatory jurisdiction. TCCOS and Mathews & Freeland comment that TCEQ should not push its statutory obligations off onto other governmental entities, without providing the funding needed to implement these obligations. Therefore, TCCOS and Mathews & Freeland strongly object to this MCM. Lloyd Gosselink requests deleting this requirement from the permit because it is overly burdensome for many small MS4s and it requires the MS4s to enforce TCEQ's requirements of the CGP, TXR150000, since the construction sites over one acre are required to obtain coverage under the TPDES CGP.

Response 246:

TCEQ is the permitting authority for the NPDES program in the State of Texas and is the responsible agency for issuing and enforcing TPDES permits. TCEQ is not delegating permit authority for the TPDES CGP, TXR150000. The requirements for this MCM in the permit follow the federal regulations at 40 C.F.R. §122.34(b)(4), which state: "You must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre." The program requirements in the permit are also directly from the federal regulations at 40 C.F.R. §122.34(b)(4)(ii)(A) to (F). This MCM consists of requirements developed by the MS4 operator to ensure that discharges from the permitted storm sewer system do not cause an adverse impact to water quality in receiving waters. The MS4 operator must

develop procedures to inspect construction sites to make certain that construction site SWP3s are properly implemented. The MS4 operator may additionally choose to develop local requirements and conditions through an ordinance to account for local water quality issues. Additionally, as part of the illicit discharge and detection MCM, MS4 operators need to ensure that storm water contributions from construction activities subject to TPDES permitting have the necessary authorization.

Comment 247:
Cleburne believes that because of the potentially large number of construction sites that may be ongoing in an MS4, formal site inspections at each location would overwhelm the staffing capabilities of small MS4s. Therefore, Cleburne comments that requiring site inspections by the municipality at only those locations that are contributing pollutants to the MS4 is a more effective and less costly way to reduce pollutant loadings. Cleburne suggests the following language for (b)(3): "site inspection and enforcement of erosion and sediment control measures for construction sites that are contributing pollutants to the MS4."

Response 247:
MS4 operators are not required to inspect all construction sites that contribute storm water associated with construction activities to their MS4. Procedures for inspections must be developed by the MS4 operator, but the procedures may allow for focused inspections. The suggested language is not necessary, as the first sentence in Part III.A.4. indicates that the purpose of this MCM is to reduce pollutants in storm water runoff from construction sites that enter the permitted MS4 through local government regulation, such as ordinances.

Comment 248:
Harris County requests revising the requirement to develop a mechanism to require erosion and sediment controls to require adherence to the TPDES CGP. Harris County requests revising the language in Part III.A.5.(b)(1) (now Part III.A.4.(b)(1)) to clarify that construction site contractors must implement erosion and sediment control BMPs in compliance with the TPDES CGP. Similarly, Harris County requests revising the language in (b)(2) to clarify that construction site contractors must control wastes at the construction site that may cause adverse impacts to water quality in compliance with the TPDES CGP.

Response 248:
Where the MS4 operator concludes that compliance with the TPDES CGP is adequate to protect the quality of discharges from the MS4, the MS4 operator can establish that construction site operators need

only comply with the requirements of that general permit. Alternatively, the permit allows MS4 operators who may require additional or more specific controls to address local water quality issues or other area specific concerns.

Post-Construction Storm Water Management in New Development and Redevelopment (now Part III.A.5. of the permit)

Comment 249:
TCUC, Harris County, TAOC, and BCES comment that the permit should include specific information on how TCEQ will handle post-construction storm water management for new developments and redevelopments for counties who lack enforcement authority. Mathews & Freeland comments that the phrase "to the extent allowable under State and local law" is an open invitation for abuse by non-municipalities and that TCEQ should at the very least provide the regulated community with a list of entities that lack authority under state law.

Response 249:
This MCM is developed by the MS4 operator with emphasis on local growth patterns and flood control issues, as well as water quality issues. Many of the program elements that an MS4 operator could choose to develop for this MCM may not be directly related to the TPDES permit requirements of a contributor to the MS4 and not directly related to activities that fall under the scope of TWC, Chapter 26. However, to comply with the permit it is a requirement that the MS4 operator develop this MCM such that discharges from the MS4 are protective of water quality. TCEQ does not require counties to regulate third parties beyond their authority. If a county lacks the authority to enforce controls that would prevent or minimize water quality impacts, it can request the entity causing the discharge to discontinue. If they will not voluntarily comply, the county may report suspected violations to TCEQ by calling the Environmental Violations Hotline at 1-888-777-3186 or their local regional office and use TCEQ enforcement authority.

The language "to the extent allowable under State and local law" was included in the permit to emphasize that MS4 operators are not required to regulate or enforce MCMs beyond their statutory and regulatory authority. The provisions of the permit must be implemented to the MEP, but within the legal authority of the small MS4s.

Comment 250:

Fort Hood requests revising the second sentence of Part III.A.6. (renumbered as Part III.A.5.) as follows, and also requests further guidance regarding the standard that TCEQ expects MS4 operators to attain. According to Fort Hood, additional guidance on this item, such as what types and how many controls are needed to satisfy the requirement, would assist in achieving consistent interpretations among MS4 operators and suggests the following language: "The program must ensure that permanent controls will be in place as needed, to prevent or minimize water quality impacts."

Response 250:
TCEQ declines to revise the language, which was incorporated directly from 40 C.F.R. §122.34(b)(5), relating to what is required of a regulated MS4 operator. TCEQ recommends that MS4 operators access the EPA's National Menu of BMPs (see *http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm*), which were adopted by TCEQ, for additional guidance on this MCM.

Comment 251:
Carter & Burgess comments that the language for this MCM is much less detailed than the EPA model general permit, which makes it almost impossible for a small MS4 operator to determine the actual goal of the MCM. In EPA's materials relating to this control measure, EPA seeks post-construction site BMPs that will reduce discharges and pollutants in an "attempt to maintain pre-development runoff conditions."

Response 251:
The permit requirements are taken directly from the final federal Phase II regulations at 40 C.F.R. §122.34(b)(5) and adopted by reference in 30 TAC §281.25. Additionally, the federal regulations contain guidance on development of this MCM. This guidance was incorporated in the EPA model permit. Although that guidance was not adopted by reference in 30 TAC §281.25, and was not included in this permit, control measures developed with consideration for the guidance could satisfy this provision of the permit. Currently, the permit language is flexible enough to allow a small MS4 operator to utilize this guidance or other resources and approaches to development of this MCM.

Comment 252:
Cleburne believes writing ordinances addressing post-construction runoff is difficult to achieve and to update as new BMP technology evolves. Cleburne comments that incorporating discussions of post-development runoff in plan review would allow engineers more innovative options when developing BMPs than what restrictive ordinances might allow. Instead, Cleburne believes MS4 operators should reference policies and ordinances already in place or planned for phase-in within the permit term in the

SWMP. Cleburne suggests the following permit language: *(b) Specify mechanisms in the plan review process, design criteria or any ordinances which address post-construction runoff from new development and redevelopment projects; and . . ..*

Response 252:
The MS4 operator should regularly update and revise the SWMP since the universe of storm water BMPs and controls is rapidly evolving. As improved controls are identified, developed, and included by the MS4 operator within MCMs, revision or amendment of local ordinances may also be necessary. Strict, prescriptive local ordinances may not be necessary where other mechanisms exist, such as a building permit process where post-construction controls can be considered and agreed upon by the MS4 operator and the developer. The SWMP may reference existing ordinances, building and design criteria, and other local controls that already meet or contribute to the goal of this MCM.

Comment 253:
TCCOS and Mathews & Freeland comment that this MCM requires small MS4 operators to develop, implement, and enforce a regulatory program. In the opinion of TCCOS and Mathews & Freeland, TCEQ lacks the statutory and constitutional authority to force municipalities to regulate the conduct of third persons. TCCOS and Mathews & Freeland comment that TCEQ expressly seeks to conscript local land use authority. TCCOS and Mathews & Freeland strongly object to this MCM and recommend that TCEQ adopt the following language, which they believe accomplishes the goal of making local land use decisions with an awareness of water quality impacts that might result from such decisions:

6. Post Construction Storm Water Management in New Development and Redevelopment

The MS4 operator must:

(a) Review existing programs addressing storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale that will result in the disturbance of one or more acres, that discharge into the small MS4;

(b) Study the feasibility of new projects to prevent or minimize water quality impacts resulting from storm water runoff including a combination of structural and/or non-structural BMPs appropriate for your community;

(c) Formally consider implementing programs, appropriate to your community to prevent or minimize water quality impacts resulting from storm water runoff; and

(d) Ensure adequate long-term operation and maintenance of structural controls that are owned or operated by the operator of the MS4.

Response 253:
The requirement to develop this MCM is a requirement that the MS4 operator consider contributions of storm water runoff from areas of new development and redevelopment and to develop pollution prevention measures that reduce pollutants in these discharges. The permit requirement is flexible and provides the opportunity for the MS4 operator to establish BMPs that address local water quality issues, growth patterns, and other factors. The MS4 operator also has the flexibility to require or to encourage the use of these measures wherever they are appropriate. The requirements in the permit for this MCM are consistent with 40 C.F.R. §122.34(b)(5). As stated in previous responses, TCEQ is not requiring small MS4s go beyond their statutory and regulatory authority.

Comment 254:
DAFB states that Part III.A.6.(b) (now Part III.A.5.(b)) mentions "to the extent allowable under state and local laws" and requests revising this subpart of the permit to include citations for the appropriate state laws.

Response 254:
TCEQ declines to attempt to cite all state laws that might constrain an MS4 operator's use of ordinances or other regulatory mechanisms to address post-construction runoff from new development or redevelopment within the permit because of the difficulty in tracking changes to the law.

Comment 255:
Lubbock asks whether the MS4 operator can legally ensure adequate long-term operation and maintenance of BMPs, as required in Part III.A.6.(c) (nowPart III.A.5.(c)), if the operator has already submitted an NOT. Lubbock suggests replacing the term "long term" with "for life of TPDES Construction Permit."

Response 255:

Since this item refers only to post-construction runoff control in new development and redevelopment, and does not apply to discharges regulated under the TPDES CGP, TCEQ declines to revise the language to reference the TPDES CGP. Guidance on how an MS4 operator can ensure long-term operation and maintenance of BMPs is available from the National Menu of BMPs at: *http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm*, which were adopted by TCEQ.

Authorization for Municipal Construction Activities

Comment 256:
NCTCOG expresses concern that if the day-to-day operation control component is strictly interpreted an MS4 operator may not meet the definition of construction site operator when an MS4 uses a construction contractor rather than internal resources.

Response 256:
The MS4 operator can best define itself as the construction site operator by specifying its role within the contracts or other binding agreements with the contractors, and within the language of the SWP3 that is developed for the construction activity. In some instances, based on the relationship between the MS4 operator and the contractors/subcontractors, the MS4 operator will be able to authorize the construction activity under this permit, and in other instances, separate authorization may be required under the TPDES CGP.

Comment 257:
Tarrant County requests removing Part III.A.7.(a)(i) because the information required in Part III.A.7.(a)(iv) is sufficient, as the SWP3 will include the information requested in item (i).

Response 257:
Some information in items (i) and (iv) are similar. However, the language was not revised, because the requirement to describe how construction is conducted and how storm water plans are developed is unique and necessary to ensure that this MCM is met. While item (i) may include more technical information regarding BMPs that are considered and used for construction, item (iv) may include information about who will develop, review, and implement the SWP3 for each construction site.

Comment 258:

Cleburne requests revising Part III.A.7.(a) and (b) to "If the MS4 opts to include municipal construction activities, then the MCM must include . . .."

Response 258:
The first sentence in the opening paragraph of this MCM at Part III.A.7. states that the development of an MCM is an optional measure. Therefore, it is not necessary to reiterate that this is an option in the later language.

Comment 259:
Tarrant County requests deleting the requirement to provide information within the MCM on how construction activities are conducted with regard to local conditions. Tarrant County comments that the information required to satisfy Part III.A.7.(b) of the permit already requires providing this information in the construction SWP3.

Response 259:
If the MS4 operator chooses to include this optional seventh MCM under the provisions of the permit, a general description of how the MS4 operator will, in general, conduct construction activities for construction sites it operates must be included in the MCM and included as part of the SWMP. Then, for each separate construction activity, the MS4 operator must develop an SWP3 that describes in detail how pollution prevention measures are provided, with consideration for the site-specific conditions, to reduce pollution in runoff at each site. TCEQ considered a number of limiting regulatory factors in order to provide the optional MCM. 40 C.F.R. §122.26(c)(ii) requires an operator of an existing or new storm water discharge for a small construction activity provide a narrative description of the following: 1) the location, including a map, and the nature of the construction activity; 2) the total area of the site and the area of the site that is expected to undergo excavation during the life of the permit; 3) proposed measures, including BMPs, to control pollutants in storm water discharges during construction, including a brief description of applicable state and local erosion and sediment control requirements; 4) proposed measures to control pollutants in storm water discharges that will occur after construction operations are completed, including a brief description of applicable state or local erosion and sediment control requirements; 5) an estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material, and existing data describing the soil or the quality of the discharge; and 6) the name of the receiving water.

In this instance, since an NOI is not required for each separate construction activity conducted by the MS4 operator, the information from 40 C.F.R. §122.26(c)(ii) must be provided within the SWMP submitted with the NOI for coverage under this permit. Providing the requested general information on the MS4 operators' approach to pollution prevention at their construction sites satisfies this federal regulatory requirement. Providing the requested specific information in the development of the SWP3 for each site ensures that the SWP3 is based on site-specific conditions and is appropriate to prevent or reduce pollutants in storm water runoff from each construction site.

General Requirements

Comment 260:
Tarrant County and Grapevine suggest deleting this section because the required rationale statement describing how BMPs and measurable goals were selected is background material that is not directly related to the primary goal of improving water quality.

Response 260:
TCEQ declines to remove this language and believes that including a rationale statement regarding the selection of BMPs will aid both the MS4 operator and TCEQ in evaluating the process used to select the chosen BMPs, as well as preventing duplication of effort when assessing the need for new or different BMPs.

Recordkeeping

Comment 261:
Cleburne asks under what circumstances would an extension of the recordkeeping requirement be requested and the process for requesting one. Cleburne suggests including in the permit potential reasons and examples of when an extension is required. Cleburne asks if extensions would be granted on a case-by-case basis with official notification by the executive director directly to the permit holder. If the required records retention time frame is extended, NCTCOG and Farmers Branch ask how the executive director will notify the MS4 operator. NCTCOG and Farmers Branch request that the permit language include a statement that the requirement to maintain records for a specific length of time will be triggered by, or contingent upon, the MS4 receiving notification from the executive director. Group 1 comments that the records retention period of three years is sufficient to allow for inspection or availability of records and request deleting the following sentence: "This period may be extended by request of the

Executive Director at any time." DAFB requests clarification regarding the record retention period and extension of the retention period. DAFB comments that the permit, as currently written, appears to allow for the possibility of an MS4 operator to discard "all records the day after the expiration of this five-year permit, since five years is longer than three years."

Response 261:
The rules in 30 TAC Chapter 205 require that a general permit contain "adequate monitoring, recordkeeping, and reporting appropriate to the type of activity authorized." (30 TAC §205.2(a)(5)(A)). The period of time specified in the permit is consistent with other TCEQ rules, such as 30 TAC §319.7(c), which requires retaining all records and information related to monitoring activities for a minimum of three years. For the purposes of this permit, the MS4 operator would receive in writing any additional retention requirements beyond three years or the remainder of the term of the permit.

The purpose of this provision is to require a minimum record retention time, and based on the permit language, the MS4 operator could discard records over three years old on the day after expiration of the permit. However, Part IV.A.4. of the permit also states that the retention period for maintaining records is automatically extended to the date of final disposition of any administrative or judicial enforcement action brought against an MS4 operator.

Comment 262:
Regarding Part IV.A.1., Lubbock asks if it is possible to implement a cap of five years for all recordkeeping. Lubbock asks what is required if the general permit is not renewed after five years and notes that there are several Phase I cities that are operating under existing NPDES permits that are more than five years old.

Response 262:
In response to the comment, the first sentence in Part IV.A.1. was revised to: "The permittee must retain all records, a copy of this TPDES general permit, and records of all data used to complete the application (NOI) for this general permit and satisfy the public participation requirements, for a period of at least three years, or for the remainder of the term of this general permit, whichever is longer." If the MS4 operator submits an NOT, or if the general permit is not renewed, then records must be retained for three years following termination of coverage.

Reporting

Comment 263:
NCTCOG and Farmers Branch request that the language “Unauthorized Discharge Notification” in Part IV.B.1.(a) be used instead of “Noncompliance Notification.”

Response 263:
The term “noncompliance notification” is used because a permit violation may include actions other than unauthorized discharges.

Comment 264:
Harris County and Missouri City request revising the 24-hour reporting requirement for any noncompliance that may endanger human health or safety or the environment to five days in Part IV.B.1.(a). Harris County, Missouri City, and HCFCD state that the 24-hour requirement is very burdensome for municipalities with a new program. Harris County, Missouri City, and HCFCD also state that some MS4s may have many levels or many departments that will need guidelines and training developed to identify potential noncompliance, identify internal reporting structures, and develop clear reporting guidelines that are part of SWMP implementation. Harris County, Missouri City, and HCFCD indicate that in some instances noncompliance results from the actions of third parties or occurs on weekends. Missouri City and HCFCD request deleting Part IV.B.1.(a), relating to noncompliance notification.

Response 264:
The language in Part IV.B.1.(a) states that the noncompliance report must be provided to TCEQ “within 24 hours of becoming aware of the noncompliance.” When the noncompliance occurred is immaterial; the 24-hour reporting deadline begins to run when the MS4 operator becomes aware of noncompliance that threatens human health or safety or the environment. The language in the permit is consistent with TCEQ rules in 30 TAC Chapter 305 (Consolidated Permits). The 24-hour reporting requirement is a standard permit condition for all permits issued under this chapter. 30 TAC §305.125(9)(A) states that a “permittee shall report any noncompliance to the executive director which may endanger human health or safety, or the environment” and further requires providing such information orally within 24 hours of the time the MS4 operator becomes aware of the noncompliance.

Comment 265:
Grand Prairie states that Part IV.B.1.(a) of the permit, related to noncompliance notification, does not state whether notification is due from the regulated entity when it receives illicit discharges through its

outfalls. Grand Prairie states that "the MS4 in essence does not create noncompliance with exception to its municipal facilities and sanitary sewer collection system." Grand Prairie further states that making the MS4 responsible for all noncompliance whether it is the cause is an undue burden.

Response 265:
This permit requirement is specifically related to portions of the permit that are violated by the permitted entity and would not include illicit discharges if the MS4 operator met its permit obligations under an approved SWMP.

Comment 266:
Cleburne believes that because the permit does not contain numeric effluent limits, having a requirement for notification of noncompliance under 30 TAC §305.125(9) is inappropriate and requests deletion of this section. Cleburne comments that 30 TAC §305.125(9) is referring to TPDES discharge permits that have "unanticipated bypasses that exceed established effluent limits," or violations of "maximum daily discharge limits." Furthermore, under the illicit discharge requirements, the MS4 operator already has an obligation to detect and eliminate any illicit discharges that are found. Discovery of these discharges would constitute compliance with the permit, so they would not require notification. Cleburne comments that if notification of these discharges was the intent of this section, it is not consistent with the requirements of 30 TAC §305.125(9). Additionally, notification of discharges discovered would yield a substantial number statewide, and would overwhelm TCEQ with paperwork without providing any substantial improvement in water quality since the reported discharges will be eliminated.

Response 266:
The permit contains numeric effluent limitations for discharges from concrete batch plants where the MS4 operator chooses to develop the optional seventh MCM. Violations of these numeric limitations may be subject to the reporting requirements of 30 TAC §305.125(9). Therefore, the requirement for noncompliance notification is included in the permit.

Comment 267:
GCHD asks what the guidelines are that define a noncompliance event that may endanger human health or safety.

Response 267:

This requirement is a standard provision contained in all TPDES individual wastewater and storm water permits. There is no set or established guidance on what may constitute an endangerment to human health or safety. Discharges of storm water runoff through a permitted MS4 are not expected to constitute an event that may endanger human health and safety. However, as an example, there are cases where spills were purposefully washed into an MS4 with the mistaken belief that the system drained to a treatment plant. This would constitute noncompliance with the terms of the permit and depending upon the nature of the material discharged it may or may not constitute an endangerment to human health or safety.

Comment 268:
GCHD asks whether notification may be sent to TCEQ via email.

Response 268:
TCEQ rules currently do not provide for noncompliance notification by email, but the agency is developing a system for electronic reporting that may affect some TPDES storm water permitting programs in the future.

Comment 269:
Houston requests TCEQ clarify whether this section only applies to noncompliance with the requirements of this permit or noncompliance with any federal, state, or local statute, regulation, ordinance, or rule.

Response 269:
This section applies only to a noncompliance with this permit that may endanger human health, safety, or the environment.

Comment 270:
Universal City, HCEC, and TxDOT-Houston suggest changing the requirement to submit documentation of training activities with a requirement to summarize the training activities and achievement of associated measurable goals and deadlines in tabular form in Part IV.B.2. The commenters state that the MS4 operator should maintain supporting documentation and making this revision would facilitate streamlined reporting, TCEQ review, and less cumbersome submissions. HCEQ, TxDOT-Houston, and Universal City state that requiring documentation in the annual report exceeds federal requirements found at 40 C.F.R. §122.34(g)(3). Mathews & Freeland comments that the permit requires the annual report to include progress towards achieving the statutory goal of reducing the discharge of pollutants by the MEP

and an evaluation of the success of the implementation of the measurable goals, which are not required by 40 C.F.R. §122.34.

Response 270:

This MCM requires that the MS4 operator include examples or a description of training materials used. The annual report requirement requires submitting general information assessing compliance with each MCM, but does not require submitting every piece of documentation associated with the SWMP to TCEQ. In order to insure that the annual report remains concise, the MS4 operator would benefit from describing the efforts to meet the requirements of each MCM, and including tables and examples as needed for clarity. TCEQ believes this requirement is consistent with 40 C.F.R. §122.34(g)(3), which requires annual reports to include: 1) the status of compliance with permit conditions, an assessment of the appropriateness of your identified BMPs and progress towards achieving the identified measurable goals for each MCM; 2) results of information collected and analyzed, including monitoring data, if any, during the reporting period; 3) a change in any identified BMPs or measurable goals for any of the MCMs; and 4) notice that an MS4 is relying on another governmental entity to satisfy some permit requirements, if applicable.

Comment 271:

Carroll & Blackman requests replacing the third sentence of the first paragraph in Part IV.B.2., related to the reporting period with the following language, in order to coincide with the date TCEQ approves the NOI and SWMP. Carroll & Blackman notes that the change would allow the MS4 operator the opportunity to make any changes to the SWMP that are required based on the review of the SWMP by TCEQ: "The first calendar year for annual reporting purposes shall begin when the MS4 operator receives a notification of SWMP approval from TCEQ."

Response 271:

In response to the comment, TCEQ revised the permit to require annual reporting periods to correspond with the permit years. In other words, year one will start on the day this permit is issued and will end one year later. The annual report is due 90 days after the end of permit year one. This requirement will allow each annual report to cover one year of SWMP implementation. At the end of the fifth annual reporting period, the SWMP should be fully implemented. In subsequent permit terms, the permit may only require reporting in permit years two and four, as allowed by 40 C.F.R. §122.34(g)(3). Utilizing permit years rather than calendar years during the first permit term will better facilitate this transition. TCEQ declines to delay submitting the annual reports based on the approval date of the application. Because the permit

requires full implementation of the SWMP during the five-year permit term, it is appropriate to require an annual report to cover the full year beginning the date the permit is issued. By the end of permit year one, if the permittee has not yet implemented any portion of the SWMP because the NOI and SWMP have not been approved by TCEQ, then the permittee may so indicate in the annual report. In response to the comment, Part IV.B.2. of the permit was revised to add the following sentence after the list of information to be included in the annual report: "An annual report must be prepared whether or not the NOI and SWMP has been approved by the TCEQ. If the permittee has either not implemented the SWMP or not begun to implement the SWMP because it has not received approval of the NOI and SWMP, then the annual report may include that information."

Comment 272:

V&E comments that the sub-provisions in Part IV.B.2. appear overly broad and unduly burdensome, especially item (a), in terms of scope and the work that must be performed when viewed against the benefit gained by the MS4 operator. V&E asks to what extent each of these items is required of Phase I MS4 operators. V&E requests a detailed rationale, including citation to legal authorities, for these requirements. TCCOS and Mathews & Freeland recommend revising this provision to: "The status of the compliance with permit conditions, an assessment of the appropriateness of your identified BMPs, and progress towards achieving your measurable goals for each of the MCMs." TAOC comments that (a) through (f) should be required only if there is a change from the initial plan. Group 1 comments that the language implies that monitoring or studies will be conducted to assess the progress towards reducing the discharge of pollutants and requests modifying the language as follows: "The status of compliance with permit conditions, an assessment of the appropriateness of your identified best management practices and progress towards achieving your identified measurable goals for each of the minimum control measure." Lloyd Gosselink states that the requirements listed in Parts IV.B.2.(g) and (h) of the permit, which require the annual reports to include the number of construction activities within each MS4 operator's jurisdiction, exceeds the federal requirements and is overly burdensome. Lloyd Gosselink states that the permit does not indicate why this requirement is needed, and requests deleting the provision.

Response 272:

Phase I MS4 operators are authorized under individual storm water permits. These permits were drafted with conditions specific to each of the Phase I MS4 operators so the requirements and specific permit language are varied. With respect to the requirements of Part IV.B.2.(a), the federal storm water regulations at 40 C.F.R. §122.34 (g)(3) state that small MS4 operators must submit an annual report and that the contents of the report must include: "The status of compliance with permit conditions, an

assessment of the appropriateness of your identified best management practices and progress towards achieving your identified measurable goals for each of the minimum control measures." In addition to subsection (a), the reporting requirements in (e), (f), and (j) are specifically required in 40 C.F.R. §122.34(g)(3). The requirements in subsection (b) and (j) are required only if applicable. Subsection (c) is an optional inclusion in the first year report only. Subsection (d) requires a summary of the results of information collected and analyzed only if such information is actually collected.

Subsection (g) and (h) ask for the number of municipal and non-municipal construction activities that occurred within the jurisdiction of the MS4. Operators of construction activities who discharge to an MS4 are required to submit NOIs or site notices to the operator of any MS4 receiving the discharge. Because the CGP already requires that dischargers submit this information to the MS4, requiring the MS4 to include the number of forms received is not overly burdensome. It will also allow the MS4 to obtain information on the number of activities that are occurring within their jurisdiction and to revise their BMPs if needed to address compliance. For example, if the MS4 operator does not receive any construction NOIs or site notices, yet observes multiple construction activities discharging into its system, then the MS4 operator may direct a portion of its program to provide additional information to construction site operators about the requirements of the CGP. Finally, since only large construction operators will submit NOIs to TCEQ, this requirement may allow TCEQ to better evaluate whether existing control measures are appropriate for the total areas of disturbed surfaces and to obtain additional information on the number of small construction sites discharging under the CGP.

Comment 273:
Dodson comments that an unstructured annual report will not provide TCEQ with enough information to properly administer and evaluate the effectiveness of the program and requests that TCEQ develop and standardize an Annual Report form that will give TCEQ the information it needs.

Response 273:
The current requirements allow great latitude for MS4 operators to develop an annual report that best serves their needs and that will summarize their SWMP activities. At this time, a required annual report format is not included in the permit. However, after reviewing a number of these reports from the many different types of MS4 operators, the executive director may determine it appropriate or necessary to develop and provide a standard or template report format as a resource.

Comment 274:

TAOC comments that the term “concise” is not defined as it relates to the annual report, and notes that the stakeholders group for the Phase II MS4 general permit recommended ten pages or less. Dodson comments that EPA’s initial guidance was that a two to four page standard report form is adequate.

Response 274:
A specific range of pages for the annual reports is not required, since each MS4 operator will have unique information to submit. It is appropriate to leave the length of the annual report flexible so each MS4 operator can include its unique site-specific information.

Comment 275:
DAFB requests clarification of Part IV.B.2.(g) regarding how an MS4 operator determines the number of municipal construction activities authorized under the permit and what comprises a construction activity. DAFB asks if one large project that has five components is considered a single activity or five different construction activities. DAFB also asks what if the individual components take place over a period of several years?

Response 275:
MS4 operators that conduct construction activities under this permit are required to post a construction site notice, Attachment 1 of the permit, at each of the construction sites. Therefore, the MS4 operator may simply total the number of construction sites where notices were posted in order to determine the number of activities authorized. Construction activities may not be contiguous or may occur over a period of years and still be considered a single activity if they are part of a common plan of development. A common plan of development is a construction activity that is completed in separate stages, separate phases, or in combination with other construction activities. A common plan of development is identified by the documentation for the construction project that specifies the scope of the project and may include plats, blueprints, marketing plans, contracts, building permits, a public notice or hearing, zoning requests, or other similar documentation and activities.

Comment 276:
Group 1, Lloyd Gosselink, and Carroll & Blackman request deletion of the language in Part IV.B.2. that requires a small MS4 to include in their annual report the number of municipal activities that occurred within the jurisdiction of the small MS4 operator and the total number of acres disturbed, and the number of nonmunicipal construction activities that occurred within the jurisdiction of the MS4 operator because

this information is not required by the federal rules. Lloyd Gosselink and Carroll & Blackman believe this provision is unnecessary and overly burdensome.

Response 276:

The provision to allow authorization of MS4 operator construction activities under this permit was proposed as a more efficient and less expensive manner of authorizing these activities. The alternative authorization is to apply for coverage under TPDES CGP, TXR150000. The application process for large construction activities under TXR150000 requires submitting an NOI and a $100 application fee for each construction activity that is authorized. The NOI for coverage under TXR150000 requires the applicant to provide the number of acres disturbed. Therefore, this same information is provided, regardless of whether authorization is sought under TXR150000 or under the optional seventh MCM. For MS4 operators that do find the annual summary report a burden, the option of authorizing these activities under the CGP remains. The permit also retains the requirement to include the number of non-municipal construction activities, which is appropriate as discussed in Response 272 and 277.

Comment 277:

Cleburne recommends deleting Part V.B.2.(h) (now Part IV.B.2.(h)) because it obligates the MS4 operator to track TPDES permit compliance for TCEQ, even though the MS4 operator does not have the authority to require or authorize storm water construction permits. Cleburne asks how a municipality would determine the number of construction activities if construction site operators will not be required to submit NOIs to the MS4 operators and small sites are not required to submit NOIs to TCEQ. Does TCEQ want the number of building permits issued, even though many of these would not have earth disturbing activities and others would not meet acreage requirements that require TPDES permitting? Additionally, Cleburne comments that many earth-disturbing activities do not involve the municipality issuing permits, so there is no means of tracking these activities. Cleburne comments that, because it is TCEQ's responsibility to authorize and issue the TPDES general permit for construction activities, the ability and responsibility of tracking this program lies with the state. Lloyd Gosselink and Carroll & Blackman believe this provision is unnecessary and overly burdensome. TAOC comments that the permit should not include a general requirement for non-municipal construction activities, because counties are not authorized to conduct non-municipal construction activities or to track and report such activities. Group 1, TCCOS, and Mathews & Freeland request deleting this requirement because is not required by the federal rules.

Response 277:

This permit requires the operators of all regulated MS4s to develop, implement, and enforce an SWMP to reduce pollutants in storm water discharges from the MS4 to the MEP. It was determined that construction site runoff is a significant potential contributor of pollutants to storm water runoff. Therefore, the federal regulations include an MCM requirement to address these discharges in the Phase II final regulations for small MS4s. Also, the permit contains provisions that the MS4 operator must control runoff from these sites, but only if that runoff enters its MS4. The TPDES CGP requires all regulated construction site operators to submit copies of either the NOI or the construction site notice to the MS4 operator, but only if the discharge enters that MS4. Receiving these notifications will assist MS4 operators in implementing this MCM by identifying construction activities that are regulated under a TPDES permit and that should have adequate controls in place. It will also assist in identifying sites that do not have TPDES authorization and that may be a significant contributor of pollutants or even an illicit discharge to the MS4. Therefore, the requirement to summarize the number of NOIs and construction site notices received within the annual report is intended for use as one measure of the MS4 operator's construction site storm water runoff control MCM.

Comment 278:

Cleburne comments that a single, systemwide report provided by multiple MS4 operators is beneficial because it would cut down on reporting requirement costs and workloads, but there is no option for co-permitting given under Part II.E., Permitting Options. As currently written, there is little incentive to participate in a watershed based SWMP. TxDOT comments that the language in this section suggests that co-permitting and shared annual reports are allowable and requests clarification. TxDOT also asks who TCEQ will hold accountable for deficiencies in shared annual reports, if those are allowed.

Response 278:

As indicated in a previous response to comments, TCEQ supports using the mechanism of a shared SWMP or shared program elements. The difference between the concept raised in the federal rules and the requirements established in this permit is that TCEQ will require submission of individual NOIs and SWMPs, as well as individual copies of the annual reports signed and certified by the MS4 operator who submits it. Since annual reports will be submitted for each regulated MS4 operator, that operator will be responsible for the accuracy and completeness of the report for its MS4.

Standard Permit Conditions

Comment 279:

TCUC and TAOC request adding language to the permit requiring TCEQ to provide a method of negotiating amendments to the SWMP, including an appeals process, if TCEQ requires additions or modifications of the SWMP.

Response 279:
TCEQ may require amendments to the SWMP; however, these amendments will be coordinated with the affected MS4 operator on an individual basis.

Comment 280:
Cleburne believes that the language in Part V.B. implies that an MS4 operator cannot make changes to the SWMP despite language in Part V.B.2.(f) that allows for the proposal of changes to the SWMP. It appears this language was more appropriately used in other TPDES permits, but does not meet the intent of this permit. Cleburne comments that the ability to alter the SWMP throughout the permit term is very important to allow the MS4 operator to continually improve its program. Cleburne suggests modifying or deleting the second sentence of this condition to remove the possibility of enforcement against a permit holder or revocation of a permit if the MS4 operator modifies its SWMP.

Response 280:
This provision does not prohibit an MS4 operator from modifying its SWMP during the permit. In fact, as pointed out by the comment, TCEQ encourages regulated MS4 operators to make improvements in their SWMP when improvements are possible. The requirement in the permit is consistent with federal rules at 40 C.F.R. §122.41(f) relating to conditions that are applicable to all permits. The language simply states that, if the MS4 operator notifies TCEQ of a change in the practices at the site, then the MS4 operator must continue to comply with the permit.

Comment 281:
Cleburne comments that MS4 operators cannot halt the rain so, therefore, it cannot halt or reduce the permitted activity. Cleburne recommends deleting Part V.C. because the language in this item was written for industrial point source discharges or pretreatment processes and is not pertinent to storm water discharges.

Response 281:
This requirement in the permit is consistent with federal rules at 40 C.F.R. §122.41(c) relating to conditions that are applicable to all NPDES permits, which states that it “shall not be a defense for a

permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit."

Discharger Subject to Penalties for Violations

Comment 282:
Russell Moorman and Carter & Burgess recommend deleting the following references because they were repealed by the legislature: TWC, §§26.136, 26.212, and 26.213.

Response 282:
The references to these sections of the TWC were removed and Part V.E. was revised to include general references to Texas Water Code, Chapters 26, 27, and 28 and Texas Health and Safety Code, Chapter 361. The revised language is more consistent with other TPDES permits.

Authorization for Municipal Construction Activities

Comment 283:
NCTRSW notes that the first paragraph contains a typographical error: "permit general" which should read "general permit."

Response 283:
This item was corrected as noted.

Comment 284:
V&E comments that Part VI. requires that the MS4 operator include storm water MCMs for covered construction activities in the SWMP at the time the SWMP is initially submitted with the NOI in order to obtain coverage. V&E, TCCOS, and Mathews & Freeland request clarification on whether the MS4 operator may only seek municipal construction activity coverage under the MS4 general permit when the operator initially submits the SWMP or if the SWMP may be modified at a later date to obtain coverage for municipal construction activities under the permit.

Response 284:

An MS4 operator may amend its SWMP at any time to include municipally-operated construction activities. Such a change would result in a change to information submitted in the NOI and an NOC would be required to include the construction authorization in the SWMP.

Comment 285:
Group 1 recommends incorporating this section by reference to the CGP, TXR150000, because it almost duplicates the language found in that permit.

Response 285:
Where applicable, the construction provisions of this permit are similar and in many cases, identical to, the CGP. However, the specific provisions were retained in the permit, rather than referencing the CGP language because each general permit is a unique authorization and compliance is determined based on the specific conditions outlined in the permit.

Comment 286:
DFW asks whether storm water discharges from all construction activities conducted on airport property can be authorized under this permit and notes that some construction activities may not be characteristic of municipal construction projects.

Response 286:
Any construction activity in the regulated area where the MS4 operator is the construction site operator may be authorized under this permit. If an airport is the MS4 operator, then airport construction activities may be included under this provision.

Comment 287:
TxDOT requests that small (one to five acres) municipal construction projects that occur during a time and at a location with a rainfall erosivity factor that is less than five be exempt from developing an SWP3, which is allowed under the CGP. Allowing this exemption would maintain consistency between the two permits and provide an incentive for MS4 operators to take advantage of this optional MCM.

Response 287:
Coverage under this seventh MCM is optional and may be on a site-by-site basis. Where construction activities occur and would meet the low-rainfall erosivity waiver conditions of the CGP, MS4 operators

may obtain coverage under that permit. There are no application fees for waivers under that separate permit.

Comment 288:
TxDOT requests replacing the term "industrial activity," in Part VI.B.2.(c), with "construction support activity" to remain consistent with the description of this section, "Discharges of Storm Water Associated with Construction Support Activities."

Response 288:
TCEQ agrees that not all construction support activities meet the definition of "industrial" activities, thus the language was revised as requested. In addition, the phrase "as required" was added to the end of the sentence because authorization may be required under the CGP, under the MSGP, or under another TCEQ individual or general permit.

Comment 289:
Houston, Missouri City, and HCFCD request revising the term "air conditioning condensate" in Part VI.B.3.(f) of the permit to "air conditioning condensation."

Response 289:
TCEQ declines to revise the wording, as the term "condensate" is consistent with the TPDES CGP, as well as other TPDES individual and general wastewater permits.

Comment 290:
Harris County requests adding the term "water line flushing" alongside "fire hydrant flushing" in Part VI.B.3.(b). Harris County comments that potable water flushed from lines is often hyperchlorinated, and then the flushed water is discharged to a storm sewer system or other water in the state. Harris County states that acute toxicity in many aquatic animals can occur at concentrations of chlorine of 2.0 mg/l or greater, and requests that the permit restrict fire hydrant and water line flushings to those that are determined to contain less than 4.0 mg/l of chlorine, similar to most small wastewater treatment plants. Carter & Burgess asks how fire hydrant flushing differs from the water line flushing that is allowed at Part II.B.(a) and notes that fire hydrants are supplied by a water line.

Response 290:

TCEQ declines to revise the language, and notes that waterline flushings are included at Part VI.B.3.(e) as a potable water source. The list of non-storm water sources that may be discharged from construction sites permitted under this permit is identical to the sources that may be discharged under the CGP.

Comment 291:
Carter & Burgess asks why the list of acceptable non-storm water discharges in Part V.B.3. includes "vehicle, external building and pavement wash water where detergents and soaps are not used and where spills or leaks of toxic or hazardous materials have not occurred," while the non-storm water discharges allowed in Part II.B. does not. Carter & Burgess asks if that means that the only dischargers that can include this type of non-storm water discharges are those that elect to implement the optional seventh MCM.

Response 291:
The list of non-storm water sources in this section, that may be discharged from construction sites permitted under this permit, is identical to the sources that may be discharged under the CGP from construction activities that are authorized under this section of the general permit. However, as noted in a previous response related to Part II.B. of the permit, the non-storm water list in Part II was revised to add the non-storm water discharges that are listed in the MSGP and the CGP, as well.

Limitations on Permit Coverage

Comment 292:
Mathews & Freeland comment that Part VI.C. states that discharges that occur after construction activities have been completed, and after the construction site and any supporting activity site have undergone final stabilization, are not eligible for coverage under the general permit. Mathews & Freeland states that because the permit authorizes discharges from small MS4s rather than just construction sites, this exclusion effectively denies post-construction discharges from coverage under the general permit. Mathews & Freeland does not believe that is the intent and suggest Part VI.C. be removed from the permit.

Response 292:
In response to this comment, the sentence in Part VI.C. of the general permit was clarified as follows, to note that discharges from municipal construction activities may only obtain permit coverage during actual construction and prior to final stabilization: "Discharges that occur after construction activities have been

completed, and after the construction site and any supporting activity site have undergone final stabilization, are not eligible for coverage under Part VI of the general permit."

Numeric Effluent Limitations

Comment 293:
Austin requests adding asphalt batch plants to the requirement to monitor discharges.

Response 293:
Sites that manufacture asphalt emulsions are subject to categorical numeric effluent limitations for storm water discharges based on the Asphalt Emulsion Subcategory of the Paving and Roofing Materials (Tars and Asphalt) Manufacturing Point Source Category at 40 C.F.R. §443.13. Asphalt batch plants typically do not manufacture these materials, but instead purchase asphalt paving and roofing emulsions and then combine them with rock or other materials at the batch plant site. These batch plants qualify for coverage under this permit under certain circumstances that are defined in the permit. There are no numeric effluent limitations in the permit for these sites and there are no categorical effluent limitations established for these discharges. Instead, the permit requires pollution prevention controls to eliminate or reduce pollution in storm water runoff.

Comment 294:
Austin requests increasing the monitoring frequency from once per year to two times per year. Austin also states that, although most construction activities requiring a dedicated batch plant (asphalt or concrete) may be active for a comparatively longer duration than most construction sites, the activities at the site remain temporary in nature relative to fixed facilities.

Response 294:
This seventh MCM would provide authorization for the discharge of storm water from concrete and asphalt batch plants where the MS4 operator meets the definition of a construction site operator and provides an alternative to obtaining coverage under the CGP. For consistency, this permit provides for identical numerical effluent limitations and monitoring frequencies for concrete batch plants as the CGP. There are no effluent limitations in either permit for asphalt batch plants. Concrete batch plants that intend to discharge both storm water runoff and wastewater must obtain coverage under either a TPDES individual permit or the TPDES MSGP, TXR050000. Under the MSGP, the monitoring frequency for these discharges is once per month.

Comment 295:

Cleburne comments that because of the temporary nature of concrete batch plants associated with a construction project, it may not be possible to monitor a discharge from the facility during periods of dry weather. Cleburne requests TCEQ provide some insight on how to exempt storm water monitoring from a plant in use for only a short time during dry weather or when no runoff leaves the property of the batch plant.

Response 295:

The requirement is to sample the discharge of storm water runoff from an associated concrete batch plant at a frequency of once per year. Obviously, if the operation of the plant only occurs during dry weather no sampling is possible. If the plant is in operation for less than one year, then one sample must be collected if a discharge occurs during that time.

Comment 296:

Bunker Hill requests adding a statement to Part VI.D. that says TPDES permits do not contain water quality based effluent limitations and instead are largely based on implementing BMPs and/or technology based limits in combination with instream monitoring to assess standards attainment and to determine whether additional controls on storm water are needed. Bunker Hill believes that this request is consistent with regulatory intent and language and would also result in protection for small MS4s that interconnect with large municipalities.

Response 296:

The Fact Sheet and Executive Director's Preliminary Decision provides the background evidence on water quality compliance for discharges authorized under this permit and is the appropriate place to provide the requested references. More detailed guidance on how TCEQ will rely on BMPs and pollution prevention, as opposed to water quality-based numeric effluent limitations to protect receiving waters is available in TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards*. This document is available on TCEQ's Web page at: *http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-194.html*.

Storm Water Pollution Prevention Plan (SWP3)

Comment 297:

Lubbock asks whether the first paragraph of Part VI.E. should read “storm water associated with construction activities that reach waters in the state.”

Response 297:
The purpose of Part V.I. is to provide a permitting mechanism for discharges that would otherwise require permit coverage under the TPDES CGP, TXR150000. The current language that requires an SWP3 to be prepared for discharges that reach waters of the U.S. is consistent with the language in the CGP.

Contents of SWP3

Comment 298:
TxDOT requests clarification of the term “close proximity” in item VI.J.1.(f)(7), in terms of distance.

Response 298:
This language is consistent with the existing TPDES CGP, and refers to water bodies that are either directly adjacent to a construction site or water bodies that will eventually receive the discharge from a construction site. It is appropriate to include waters within three stream miles downstream from the construction site or to list the first classified receiving water that the discharge would reach, whichever is closer. This is consistent with the application requirements for individual TPDES wastewater permit applications.

Comment 299:
TxDOT requests clarification of the term “at or near the site” in item VI.J.1.(h), in terms of distance so that the requirement is more easily understood and complied with.

Response 299:
This item includes water bodies that will actually be located within the construction area, or waters that are adjacent or downstream of the construction site. For the purposes of identifying waters downstream of the construction site, the discharger should include the name(s) of the first classified receiving water downstream of the discharge, or the name(s) of all unclassified receiving water(s) within three stream miles downstream of the site.

Comment 300:

Austin requests removing the term “where feasible” in VI.J.4.(a) from the first sentence of this requirement for sediment basins. Austin suggests stating the basic requirement clearly, followed by a provision for the use of alternative controls if the primary requirement is not feasible.

Response 300:
The permit only requires this structural control “where feasible” because it is appropriate to allow alternative controls when site-specific conditions could make a sediment basin ineffective, inappropriate, or even impossible to implement at a site. The suggested revision to state that the structural control is required and then to provide guidance on alternatives if the control is not feasible does not provide sufficient flexibility to foster easy, site-specific implementation.

Comment 301:
Austin requests that the permit include a requirement in Part VI.J.6. - Other Controls, stating that the SWP3 identify all potential sources of non-storm water discharges (except for flows from fire fighting activities) and ensure that appropriate pollution prevention measures are implemented for the non-storm water components of the discharge. Austin comments that this is consistent with the EPA Region 6 CGP.

Response 301:
This requirement is already included in Part VI.J.10. of the permit. This section requires that “the SWP3 must identify and ensure the implementation of appropriate pollution prevention measures for all eligible non-storm water components of the discharge.”

Comment 302:
NCTCOG and Farmers Branch request clarification in Part VI.J.9.(a) regarding whether it is TCEQ’s intent to allow for only monthly inspections during seasonal arid conditions or if the exemption is limited only to areas that are finally or temporarily stabilized. NCTCOG and Farmers Branch comment that if the area is not stabilized, monthly inspections during arid seasons are not sufficient to control dirt from entering a storm sewer system without a rain event (direct dumping to the system). During these dry seasons rain is not expected; therefore, sediment controls are more likely neglected, although it is the busiest time for most construction sites.

Response 302:
A once monthly inspection is the minimum frequency required to meet permit compliance in these defined arid or semi-arid areas, regardless of the stage of the construction activity or site stabilization. In

these areas of the state, rainfall and the resultant runoff will occur on a much less frequent basis than in other areas. As a result of comparatively less frequent storm events, storm water controls are expected to require maintenance on a less frequent basis than controls utilized in other areas of the state.

Comment 303:
Lubbock asks whether MS4s that are located in areas considered arid annually, rather than seasonally, can utilize the monthly inspection option, included in Part VI.J.9. of the permit. Lubbock states that seasonal and annual seem contradictory, especially for areas that are arid or semi-arid year-round.

Response 303:
An MS4 that is located in an area that has an average annual rainfall of less than 20 inches is considered either an arid or a semi-arid area. It is appropriate to conduct monthly inspections if the entire year is arid, but not if the area experiences a period of time where there is consistent rainfall, or if the construction occurs during a "wet" season.

Comment 304:
Lubbock asks what qualifications are required for personnel to conduct construction inspections and suggests including a definition of those qualifications in Part II of the permit.

Response 304:
There are no certifications or other credentials recognized by TCEQ as necessary for individuals who inspect storm water controls. Inspectors do not need to obtain a letter from TCEQ prior to being allowed to perform inspections. The MS4 operator is in the best position to ensure that the selected personnel have read the SWP3 and are sufficiently familiar with the site to perform these inspections.

Comment 305:
Cleburne recommends moving the statement on noncompliance from Part VI.J.9.(e) because it fits more appropriately under Part VI.J.9.(d). Cleburne suggests adding the following language at the end of J.9.(d): "Where a report does not identify any incidents of non-compliance, the report must contain a certification that the facility or site is in compliance with the SWP3 and this permit." Additionally, Cleburne recommends deleting the last two sentences of J.9.(e) that state: "Reports must identify any incidents of non-compliance. Where a report does not identify any incidents of non-compliance, the report must contain a certification that the facility or site is in compliance with the SWP3 and this permit."

Response 305:

Although VI.J.9.(d) mentions failed structural controls, this is not necessarily equal to permit noncompliance. Therefore, the language in VI.J.9.(e) was not incorporated into VI.J.9.(d). The suggested additional report requirements, including documentation of the names and qualifications of the inspectors, are not necessary to ensure compliance with the SWP3 requirements and were not included.

Additional Retention of Records Requirements

Comment 306:

Cleburne believes that requiring keeping records of construction activities for three years would create a large volume of files and put an undue burden on the MS4 operator. Because of the temporary nature of construction activities, any follow-up on compliance with measures taken as part of the SWP3 should be done during the construction phase or shortly after final stabilization. Cleburne suggests that because the SWP3 remains active until final stabilization it is more reasonable to retain the records six months after the filing of the NOT. This would allow time for TCEQ to review the project after completion or follow up on any complaints prior to records being removed.

Response 306:

The general permit rules in 30 TAC Chapter 205 require that a general permit contain "adequate monitoring, recordkeeping, and reporting appropriate to the type of activity authorized." (30 TAC §205(a)(5)(A)). A three-year record retention requirement is consistent with other TCEQ rules. For example, the requirements for monitoring activities in 30 TAC §319.7(c) state: "All records and information resulting from the required monitoring activities, including, but not limited to, all records concerning measurements and analyses performed and concerning calibration and maintenance of flow measurement and other instrumentation, shall be retained for a minimum of three years, or for a longer period if requested by the executive director or his designee."

Fact Sheet and Executive Director's Preliminary Decision

Fact Sheet - Allowable Non-Storm Water Discharges

Comment 307:

Grapevine expressed concern over the final paragraph in Part III.E. of the fact sheet. Grapevine states that the requirement could conflict with requirements to maintain safe drinking water standards.

Grapevine notes that water line flushing may be necessary to control bacteria levels in the public water supply lines and that restricting necessary flushing operations could result in stagnant water and elevated bacteria levels in the water distribution system.

Response 307:
TCEQ recognizes that water line flushing may be required to control bacteria, but this permit cannot authorize a discharge from the MS4 that would cause a violation of water quality standards. The MS4 operator may need to consider the possible pollutants in any non-storm water discharge that it chooses to allow into the MS4 without additional controls. The language in the fact sheet does not prohibit the discharge of water line flushing; it only states that consideration be given to all discharges that are allowed into the MS4, such as whether those discharges can be allowed without additional BMPs.

Fact Sheet - Discharges from MS4 Construction Activities

Comment 308:
Tarrant County and NCTRSW comment that the last sentence of Part III.F. appears to remove the possibility that the MS4 operator could utilize the general permit to obtain coverage for regulated construction activities while other construction site operators could use the TPDES CGP, TXR150000. The commenters request clarification regarding “sole operator.”

Response 308:
TCEQ revised the last sentence of the paragraph to: “Additionally, if the MS4 either cannot or chooses not to meet and maintain the status as the sole operator for any specific construction activity, then authorization under a separate TPDES permit must be obtained for the additional operators, during construction activities at that specific site.” A sole operator, for the purposes of this permit, means the only operator at a particular construction site. The sole operator would meet both criteria (a) and (b) that are included in the definition of "construction site operator."

Fact Sheet - Permit Conditions

Comment 309:
Tarrant County and NCTRSW comment that the second sentence of Part IV.C.3., related to the optional seventh MCM, appears inconsistent with the definition of “construction site operator.” For consistency

with the definition, they request revising the second part of the sentence to replace “and” with “or” so that the sentence reads as follows:

“In order to qualify for this provision, MS4s must maintain control over the plans and specifications of the construction activity, or must maintain the status of the operator with day-to-day operational control over the construction site, to the extent necessary to meet the requirements of the SWP3 for that site.”

Response 309:
The requested change was made and a clarification was also added to the fourth sentence to clarify that in some cases the MS4 operator is considered the "sole" operator and thus could obtain coverage for construction activities under this permit without additional requirements for subcontractors to apply for coverage under the CGP.

(“Part II”) Comments Resulting in Changes in the Republished General Permit - The following comments were received during the original comment period in 2002 and resulted in changes to the re-noticed general permit in 2005. Comments made during the 2005 comment period on the revised language are addressed in Part I of the response to comments. Unless other wise noted, the changes noted were all made in response to comments.

Title Page

Comment 310:
Group 1 requests changing the title of the permit from “General Permit to Discharge Waste” to “General Permit for Discharges from Small Municipal Separate Storm Sewer Systems.” Group 1 notes that the current title assumes that storm water meets the state definition of “waste” and their proposed language is taken directly from the EPA model general permit. V&E requests revision of the title page to reflect that this is a general permit to discharge storm water and not waste. V&E comments that the regulation of storm water is derived from CWA, §1342(p), which pertains solely to storm water discharges. V&E comments that the Federal Water Pollution Control Act limits the regulatory oversight to municipal and industrial storm water, which is not a waste. V&E strongly recommends changing the title page of the permit to “General Permit to Discharge Storm Water.”

Response 310:

The title of the re-noticed permit was changed to "General Permit to Discharge Under the Texas Pollutant Discharge Elimination System."

Definitions

Comment 311:
Harris County, HCFCD, V&E, and Houston comment that the definition of "best management practices" appears to include only non-structural controls, though structural controls are generally considered BMPs. DAFB, NCTCOG, and Farmers Branch comment that the definition of "best management practices" should read: "practices to prevent or reduce pollution . . .."

Response 311:
The definition of "best management practices" was revised in the re-noticed permit. BMPs are defined as: "Schedules of activities, prohibitions of practices, maintenance procedures, structural controls, local ordinances, and other management practices to prevent or reduce the discharge of pollutants. BMPs also include treatment requirements, operating procedures, and practices to control runoff, spills or leaks, waste disposal, or drainage from raw material storage areas."

Comment 312:
Houston comments that the definition of "control measure" includes a reference to other method used to prevent or reduce the discharge of pollutants and asks if the term "other method" means structural controls.

Response 312:
The definition of "best management practices" was amended in the re-noticed permit to include "structural controls" (see previous response). Therefore, the definition of "control measure" was deleted from the re-noticed permit.

Comment 313:
Houston, V&E, and TDCJ comment that the permit does not define what constitutes a "larger common plan of development or sale" as used in the definitions of large and small construction activities. Houston asks whether TCEQ intends to adopt EPA Region 6 guidance on this term. V&E requests that TCEQ provide written guidance that is readily available to the regulated community if a definition of the term is not included in the permit.

Response 313:
The following definition of "common plan of development" was added to the re-noticed permit: "A construction activity that is completed in separate stages, separate phases, or in combination with other construction activities. A common plan of development or sale is identified by the documentation for the construction project that identifies the scope of the project, and may include plats, blueprints, marketing plans, contracts, building permits, a public notice or hearing, zoning requests, or other similar documentation and activities."

This definition matches the definition found in the CGP number, TXR150000. However, a single definition cannot encompass or describe every possible scenario that may constitute a common plan of development. Therefore, additional guidance and examples may be provided by TCEQ, as necessary.

Comment 314:
NCTCOG and Farmers Branch comment that there is a difference in the definition of "construction site operator" between the TPDES small MS4 general permit and the CGP. Lloyd Gosselink, Carter & Burgess, Houston, Farmers Branch, V&E, Group 1, and Harris County request that the TCEQ replace the word "all" with "either" in the first sentence, and replace "and" with "or" in part (a) of the definition for "Construction Site Operator," for consistency with both TCEQ and EPA Region VI CGPs.

Response 314:
The definition of "construction site operator" was revised for consistency with the approved TPDES CGP, TXR150000. The re-noticed permit defines "construction site operator" as:

The person or persons associated with a small or large construction project that meets either of the following two criteria:

(a) the person or persons that have operational control over construction plans and specifications (including approval of revisions) to the extent necessary to meet the requirements and conditions of this general permit; or

(b) the person or persons that have day-to-day operational control of those activities at a construction site that are necessary to ensure compliance with a storm water pollution prevention plan for the site or other permit conditions (e.g. they are authorized to direct workers at a site to carry out activities required by the Storm Water Pollution Prevention Plan or comply with other permit conditions).

Comment 315:

Cleburne, Farmers Branch, and NCTCOG recommend including a definition of “daily maximum” in the permit. NCTCOG and Farmers Branch comment that this term is used in Part IV. (Numeric Effluent Limitations) and Part VII.D. (Authorization for Municipal Construction Activities) of the permit to describe sampling requirements, but believe the term is subject to interpretation.

Response 315:

The following definition of "daily maximum" was added to the re-noticed permit: “For the purposes of compliance with the numeric effluent limitations contained in this permit, this is the maximum concentration measured on a single day, by grab sample, within a period of one calender year.”

Comment 316:

DAFB requests a definition of the term “drainage system.” This term is used in the definition of “small municipal separate storm sewer system” and in Part VII.J.9.(b) of the permit.

Response 316:

Part VI.J.9.(b) - Inspection of Controls, was revised in the re-noticed permit to remove the term "drainage system" and add alternative clarifying language.

Comment 317:

DAFB comments that the definition of “final stabilization” should read as follows: “where either of the following two conditions is met . . ..” Houston comments that the definition differs from the one used in the CGP and urges TCEQ to use the same definitions in both permits.

Response 317:

TCEQ revised the definition of “final stabilization” in the re-noticed permit to match the definition of the term in the CGP. The first sentence of the definition was changed to: “A construction site where either of the following conditions are met: . . ..” Additionally, a new part (b) was added and the original parts renumbered. The new part states:

(b) For individual lots in a residential construction site by either:

(1) the homebuilder completing final stabilization as specified in condition (a) above; or

(2) the homebuilder establishing temporary stabilization for an individual lot prior to the time of transfer of the ownership of the home to the buyer and after informing the homeowner of the need for, and benefits of, final stabilization.

Comment 318:

TCCOS and Mathews & Freeland comment that under the definition of "illicit discharge" the addition of any pollutant to any part of the MS4 would qualify as an illicit discharge. TCCOS and Mathews & Freeland request modifying the definition as follows: "Any discharge to a municipal separate storm sewer system composed of sewage, industrial waste, or municipal waste, except discharges of storm water runoff and discharges resulting from fire fighting activities." TCCOS and Mathews & Freeland also request modification of the definition of "illicit connection" to correspond with the proposed changes for "illicit discharge." Farmers Branch comments that the current definition makes "illicit discharges" out of non-TPDES authorizations, such as those granted under TCEQ's Voluntary Cleanup Program. Cleburne comments that the definition of "illicit discharge" is too broad, and that it would include all discharges from an MS4 because rainwater will always carry some materials (e.g., leaves, sticks, and dirt, sand, silt, fertilizers, etc.). Cleburne also believes the current definition does not take into account agricultural activities that are exempt from permit requirements.

Response 318:

To some extent storm water will usually contain and transport pollutants. Storm water containing pollutants is not automatically classified as an illicit discharge. Only in situations where storm water is commingled with unauthorized waste streams does the discharge become illicit. In the re-noticed permit, TCEQ modified the definition of "illicit discharge" to: "Any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges pursuant to this general permit or a separate authorization and discharges resulting from emergency fire fighting activities."

Comment 319:

Harris County and HCFCD recommend enclosing in parentheses the phrase "including sewer service connections and foundation drains" in the definition of "infiltration." V&E requests replacing the word "wastewater" with the words "storm water."

Response 319:

The definition of "infiltration" was deleted and the following definition of "ground water infiltration" was added to the re-noticed permit: "Groundwater that enters a sewer system (including sewer service

connections and foundation drains) through such means as defective pipes, pipe joints, connections, or manholes."

Comment 320:
Houston and TxDOT request that TCEQ define "large construction activity" the same as it does in the TPDES CGP, TXR150000. DAFB requests revising the language in the definition of "large construction activity" to state: "result in land disturbance of equal to or greater than five (5) acres."

Response 320:
The definition of "large construction activity" was revised in the re-noticed permit to match the definition of that term in the TPDES CGP. The definition was changed to:

"Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than five (5) acres of land. Large construction activity also includes the disturbance of less than five (5) acres of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than five (5) acres of land. Large construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, and original purpose of a ditch, channel, or other similar storm water conveyance. Large construction activity does not include the routine grading of existing dirt roads, asphalt overlays of existing roads, the routine clearing of existing right-of-ways, and similar maintenance activities."

Comment 321:
Group 1 recommends revising the definition of "major outfalls" to state: "An outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent." Cleburne suggests defining a "major outfall" as "an outfall that discharges from a single pipe with an inside diameter of 36 inches or more or an equivalent vegetated drainage that discharges into an intermittent or perennial stream or other water body delineated on the USGS 7.5 minute series topographic map quad sheets." Tarrant County comments that discharges into a floodway as defined by a FEMA map could be used in determining a major outfall instead of using the drainage area. Harris County and V&E request that the definition for "major outfall" include some clarification for the location of the outfall. Tarrant County requests adding the following sentence at the end of the definition: "MS4s that don't have underground storm drain pipe systems and traditional outfalls may substitute other sites that will allow the permittee to locate and trace illicit discharges."

DAFB, TCUC, Harris County, and BCES question how discharges from these pipes are equivalent to discharges from the referenced watersheds. These commenters state that each MS4 should determine what constitutes a "major outfall." Farmers Branch requests revising the criteria for round pipes draining areas zoned as industrial from an inside diameter of 12 inches to a diameter of 24 or 36 inches. V&E, DFW, Cleburne, and Carter & Burgess request clarification for storm water from industrial areas when there are no zoning requirements within the MS4. Carter & Burgess suggests identifying industrial areas by referring to the standard industrial classification codes referenced in the federal regulations and that define "storm water associated with industrial activities."

Harris County and TAOC state that most counties do not have pipes and therefore defining major outfalls based on defined 50-acre drainage areas would require counties to perform prolonged and expensive drainage studies. Tarrant County comments that defining an outfall by the drainage area is unduly restrictive and will require drainage studies. NCTCOG comments that this definition and mapping requirement puts a heavy burden on MS4 operators with limited resources for mapping to produce accurate maps. Group 1 states that the requirement to identify outfalls based on zoning requires development of a comprehensive zoning plan or costly land-use map. Cleburne comments that operators would not have the funding to develop drainage maps on the sub-watershed or micro-watershed level with areas of each watershed measured in acres. Group 1 comments that federal regulations do not require small regulated MS4s to develop costly land-use maps to perform comprehensive zoning or planning efforts or to delineate MS4 "micro-basins" needed to determine the acreage that drains a specific area. Grand Prairie requests requiring a less stringent manner of defining outfalls as MS4s have limited resources for the mapping.

TCCOS and Mathews & Freeland comment that the definition of "major outfall" is from federal regulations for Phase I MS4s and that federal Phase II regulations do not use the term "major outfall" with regard to the level of geographic detail required for mapping of small MS4s. Instead, Phase II regulations require operators to map "outfalls." TCCOS and Mathews & Freeland object to TCEQ forcing Phase II cities to map their MS4s to the same degree of detail as required in the Phase I federal regulations. TCCOS and Mathews & Freeland recommend the use of the term "outfall" rather than "major outfall," without providing a specific definition for the term. NCTCOG suggests defining the term "major outfall" in a less stringent manner or that the mapping requirement in Part III.3.(d)(2) could allow MS4s the option of mapping all outfalls. NCTCOG further comments that the limited resources of small MS4s are likely more suited to identifying all outfalls as opposed to identifying those meeting specific drainage criteria.

Response 321:
The federal rules at 40 C.F.R. §122.34(b)(3)(ii)(A) and adopted by reference in 40 TAC §281.25 require the small MS4 operator to develop a storm sewer system map "showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls." Therefore, the definition of "major outfall" was deleted from the re-noticed permit and Part III.A.3.(d)(1) was revised to require the map of the storm sewer system to show the location of "all outfalls" as required by the federal rules.

Comment 322:
NCTCOG and Farmers Branch recommend defining the term "outfall" in the permit or in a guidance document.

Response 322:
A definition for "outfall" was added to the re-noticed permit and reads as: "A point source at the point where a municipal separate storm sewer discharges to surface water in the state and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances that connect segments of the same stream or other waters of the U.S. and are used to convey waters of the U.S."

Comment 323:
Group 1 recommends changing the definition of "MS4 operator" to remove the words "owner or." Group 1 notes that the term "owner" does not necessarily refer to a public entity and is ambiguous.

Response 323:
The MS4 operator is the party or parties responsible for obtaining permit coverage. In many instances the public entity responsible for the management and operation of the MS4 is the party subject to the permit. In some instances, the public entity may contract with a separate party to provide management and maintenance of the system and for implementation of the SWMP. In these instances and depending on the terms of the contract, both the contractor and the public entity may be required to apply for coverage. Therefore, the definition of "MS4 Operator" in the re-noticed permit now states: "The public entity, and/or the entity contracted by the public entity, responsible for management and operation of the municipal separate storm sewer system that is subject to the terms of this general permit."

Comment 324:

NCTCOG recommends defining the term “notice of change” in the permit or in a guidance document.

Response 324:
A definition of “notice of change” was added to the re-noticed permit. It is defined as: “Written notification from the permittee to the executive director providing changes to information that was previously provided to the agency in a notice of intent.”

Comment 325:
NCTCOG and Farmers Branch request defining the term “notice of termination” in the permit or in a guidance document.

Response 325:
A definition of “notice of termination” was added to the re-noticed permit. It is defined as: “A written submission to the executive director from a permittee authorized under a general permit requesting termination of coverage under this general permit.”

Comment 326:
Houston requests that TCEQ use the same definition of “small construction activity” that it uses in the CGP. TxDOT requests that this definition be consistent with the definition found in the CGP.

Response 326:
The definition of “small construction activity” was revised in the re-noticed permit to match the definition in the TPDES CGP, TXR150000. The definition was changed to:

“Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one (1) acre and less than five (5) acres of land. Small construction activity also includes the disturbance of less than one (1) acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one (1) and less than five (5) acres of land. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, and original purpose of a ditch, channel, or other similar storm water conveyance. Small construction activity does not include the routine grading of existing dirt roads, asphalt overlays of existing roads, the routine clearing of existing right-of-ways, and similar maintenance activities.”

Comment 327:
V&E, DAFB, TCCOS, and Mathews & Freeland request clarification and/or written guidance for the last subpart in the definition of "small municipal separate storm sewer system," which states that it does not include "very discrete systems such as those serving individual buildings." TCCOS and Mathews & Freeland recommend modifying that portion of the definition to exempt those MS4 operators whose systems serve less than one acre. TCCOS and Mathews & Freeland also ask whether independent school districts and community colleges, or the Capital Area Complex are required to obtain coverage.

Response 327:
The definition was not modified to delineate a fixed number of acres that would constitute a system because it would not take into account the purpose of the storm water conveyances within an area. In the preamble to the Phase II rules (See 64 FR 68749), EPA discusses instances where a municipal separate storm sewer may not be considered a system. For example, a storm sewer serving only one building would not be considered a system and EPA includes the specific examples of post offices or urban offices of the U.S. Park Service. EPA also indicated that storm sewers for federal facilities consisting of more than one building may be treated as a single building rather than as an MS4 and states that the permitting authority must determine whether a municipal complex is regulated as a small MS4. Such determinations may necessarily remain subjective and are not easily defined. Therefore, though TCEQ may develop guidance it still may be required to make individual determinations on what constitutes an MS4.

However, the following was added to the definition of small MS4 in the re-noticed permit to help clarify when a system requires permit coverage: "For purposes of this permit, a very discreet system includes storm drains associated with municipal office and education complexes, where the complexes serve a transient (nonresidential) population, and where the buildings are not physically interconnected to an MS4 that is also operated by that public entity."

Comment 328:
V&E requests that the permit include a definition for "structural control" identical to the definition in the storm water CGP. Harris County requests defining "structural controls" as follows: "constructed facilities or vegetative practices that are generally designed to minimize, capture or prevent pollution."

Response 328:
A definition of "structural control" was added to the re-noticed permit. The definition is identical to the definition in the TPDES CGP, TXR150000:

"A pollution prevention practice that requires the construction of a device, or the use of a device, to capture or prevent pollution in storm water runoff. Structural controls and practices may include but are not limited to: wet ponds, bioretention, infiltration basins, storm water wetlands, silt fences, earthen dikes, drainage swales, sediment traps, check dams, subsurface drains, storm drain inlet protection, rock outlet protection, reinforced soil retaining systems, gabions, and temporary or permanent sediment basins."

Comment 329:
TCCOS and Mathews & Freeland request modifying the definition of "storm water management program" as follows to reflect the true scope of the permit requirements: "a comprehensive program to manage the quality of discharges from the municipal separate storm sewer system."

Response 329:
The definition of SWMP was revised in the re-noticed permit to state: "Storm Water Management Program (SWMP) - A comprehensive program to manage the quality of discharges from the municipal separate storm sewer system."

Comment 330:
TCUC and BCES note that the definition of "urbanized area" is defined by the 1990 and 2000 Decennial Census and inquire which census TCEQ intends to use. Group 1, V&E, TAOC, TCCOS, Freese & Nichols, Mathews & Freeland, and Dodson request revision of the definition of "urbanized area" and revision of Part II.A.1. to reflect that urbanized areas are based on only the 2000 Decennial Census. NCTCOG and Farmers Branch request revising the definition of "urbanized area" as follows: "An area of high population density as defined and used by the U.S. Census Bureau in the 1990 and 2000 decennial census that may include multiple MS4s."

Response 330:
The federal Phase II storm water rules at 40 C.F.R. §122.32(a)(1) base the need for a permit on the "latest decennial Census." Subsequent EPA guidance indicates that the urbanized area boundaries are based solely on the 2000 Census Data. The definition of "urbanized area" in the re-noticed permit was modified to state: "An area of high population density that may include multiple MS4s as defined and used by the U.S. Census Bureau in the 2000 Decennial Census."

In addition, Part II.A.1.was revised in the re-noticed permit to: "A small MS4 that is fully or partially located within an urbanized area, as determined by the 2000 Decennial Census by the U.S. Bureau of Census, must obtain authorization for the discharge of storm water runoff and is eligible for coverage under this general permit."

Comment 331:
Houston and V&E comment that the definition of "waters of the United States" does not parallel the EPA's definition at 40 C.F.R. §122.2. Specifically, the exclusions for water treatment systems and prior converted crop lands were omitted from the federal definition in the permit. V&E recommends revising the definition in the TPDES general permit to incorporate these exclusions in the definition of "Waters of the United States."

Response 331:
The definition of "waters in the United States" in the re-noticed permit was amended to add the following language from the federal definition:

"Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR §423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA."

Designated MS4s and Designation Criteria

Comment 332:
TCCOS, Mathews & Freeland, Lloyd Gosselink, and Carter & Burgess comment that the designation criteria attempts to establish a requirement of general applicability and that adoption through rulemaking procedures pursuant to Texas Government Code, Chapter 2001, is appropriate. TCCOS, Lloyd Gosselink, Carter & Burgess, and Mathews & Freeland also request offering designated small MS4s the opportunity for a contested case hearing if they wish to challenge TCEQ's determination. Tarrant County suggests adding the following language after the second sentence in the opening paragraph of Part II.A.2.:

"The designation process is subject to TCEQ appeal procedures." TCCOS and Mathews & Freeland further comment that TCEQ did not make any attempt to apply the designation criteria to any small MS4s prior to December 9, 2002. HCFCD comments that neither the Fact Sheet nor permit indicate whether the application of the criteria has resulted in the designation of any additional small MS4s. NCTCOG and Farmers Branch comment that TCEQ is applying the designation criteria to all entities and does not limit these criteria to EPA's suggestion of entities with a population of at least 10,000 and 1,000 persons per square mile and does not give consideration to high growth potential or contiguity to an urbanized area. NCTCOG and Farmers Branch also comment that the words "with consideration" in the opening paragraph of Part II.G. are unclear and therefore do not allow a simple mechanism to determine if a community may be designated. In addition to the designation criteria in the permit, Austin requests that TCEQ add a factor related to the control of discharges for the protection of sole-source drinking water supplies and a second factor related to the control of discharges for the protection of endangered species. DAFB requests changing the permit language to use the term "contiguous" instead of "adjacent" because the term "adjacent" does not necessarily indicate that the systems touch each other and does not mean that one system discharges to the other. If TCEQ declines to make the requested change, DAFB requests including a definition of the term "adjacent small MS4" in the permit. V&E, TAOS, TCUC, BCES, and Cleburne request the deletion of the sixth criterion used for designation of MS4 operators as covered under this permit because it is vague and too subjective. V&E asks how this criterion could be implemented on a consistent and objective basis. TCUC and BCES comment that the language allows TCEQ too much authority to designate non-urbanized areas.

Response 332:

40 C.F.R. §122.32(a)(2), which was adopted by reference in 30 TAC §281.25, states that a small MS4 may be regulated if "[y]ou are designated by the TPDES permitting authority . . .." To meet the requirement in §122.32(a)(2), TCEQ developed designation criteria to apply to small MS4s that are not located in urbanized areas and where it was determined that controls were necessary to protect water quality. TCEQ applied the criteria to small MS4s located outside of urbanized areas and determined that no additional small MS4s were "designated" at this time. The criteria used for making a determination whether TCEQ would designate any additional MS4s were: 1) whether controls for discharges were determined to be necessary for source water protection of public drinking water resources based on the results of source water assessments by TCEQ; 2) whether controls for discharges were necessary to protect sea grass areas of Texas bays as delineated by the Texas Parks & Wildlife Department; 3) whether controls for discharges were necessary to protect receiving waters designated as having an exceptional aquatic life use; 4) whether controls are required for pollutants of concern expected to be present in

discharges to a receiving water listed on the CWA, §303(d) list based on an approved TMDL plan; 5) if requested by a regulated MS4 operator, that discharges from an adjacent small MS4 were determined by TCEQ to be significant contributors of pollutants to the regulated MS4; and 6) additional factors relative to the environmental sensitivity of receiving watersheds.

EPA did not specify what criteria must be used or that the criteria be included in the permit. EPA specified only that criteria be developed "to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts." See 40 C.F.R. §123.35(b)(1)(i).

Therefore, TCEQ has decided not to include specific designation criteria in the permit language. TCEQ may identify other criteria with sufficient water quality impacts to warrant "designation" in the future; it is not doing so at this time. Part II.G. was deleted from the re-noticed permit and Part II.A.2. was revised to state:

2. Designated MS4s

An MS4 that is outside an urbanized area that has been"designated" by TCEQ based on evaluation criteria as required by 40 CFR §122.32(a)(2) or 40 CFR §122.26(a)(1)(v) and adopted by reference in Title 30, Texas Administrative Code (TAC), §281.25, is eligible for coverage under this general permit. Following designation, operators of small MS4s must obtain authorization under this general permit or apply for coverage under an individual TPDES storm water permit within 180 days of notification of their designation.

Allowable Non-Storm Water Discharges

Comment 333:
DAFB requests a definition for "substantial sources of pollutants" and requests clarification on how these sources are determined and documented. Houston comments that the permit lists non-storm water discharges that are allowed provided the MS4 operator has not determined that they are "substantial" sources of pollutants. However, the Phase II rules allow these discharges as long as they are not "significant" sources of pollutants. Houston asks whether TCEQ intends a different meaning. CTS requests revising the last phrase of the introductory paragraph, "provided that they have not been

determined by the permittee to be substantial sources of pollutants to the MS4," to "unless they have been determined by the permittee to be substantial sources of pollutants."

Response 333:
The MS4 operator can determine if certain non-storm water discharges to their system are a significant contributor of pollutants to their system by implementing their illicit discharge detection and elimination MCM. 40 C.F.R. §122.34(b)(3)(iv) recommends visually screening outfalls during dry weather and conducting field tests of selected pollutants as part of the procedures for locating priority areas. The MS4 operator may determine that the source is a significant contributor based on a number of factors, including: Observing the immediate receiving waters for signs of changes in the appearance or biological communities; sampling the source and submitting the sample to laboratory analyses; and considering the nature of the source and local water quality.

To maintain consistency with the federal rules at 40 C.F.R. §122.34(b)(3)(iii) and to Part III.A.3.(c) of this permit, the introductory paragraph of Part II.B was changed in the re-noticed permit to: "The following non-storm water sources may be discharged from the small MS4 and are not required to be addressed in the MS4's Illicit Discharge and Detection or other minimum control measures, unless they have been determined by the permittee or the TCEQ to be significant contributors of pollutants to the MS4: . . .."

Comment 334:
DFW, Farmers Branch, and Grand Prairie request a definition of what is included in "fire fighting activities" as used in Part II.B.(o) and request that the permit include a listing of the activities that are exempted. The commenters indicate that some of the activities that may be confusing include the washing of trucks at fire stations, runoff water from training exercises, and test water from fire suppression systems.

Response 334:
Discharges from fire fighting activities are those discharges that result following the emergency response to a fire and the activities required to extinguish that fire. Fire fighting activities would not include the washing of trucks at fire stations, runoff water from training exercises, and test water from fire suppression systems. Part II.B.(o) was modified in the re-noticed permit to: "discharges or flows from fire fighting activities (fire fighting activities do not include washing of trucks, run-off water from training activities, test water from fire suppression systems, and similar activities); . . .."

Discharges Authorized By Another TPDES Permit

Comment 335:
DAFB suggests that the construction of the first sentence due to the placement of the word "only" indicates that authorization is the single consequence possible and implies that there are additional, but unspecified consequences other than authorization. DAFB recommends revising the permit language to: ". . . may be authorized under this TPDES general permit only if the following . . .."

Response 335:
In response to the comment, Part II.C.1. of permit was revised to: "Discharges authorized by an individual or other general TPDES permit may be authorized under this TPDES general permit only if the following conditions are met: . . .."

Compliance With Water Quality Standards

Comment 336:
GCHD asks who will make the determination that the discharge will affect water quality. Group 1 comments that this language would require small regulated MS4s to determine if storm water discharges would cause or contribute to a violation of water quality standards or that the discharge would fail to protect and maintain the existing designated uses of the receiving stream in order to be eligible for coverage under this permit. They suggest revising the language to say that the discharges are not eligible for coverage under the permit if those discharges are determined by TCEQ to cause or contribute to a violation of water quality standards. In the event a discharge is not eligible under this provision, TCEQ should provide some level of general permit coverage until such time an individual permit is issued.

Response 336:
It is the responsibility of TCEQ to determine that the discharge would result in a violation of water quality standards and to notify the applicant. The second sentence of Part II.C.3. was modified in the re-noticed permit to: "The executive director may require an application for an individual permit or alternative general permit to authorize discharges to surface water in the state if the executive director determines that an activity will cause a violation of water quality standards or is found to cause or contribute to the impairment of a designated use of surface water in the state."

Discharges to the Edwards Aquifer Recharge Zone

Comment 337:

Lloyd Gosselink and Carter & Burgess request deleting the following sentence from the second paragraph: "All applicable requirements of the Edwards Aquifer Rule for reductions of suspended solids in storm water runoff are in addition to the effluent limitation requirements and benchmark goals in this general permit for this pollutant." The commenters state that the only effluent limits in the permit are for storm water runoff from concrete batch plants and that there are no benchmark goals set in permit.

Response 337:

The third sentence of the second paragraph of Part II.C.5. was revised in the re-noticed permit to: "All applicable requirements of the Edwards Aquifer Rule for reductions of suspended solids in storm water runoff are in addition to the effluent limitation requirement found in Part VI.D. of this general permit."

Comment 338:

TxDOT disagrees with the requirement in Part II.C.5. to attach the Water Pollution Abatement Plan to the SWMP. TxDOT also requests revising the permit throughout so that the current requirements that certain items "must be included in the SWMP," instead state that the items must be "included or referenced in the SWMP." TxDOT believes this would allow the maintenance of supplementary or additional detailed information in separate documents, thus keeping the SWMP at a more manageable size.

Response 338:

The fourth sentence of the second paragraph of Part II.C.5. was revised in the re-noticed permit to: "A copy of the agency-approved Water Pollution Abatement Plans that are required by the Edwards Aquifer Rule must either be attached as a part of the SWMP or referenced in the SWMP."

Application for Coverage

Comment 339:

Farmers Branch, Cleburne, Harris County, Missouri City, TAOC, and V&E request that the permit define a deadline or time frame for the executive director to acknowledge and respond to an application for coverage under this general permit. The commenters suggest considering the NOI and SWMP administratively complete if TCEQ fails to respond within a specific time frame. V&E recommends a 45-day time frame. Farmers Branch and Cleburne recommend a time frame of 90 days. Harris County, Missouri City, and TAOC recommend a time frame of 60 days. TCCOS, Mathews & Freeland, and Grapevine recommend using the following language in the general permit: "Within 30 days of the

submittal of the NOI, the Executive Director shall determine either: *(1) the NOI is complete and confirm coverage by providing a notification and an authorization number; (2) the NOI is incomplete and deny coverage until a completed NOI is submitted, or (3) the applicant is ineligible for coverage and require an application for an individual permit be submitted. If TCEQ has not responded to a submittal of an NOI within 30 days, the NOI is presumed complete and the applicant is eligible for coverage under the permit.*"

Response 339:
Based on the partial remand of the Phase II rules by the U.S. 9th Circuit Court of Appeals on September 15, 2003, that permitting authority review is required for the NOI, the provision automatically authorizing coverage was removed from the re-noticed permit and the section was revised to state that authorization does not occur until "the applicant is notified by TCEQ that the NOI and SWMP have been administratively and technically reviewed and the applicant has followed the public participation provisions in Part II.D.12."

Comment 340:
NCTCOG, Farmers Branch, TCUC, and BCES comment that Part II.D.1.(a) does not address what the deadline is for submitting an NOI if the permit effective date occurs after December 9, 2002. NCTCOG, Farmers Branch, Cleburne, Harris County, and TAOC request clarification of whether the 90-day time frame for submitting an NOI would apply if the permit's effective date is later than December 9, 2002, and/or if the EPA deadline of March 10, 2003, for issuing the permit is not met.

Response 340:
The March 10, 2003, deadline is specifically stated in the federal rules for storm water discharges at 40 C.F.R. §122.26(e)(9) adopted by reference by TCEQ at 30 TAC §281.25. To change the date would require an amendment of the federal rules. However, the permit provisions allow MS4 operators 90 days following the effective date of the permit to submit an NOI for coverage under the permit. The 90-day application time frame would begin the date the permit is issued and is not based on the March 10, 2003, federal deadline. The time frame is established to provide a reasonable period for regulated MS4s to revise and finalize SWMPs for submitting with their NOI.

Although the issuing of this permit and the deadline for application are beyond the federal deadline, authorization of the discharges is most reasonably regulated under a general permit. TCEQ does not intend to initiate enforcement actions against regulated MS4s that meet the application deadline in the

permit. Until the application is submitted and until authorization is obtained, TCEQ recommends that MS4s implement those BMPs and other pollution prevention measures that they have developed in order to ensure that storm water discharges do not threaten receiving water quality. In the re-noticed permit the second sentence of Part II.D.1.(a) was deleted because the dates referenced are no longer applicable.

Comment 341:

TCCOS and Mathews & Freeland comment that the permit should include specific language consistent with 30 TAC §205.4(c) explaining how the executive director will notify operators of small MS4s if they are denied coverage under the permit. TCCOS and Mathews & Freeland also ask that the permit specify a time frame for the submission of an individual permit application if coverage under the general permit is denied. If coverage is denied they request allowing the operator of a small MS4 to discharge pursuant to the terms of the general permit until the commission issues a final decision on an individual permit application. TCCOS and Mathews & Freeland request using the following language in the general permit: "If the Executive Director denies coverage under this general permit, the Executive Director shall provide written notice to the discharger including, at a minimum, a statement of the basis for the denial of coverage and a statement that the discharger has 180 days to submit an individual permit application. An operator of a small MS4 that is denied coverage under this permit shall be authorized to discharge pursuant to this general permit until the effective date of the commission's action on an individual permit application."

Response 341:

Denial of coverage under a general permit is controlled by 30 TAC §205.4(c) relating to denial of an authorization or NOI. Denial of coverage under the permit would not necessarily require an individual permit application. The rule also specifically states that in the event a discharger is denied coverage under a general permit that the executive director will notify the discharger in writing (30 TAC §205.4(c)(1)). In the re-noticed permit Part II.D.1. was changed to add the following sentence: "Denial of coverage under this general permit is subject to the requirements of 30 TAC §205.4(c)."

Comment 342:

TCCOS and Mathews & Freeland comment that the permit does not include requirements found in 30 TAC Chapter 205 requiring general permits to describe the procedure for suspension of authorization. TCCOS and Mathews & Freeland request the use of the following language to describe the suspension procedure: "The executive director may suspend a discharger's authority to discharge under this permit for the reasons specified in §205.4(d) of this title (relating to Authorizations and Notices of Intent) by

providing the discharger with written notice of the executive director's intent to suspend authority. The written notice shall include a statement of the basis for this decision, a statement that the discharger's authorization under this general permit shall be suspended on the effective date of the commission's action on an individual permit application (unless the commission provides otherwise), a statement that an individual permit application must be submitted within 180 days of the notice, and a statement that the executive director's decision is subject to being overturned pursuant to §50.139 of this title (relating to Motion to Overturn Executive Director's Decision.)."

Response 342:
30 TAC §205.4(d)(1) requires the permit to describe the procedures for suspension of an authorization or NOI. Therefore, the re-noticed permit was revised to include a new Part II.D.11. - Suspension of Permit Coverage, that states:

"The executive director may suspend an authorization under this general permit for the reasons specified in 30 TAC §205.4(d) by providing the discharger with written notice of the decision to suspend that authority, and the written notice will include a brief statement of the basis for the decision. If the decision requires an application for an individual permit or an alternative general permit, the written notice will also include a statement establishing the deadline for submitting an application. The written notice will state that the authorization under this general permit is either suspended on the effective date of the commission's action on the permit application, unless the commission expressly provides otherwise, or immediately, if required by the executive director."

Storm Water Management Program (SWMP)

Comment 343:
TCCOS and Mathews & Freeland comment that the permit states that to obtain authorization an MS4 operator must submit an NOI with an SWMP. Part II.D.3. refers to this submission as an "initial" SWMP and the Fact Sheet states that the NOI will include a "description of the required" SWMP. TCCOS and Mathews & Freeland note the inconsistency in these provisions and seek clarification. Additionally, TCCOS comments that the permit provisions do not adequately describe what must be included in an initial SWMP. TCCOS and Mathews & Freeland request revising the language in Part II.D.3. as follows: "An initial storm water management program must be developed for eligible discharges that reach Waters of the United States according to the requirements of Part III of this permit and a description of the initial SWMP must be submitted with the NOI. The initial SWMP should include a plan for the development of

BMPs and the measurable goals for each of the storm water MCMs in Part III of this permit and must include a time line that demonstrates a schedule for the development and implementation of the program throughout the permit term. The program must be completely implemented by the expiration date of this general permit. If an MS4 operator determines changes to the plan are needed, alterations can be made so long as the revisions are summarized in the annual report."

Response 343:
An applicant for coverage under the permit must submit an SWMP that describes the six MCMs and the seventh MCM if the MS4 operator is also seeking to use that optional provision. Many MCMs may not be fully developed and the applicant may need to provide a development and implementation schedule. Such an SWMP would satisfy the application requirements. The specifics of the SWMP may be modified throughout the term of the permit as the MS4 operator modifies the MCMs to improve or more efficiently control pollution.

For consistency throughout the re-noticed permit, all references to an "initial SWMP" in the permit were changed to "the SWMP" to avoid any perception that there are two separate documents, a "SWMP" and an "initial SWMP." Also, the Fact Sheet was changed to state that an SWMP must be submitted with the NOI.

Comment 344:
Missouri City recommends revising the first sentence to clarify that an SWMP must be developed for MS4s in urbanized areas with discharges to interconnected MS4 systems that subsequently drain to waters of the U.S. Missouri City believes that the language as written may be construed to mean that systems with no direct discharges to waters of the U.S. do not need to develop an SWMP.

Response 344:
The first sentence in Part II.D.3. was revised in the re-noticed permit to: "A SWMP must be developed and submitted with the NOI for eligible discharges that will reach waters of the United States (U.S.), including discharges from the regulated small MS4 to other MS4s or privately-owned separate storm sewer systems that subsequently drain to waters of the U.S. according to the requirements of Part III of this general permit and submitted with the NOI."

Contents of the NOI

Comment 345:

Houston comments that almost everywhere in the permit the regulated party is referred to as the MS4 operator, which includes both the owner and operator of the MS4. However, for purposes of the content of the NOI, only information on the owner is required. Houston comments that TCEQ should require the same information from both the owner and operator if the entity that operates the MS4 is different from the owner of the MS4.

Response 345:

Part II.D.4. of the re-noticed permit, Contents of the NOI, and Part II.D.5., Notice of Change (NOC) were revised to delete references to the "owner" and instead require information regarding the "MS4 operator," defined in the permit as "the owner or public entity that is responsible for the management and operation of the municipal separate storm sewer system and is subject to the provisions of this general permit." Part II.D.4.(a) was revised to change the heading from "Owner Information" to "MS4 Operator Information." Additionally, the first sentence of Part II.D.5. was changed to the following: "If the MS4 operator becomes aware that it failed to submit any relevant facts, or submitted incorrect information in the NOI, the correct information must be provided to the executive director in an NOC within 30 days after discovery."

Comment 346:

DFW asks if the word "any" in Part II.D.4.(b)(5) to provide "the name, mailing address, telephone number, and fax number of any person(s) responsible for implementing or coordinating the SWMP" refers to all persons responsible for implementing the SWMP or implies one designee. Tarrant County, NCTCOG, Farmers Branch, TCUC, Harris County, Missouri City, and TAOC recommend revising the requirement to include the name of a "designated" person for clarification and to make the requirement practical to implement. Tarrant County believes the SWMP, a more comprehensive document than the NOI, would contain information about "any person(s)."

Response 346:

Part II.D.4.(b)(5) was revised in the re-noticed permit to: "the name, mailing address, telephone number, and fax number of the designated person(s) responsible for implementing or coordinating implementation of the SWMP . . .."

Comment 347:

TCCOS and Mathews & Freeland comment that Part II.D.4.(b)(6) appears to require applicants to submit the name of the SWMP or the name of the building where the SWMP is located. TCCOS and Mathews & Freeland recommend changing this provision to clearly require the name, description, or the physical location of the SWMP.

Response 347:
Part II.D.4.(b)(6) was revised in the re-noticed permit to: "either the physical address or a description of the location of the SWMP . . .."

Comment 348:
Lloyd Gosselink, Cleburne, and Carter & Burgess comment that the purpose is not apparent for the requirement in Part II.D.4.(b)(7) to include on the NOI the name and address where the public can view all applicable records and that the term "all applicable records" is ambiguous. Cleburne comments that if a location must be provided for the general public to view records on demand, then the available records should be restricted to the NOI, original SWMP, and annual reports. The commenters state that the availability of these documents should be determined pursuant to the Texas Public Information Act. Lloyd Gosselink and Carter & Burgess comment that it is not necessary to identify in the NOI where the documents are available.

Response 348:
Part II.D.4.(b)(7) was deleted from the re-noticed permit. The previous provision requires that the NOI include information on the location of the SWMP. Part IV.A.3. specifies what records must be made available upon written request by the public and was modified to specify that records other than the NOI and SWMP requested from an MS4 operator are subject to the requirements of the Texas Public Information Act. The revised section states that the NOI and SWMP must be made available to the general public if requested in writing and that other records may be made available in accordance with the Texas Public Information Act.

Comment 349:
TCCOS and Mathews & Freeland comment that requiring certification that the SWMP was developed according to the provisions of the permit at the time of filing an NOI is premature given that only an initial SWMP will be submitted with the NOI. TCCOS and Mathews & Freeland request modifying the permit to reference the "initial SWMP."

Response 349:
As noted in an earlier response, all references to an "initial SWMP" were changed to "the SWMP" in the re-noticed permit to avoid any perception that there are two separate documents, an "SWMP" and an "initial SWMP." This section requires the applicant to certify that the original SWMP submitted to TCEQ is a document that was prepared according to the provisions and requirements of the permit.

Comment 350:
TxDOT, DAFB, NCTCOG, Cleburne, Farmers Branch, Freese & Nichols, DFW, Carter & Burgess, Grand Prairie, TCCOS, Mathews & Freeland, Grapevine, TCUC, Tarrant County, Harris County, and TAOC recommend defining the term "major waters" in Part II.D.4.(9) and (10) because the requirement to identify all receiving waters is overly burdensome. TCCOS and Mathews & Freeland recommend deleting either the word "major" or that a more descriptive criteria be used. NCTCOG, Farmers Branch, and Freese & Nichols request deleting "the" and the term "waters of the United States" substituted. Lloyd Gosselink and Carter & Burgess recommend deleting the term and replacing it with the term "classified segments" because that term is defined in 30 TAC §307.3(a)(11). Group 1 requests deleting the term and instead using the term "receiving waters."

Response 350:
Part II.D.4.(9) and (10) were deleted and the following Part II.D.4.(8) was added in the re-noticed permit:

(8) the name of each classified segment that receives discharges, directly or indirectly, from the MS4. *If one or more of the discharge(s) is not directly to a classified segment, then the name of the first classified segment that those discharges reach shall be identified . . ..*

Comment 351:
TxDOT states that they currently review projects based on the most current EPA approved CWA, §303(d) list, which was published in 1999. TxDOT suggests changing the language in Part II.D.4.b.(10) from "are on the latest CWA §303(d) list" to "are on the latest EPA approved CWA §303(d) list" to avoid confusion regarding what list is applicable.

Response 351:
The phrase "approved CWA §303(d) list" was added to Part II.D.4.b.(10) in the re-noticed permit.

Notice of Change (NOC)

Comment 352:

NCTCOG, Farmers Branch, TCUC, and DAFB request that the permit be more specific about the changes that would require an NOC. TAOC and Cleburne request defining what changes require an NOC. Farmers Branch suggests removing the term “relevant” because it is unclear. TAOC requests development of an NOC form.

Response 352:

Currently NOCs are provided by MS4 operators to the executive director in the form of a letter. The development of NOC forms is currently being considered for a number of existing TPDES general permits and will also be considered for this permit. The second sentence of Part II.D.5 was revised in the re-noticed permit to: “If any information provided in the NOI changes, an NOC must be submitted within 30 days from the time the permittee becomes aware of the change.”

Notice of Termination (NOT)

Comment 353:

DAFB comments this section refers to NOTs while the language regarding NOTs follows this section and requests reversing in order these sections of the permit.

Response 353:

TCEQ declines to change the order of the sections, but in the re-noticed permit the title of Part II.D.7. was changed from “Terminating Coverage to “Notice of Termination (NOT).”

Signatory Requirement for NOI, NOT, and NOC Forms

Comment 354:

Tarrant County suggests including the actual "I certify . . ." language found in 30 TAC §305.44 because this program may involve local government staff who are not familiar with the legal details regarding the signatory requirement. Tarrant County states that this could simplify the preparation of these documents and also stresses the importance of complying with SWMP provisions. Cleburne asks if this section should also include a reference to certification requirements, such as the certification statement in 30 TAC §305.44(b) and whether the certification statement should be signed as required by that rule.

Response 354:

The signatory portion of the NOI and NOT forms will include the certification statement. Due to the varied types of operators of small MS4 systems, it is necessary for applicants to review 30 TAC §305.44 to identify what level of authority is required to sign the appropriate forms. However, Part II.D.8. was revised in the re-noticed permit to more clearly reference the applicable TAC requirement: "NOI, NOT, and NOC forms must be signed and certified consistent with 30 TAC §305.44(a) and (b) (relating to Signatories to Applications)."

Fees

Comment 355:
V&E comments that MS4s "are separate and distinct from sanitary sewer systems and do not involve the introduction of waste waters to waste treatment facilities." V&E further comments that storm water and specified non-storm water discharges authorized under the permit are not wastewater and that it is inappropriate to make these discharges subject to a "wastewater service fee." V&E and Houston recommend the removal of this waste treatment inspection fee from this permit. Cleburne requests limiting fees to the $100 application fee and the $100 annual inspection fee, and not include watershed monitoring and assessment fees.

Response 355:
The Waste Treatment Inspection Fee and the Water Quality Assessment Fee were combined into a single Water Quality Fee under 30 TAC Chapter 21. There is no longer an annual watershed monitoring and assessment fee. The application fee is based on the cost to the agency for processing the application and tracking the information in an electronic database. The annual water quality fee is utilized to help fund the agency's inspection programs that ensure compliance with the TPDES permitting program. However, the second paragraph of Part II.D.9 regarding waste treatment inspection fees was revised in the re-noticed permit to: "A permittee authorized under this general permit must pay an annual Water Quality fee of $100 under Texas Water Code, §26.0291 and 30 TAC Chapter 205 (relating to General Permits for Waste Discharges)."

Permit Expiration

Comment 356:
Harris County and Cleburne note that if the general permit is not renewed, MS4s must submit an individual permit application at least 180 days before the expiration date. Harris County requests adding

the following language: "TCEQ must notify the permittee of its intent to not renew this permit at least 240 days before the expiration of this permit." Cleburne suggests requiring TCEQ notify MS4 operators in writing one year in advance of permit expiration if the permit will not be renewed. DFW asks what permitted MS4s would need to do if the decision is made that the general permit will not be renewed, but it is not announced at least 180 days prior to the expiration date.

Response 356:
30 TAC §205.5(d) requires that, if the commission is not proposing to renew a general permit at least 90 days before its expiration date, dischargers authorized under the general permit must submit an application for an individual permit before expiration of the general permit. It further states that if an application for an individual permit is submitted before expiration of the general permit, authorization under the expired general permit remains in effect until the individual permit application is issued or denied.

Therefore, Part II.D.10.(d) was revised in the re-noticed permit to: "If the commission does not propose to reissue this general permit within 90 days before the expiration date, permittees must apply for authorization under a TPDES individual permit or an alternative general permit. If the application for an individual permit is submitted before the expiration date, authorization under this expiring general permit remains in effect until the issuance or denial of an individual permit."

Permitting Options

Comment 357:
CTS requests changing the phrase in the second sentence of Part II.E.1. from "regardless if the systems are physically interconnected . . ." to "regardless whether the systems are physically interconnected . . .."

Response 357:
The second sentence of Part II.E.1. was modified in the re-noticed permit to: "Multiple small MS4s with separate operators must individually submit an NOI to obtain coverage under this general permit, regardless of whether the systems are physically interconnected, located in the same urbanized area, or are located in the same watershed."

Comment 358:

Missouri City requests revising the fourth sentence in Part II.E.1. to: "These MS4 operators may combine or share efforts in meeting any or all of the SWMP requirements stated in Part II.D.3. or Part III of this general permit." Missouri City also requests adding a new sentence prior to the final sentence of the paragraph that states: "These MS4 operators must submit a SWMP that is either separate from or shared with the other MS4 operators who are operating MS4s that are interconnected or located in the same urbanized area or located in the same watershed."

Response 358:
The fourth sentence of Part II.E.1. was revised in the re-noticed permit to: "These MS4 operators may combine or share efforts in meeting any or all of the SWMP requirements stated in Part III of this general permit." This will allow applicants with a shared SWMP to concurrently submit separate NOIs and attach to them a single shared SWMP that names each of the participating MS4 operators. The requested additional sentence is not necessary, as the permit clearly states that each MS4 operator must submit an NOI and attached SWMP. This is a requirement regardless of whether the systems or interconnected or located in the same urbanized area.

Comment 359:
Harris County requests that in the last sentence of Part II.E.1.(a) the phrase "a copy of the submitted NOI may be readily available" be modified by replacing "may" with "must."

Response 359:
The re-noticed permit was modified accordingly.

Comment 360:
Tyler comments that the language in Part II.E. differs from the fact sheet, which references co-permittees. Tyler states that the permit encourages cooperation without making the separate MS4s co-permittees, but that the fact sheet language may lead to confusion.

Response 360:
The fact sheet was modified for the re-noticed permit to remove the term "co-permittee" to better illustrate the intent of sharing SWMP implementation responsibilities.

Waivers

Comment 361:
DAFB comments that this part addresses two waiver options, but nowhere in the permit is there language to specifically identify what the options are. DAFB requests using subparagraph titles to specify that Part II.F.1 is Waiver Option 1 and Part II.F.2 is Waiver Option 2.

Response 361:
Part II.F.1. and Part II.F.2. were revised in the re-noticed permit to: *1. Waiver Option 1: The system serves a population of less than 1,000 within an urbanized area and meets the following criteria . . .*" and "*2. Waiver Option 2: The system serves a population under 10,000 and meets the following criteria: . . ..*

Comment 362:
Cleburne believes the permit should include the waiver request form so MS4 operators will know what specific information is required and will be able to make the request in a timely manner. Because the waiver form has not been published, operators should only be required to have their form submitted by the March 10, 2003, or other deadline, not have the waiver approved by that date. Cleburne comments that the MS4 operator should not be held responsible for the amount of time TCEQ will take to review and approve the waiver.

Response 362:
Inclusion of the waiver request form in the permit would limit the ability to revise the form during the term of the permit. The time frame for obtaining a waiver was modified in the re-noticed permit for consistency with the time frame for obtaining authorization. The following language was added at the end of the first paragraph of Part II.F. in the re-noticed permit:

A provisional waiver from permitting requirements begins two days after a completed waiver form is postmarked for delivery to the TCEQ. Following review of the waiver form, the executive director may: 1) determine that the waiver form is complete and confirm coverage under the waiver by providing a notification and a waiver number, 2) determine that the waiver form is incomplete and deny the waiver until a completed waiver form is submitted, or 3) deny the waiver and require that permit coverage be obtained.

Storm Water Management Program

Comment 363:

HCFCD comments that the requirement to prepare an SWMP appears restricted to MS4s where storm water discharges reach waters of the U.S. HCFCD is concerned that regulated small MS4s who discharge into a larger MS4 will incorrectly conclude that waters leaving their systems do not reach waters of the U.S. and will reach the conclusion that they are not obligated to develop and implement an SWMP. HCFCD urges that the permit include language indicating that MS4s with discharges to other MS4 systems draining to waters of the U.S. must prepare and implement an SWMP.

Response 363:
Authorization for discharges from a small MS4 or from construction sites where the MS4 operator is the construction site operator is required whether the discharge is directly or indirectly to waters of the United States. The first sentence of Part III. was revised in the re-noticed permit to: "To the extent allowable under state and local law, a SWMP must be developed and implemented according to the requirements of Part III of this general permit, for storm water discharges that reach waters of the United States, regardless of whether the discharge is conveyed through a separately operated storm sewer."

Comment 364:
HCFCD comments that the fourth line of the first paragraph contains a grammatical error and should read "to the maximum extent practicable and to effectively prohibit . . .." Cleburne comments that the sentence "the storm water management program must be developed to prevent pollution in storm water to the MEP, effectively prohibit illicit discharges to the system" is unclear. Cleburne requests rephrasing the sentence.

Response 364:
The second sentence of Part III. was revised in the re-noticed permit to: "The SWMP must be developed to prevent pollution in storm water to the maximum extent practicable (MEP) and to effectively prohibit illicit discharges to the system."

Comment 365:
Dodson comments that the language of each of the MCMs is not consistent and requests that the beginning of each MCM include the following language: "The MS4 operator must . . .." This additional language will help MS4 operators understand the minimum requirements.

Response 365:

The following two sentences were added to the first paragraph of Part III of the re-noticed permit: "The small MS4 operator must develop the SWMP to include the six minimum control measures described in Part III.A.1. through 6. The MS4 operator may develop and include the optional seventh minimum control measure in Part III.A.7."

Public Education and Outreach On Storm Water Impacts

Comment 366:
TxDOT and Carter & Burgess comment that the public education requirements are less flexible, more prescriptive, counterproductive, and potentially more costly to Phase II MS4s than those required by EPA. TxDOT believes that the specific list included in Part III.A.1.(a) limits the flexibility necessary for some agencies to develop educational programs that are appropriately tailored to both the community and the MS4 operator's responsibility and function within that community. TxDOT requests omitting or referring to the specific community constituents listed in Part II.A.1.(a) as examples of groups with the MS4 that may be targeted.

TCCOS and Mathews & Freeland comment that the permit language in this subpart is confusing because it appears that small MS4 operators are required to either distribute educational materials or conduct equivalent outreach activities. However, TCCOS and Mathews & Freeland contend that the list of groups to inform within the MS4 area and the content included in the outreach only appear to apply to the second option. TCCOS and Mathews & Freeland request revising the permit after the description of item 1 to: *A section of the SWMP must be developed to include: (a) A public education program to distribute educational materials to the community; or (b) Equivalent outreach activities that will be used to inform the following groups within the MS4 area . . ..* DAFB requests changing in Part III.A.1.(a) the word "outreach"with "outreach program." DAFB also recommends changing the words "minimize their impact" to "minimize the impact."

Response 366:
A list of specific groups was included in the permit to demonstrate the many segments of the public that this MCM should address. The re-noticed permit was modified to allow flexibility when determining what groups to target. Part III.A.1(a) was revised to: "A public education program must be developed to distribute educational materials to the community or to conduct equivalent outreach activities that will be used to inform the public. The MS4 operator may determine the most appropriate sections of the

population at which to direct the program. The MS4 operator must consider the following groups and the SWMP must provide justification for any listed group that is not included in the program . . .."

Additionally, the concluding paragraph of Part III.A.1.(a) was modified in the re-noticed permit to: "The outreach must inform the public about the impacts that pollution in storm water run-off can have on water quality, hazards associated with illegal discharges and improper disposal of waste, and ways they can minimize their impact on storm water quality."

Comment 367:
DFW, Lloyd Gosselink, Dodson, Carter & Burgess, Dodson, TCCOS, and Mathews & Freeland comment that the meaning of the term "reasonable attempt" used in Part III.A.1.(b) is unclear. The commenters request either defining or deleting the term. DAFB requests revising the permit language that states: "Via documentation, the MS4 operator must ensure that a reasonable attempt was made . . ." to: "The SMS4 operator must ensure that a reasonable attempt was made . . . and maintain documentation thereof." HCFCD suggests the wording: "During program implementation, the MS4 operator must document that reasonable attempts to reach all constituents within the MS4 area to meet this measure were made." TCCOS and Mathews & Freeland comment that the term "ensure" as used in this subpart is subjective and should not be used in the permit. TCCOS and Mathews & Freeland also comment that the term "constituents" is confusing because it is not used properly, as it means "one who authorizes another to act for him or one of a group who elects another to represent him in public office."

NCTCOG, Freese & Nichols, and Farmers Branch request deleting "all" from paragraph (b). Tarrant County recommends reserving the terms "must" and "all" for permit elements that are likely to result in enforcement actions by TCEQ. Tarrant County suggests changing "must ensure that a reasonable attempt . . ." to "should ensure . . ." and remove the word "all" in front of "constituents." Group 1 requests modifying the language from "all constituents . . ." to "the community . . ." and notes that there is no requirement in the federal rules that all constituents must be reached within an urbanized area. Cleburne recommends changing Part III.A.1.(b) to: "The MS4 operator must ensure and document that a reasonable attempt was made to reach all constituents within the MS4 area to meet this measure."

Response 367:
Part III.A.1.(b) was revised in the re-noticed permit to: "The MS4 operator must document activities conducted and materials used to fulfill this control measure. Documentation shall be detailed enough to

demonstrate the amount of resources used to address each group. This documentation shall be retained in the annual reports required in Part IV.B.2. of this general permit."

Public Involvement/Participation

Comment 368:
Farmers Branch, DAFB, TCCOS, Dodson, Lloyd Gosselink, Group 1, and Mathews & Freeland question the use of the phrases "all constituents" and "sufficient opportunities" used in this section. NCTCOG and Farmers Branch recommend deleting paragraphs (a) and (c) from the permit language or if the paragraphs remain, deleting the word "all" from paragraphs (a) and (b) and changing the word "must" to "may or should" in paragraphs (a) and (b). NCTCOG and Farmers Branch comment that paragraph (b) is sufficient for compliance at the level that most Phase II entities are capable of with their limited resources.

Tarrant County asks for an evaluation of the terms "all" and "must" for appropriate usage in this section. If the term "must" is retained, then it should only apply to Part III.A.2.(b), resulting in the deletion or modification of both (a) and (c). The reason for this is the inordinate amount of limited resources that are spent by an MS4 operator on this measure. EPA's Phase II model permit required the wording in (b), but did not require the degree of expenditures and time that are expressed in both (a) and (c). TCCOS, Freese & Nichols, and Mathews & Freeland comment that the requirements of this subpart exceed EPA requirements that require small MS4s comply with state and local public notice requirements. TCCOS and Mathews & Freeland request revising the permit language to limit the requirement to mirror EPA's, thereby deleting language in (a) and (c).

Cleburne recommends deleting Part III.A.2.(c) because it is redundant and recommends adding the sentence "Public involvement and participation program efforts must be documented" to Part III.A.2.(a). Additionally, Cleburne suggests the statement exempting correctional facilities from this control would then become subpart (b) and read as follows, *(b) Correctional facilities will not be required to implement this MCM.*

Group 1 comments that the second sentence of Part II.A.2.(a) elevates an EPA recommendation to a requirement and requests modifying the sentence to state: "It is recommended that the program include provisions to allow opportunities for all constituents within the MS4 area to participate in the storm water management program development and implementation."

Response 368:
Part III.A.2. was revised in the re-noticed permit to consolidate (a), (b), and (c) into a single statement of what the MCM requires and to follow the language in 40 C.F.R. §122.34(b)(2)(i). The modified section was changed to:

2. Public Involvement/Participation

The MS4 operator must, at a minimum, comply with any state and local public notice requirements when implementing a public involvement/participation program. It is recommended that the program include provisions to allow all members of the public within the MS4 the opportunity to participate in SWMP development and implementation. Correctional facilities will not be required to implement this MCM.

Illicit Discharge Detection and Elimination

Comment 369:
TCUC, BCES, TAOC, TxDOT, Tarrant County, and Harris County comment that wherever this section requires MS4s to establish an ordinance or other regulatory mechanism, it needs to include the statement "to the extent allowable under state and local law." V&E requests modifying the illicit discharge detection and elimination MCM to include the phrase "to the extent allowable under state and local law." NCTCOG requests including the allowance for "other regulatory mechanism" in all sections requiring an ordinance.

Response 369:
The final NPDES Phase II federal storm water regulations, 64 FR 68721, 68766 (1999) state that a small MS4 cannot simply fail to pass ordinances necessary to administer and enforce the required MCMs that constitute the bulk of the SWMP. The regulations state that "a small MS4 operator that seeks to implement a program under section 40 C.F.R. §122.34(b) may omit a requirement to develop an ordinance or other regulatory mechanism only to the extent its municipal charter, state constitution or other legal authority prevents the operator from exercising the necessary authority." The third sentence of Part III.A.3.(a) was revised in the re-noticed permit to: "To the extent allowable under state and local law, an ordinance or other regulatory mechanism must be utilized to prohibit and eliminate illicit discharges."

Additionally, Part III.A.3.(a)(2) was changed to: "The SWMP must include appropriate actions and, to the extent allowable under state and local law, establish enforcement procedures for removing the source of an illicit discharge. Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, the information regarding the illicit discharge may be referred to the TCEQ's regional field office."

Comment 370:
NCTCOG comments that the federal storm water regulations list certain non-storm water discharges that require addressing only if determined to contribute pollutants. However, Part III.A.3.(b) states that these discharges "must be considered by the permittee to determine if they are a significant contributor of pollutants to the MS4." NCTCOG comments that this seems to remove the assumption that these discharges are allowable. NCTCOG asks that TCEQ provide guidance to clarify that the intent of TPDES is not to exceed NPDES provisions on allowable discharges. Group 1 comments that the current language opens the door for monitoring programs and studies that are clearly excluded from the Phase II program and asks how MS4 operators are to determine if discharges are a significant contributor of pollutants. Group 1 requests modifying the language as follows: "All non-storm water flows, including those listed in Part II.B. and Part VII.B., must be addressed by the permittee only if they are identified as a significant contributor of pollutants to the MS4." Freese & Nichols recommends the following revision to the language because it does not agree with Part II.B.: "If the non-storm water discharges, including those listed in Part II.B. and Part VII.B, are determined to be significant contributors, they must be considered by the permittee." Grand Prairie recommends that this section include an assumption that these non-storm water discharges are not significant contributors of pollutants to the MS4 because it believes that the language as written implies that sampling or some other type of detection are required for these discharges.

Response 370:
This section is in accordance with the final federal Phase II regulations. 40 C.F.R.§122.34(b)(3)(iii) states that small MS4s must address certain categories of non-storm water discharges "only if you identify them as significant contributors of pollutants to your small MS4." The categories of non-storm water discharges listed in §122.34(b)(3)(iii) are those listed in Part II.B.(a) - (o) of the permit. It is not the intent to require that the MS4 operator perform water quality studies or to require monitoring programs to test and verify the effect of the listed "allowable" non-storm water discharges.

One option the MS4 operator has is to incorporate the consideration of non-storm water discharges as a part of a dry weather screening program, which complies with the permit requirement for the illicit discharge detection and elimination MCM. To implement the MS4 operator would screen the entire system within the five-year term of the permit for dry weather flows. When a flow is detected, it is traced to the source. If it is determined that the flow is a non-storm water source listed in Part II.B or Part VI.B, it is an allowable non-storm discharge, unless the MS4 operator determines it is a significant source of pollutants. In making this determination, the MS4 operator may consider the conditions of the receiving water, noting any change that can be attributed to the dry weather flow, such as color, foam, changes in the aesthetic qualities, or obvious toxic effects to aquatic organisms and algal communities. The MS4 operator may also consider the physical character of the discharge itself. Finding the source as a potentially allowable non-storm water discharge and lacking the example indications for the presence of significant pollutants the MS4 operator could conclude that the source is not a significant source of pollutants. Alternatively, if the discharge remains suspect, the MS4 operator can sample and conduct laboratory analyses for a range of suspected pollutants.

However, the first sentence of Part III.A.3.(b) was revised in the re-noticed permit to include the following clarification: "Non-storm water flows listed in Part II.B and Part VI.B. do not need to be considered by the MS4 operator as an illicit discharge requiring elimination unless the operator of the MS4 or the executive director identifies the flow as a significant source of pollutants to the MS4."

Comment 371:

TCCOS and Mathews & Freeland comment that the permit does not explain the difference between illicit discharges and non-storm water discharges and asks why two separate programs are necessary. TCCOS and Mathews & Freeland request that TCEQ revise the permit to require only a single program to "detect and eliminate purposefully constructed connections between industrial processes and sewage collection systems and the MS4." TCCOS and Mathews & Freeland request combining and revising subparts (a) and (b) to state:

(a) Illicit Discharges: A section within the SWMP must be developed to establish a program to detect and eliminate illicit connections to the MS4. The SWMP must explain how the entire MS4 will be inspected for illicit connections during the term of the permit and what methods will be used to eliminate such connections. If the non-storm water flows originate from the activities conducted by persons other than the permittee, the method to eliminate such connections may be limited to the permittee giving notice to TCEQ of such illicit connections.

Dodson comments that there may be confusion regarding items (b) and (c) and asks whether incidental non-storm water discharges also will be addressed when the MS4 evaluates all its non-storm water discharges as part of the MCM. Dodson requests deleting item (c). Cleburne comments that the last sentence of Part III.A.3.(c) is redundant since detection and elimination of illicit discharges is required in Part II.A.3.(a). DAFB requests a definition of "illegal dumping" as the term is used in Part III.A.3.(b).

NCTCOG comments that federal storm water regulations list certain non-storm water discharges that require addressing only if determined to contribute pollutants. However, the permit states that these discharges must be considered by the permittee to determine if they are significant contributors of pollutants to the MS4. NCTCOG comments that this seems to remove the assumption that these discharges are allowable. At minimum, TCEQ should provide guidance to clarify that the intent of TCEQ is not to exceed NPDES provisions on allowable discharges. Group 1 comments that the current language opens the door for monitoring programs and studies that are clearly excluded from the Phase II program and asks how MS4 operators are to determine if discharges are a significant contributor of pollutants.

Group 1 requests modifying the language as follows: "All non-storm water flows, including those listed in Part II.B. and Part VII.B., must be addressed by the permittee only if they are identified as a significant contributor of pollutants to the MS4." Freese & Nichols recommends the following revision to the language because it does not agree with Part II.B.: "If the non-storm water discharges, including those listed in Part II.B. and Part VII.B, are determined to be significant contributors, they must be considered by the permittee." Grand Prairie recommends that this section include an assumption that these non-storm water discharges are not significant contributors of pollutants to the MS4 because it believes that the language as written implies that sampling or some other type of detection is required for these discharges.

Response 371:
This MCM requires that the MS4 operator either identify and eliminate illicit discharges to the MS4 or develop a protocol for allowing certain non-storm water discharges. Illicit discharges may include unregulated wastewater contributions to the MS4 that may stem from direct purposefully constructed illicit connections, from accidental connections, or simply from improper disposal practices. Therefore, this requirement cannot be limited to only "purposefully constructed connections." Similarly, the MS4 operator must eliminate other non-storm water discharges, including those listed in Part II.B. of the permit, when it determines that these sources are significant contributors of pollutants to the small MS4.

It is not the intent to require that the MS4 operator perform water quality studies or to require monitoring programs to test and verify the effect of the listed "allowable" non-storm water discharges. Illicit discharge is defined at 40 C.F.R. §122.26(b)(2) as any discharge to a municipal separate storm sewer that is not composed entirely of storm water, except discharges pursuant to an NPDES permit and discharges resulting from fire fighting activities. The final NPDES Phase II federal storm water regulations, 64 FR 68721, 68756 (1999) further state: "As detailed below, other sources of non-storm water, that would otherwise be considered illicit discharges, do not need to be addressed unless the operator of the MS4 identifies one or more of them as a significant source of pollutants into the system." Part III.A.3.(b) and (c) were merged into a new (b) in the re-noticed permit as follows:

(b) Allowable Non-Storm Water Discharges

Non-storm water flows listed in Part II.B and Part VI.B. do not need to be considered by the MS4 operator as an illicit discharge requiring elimination unless the operator of the MS4 or the executive director identifies the flow as a significant source of pollutants to the MS4. In lieu of considering non-storm water sources on a case-by-case basis, the MS4 operator may develop a list of common and incidental non-storm water discharges that will not be addressed as illicit discharges requiring elimination. If developed, the listed sources must not be reasonably expected to be significant sources of pollutants either because of the nature of the discharge or the conditions that have been established by the MS4 operator prior to accepting the discharge to the MS4. All local controls and conditions established for these discharges must be described in the SWMP and any changes from the initial SWMP must be included in the annual report described in Part IV.B.2. of this general permit.

Comment 372:

NCTCOG, TCCOS, TxDOT, Cleburne, Group 1, and Mathews & Freeland comment that the mapping requirement in the permit requires more than what is required by the federal NPDES regulations. NCTCOG comments that requiring the MS4 operator to detail the location of all major outfalls, provide the source of information used to develop the map, provide information on how the outfalls were verified, and how the map will be regularly updated places a heavy burden on MS4s that have limited resources for accurate mapping. TCCOS and Mathews & Freeland request revising the mapping requirement to allow individual MS4 operators to develop maps that are appropriate for their needs. TCCOS and Mathews & Freeland request revising this subpart of the permit to state the following: *A map of the storm sewer system must be developed and must include the following: (1) the location of all outfalls; (2) the names and locations of all waters of the U.S. that receive discharges from the outfalls; and (3) any additional*

information needed by the permittee to implement its SWMP. TCCOS and Mathews & Freeland request that the permit require that the map itself contain a brief description of how it was developed, to avoid vast amounts of information being contained within the SWMP. Group 1 comments that the federal rule does not require the MS4 operator to include the source of information used to develop the storm sewer map, including how the outfalls were verified and how the map will be regularly updated in the SWMP and recommends deleting this requirement.

Harris County and TAOC request revising the phrase "the location of all major outfalls" to "the location of all major outfalls or other sites that will allow the permittee to locate and trace illicit discharges to the MS4." Tarrant County requests modifying the permit from "the location of all major outfalls" to "the location of all major outfalls or other sites that will allow the permittee to locate and trace illicit discharges to the MS4." Group 1 recommends affording small municipalities the flexibility to trace illicit discharges from the identified source at the receiving stream without the use of detailed storm sewer collection system maps, if feasible. Harris County and TAOC comment that requiring the MS4 operator to show the locations of all waters of the U.S. receiving discharges from the outfalls is overly broad and burdensome and request deleting it from these subsections.

Response 372:
The federal regulations at 40 C.F.R. §122.34(b)(3)(ii)(A) and adopted by reference in 30 TAC §281.25 state that a small MS4 operator must develop "a storm sewer system map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls." The mapping requirement does not distinguish between "major outfalls" and other outfalls. Additionally, the requirement that the MS4 operator show the location of all waters of the U.S. receiving discharges follows the federal requirement.

Part III.A.3.(c)(1) was revised in the re-noticed permit to require that the storm sewer map show the location of all outfalls and to name and locate waters of the U.S. that receive discharges from these outfalls. MS4 operators may include any additional features or information, including information on how the map was developed, that are advantageous to their needs. Part III.A.3.(d)(1) was changed to:

(1) A map of the storm sewer system must be developed and must include the following:

(i) the location of all outfalls;

(ii) the names and locations of all waters of the U.S. that receive discharges from the outfalls; and

(iii) any additional information needed by the permittee to implement its SWMP.

Comment 373:
TCCOS and Mathews & Freeland request that the permit clarify that the storm sewer map may be developed during the term of the permit.

Response 373:
The federal regulations allow MS4 operators up to five years from the date this permit is issued to fully develop and implement their SWMP (40 C.F.R. §122.34(a)). The map is a part of the SWMP and, as such, must be fully developed prior to the end of the five-year permit term. Therefore, an MS4 operator may continue to develop the map throughout the term of the permit. A sentence was added at the end of the introductory paragraph to Part III. in the re-noticed permit that states: "Small MS4s have five years from the date of issuance of this general permit to fully implement their SWMP." This sentence clarifies that this time frame applies not only to the storm sewer map, but to the entire SWMP.

Pollution Prevention/Good Housekeeping for Municipal Operations

Comment 374:
Group 1 requests modifying the language in Part III.A.4.(a) as follows: "Develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations." TCCOS and Mathews & Freeland request, in order to avoid ambiguity, that TCEQ use the language of the EPA's rule to define the scope of this MCM as follows: *4. Pollution Prevention/Good Housekeeping for Permittee Operations: A section within the SWMP must be developed to establish an operation and maintenance program that includes a training program and has the ultimate goal of preventing or reducing pollutant runoff from operations controlled by the operator of the small MS4. The program must include employee training to prevent or reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.*

Response 374:
To more closely follow the federal rule for the pollution prevention/good housekeeping MCM at 40 C.F.R. §122.34(b)(6)(i), Part III.A.4 and A.4.(a) were modified in the re-noticed permit to:

4. Pollution Prevention/Good Housekeeping for Municipal Operations

A section within the SWMP must be developed to establish an operation and maintenance program, including an employee training component, that has the ultimate goal of preventing or reducing pollutant runoff from municipal operations.

(a) Good Housekeeping and Best Management Practices (BMPs)

Housekeeping measures and BMPs (which may include new or existing structural and non-structural controls) must be identified and either continued or implemented with the goal of preventing or reducing pollutant runoff from municipal operations. Examples of municipal operations and municipally owned areas include, but are not limited to . . ..

Comment 375:
Group 1 requests modifying the language at Part III.A.4.(b) as follows: "Using training materials that are available from EPA, your State, Tribe, or other organizations, your program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance."

Response 375:
Although the permit language does not limit the MS4 operator from obtaining training materials from a separate source, the language of Part III.A.4.(b) in the re-noticed permit was revised to: "A training program must be developed for all employees responsible for municipal operations subject to the pollution prevention/good housekeeping program. The training program must include training materials directed at preventing and reducing storm water pollution from municipal operations. Materials may be developed, or obtained from the EPA, states, or other organizations and sources. Examples or descriptions of training materials being used must be included in the SWMP."

Comment 376:
TCCOS and Mathews & Freeland comment that the Part III.A.4.(d) states that wastes must be properly disposed of and asks what is meant by "waste" in this provision. TCCOS and Mathews & Freeland ask if it includes all of the MS4, which would include all municipal streets.

Response 376:

The provision includes waste removed from the MS4, which would include streets that are designed and utilized for storm water conveyance and from maintenance of any storm water control structures. For clarification, the first sentence of Part III.A.4.(d) was changed in the re-noticed permit to: "Waste removed from the MS4 and waste that is collected as a result of maintenance of storm water structural controls must be properly disposed. A section within the SWMP must be developed to include procedures for the proper disposal of waste, including . . .."

Comment 377:

Group 1 comments that municipally owned industrial facilities are regulated by separate TPDES permits that have no connection to the MS4 permit. Group 1 requests deleting the final paragraph requiring information on storm water associated with industrial activities. TCCOS and Mathews & Freeland ask if the permit only requires that the SWMP list all municipally owned industrial activities. TCCOS and Mathews & Freeland further inquire if the State of Texas in its SWMP for the Capital Complex fails to list all of the TxDOT construction projects would this be a violation of its authorization under the permit? Harris County requests revising the permit to require that if the MS4 operator has not yet received a letter of acknowledgment for an NOI or NOC submitted for an industrial storm water discharge, that the MS4 operator "must," rather than "may," make a copy of the NOI or NOC readily available.

Response 377:

SWMPs for each state owned, operated, and permitted MS4 are not required to address every industrial activity performed by all state agencies throughout Texas. In the example, TxDOT may submit an NOI for each of their districts, as these storm sewer systems are operated through each district office. The NOI and SWMP would address the separate storm sewer systems that lie within urbanized areas and that are located within the jurisdiction of the district. The SWMP would address industrial activities conducted by the district TxDOT office that are not subject to, and authorized under TPDES general permit TXR050000. Another MS4 operated by another state agency, and subject to the provisions of this permit, would similarly address industrial activities. The final paragraph of Part III.A.4.(e), concerning storm water discharges subject to TPDES general permit TXR05000 was deleted from the re-noticed permit.

Construction Site Storm Water Runoff Control

Comment 378:

NCTCOG, Tarrant County, and TAOC request revising the requirements in this MCM to provide for enforcement to reflect that the MS4 operator must do so "to the extent allowable under State and local law." TAOC states that the permit should specify how TCEQ will handle the program for entities lacking enforcement authority.

Response 378:
The first sentence at Part III.A.5. was revised in the re-noticed permit to: "The MS4 operator, to the extent allowable under state and local law, must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre or if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more of land." In addition, Part III.A.5.(c)(3) was changed to: *(3) site inspection and enforcement of control measures to the extent allowable under state and local law.*

Comment 379:
NCTCOG requests revising the second sentence of Part III.A.5. to "from sites where TCEQ has waived the permitting requirements . . ." instead of "from sites that TCEQ has waived the permitting requirements . . .." Harris County comments that the permit should clarify in what situation, such as a rainfall erosivity factor of less than five, TCEQ would waive permitting requirements for storm water discharges associated with small construction activities. Harris County requests clarification on the situation addressed by the following sentence: "The MS4 operator is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from sites that TCEQ has waived the permitting requirements for storm water discharges associated with small construction activities." NCTCOG and Farmers Branch recommend substituting the word "where" for the word "that" in the following phrase: "to reduce pollutant discharges from sites that TCEQ has waived . . .."

Response 379:
The second sentence of Part III.A.5. was revised in the re-noticed permit to: "The MS4 operator is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from sites where the construction site operator has obtained a waiver from permit requirements under NPDES or TPDES construction permitting requirements based on a low potential for erosion."

Post-Construction Storm Water Management in New Development and Redevelopment

Comment 380:
Tarrant County, Harris County, and TAOC recommend inserting the wording “to the extent allowable under State and local law” at the beginning of the first paragraph in Part III.A.6.

Response 380:
The first sentence of Part III.A.6. was revised in the re-noticed permit to: “To the extent allowable under state and local law, the MS4 operator must develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre of land, including projects less than one acre that are part of a larger common plan of development or sale that will result in disturbance of one or more acres, that discharge into the MS4.”

Comment 381:
DAFB recommends revising the permit language in Part III.A.6.(a) that requires the development of structural and/or non-structural BMPs “appropriate for your community” to state that they are “appropriate for the community.”

Response 381:
The suggested revision was made to Part III.A.6.(a) in the re-noticed permit.

Authorization for Municipal Construction Activities

Comment 382:
DAFB requests revising the permit language in Part III.A.7. to remove the word “initial” from the sentence in the opening paragraph that reads: “This MCM must be developed as a part of the SWMP that is submitted with the initial NOI for permit coverage.”

Response 382:
Part III.A.7. was revised as recommended in the re-noticed permit.

Comment 383:
Group 1 notes that there is a typographical error in the second sentence of the opening paragraph of Part III.A.7.: “conditions of this of this general permit . . ..” Cleburne recommends deleting from the second sentence the words “compliant with the conditions of this of this general permit.”

Response 383:
The second sentence of Part III.A.7. was changed in the re-noticed permit to: "Additionally, contractors working for the permittee are not required to obtain a separate authorization if they do not meet the definition of a 'construction site operator,' as long as the permittee meets the status of construction site operator."

(In first draft permit, deleted in re-noticed draft permit) - Numeric Effluent Limitations

Comment 384:
TCUC, Tarrant County, NCTCOG, Dodson, Lloyd Gosselink, Cleburne, TCCOS, TAOC, Group 1, BCES, and Mathews & Freeland question whether to include this section in the permit. Commenters note that effluent limits for batch plants are covered under Part VI.D. of the permit. Grand Prairie requests any monitoring of storm water runoff from concrete batch plants be done by the owner/operator of the batch plant rather than the MS4.

Response 384:
This section was deleted from the re-noticed permit. The effluent limits for concrete batch plants apply only to MS4s that utilize the seventh MCM and seek authorization for storm water discharges from concrete batch plants associated with municipal construction activity. The effluent limits relating to construction site runoff are included in Part VI.D. of the permit.

Recordkeeping

Comment 385:
DAFB requests clarification regarding the permit language in Part IV.A.2. that states "must be retained at a location accessible to the permitting authority." DAFB asks if it is TCEQ's intent that the SWMP will be at a location that allows the permitting authority to retrieve it at will. If this is not the intent, DAFB requests revising the permit to state that the SWMP must be made available to TCEQ personnel.

Response 385:
Part IV.A.2. was revised in the re-noticed permit to: "The permittee must submit the records to the executive director only when specifically asked to do so. The SWMP required by this general permit (including a copy of the general permit) must be retained at a location accessible to the TCEQ."

Comment 386:

BCES, Carter & Burgess, Cleburne, Farmers Branch, Freese & Nichols, GCHD, Grand Prairie, Lloyd Gosselink, NCTCOG, Tarrant County, TAOC, TCCOS, TCUC, V&E, and Mathews & Freeland recommend revising Part IV.A.3 to require following the Texas Public Information Act when information is requested. Lloyd Gosselink comments that the provision is an unlawful contravention of the Act and that TCEQ has not been given the authority to contravene the clear wording and intent of the Act. GCHD requests clarification about what is meant by the phrase "making the records available to the public."

Response 386:

The language in Part IV.3. was changed in the re-noticed permit to allow ten business days for the MS4 to provide copies of the NOI and SWMP when requested by the general public in writing. The section was further modified to specify that other records requested are subject to the requirements of the Texas Public Information Act. Part IV.A.3. was revised to: "The permittee must make the NOI and the SWMP available to the public if requested to do so in writing. Copies of the SWMP must be made available within 10 working days of receipt of a written request. Other records must be provided in accordance with the Texas Public Information Act. However, all requests for records from federal facilities must be made in accordance with the Freedom of Information Act."

Comment 387:

DAFB comments that Part IV.A.3. details specific conditions when the MS4 operator must make the SWMP available to the public. DAFB requests an explanation of how these requirements interact with the Freedom of Information Act (FOIA) requests at federal institutions (i.e., Army posts, Air Force bases, etc.).

Response 387:

Documents submitted to TCEQ are subject to the Texas Public Information Act. Thus, copies of the NOI and SWMP submitted to the agency are a matter of public record and are available to the general public from TCEQ. If a member of the general public requests information directly from a federal facility, the request must comply with the FOIA. Federal agencies are tasked with complying with the FOIA. Per the previous response to comment, language was added to the provision to state that requests for records from federal facilities must be provided in accordance with the FOIA.

Reporting

Comment 388:
DAFB requests a definition for “relevant facts” found in Part IV.B.1.(c).

Response 388:
This term is only used in this section of the permit regarding when an MS4 operator should correct or supply missing information in a report, NOI, NOT, or NOC. To more clearly explain how an MS4 operator should correct information submitted to TCEQ, Part IV.B.1.(b) was changed in the re-noticed permit to: “When the permittee becomes aware that it either submitted incorrect information or failed to submit complete and accurate information requested in an NOI, NOT, or NOC, or any other report, it must promptly submit the facts or information to the executive director.”

Comment 389:
DAFB requests including either a definition of the term “authorized TCEQ personnel” as used in this subpart and in Part VI.I.2. in the permit or revising the permit language to “TCEQ personnel.” DAFB notes that if it is necessary to distinguish a category of TCEQ personnel that are authorized, then there must be some TCEQ personnel who are not authorized.

Response 389:
The term “authorized TCEQ personnel” was changed to “TCEQ personnel” in Part IV.B.2. of the re-noticed permit.

Comment 390:
TCUC, Tarrant County, BCES, Lloyd Gosselink, Carroll & Blackman, Grand Prairie, TAOC, NCTCOG, Farmers Branch, Cleburne, TCUC, Freese & Nichols, and Harris County request clarification in Part IV.B.2. regarding what the reporting year is and exactly when the annual reports are due.

Response 390:
The re-noticed permit was revised to state that the annual report covers the calender year from January 1 through December 31 and that the report for that year is due 90 days after the end of that calender year on March 31st. However, the language was changed again in response to the comments received on the re-noticed permit. See Response 272 for final resolution of this issue.

Comment 391:

NCTCOG and Farmers Branch comment that TCEQ should allow the inclusion in the existing BMPs of the MS4 in Part IV.B.2.(c) any MCM that was initiated before the permit was issued. The time frame should go beyond the three-year limit stated in the permit language. Part III. of the permit states that: "Existing programs or BMPs may be used to fulfill the requirements of this general permit." This statement does not specify any time limit and, therefore, it should allow an MS4 operator to include any activities it has performed in the past. Group 1 comments that the language is not found in the federal rules and any information regarding activities conducted prior to the required compliance date is irrelevant and could be confusing to TCEQ inspectors and the public. Group 1 requests deleting this item.

Response 391:
Programs in place prior to when this permit is issued may be included in the SWMP as appropriate and TCEQ revised this provision to remove the three-year limitation. Part IV.B.2.(c) was changed in the re-noticed permit to: "Any MCM activities initiated before permit issuance may be included, under the appropriate headings, as part of the first year's annual report . . .."

Comment 392:
Group 1 requests modifying the language in Part IV.B.2.(d) to make it clear an MS4 operator is only required to report monitoring data if any is acquired and suggests that the provision state: "Results of information collected and analyzed, including monitoring data, if any, during the reporting period."

Response 392:
Part IV.B.2.(d) was revised in the re-noticed permit to: "A summary of the results of information (including monitoring data) collected and analyzed, if any, during the reporting period used to assess the success of the program at reducing the discharge of pollutants to the MEP . . .."

Comment 393:
NCTCOG and Farmers Branch recommend removing Part IV.B.2.(e) because an implementation schedule is already provided in the plan. Group 1 requests modifying the language because there is no requirement in the federal rules to develop an implementation schedule for the future permit year and suggests the following revision: "A summary of the storm water activities you plan to undertake during the next reporting cycle."

Response 393:

During compilation of the annual report, MS4 operators may determine changes to existing implementation schedules and activities. The annual report is an important place to record these changes or additional activities. Part IV.B.2.(e) was revised in the re-noticed permit to eliminate the ending phrase "(including an implementation schedule)" and now reads: "A summary of the storm water activities the MS4 operator plans to undertake during the next reporting cycle . . .."

Comment 394:
NCTCOG and Farmers Branch comment that the term "co-permittee" as used in Part IV.B.2.(j) is not found in any other part of the permit and that the potential relationship between a permittee under the general permit and a permittee under an individual permit is not clear in the general permit. NCTCOG and Farmers Branch comment that this may be an appropriate topic for a guidance document. TCCOS, Group 1, and Mathews & Freeland recommend removing this provision from the permit or that TCEQ develop a co-permitting option. Cleburne suggests adding a definition of the term if co-permitting is an option for obtaining permit coverage.

Response 394:
The term "co-permittee" used to describe the option of multiple MS4 operators participating in a shared SWMP was changed. While each MS4 operator that shares an SWMP must submit its own annual report, the report can be a copy of the report that was developed by all of the SWMP participants. Therefore, a sentence was added to Part IV.B.2. after (i) in the re-noticed permit to state: "If permittees share a common SWMP, all permittees must contribute to a system-wide report (if applicable) . . .."

Comment 395:
NCTCOG and Farmers Branch inquire if the reference in Part IV.B.2.(k) to Part VII.E.1.(a) should actually be to Part VI.6. or be Part II.D.4.(b)(8). Cleburne notes there is an incorrect reference to Part VII.E.1.(a) and it should be changed to: "Each permittee must sign and certify the annual report in accordance with 30 TAC §305.128; and . . .."

Response 395:
A sentence was added in Part IV.B.2. in the re-noticed permit to state: "Each permittee must sign and certify the annual report in accordance with 30 TAC §305.128 (relating to Signatories to Reports); and . . .."

Comment 396:

Lloyd Gosselink and Carroll & Blackman recommend changing TCEQ's Web address in Part IV.B.2.(l) to *www.tceq.state.tx.us* from *www.tnrcc.state.tx.us*.

Response 396:
This change was made in the re-noticed permit. Currently, both Web addresses will take you to the TCEQ homepage.

Standard Permit Conditions

Comment 397:
Cleburne recommends deleting the language in Part V.E. referencing the CWA pretreatment programs and issued permits because these references are not pertinent to MS4 storm water discharges. The MS4 operator does not control EPA, state, or POTW issued permits and therefore this requirement should not be included here. Cleburne suggests the following language instead: *(a) negligently or knowingly violating CWA 301, 302, 306, 307, 308, 318, or 405, ...*

Response 397:
This condition is taken directly from federal rules at 40 C.F.R. §122.41(a)(2) that applies to conditions applicable to all permits and therefore is retained. However, because MS4s authorized under this permit are not typically part of the NPDES approved pretreatment program, Part V.E.(a) was revised in the re-noticed permit to remove the phrase "or any requirement imposed in a pretreatment program approved under CWA, §§402(a)(3) or 402(b)(8)."

Authorization for Municipal Construction Activities

Comment 398:
TCCOS and Mathews & Freeland believe that if an operator of a small MS4 elects to use the seventh MCM to authorize its construction activities, the operator of the MS4 is required to prepare SWP3s for all construction sites with a land disturbance greater than one acre. This is regardless of whether the construction activity is automatically authorized pursuant to the terms of the CGP because it occurs during periods of low potential for erosion. TCCOS and Mathews & Freeland suggest that the permit clarify that the operator of a small MS4 that elects to implement the seventh MCM may choose to cover particular construction activities under the terms of the CGP rather than this permit. TCCOS and Mathews & Freeland recommend modifying Part VII as follows: "The MS4 operator may apply under

TPDES general permit TXR150000 for authorization to discharge storm water runoff from each construction activity performed by the MS4 operator that results in a land disturbance of one (1) or more acres of land. Alternatively, the MS4 operator may develop the Storm Water Management Program to include this optional seventh storm water MCM if the eligibility requirements in Part VII.A. are met. If the MS4 operator includes this MCM within the description of the initial SWMP with the NOI or submits an NOC notifying the Executive Director of the addition of this MCM and identifying the geographic area or boundary where the activities will be conducted under the provisions of this permit, and meets the terms and requirements of this permit, discharges from these construction activities may be authorized under this general permit. Even if an MS4 operator has developed this optional seventh storm water MCM, the MS4 operator may apply under TPDES general permit TXR150000 for authorization for particular municipal construction activities including those activities that occur during periods of low potential for erosion (for which no SWP3 must be developed)."

Response 398:

The purpose of this optional MCM is to provide the MS4 with an alternative to the CGP, TPDES permit number TXR150000. The MS4 operator may elect to obtain coverage for some construction sites under this seventh MCM and elect to cover other construction sites under the TPDES CGP. To provide additional clarity, the introductory paragraph to Part VI of the re-noticed permit was revised to clarify that this alternative can only be used for construction activities that occur within the regulated portion of the MS4 and cannot be utilized for the portions of the MS4 that are located outside of an urbanized area unless the MS4 operator includes those areas in its authorization under this permit. The introductory paragraph to Part VI. was changed to:

"The small MS4 operator may obtain authorization under TPDES general permit TXR150000 to discharge storm water runoff from each construction activity performed by the MS4 operator that results in a land disturbance of one (1) or more acres of land. Alternatively, the MS4 operator may develop the SWMP to include this optional seventh (7th) storm water MCM if the eligibility requirements in Part VI.A. are met. If an MS4 operator decides to utilize this MCM, then the MS4 operator must include the MCM it in its SWMP submitted with the NOI or submit an NOC notifying the executive director of the addition of this MCM to its SWMP. The MS4 operator must identify the geographic area or boundary where the construction activities will be conducted under the provisions of this general permit. If the MS4 meets the terms and requirements of this general permit, then discharges from these construction activities may be authorized under this general permit as long as they occur within the regulated geographic area of the small MS4. Even if an MS4 operator has developed this optional seventh storm

water MCM, the MS4 operator may apply under TPDES general permit TXR150000 for authorization for particular municipal construction activities including those activities that occur during periods of low potential for erosion (for which no SWP3 must be developed)."

Eligible Construction Sites

Comment 399:
Cleburne suggests the following editorial change: "Discharges from construction activities in which the MS4 operator meets the definition of construction site operator are eligible for authorization under this general permit."

Response 399:
Part VI.A. was changed in the re-noticed permit to: "Discharges from construction activities where the small MS4 operator meets the definition of construction site operator are eligible for authorization under this general permit."

Discharges Eligible For Authorization

Comment 400:
Cleburne believes that storm water flows should not be listed under Part VI.B. because permitting for construction under Part VI.B. is optional. Flows from construction are either covered in Part VI.B. or by a separate TPDES storm water permit.

Response 400:
This section addresses only the construction activities that are authorized under this permit. However, Part VI.B.2. was revised in the re-noticed permit to reference "supporting" activities rather than "industrial" activities, which is consistent with the CGP. The initial paragraph of Part VI.B.2. was changed to:

2. Discharges of Storm Water Associated with Construction Support Activities

Discharges of storm water runoff from construction support activities, including concrete batch plants, asphalt batch plants, equipment staging areas, material storage yards, material borrow areas, and excavated material disposal areas may be authorized under this general permit provided . . ..

Comment 401:
DFW and V&E request clarification of the term "close proximity" used in Part VI.B.2.(a) relative to the authorization for discharges from batch plants supporting a construction activity. V&E further asks if an off site support activity that is used by the operator to support construction activities at different locations is eligible for coverage as long as the off site support area is identified and has storm water management controls for its area in one or more of the SWP3s for the individual construction projects. DAFB requests revising the permit language to state "or in proximity to the permitted . . .." DAFB also requests adding a definition of the "proximal interval in terms of a distance such as feet, yards, miles, etc."

Response 401:
The permit includes a provision for coverage of supporting industrial activities in order to provide an efficient means for obtaining the necessary authorization while encouraging coordinated pollution prevention activities between associated sites. The activities at supporting sites can be addressed in an SWP3 and authorized when the construction site operator submits the NOI for the construction activity. Because the authorization for these supporting sites is included in the authorization for the main construction activity, it is required that the supporting sites are located in close proximity to the actual construction activity. Where the supporting activities are remotely located, they may be authorized under the industrial storm water permit, TPDES permit number TXR050000.

While operating under that authorization, a site authorized under this provision can provide support to additional construction activities and also sell their services and products to the public in general. When the authorization for the supported construction activity is terminated, the supporting site may be covered under another authorized supported site by amending the SWP3 of the authorized site to include the off site supporting activity. Alternatively, the off site supporting activity may obtain coverage under the industrial storm water general permit.

To clarify what support activities are eligible for authorization, Part VI.B.2.(a) was changed in the re-noticed permit to: "the activity is located within a 1-mile distance from the boundary of the permitted construction site and directly supports the construction activity . . .." The one-mile distance requirement is consistent with the same requirement found in the CGP.

Comment 402:
V&E requests revising Part VI.B.3. to include all of the non-storm water discharges allowed under Part II.A.3. of the CGP. V&E recommends including trench dewatering flows in the list of allowable non-

storm water discharges in this part. V&E notes that EPA has stated that dewatering of trenches is the same type of water as contemplated by the term "groundwater dewatering."

Response 402:
It is appropriate to utilize the same list of non-storm water discharges that is allowed under the CGP and this permit was revised to include an identical list as is in the TPDES CGP. Part VI.B.3. was changed in the re-noticed permit to:

3. Non-storm Water Discharges

The following non-storm water discharges from construction sites authorized under this general permit are also eligible for authorization under this MCM:

(a) discharges from fire fighting activities (fire fighting activities do not include washing of trucks, run-off water from training activities, test water from fire suppression systems, and similar activities);

(b) fire hydrant flushings;

(c) vehicle, external building, and pavement wash water where detergents and soaps are not used and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(d) water used to control dust;

(e) potable water sources including waterline flushings;

(f) air conditioning condensate; and

(g) uncontaminated ground water or spring water, including foundation or footing drains where flows are not contaminated with industrial materials such as solvents.

Limitations on Permit Coverage

Comment 403:

TCCOS and Mathews & Freeland comment that the permit does not authorize discharges that occur after the construction site has undergone final stabilization. Thus, it effectively removes post- construction discharges from coverage under the permit. TCCOS and Mathews & Freeland do not believe that was the intent and suggest removing this subsection from the permit.

Response 403:
Part VI.C. was deleted in the re-noticed permit and the remaining sections renumbered accordingly.

Numeric Effluent Limitations

Comment 404:
Houston requests clarification regarding numeric effluent limitations affecting concrete batch plants. Houston assumes these provisions are limited to storm water runoff from concrete batch plants owned or operated by the MS4 operator or by a construction contractor working on behalf of the MS4 operator. Houston also assumes that TCEQ is not requiring MS4 operators to monitor storm water runoff from all concrete batch plants that discharge to their MS4s. Austin requests that the requirement include a statement that associates the batch plant with a construction site or construction activities. Cleburne suggests incorporating the following change for clarity: "All discharges of storm water runoff from concrete batch plants associated with a construction project authorized under the MS4 TPDES General Permit must be monitored at the following monitoring frequency and comply with the following numeric effluent limitations . . .."

Response 404:
The information contained in this part of the permit applies only to those construction activities that an MS4 operator is seeking authorization for under this permit and where the MS4 operator is the construction site operator. Thus, TCEQ is not requiring MS4 operators to monitor storm water runoff from all concrete batch plants that discharge to their MS4s. In order to provide additional clarity, the first sentence in Part VI.D. was revised in the re-noticed permit to: "All discharges of storm water runoff from concrete batch plants must be monitored at the following monitoring frequency and comply with the following numeric effluent limitations . . .."

Storm Water Pollution Prevention Plan (SWP3)

Comment 405:

Cleburne comments that Part VI.E.3. is repetitive and suggests the following editorial changes for clarity in Part VI.E.1.: *1. develop a SWP3 according to the provisions of this general permit that covers the entire site and begin implementation of that plan prior to commencing construction activities* . . .. Tarrant County also recommends deleting item three because it is already stated in item one.

Response 405:
Part VI.E.3. was deleted from the re-noticed permit and Part VI.E.1. was changed to: "develop a SWP3 according to the provisions of this general permit that covers the entire site and begin implementation of that plan prior to commencing construction activities . . .."

Comment 406:
NCTCOG and Farmers Branch request revising the permit language in Part VI.E.5. for clerical reasons from "are aware that municipal personnel that are responsible" to "are aware that municipal personnel are responsible."

Response 406:
Part VI.E.5. was revised in the re-noticed permit to: "ensure that the SWP3 identifies the municipal personnel responsible for implementation of control measures described in the plan . . .."

Deadlines for SWP3 Preparation and Compliance

Comment 407:
NCTCOG and Farmers Branch request changing the word "operators" in Part VI.G.2. to "contractors" because the MS4 is the sole operator under this permit.

Response 407:
The word "operators" was changed to "contractors" in Part VI.G.2. of the re-noticed permit.

Contents of SWP3

Comment 408:
Cleburne comments that the request in Part VI.J.1.(d) to provide "the quality of any discharge from the site" is vague and asks how the MS4 operator is to determine the quality of the discharge. Cleburne

believes that describing the quality of a discharge can be very subjective and asks whether the requirement refers to the quality of the discharge before, during, or after construction. Cleburne also asks whether this refers to storm water runoff and, if so, how this is determined prior to construction activities when the SWP3 is being prepared.

Response 408:
The re-noticed permit was changed to remove requiring an estimate of the runoff coefficient and Part VI.J.1.(d) was changed to: *(d) data describing the soil type or the quality of any discharge from the site* . . .." The quality requirement refers to discharges of runoff from the site, and information obtained from visual observation or the use of historical knowledge of runoff based on soil type. This MS4 operator may revise this portion of the SWP3 when new information becomes available.

Comment 409:
Austin requests revising the term "alternative sediment controls" in Part VI.J.4.(a) to "equivalent control measure" for consistency with the current EPA Region 6 CGP and states that it also establishes the expectation that the alternative control must provide a level of treatment equal to the temporary sediment basin.

Response 409:
Part VI.J.4.(a) was revised in the re-noticed permit to require "equivalent control measures" instead of "alternative sediment controls."

Comment 410:
NCTCOG and Farmers Branch comment that Part VI.J.5. refers to the submission of an NOT. However, they note that NOTs are not required for municipal construction activities.

Response 410:
The last sentence in Part VI.J.5. was changed in the re-noticed permit to: "Permittees are only responsible for the installation and maintenance of storm water management measures prior to final stabilization of the site."

Comment 411:
Cleburne recommends deleting the language from Part VI.J.9.(b) because it repeats Part VI.J.9.(a).

Response 411:

The re-noticed permit deleted the duplicate requirements in Part VI.J.9.(b) and both provisions were revised for better clarity and meaning. Additionally, an alternative inspection schedule, comparable to requirements in TPDES general permit TXR150000 for construction activities was included in the revision:

(a) Personnel provided by the permittee and familiar with the SWP3 must inspect disturbed areas of the construction site that have not been finally stabilized, areas used for storage of materials that are exposed to precipitation, all structural control measures for effectiveness and necessary maintenance, and locations where vehicles enter or exit the site for evidence of off-site tracking. Inspections must occur at least once every fourteen (14) calender days and within twenty four (24) hours of the end of a storm event of 0.5 inches or greater. As an alternative, the SWP3 may be developed to require that these inspections will occur at least once every seven (7) calender days; in which case additional inspections are not required following each qualifying storm event. If this alternative schedule is developed, the inspection must occur on a specifically defined day, regardless of whether or not there has been a rainfall event since the previous inspection.

Where sites have been finally or temporarily stabilized, where runoff is unlikely due to winter conditions (e.g. site is covered with snow, ice, or frozen ground exists), or during seasonal arid periods in arid areas (areas with an average annual rainfall of 0 to 10 inches) and semi-arid areas (areas with an average annual rainfall of 10 to 20 inches), inspections must be conducted at least once every month.

(b) Personnel provided by the permittee and familiar with the SWP3 must inspect all accessible discharge locations to determine if erosion control measures are effective in preventing visually noticeable changes to receiving waters, including persistent cloudy appearance in water color and noticeable accumulation of sediments.

Where discharge locations are inaccessible, nearby downstream locations must be inspected to the extent that such inspections are practicable. The frequency for these inspections must be established by the permittee in the SWP3 with consideration for local rainfall and soil, but must occur at least once during the construction activity if a discharge occurs.

Fact Sheet - Permit Coverage

Comment 412:

TCCOS and Mathews & Freeland comment that the permit states that TCEQ "may determine that an NOI is complete," while the fact sheet states that TCEQ "shall either confirm coverage or notify the applicant that coverage under the permit is denied."

Response 412:

The fact sheet of the re-noticed permit was changed for consistency with the actual permit language. Part VIII.C. was changed, in part to: "Following review of the NOI, SWMP, and any public comments received on the application, the Executive Director will determine that: 1) the submission is complete and confirm coverage by providing a notification and an authorization number, 2) determine the NOI is incomplete and deny coverage until a complete NOI and SWMP is submitted, or 3) deny coverage and provide a deadline by which the MS4 operator must submit an application for an individual permit."