

The Texas Natural Resource Conservation Commission (commission) adopts the amendment to §281.25, Additional Facilities and Projects for Which Texas Pollutant Discharge Elimination System (TPDES) Permits are Required, *without change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2962) and it will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The adopted amendment incorporates new provisions contained within 40 Code of Federal Regulations (CFR) §§122.30 - 122.37, except for the United States Environmental Protection Agency (EPA) guidance contained in 40 CFR §122.33 and §122.34, to address storm water discharges from small municipal separate storm sewer systems (MS4s). The primary purpose of the amendment is to conform to specified EPA regulations by incorporating the federal regulations by reference.

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 TPDES program, 63 FR 51164 (September 24, 1998), is administered by the commission.

The amendment to this chapter, necessitated by EPA revisions to its regulations, is part of an effort by the commission to revise several chapters of its rules to maintain equivalency with EPA regulations and to thereby maintain delegated NPDES permitting authority.

SECTION DISCUSSION

The amendment to §281.25 incorporates by reference provisions in 40 CFR §§122.30 - 122.37, except for guidance contained within §122.33 and §122.34. To implement this change, the existing language in §281.25 is designated as subsection (a), and new language incorporating by reference the regulatory requirements of 40 CFR §§122.30 - 122.37 is adopted as subsection (b). The federal rules are Phase II of the storm water program which expand the existing program to include discharges of storm water from smaller governmental entities in areas of less than 100,000 persons. The Phase II rules require small MS4s to establish a storm water discharge control program that meets the requirements of six minimum control measures. The responsibility for implementation may be shared between entities. The MS4 remains responsible for permit compliance if another entity fails to implement a control measure or a portion thereof. These minimum control measures are public education and outreach on storm water impacts, public involvement participation, illicit discharge detection and elimination, construction site storm water runoff control, post-construction storm water management in new development and redevelopment, and pollution prevention/good housekeeping for municipal operations. Implementation of the minimum measures identified for small MS4s should significantly reduce pollutants in urban storm water compared to existing levels in a cost-effective manner.

EPA identified a total of approximately 285 potential MS4s in Texas. Of this total, the EPA identified 229 governmental entities located fully or partially within an “urbanized area” as determined by the Bureau of the Census (at least a population of 50,000 and a density of at least 1,000 people per square mile). However, EPA did not indicate how many of these 229 entities operate MS4s and are therefore subject to permitting regulations. The EPA list did not include military bases, large hospitals, prison

complexes, universities, sewer districts, and highway departments that operate a small MS4 within an urbanized area. These entities are also subject to the permitting regulations, but were not individually listed by EPA. The EPA also identified 56 governmental entities located outside of an urbanized area that must be examined by the permitting authority for potential designation (at least a population of 10,000 and a density of at least 1,000 people per square mile). Of the 56 entities identified by the EPA, only those operating a small MS4 would potentially be regulated. The list does not include all operators of small MS4s that may be designated by the commission. Operators of small MS4s in areas with populations below 10,000 and below a density of 1,000 people per square mile may also be designated but examination of them is not required.

A general permit is being prepared by the commission in order to allow entities to apply for permit coverage. Those MS4s choosing not to seek general permit coverage can apply for an individual TPDES permit.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the 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 adopted amendment will 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 adopted amendment would update application processing rules to incorporate certain federal regulations regarding NPDES permitting requirements. The 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 assessed the adopted amendment in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to ensure that permit requirements are equivalent to EPA NPDES permitting regulations. The adopted amendment will substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations. The preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to this 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 adopted 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 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 incorporated in the commission's rules are consistent with and will aid in achieving CMP goals and policies. The commission also determined that the adopted 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.

PUBLIC COMMENT

A public hearing was not held on this rulemaking. The public comment period closed May 13, 2002, and no comments were received.

SUBCHAPTER A: APPLICATIONS PROCESSING

§281.25

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (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.

§281.25. Additional Facilities and Projects for Which Texas Pollutant Discharge Elimination System (TPDES) Permits Are Required.

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 122, which are in effect as of the date of TPDES program authorization, as amended, are adopted by reference.

(1) Part 122, Subpart 1B -- Permit Applications and Special TPDES Program Requirements, §122.23, requiring permits for concentrated animal feeding operations. The adoption of 40 CFR §122.23 does not apply to Chapter 321, Subchapter B of this title (relating to Commercial Livestock and Poultry Production Operations) where discharges are prohibited.

(2) Part 122, Subpart B -- Permit Applications and Special TPDES Program Requirements, §122.24, requiring permits for concentrated aquatic animal production facilities, except 40 CFR §122.24(c)(2).

(3) Part 122, Subpart B -- Permit Applications and Special TPDES Program Requirements, §122.25, requiring permits for discharges into aquaculture projects.

(4) Part 122, Subpart B -- Permit Applications and Special TPDES Program Requirements, §122.26, requiring permits for storm water discharges.

(5) Part 122, Subpart B -- Permit Applications and Special TPDES Program Requirements, §122.27, requiring permits for silvicultural activities.

(b) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 122, (Federal Register, Volume 64, December 8, 1999), except for the EPA guidance contained in 40 CFR §122.33 and §122.34, as amended, are adopted by reference.

(1) Part 122, Subpart B -- Permit Applications and Special TPDES Program Requirements, §122.30, What are the objectives of the storm water regulations for small MS4s?

(2) Part 122, Subpart B -- Permit Applications and Special TPDES Program Requirements, §122.31, As a Tribe, what is my role under the NPDES storm water program?

(3) Part 122, Subpart B -- Permit Applications and Special TPDES Program

Requirements, §122.32, As an operator of a small MS4, am I regulated under the NPDES storm water program?

(4) Part 122, Subpart B -- Permit Applications and Special TPDES Program

Requirements, §122.33 (excluding guidance), If I am an operator of a regulated small MS4, how do I apply for an NPDES permit and when do I have to apply?

(5) Part 122, Subpart B -- Permit Applications and Special TPDES Program

Requirements, §122.34 (excluding guidance), As an operator of a regulated small MS4, what will my NPDES MS4 storm water permit require?

(6) Part 122, Subpart B -- Permit Applications and Special TPDES Program

Requirements, §122.35, As an operator of a regulated small MS4, may I share the responsibility to implement the minimum control measures with other entities?

(7) Part 122, Subpart B -- Permit Applications and Special TPDES Program

Requirements, §122.36, As an operator of a regulated small MS4, what happens if I don't comply with the application or permit requirements in §§122.33 - 122.35?

(8) Part 122, Subpart B -- Permit Applications and Special TPDES Program

Requirements, §122.37, Will the small MS4 storm water program regulations at §§122.32 - 122.36 and §123.35 change in the future?