

The Texas Commission on Environmental Quality (commission) proposes an amendment to §305.48. The primary purpose of the proposed amendment is to revise the commission rules to incorporate by reference United States Environmental Protection Agency (EPA) regulations relating to cooling water intake structures.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

On September 14, 1998, the State of Texas was authorized by EPA to administer and enforce the National Pollutant Discharge Elimination System (NPDES) program for regulating discharges of pollutants into waters of 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). The approved state program, i.e., the Texas Pollutant Discharge Elimination System (TPDES) program, published September 24, 1998 in the *Federal Register* (63 FR 51164), is administered by the commission. The changes in this chapter, necessitated by EPA changes to its regulations, are part of an effort by the commission to revise several chapters of its rules to maintain equivalency with EPA's regulations and thereby to maintain delegated NPDES permitting authority.

Section 305.48 is also being amended to correct the name for Standard Industrial Classification (SIC) codes and require permit applicants also to submit North American Industry Classification System (NAICS) codes.

SECTION DISCUSSION

Subchapter C, Application for Permit.

Section 305.48, Additional Contents of Applications for Wastewater Discharge Permits, is proposed to be amended to incorporate new requirements in 40 Code of Federal Regulations (CFR) §122.21(r) which requires all owners or operators of new facilities subject to regulations addressing cooling water intake structures to submit three general categories of information when they apply for a TPDES permit. The general categories of information include: 1) physical data to characterize the source water body in the vicinity where the cooling water intake structures are located; 2) data to characterize the design and operation of the cooling water intake structures; and 3) existing data (if available) to characterize the baseline biological condition of the source waterbody. 40 CFR §122.21 is not the exclusive list of information applicants must submit if the new cooling water intake structure rules are applicable. 40 CFR Part 125, Subchapter I, Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Act, also contains permit application information that must be provided when submitting a TPDES permit application. These requirements are proposed to be incorporated by reference in 30 TAC §308.91 as a concurrent rulemaking published in this issue of the *Texas Register*.

Section 305.48 is proposed to be amended to correct the name for SIC codes and to update the rules to require submission of up to four NAICS codes. The existing rule language incorrectly states that the acronym "SIC" stands for standard industrial codes. Also, a requirement for permit applicants to provide up to four NAICS codes has been added because this system has replaced SIC codes. NAICS is an industry classification system that groups establishments into industries based on the activities in

which they are primarily engaged. However, existing federal rules applicable to wastewater permitting applications and categorical effluent guideline reference SIC codes. Therefore, the rules are being amended to require applicants for a wastewater permit to provide SIC and NAICS code information. It is anticipated that, once SIC codes are phased out and regulations and guidance documents include NAICS code references, the rule may be revised to delete the requirement for submitting SIC codes. A typographical error in a citation in §305.48(b)(2) is also proposed to be corrected.

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 amendments are 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 revise the commission rules to conform to new EPA updates to regulations under the Clean Water Act. The commission received authority from EPA to issue TPDES permits on September 18, 1998. In order to keep this authority, the commission is required to adopt updated EPA rules that affect the TPDES program. This rulemaking helps fulfill this requirement by incorporating new requirements in 40 CFR §122.21(r) which requires all owners or operators of new facilities subject to regulations addressing cooling water intake structures to submit three general categories of information when they apply for a TPDES permit.

The EPA estimated that 121 new facilities nationwide would be affected by the regulations. Eighty-three are anticipated to be electric generating stations and 38 are anticipated to be manufacturing

facilities. Projecting the number of facilities in Texas estimated to be impacted by the new regulations, based on the population in Texas compared to the United States, six electric generators and three new manufacturing facilities may be impacted. EPA estimated that four of the 83 electric generators are projected to be government-owned. Based again on population percentages, potentially one such electric generating facility would be located in Texas. The type of government cannot be determined, but is anticipated to be either a municipality or an entity created by the state legislature, such as a river authority. No government-owned manufacturing facilities are anticipated to be affected by the new regulations.

The proposed amendment does not introduce additional regulatory requirements that are not currently enforced by the EPA. Therefore, the commission does not anticipate any 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 a reduction in impingement mortality and entrainment for all life stages of fish and shellfish at new facilities.

The proposed amendment is intended to revise the commission rules to conform to new EPA updates to regulations under the Clean Water Act. The commission received authority from EPA to issue TPDES permits on September 18, 1998. In order to keep this authority, the commission is required to adopt

updated EPA rules that affect the TPDES program. This rulemaking helps fulfill this requirement by incorporating new requirements in 40 CFR §122.21(r) which requires all owners or operators of new facilities subject to regulations addressing cooling water intake structures to submit three general categories of information when they apply for a TPDES permit.

The EPA estimated that 121 new facilities nationwide would be affected by the regulations. Eighty-three are anticipated to be electric generating stations and 38 are anticipated to be manufacturing facilities. Projecting the number of facilities in Texas estimated to be impacted by the new regulations, based on the population in Texas compared to the United States, six electric generators and three new manufacturing facilities may be impacted.

The proposed amendment does not introduce additional regulatory requirements that are not currently enforced by the EPA. Therefore, the commission does not anticipate any additional fiscal implications for affected individuals or businesses due to implementation of the proposed amendment.

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 revise the commission rules to conform to new EPA updates to regulations under the Clean Water Act.

The commission received authority from EPA to issue TPDES permits on September 18, 1998. In order to keep this authority, the commission is required to adopt updated EPA rules that affect the

TPDES program. This rulemaking helps fulfill this requirement by incorporating new requirements in 40 CFR §122.21(r) which requires all owners or operators of new facilities subject to regulations addressing cooling water intake structures to submit three general categories of information when they apply for a TPDES permit.

The EPA estimated that 121 new facilities nationwide would be affected by the regulations. Eighty-three are anticipated to be electric generating stations and 38 are anticipated to be manufacturing facilities. Projecting the number of facilities in Texas estimated to be impacted by the new regulations, based on the population in Texas compared to the United States, six electric generators and three new manufacturing facilities may be impacted. It is not anticipated that any of these facilities would be small businesses or micro-businesses.

The proposed amendment does not introduce additional regulatory requirements that are not currently enforced by the EPA. Therefore, the commission does not anticipate any additional fiscal implications for affected small and micro-businesses due to implementation of the proposed amendment.

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 criteria for a "major environmental rule" as identified in that statute. A major environmental rule means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment or public health and safety of the state or a sector of the state. 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 commission's consolidated permits rules to incorporate certain federal regulations regarding NPDES permitting requirements. The proposed amendment does not meet the criteria for a "major environmental rule" as set out 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 proposed amendment does not introduce additional regulatory requirements that are not currently enforced by the EPA. Therefore, the commission concludes that a regulatory analysis is not required in

this instance because the proposed rule does not meet any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary assessment of these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to ensure that the commission's consolidated permits requirements are equivalent to EPA's NPDES permitting regulations. The proposed rules 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 does not adversely affect real property and also is within the exceptions of Chapter 2007 because it is reasonably taken to fulfill an obligation mandated by federal law.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission reviewed the proposed rulemaking and found that the proposal is a rulemaking subject to Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) because it involves rules governing a specifically listed individual commission action (issuance or approval) that may affect a coastal natural resource area. Therefore, the rulemaking must be consistent with applicable goals and policies of the Texas Coastal Management Program (CMP).

The commission prepared a preliminary consistency determination for the proposed rules under 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. CMP goals applicable to the proposed amendment include 31 TAC §501.12(5), concerning balance of the benefits from economic development and multiple human uses of the coastal zone and benefits from protecting, preserving, restoring, and enhancing coastal natural resource areas; §501.14(a)(1)(B), concerning electric generating facilities using once-through cooling systems to be located and designed to have the least adverse effects practicable, including impingement or entrainment of estuarine organisms; and §501.14(r)(1)A)(vi), concerning commission administration of the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state. The rulemaking incorporates by reference federal requirements to prevent the entrainment of aquatic or marine organisms with cooling water at new facilities that uptake at least two million gallons per day of water (with at least 25% of the total water used for cooling purposes). The rulemaking applies statewide, including the coastal areas.

The commission seeks public comment on the consistency of the proposed amendment with applicable CMP goals and policies.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, 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., January 6, 2003. For further information or questions concerning this proposal, please contact Joseph Thomas, Office of Environmental Policy, Analysis, and Assessment, (512) 239-4580.

SUBCHAPTER C: APPLICATION FOR PERMIT

§305.48

STATUTORY AUTHORITY

The amendment is proposed 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 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.

§305.48. Additional Contents of Applications for Wastewater Discharge Permits.

- (a) The following shall be included in an application for a wastewater discharge permit.

(1) - (2) (No change.)

(3) The applicant shall submit any other information reasonably required by the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and federal statutes, including, but not limited to, the following:

(A) - (B) (No change.)

(C) up to four Standard Industrial Classification (SIC) codes and North American Industry Classification System (NAICS) codes [standard industrial codes (SIC)] which best reflect the principal products or services provided by the facility.

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

(1) (No change.)

(2) Subpart B - Permit Applications and Special NPDES Program Requirements, §122.21(h), providing application requirements for manufacturing, commercial, mining, and silvicultural facilities which discharge only nonprocess wastewater, except 40 Code of Federal Regulations §122.21(h)(4)(iii), the requirements of which are addressed in §305.126(e) of this title (relating to Additional Standard [Standards] Permit Conditions for Waste Discharge Permits).

(3) (No change.)

(4) Subpart B - Permit Applications and Special NPDES Program Requirements,

§122.21(r), providing application requirements for new facilities with new or modified cooling water intake structures.

(c) In addition to the information required by §305.45 of this title (relating to Contents [Content] of Application for Permit), an application by an individual for a waste discharge permit shall contain:

(1) - (5) (No change.)