

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §205.2, Purpose and Applicability.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The primary purpose of the proposed amendment is to revise the commission rule to conform to certain United States Environmental Protection Agency (EPA) regulations by introducing language which corresponds to the federal regulations.

On September 14, 1998, EPA authorized the State of Texas to administer and enforce the National Pollutant Discharge Elimination System (NPDES) program for regulating discharges of pollutants into waters in the state under the federal Water Pollution Control Act, as amended, 33 United States Code, §§1251 *et seq.* (commonly referred to as the Clean Water Act or CWA). The approved state program, i.e., the Texas Pollutant Discharge Elimination System (TPDES) program, 63 Federal Register 51164 (September 24, 1998), is administered by the commission. The change in Chapter 205, necessitated by EPA changes to its regulations, is part of the commission's effort to revise several chapters of its rules to maintain equivalency with EPA regulations and to thereby maintain delegated NPDES permitting authority.

SECTION DISCUSSION

Section 205.2 is proposed to be amended to incorporate language contained in 40 Code of Federal Regulations (CFR) §122.28(a)(3). The EPA revised its general permit regulations to clarify that if a water quality-based effluent limit (WQBEL) is derived for a category or subcategory of dischargers,

and a general permit is issued for the same category or subcategory of dischargers, then the general permit must contain the same WQBEL.

The EPA believes that there are situations where general permits can effectively impose WQBELs such as where a general permit is developed in close coordination with a total maximum daily load and/or a wasteload allocation. The EPA states that cases (e.g., in Puerto Rico) exist in which general permits are being used to impose WQBELs on facilities within a specific category or subcategory of discharges. Therefore, EPA believes that there are enough situations in which WQBELs are appropriate in general permits for the modification of the rule to be useful. Currently, no general permit in Texas contains numeric WQBELs. In addition, no WQBELs have been established for a specific category or subcategory of dischargers. If a general permit is issued containing WQBELs, the impact on a specific category or subcategory of dischargers will be the same as if the entity chose to obtain an individual permit.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendment is in effect, there will be no fiscal impacts to units of state or local government as a result of implementation of the proposed amendment.

The proposed amendment is intended to conform to new EPA updates to regulations under the CWA. The commission received authority from EPA to issue TPDES permits on September 14, 1998. In order to keep this authority, the commission is required to adopt updated EPA rules that affect the

TPDES program. This rulemaking will help fulfill this requirement by incorporating the EPA requirement that if a water quality-based effluent limit is established for a category or subcategory of dischargers, then any general permit written by the agency for the same category or subcategory of dischargers must contain the same WQBEL.

Currently, no general permits contain numeric WQBELs. In addition, no WQBELs have been established for a specific category or subcategory of dischargers. Thus, this approach may only be used in limited circumstances. In contrast to the situation in Puerto Rico (the example cited by EPA), Puerto Rico does not allow for mixing zones and thus discharges must meet water quality standards at the point of discharge, making it possible to establish WQBEL in general permits which apply to all discharges without variation. The effect of incorporating this EPA requirement is to ensure that any WQBELs established for a category or subcategory of dischargers be included in a general permit issued for the same category or subcategory of dischargers. The proposed amendment is not intended to introduce additional regulatory requirements that are not currently enforced by the EPA or the commission. Therefore, the commission does not anticipate fiscal implications for affected units of state and local government due to implementation of the proposed amendment.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be continuation by the commission of the TPDES program as a result of incorporating EPA CWA requirements necessary to maintain delegation.

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SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed amendment, which is intended to add language to the existing rule to conform to EPA

CWA regulations.

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LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed amendment does not adversely affect a local economy in a material way for the first five years that the proposed amendment is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The proposal would not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment would update the general permits for waste discharges rules to incorporate certain federal regulations regarding NPDES permitting requirements.

The proposed amendment does not meet the definition of a "major environmental rule" as defined in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that a regulatory analysis is not required because the proposed amendment does not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary assessment of the proposed amendment in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed rulemaking is to ensure that the permit requirements are equivalent to EPA NPDES permitting regulations. The proposed amendment will substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the proposed rule is subject to the CMP and must be consistent with applicable CMP goals and policies in 31 TAC §501.12 and §501.14. The proposed rulemaking will conform commission rules to EPA requirements for regulating discharges of pollutants under the CWA to maintain delegated NPDES permitting authority. The NPDES requirements proposed to be incorporated in the commission's rules are consistent with and will aid in achieving CMP goals and policies. The commission also determined that the proposed rulemaking will not have a direct or significant adverse

effect on any Coastal Natural Resource Areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-023-305-WT. Comments must be received by 5:00 p.m., May 13, 2002. For further information or questions concerning this proposal, please contact Auburn Mitchell, Office of Environmental Policy, Analysis, and Assessment, (512) 239-1873.

SUBCHAPTER A: GENERAL PERMITS FOR WASTE DISCHARGES

§205.2

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

The amendment implements provisions of TWC, including §26.011, which requires the commission to establish and control water quality in the state; §26.023, which requires the commission to establish water quality standards; §26.027, which grants the commission the authority to issue permits for discharges into water in the state; §26.121, which prohibits the unauthorized discharge of waste into water in the state; and §26.127, which designates the commission as the principal authority on matters relating to the quality of water in the state.

§205.2. Purpose and Applicability.

(a) - (c) (No change.)

(d) Where sources within a specific category or subcategory of dischargers are subject to water quality-based limits imposed under Chapter 307 of this title (relating to Texas Surface Water Quality Standards), the sources in that specific category or subcategory shall be subject to the same water quality-based effluent limitations in Chapter 307.