

The Texas Natural Resource Conservation Commission (commission) proposes amendments to Chapter 205, §205.1, Definitions; §205.2, Purpose and Applicability; §205.3, Public Notice, Public Meetings, and Public Comment; §205.4, Authorizations and Notices of Intent; §205.5, Permit Duration, Amendment, and Renewal; §205.6, Annual Fee Assessments; and new §205.7, Additional Characteristics and Conditions for General Permits.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The new and amended sections of Chapter 205 are proposed to implement House Bill (HB) 1283, which amended Texas Water Code (TWC), §26.040, and became law as an act of the 76th Texas Legislature, 1999. Among other changes, this proposal addresses the provisions of HB 1283 by removing the limitation that general permits cannot authorize discharges of more than 500,000 gallons in any 24-hour period; by providing that the commission may issue a general permit for storm water discharges without having to make the findings required by TWC, §26.040(a)(1)-(5) for other categories of discharges; and by adding a requirement that the commission deny or suspend a discharger's authority under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations. The new and amended sections are also being proposed to simplify the rule language, change the term "commission" to "executive director" or "agency," as appropriate, and to clarify the requirements and procedures for issuing a general permit and obtaining authorization for discharge under a general permit.

SECTION BY SECTION DISCUSSION

Section 205.1, concerning Definitions, is proposed to be amended to include new definitions for terms used in §205.4(e) as part of the implementation of the HB 1283 changes to TWC, §26.040. The proposed amendments also include the deletion of certain terms used in §205.2, because these terms are self-explanatory, and they are the same as those found in the United States Environmental Protection Agency's (EPA) regulations for general permits found in 40 Code of Federal Regulations (CFR) §122.28. The commission believes that definitions for these terms are not needed, and their inclusion could possibly be confusing to the public. Also, statutory references have been reformatted for consistency throughout the section.

Section 205.1(1) is proposed to be amended to define "compliance history" based on TWC, §26.040(h), which requires the commission to consider the compliance history of all violations by the discharger. The commission is proposing to adopt the definition of "compliance history," as follows: "The record of all notices from the commission, including notices of violation from the executive director; and of all orders of the commission, of any other agency or political subdivision of the State of Texas and of the United States Environmental Protection Agency (USEPA) pertaining to an applicant's adherence to environmental laws and rules of the State of Texas or the United States; with the terms of any permit, compliance agreement or order issued by the commission or the USEPA; and with any final judicial decision or settlement addressing the applicant's adherence to such environmental laws and rules. The history shall be for the five-year period before the date on which the NOI is filed or, if an NOI is not required, the five-year period before the permittee begins operating under the general permit. It shall not include any order that is precluded by its terms or by law from becoming part of the applicant's

compliance history.”

The commission requests comments regarding methods of identifying the record of all orders of other agencies and political subdivisions of the State of Texas, pertaining to an applicant’s adherence to environmental laws and rules of the State of Texas or the United States; with the terms of any permit, compliance agreement or order issued by the commission or the USEPA; and with any final judicial decision or settlement addressing the applicant’s adherence to such environmental laws and rules.

Proposed §205.1(2) is the definition of “general permit,” which is under current §205.1(1), with the proposed change of the word “waters” to the singular “water.” It has been reformatted to paragraph (2) to account for the addition of the new definition under paragraph (1).

Proposed §205.1(3) is the definition of “individual permit,” which is the definition under current paragraph (2) reformatted as paragraph (3).

Section 205.1(4) is proposed to be amended to add a definition for “notice of change or NOC,” as follows: “A written submittal to the executive director from a discharger authorized under a general permit providing information on changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the discharge.” This definition is proposed to provide clarification of the requirement under proposed §205.4(h) that general permits require a person authorized to discharge waste under a general permit to submit up-to-date information to the executive director in a notice of change not later than ten days prior to a change

in previous information provided to the agency or any other change with respect to the nature or operations of the facility or the characteristics of the discharge.

Existing §205.1(4)-(7) is proposed to be deleted because the commission believes that these terms are self-explanatory, as discussed earlier in this preamble. The terms proposed for deletion are “same or similar monitoring requirements,” “same or substantially similar types of operations,” “same requirements regarding operating conditions,” and “same type of waste.”

Section 205.1(5) is the definition of “notice of intent or NOI,” which is the definition under current paragraph (3) reformatted to paragraph (7).

Section 205.1(6) is proposed to be amended to add a definition for “notice of termination or NOT,” as follows: “A written submittal to the executive director from a discharger authorized under a general permit requesting termination of coverage.” This definition is proposed to provide clarification of the requirement under proposed §205.4(h) that general permits require when the ownership of the facility changes or is transferred, a notice of termination must be submitted by the present owner, and the new owner must submit a new NOI not later than ten days prior to the change in ownership.

Proposed §205.1(7) is the definition of “Texas Pollutant Discharge Elimination System (TPDES),” which is the definition under current paragraph (8) reformatted to paragraph (7), with the statutory references to the Clean Water Act rearranged for clarity and a proposed typographical correction of the word “Systems” to “System.”

Section 205.2, concerning Purpose and Applicability, is proposed to be amended to eliminate the 500,000-gallon per day cap on discharges that may be authorized by a general permit, in accordance with HB 1283. The proposed changes also provide that the commission may issue a general permit for storm water discharges without having to make the findings required by TWC, §26.040(1)-(5) for other categories of discharges, along with other clarifications. The proposed language under §205.2(a)(5)(A) and (B) is reformatted language from existing §205.2(c)(1) and (2), with the aforementioned 500,000-gallon per day limitation removed. Thus, under proposed §205.2(a), the wording would be amended to read as follows: “The commission may issue a general permit to authorize the discharge of waste into or adjacent to water in the state by category if the commission finds the discharges in the category are storm water or the dischargers in the category: (1) engage in the same or substantially similar types of operations; (2) discharge the same types of waste; (3) are subject to the same requirements regarding effluent limitations or operating conditions; (4) are subject to the same or similar monitoring requirements; and (5) are more appropriately regulated under a general permit than under individual permits, on the basis that both: (A) the general permit can be readily enforced and the executive director can adequately monitor compliance with the terms of the general permit; this requirement being satisfied if the provisions of the general permit are clear and unambiguous and it requires adequate monitoring, record keeping, and reporting, appropriate to the type of activity authorized; and (B) the category of discharges covered by the general permit will not include a discharge of pollutants that will cause significant adverse affects to surface or groundwater quality.”

Section 205.2(b) is proposed to be reformatted for clarity by dividing existing portions of this subsection into paragraphs (1) and (2), and by deleting the superfluous sentence “For example, certain

dischargers of the same type of waste may be covered under one statewide general permit.” This sentence is not needed because proposed subsection (b) already states, “The commission may issue a general permit to authorize the discharge of waste by categories of dischargers designated under subsection (a) of this section either within the entire state or...,” and paragraph (2) under subsection (a) of the section states, “discharge the same type of waste.” The commission notes that the descriptions under proposed §205(b)(1) and (2) are included as examples and not intended to be limiting.

Section 205.2(c) is proposed to be amended to state, “Authorization to discharge under a general permit does not confer a vested right.” This subsection is reformatted from existing §205.4(d).

Section 205.3, concerning Public Notice, Public Meetings, and Public Comment, is proposed to be amended to clarify and simplify the rules, as well as to update references to certain notice requirements. Also, changes are being proposed to the requirements for newspaper notice, to be consistent with the revisions made by HB 1283. The requirements under existing §205.3(a) are proposed to be reformatted into new paragraphs (1)-(2), with a proposed change to the existing rules with regard to the required newspaper notice publication requirements for draft general permits with statewide applicability. This proposed change in the requirements for newspaper notice is consistent with HB 1283, which states that “For a statewide general permit, the commission shall designate one or more newspapers of statewide or regional circulation and shall publish notice of the proposed statewide general permit in each designated newspaper in addition to the *Texas Register*.” First, the proposed amendments would retain the requirement for *Texas Register* publication for each draft general permit under proposed §205.3(a)(1), and clarify that this paragraph (1) applies to draft general permits that will not have

statewide applicability. The proposed amendments under §205.3(a)(2) would change the requirement of publication for draft general permits with statewide applicability from the existing requirement for publication in the daily newspaper of largest general circulation in eleven required metropolitan areas to the proposed requirement for publication in “the *Texas Register* and in at least one newspaper of statewide or regional circulation,” which is in accordance with the aforementioned requirements of HB 1283. Proposed §205.3(a)(3) is the same requirement that is found under existing §205.3(c) reformatted into subsection (a) for clarity, because it involves timing of the publication of public notice of general permits.

Section 205.3(b) is proposed to be amended under paragraph (2) to replace the phrase “state and federal agencies” with the term “persons,” and paragraph (3) is proposed to be deleted, as this requirement regarding “persons on a relevant mailing list” would no longer be needed. Then, in order to account for the proposed deletion of paragraph (3), current paragraph (4) is proposed to be renumbered as paragraph (3).

Section 205.3(c) is proposed to be amended by reformatting the current requirements into paragraphs (1)-(4). In addition, the existing rule language under §205.3(c) “...except where clearly not applicable” is proposed to be replaced with the new language under §205.3(c)(1) “include the applicable information described in §39.11....” Proposed §205.3(c)(2)-(4) is the reformatted remainder of the requirements of §205.3(c).

Section 205.3(d) is proposed to be amended to change the heading “Public Meetings.” to

“Requirements relating to public meetings are as follows:.” Under proposed §205.3(d)(1), the phrase “executive director or commission” is changed to “agency;” the phrase “either the executive director or commission” is changed to “the executive director;” and the words “that” and “exists” are added for clarification in the following phrase “that a significant degree of public interest in the draft general permit exists;.” Proposed §205.3(d)(2) contains a rewording of the current language “The commission shall give notice of a public meeting under this subsection by publication...” to the proposed language “Notice of a public meeting shall be by publication....” In a similar fashion, proposed §205.3(d)(3) contains a rewording of the current language “Mailed notice of the public meeting will also be provided to the following:” to the proposed language “Notice of the public meeting shall be mailed to the following:.” Section 205.3(d)(3) is proposed to be amended under subparagraph (B) to replace the phrase “state and federal agencies” with the term “persons;” subparagraph (C) is proposed to be deleted, as this requirement regarding “persons on a relevant mailing list” would no longer be needed; and subparagraphs (D) and (E) are proposed to be redesignated as subparagraphs (C) and (D), respectively, to account for the proposed deletion of subparagraph (C). Under proposed §205.3(d)(4), the clarifying phrase “the applicable” is proposed to be added, and the wording is proposed to be changed from the current language “be in accordance with” to the proposed language “described in” for clarification. An additional proposed clarification under §205.3(d)(4) is the deletion of the current language “except where clearly not applicable.” Under proposed §205.3(d)(5), after “The public comment period shall automatically be extended to the close of any public meeting,” the following clarifying phrase is proposed to be added: “held by the agency on the proposed general permit.”

Section 205.3(e) is proposed to be amended for clarification by changing the first sentence from “If the

commission receives public comment during the comment period relating to issuance of a general permit, the commission may issue the general permit only after responding in writing to these comments” to the following: “If the agency receives public comment during the comment period relating to issuance of a general permit, the executive director shall respond in writing to these comments, and this response shall be made available to the public and filed with the chief clerk at least ten days before the commission considers the approval of general permit.” In addition, “commission” is changed to “agency” in the second sentence of this subsection (e), and a third sentence is added, as follows: “The commission shall consider all public comment in making its decision and shall either adopt the executive director’s response to public comment or prepare its own response.” Section 205.3(e)(2)-(4) is proposed to be amended by changing each occurrence of the word “will” to “shall.” Also, §205.3(e)(2) is proposed to be amended by changing the identification of the location where a copy of any issued general permit and response to comment is available for inspection from the current rule language “commission’s Wastewater Permits Section in its Austin office” to the proposed rule language “agency’s Austin office.”

Section 205.3(g) is proposed to be amended to account for the types of minor revisions to general permits in accordance with §305.62, concerning Amendment. Thus, the phrase “or minor modification” is added to amend this subsection. In addition, the reference to §305.62(c)(2) is proposed to be corrected to §305.62(c).

Section 205.4, concerning Authorizations and Notices of Intent, is proposed to be amended to implement new requirements of HB 1283 that allow authorization under a general permit to be obtained

without submitting an NOI, to clarify when the executive director will deny or suspend a discharger's authority under a general permit, to add an additional circumstance for denying or suspending authorization due to a history of "egregious conduct" on the part of the discharger, to clarify the rule by revising language and by reformatting this section.

Section 205.4(a) is proposed to be amended to cover certain requirements relating to general permits. This subsection is proposed to begin as follows: "A qualified discharger may obtain authorization to operate under a general permit by complying with the general permit's conditions for gaining coverage." Then, under paragraphs (1)-(5), certain requirements, allowances, and limitations are spelled out. Section 205.4(a)(1) is proposed to read as follows, stemming from language reformatted from existing §205.4(c), and language implementing the HB 1283 allowance for certain general permits to authorize a discharger to discharge without submitting an NOI: "A general permit shall specify either an applicable deadline for filing the notice of intent (NOI), or that an NOI is not required prior to commencement of a qualifying discharge." Proposed §205.4(a)(2) provides the logical clarification that "No new discharge under the authority of a general permit may commence after a general permit is expired." Proposed §205.4(a)(3) is language implementing the requirements and allowances under HB 1283, stating that: "For those general permits requiring an NOI, a discharger may begin discharging under the general permit after the date or period of time specified in the general permit unless the executive director or commission before that time notifies the discharger pursuant to subsections (c) or (e) of this section that the discharger is not eligible for authorization under the general permit." Proposed §205.4(a)(4) is language reformatted from existing §205.4(c) and (d) covering dischargers that are not eligible for authorization under the general permit, stating that: "The executive director

shall provide written notice to a discharger if the executive director determines that the discharger is not eligible for authorization under the general permit. The content of the notice is described in subsections (c) and (d) of this section.” Proposed §205.4(a)(5) is language from existing §205.4(c), with the word “must” changed to “shall,” as follows: “An NOI shall be submitted to the executive director by certified mail, return receipt requested.”

Section 205.4(b) is proposed to be amended to cover certain general permits requirements relating to individual permittees. This subsection is proposed to begin as follows: “The following requirements apply to existing individual permittees:.” This subsection essentially rewrites the existing rule language under current §205.4(b)(1) from the perspective of what the general permit must require or can allow. The existing rules are written from the perspective of what a discharger must or can do. For example, the current language under §205.4(b)(1) states, “A discharger who is covered by an individual permit may obtain substitute authorization to discharge waste under a general permit if,” where the proposed language states, “The general permit shall specify how a discharger covered by an individual permit may substitute authorization to discharge waste under the general permit. At a minimum, the general permit shall provide that coverage under the general permit shall not commence until:.” The reason for this shift in perspective is that Chapter 205 is not an actual general permit, but rather includes procedures for adopting a general permit, and what should be included in general permits. Section 205.4(b)(1) is proposed to be “rounded out” with the minimum requirements of the general permit needed for individual permit dischargers to “convert” to general permits, as follows: §205.4(b)(1)(A) is proposed to specify that the general permit provide that coverage under the general permit shall not commence until: “the permittee has submitted an NOI, if one is required by the general permit, as

specified by subsection (f) of this section;” and §205.4(b)(1)(B) is proposed to specify that the general permit provide that coverage under the general permit shall not commence until: “The executive director has received the discharger’s written request that the individual permit be canceled.”

Proposed §205.4(b)(2) is basically a reformatted existing §205.4(b)(4) with additional language which “fleshes out” what the general permit shall require the discharger who is covered by an individual permit to do in order to obtain authorization to discharge waste from a new outfall. In keeping with the perspective shift discussed earlier in this preamble, the first sentence under proposed §205.4(b)(2) changes the existing rule language under §205.4(b)(4) from “A discharger who is covered by an individual permit may obtain authorization to discharge waste from a new outfall under a general permit if the discharger submits a written NOI as specified in subsection (f) of this section” to the following: “The general permit may allow a discharger who is covered by an individual permit to obtain authorization to discharge waste from a new outfall under a general permit.” The last portion under proposed §205.4(b)(2) reads as follows: “The general permit shall describe how to obtain authorization to discharge waste from a new outfall. Authorization under the general permit shall not commence until the discharger:.” Then, the wording from the aforementioned existing rules concerning submittal of a written NOI is reformatted under proposed §205.4(b)(2)(A), as follows: “submits an NOI, if one is required by the general permit, as specified in subsection (f) of this section.” Additional language which “fleshes out” these requirements is proposed under subparagraph (B), as follows: “requests and receives written approval from the executive director of a minor modification to their individual permit exempting the new outfall from coverage under the individual permit.”

Proposed §205.4(b)(3) is a reformatted and more complete version of existing §205.4(b)(2). The existing rule wording of “The individual permit will be automatically canceled when authorization under the general permit becomes effective” is proposed to be changed to “Except as provided under subsection (b)(2) of this section, the commission shall cancel an individual permit if the executive director or commission does not deny the NOI or authorization under subsection (c) or (e) of this section.”

Section 205.4(c) is proposed to be amended to spell out the requirements that apply to denial of an authorization or NOI, by reformatting and, to a certain extent, “fleshing out” requirements from portions of the existing rules, notably §205.4(d)-(f). Proposed §205.4(c)(1) states: “The executive director shall provide written notice to a discharger if the executive director denies the discharger’s NOI or authorization to discharge under a general permit, including, at a minimum, a brief statement of the basis for this decision.” Proposed §205.4(c)(2) lists the reasons for which the executive director shall deny authorization to discharge under an existing general permit. Subparagraphs (A)-(F) of this proposed paragraph are reformatted from existing §205.4(e)(1)-(5) and (8), except that subparagraphs (B), (D), and (E) are clarified. Subparagraph (B) is proposed to read as follows: “the discharge is required to be authorized under the Texas Pollutant Discharge Elimination System (TPDES), and discharging under the general permit would result in backsliding prohibited under 40 CFR §122.144(1), as amended and adopted under §305.531(3) of this title (relating to Establishing and Calculating Additional Conditions and Limitations for TPDES Permits).” Subparagraph (D) is proposed to read as follows: “the discharge is located where it causes or could cause an adverse impact upon a critical area, as defined in 31 TAC §501.3 (relating to Definitions and Abbreviations), and there is a suitable location

that is available and capable of being used in light of cost, technology, and logistics.” Subparagraph (E) is proposed to include the change from “commission” to “executive director” under clause (i), and the change from “commission” to “agency” under clause (ii). Proposed §205.4(c)(3) includes reasons for which the executive director may deny authorization to discharge under an existing general permit. Subparagraphs (A)-(D) of this proposed paragraph are reformatted from existing §205.4(e)(6) and (7) and 205.4(f)(1) and (7), with the first and third occurrences of the term “commission” under subparagraph (D) changed to “executive director.” Proposed §205.4(c)(4), which is a reformatted version of existing §205.4(b)(3), requires dischargers to apply for renewal of the individual permit, if authorization is denied under this subsection.

Section 205.4(d) is proposed to be amended to spell out the requirements that apply to suspensions of authorizations or NOIs of intent, by reformatting and, to a certain extent, “fleshing out” requirements from portions of the existing rules, notably §205.4(d)-(f). Proposed §205.4(d)(1) spells out requirements for the general permit, as follows: “The general permit shall describe the procedures for suspension of authorization and NOIs under the general permit. The general permit shall require the executive director to provide written notice to a discharger that the executive director intends to suspend a discharger’s authority to discharge under a general permit, including:.” The statements required in the written notice are spelled out in proposed subparagraphs (A)-(D), which are reformatted from existing §205.4(d). Proposed §205.4(d)(2) requires that if a discharger’s authorization under a general permit is suspended, the discharge shall cease immediately. Proposed §205.4(d)(3) is reformatted from existing §205.4(f), and allows the executive director to require the person whose authorization to discharge is suspended to apply for and obtain an individual permit. Proposed §205.4(d)(4) lists the

reasons for which the executive director, after written notice to the discharger, shall suspend authorization to discharge under an existing general permit. Subparagraphs (A)-(E) of this proposed paragraph are reformatted from existing §205.4(d), 205.4(e)(5), 205.4(f)(2), (5), and (10).

Subparagraph (C) is proposed to include the change from “commission” to “executive director” under clause (i), and the change from “commission” to “agency” under clause (ii). Proposed §205.4(d)(5) includes reasons for which the executive director, after written notice to the discharger, may suspend authorization to discharge under an existing general permit, with the first and third occurrences of the term “commission” under subparagraph (E) changed to “executive director.” Subparagraphs (A)-(E) of this proposed paragraph are reformatted from existing §205.4(f)(1), (4), and (7)-(9). Proposed §205.4(d)(6) provides the clarification that the executive director’s decisions on NOIs under this chapter are subject to §50.139 of this title (relating to Motion to Overturn Executive Director’s Decision).

Section 205.4(e) is proposed to implement TWC, §26.040(h), which requires the commission to deny or revoke an NOI if, after a hearing, it finds that the discharger has a history of violations that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process. Under the proposed rule, the history of violations that could be considered by the commission would include all violations of Texas environmental laws administered by TNRCC that have been documented by the executive director during the preceding five years. These include NOV’s, NOEs, and all administrative and judicial orders entered with regard to TNRCC or United States Environmental Protection Agency permits and rules. Agreed orders entered into by the commission which contain the limitation that they are not intended to become part of the respondent’s compliance history will be considered only if the executive director has documented failure to comply with the

terms of the order. The commission's experience indicates that if an applicant has a history that reflects a disregard for the regulatory process, that person is more likely to present future compliance problems. In the past, the commission has included special conditions in permits, designed to address past compliance problems at the permitted facility. This proposal would further that policy by requiring that an operator or owner with a very poor compliance history seek and obtain an individually tailored permit.

Such a pattern of conduct exhibited at the applicant facility and in regard to wastewater discharge statutes and rules would clearly be the most relevant portion of a discharger's compliance history and given the greatest weight in the commission's deliberations. Violations by the same applicant in other media and at other facilities may also be relevant, however. To the extent that the facts surrounding them indicate a pattern of violation, or a management structure or other uniform factors exist, they may indicate the same attitude or practices are likely to occur at the facility seeking the NOI. Consequently, the proposal permits the commission to consider these violations as well, according to them the weight appropriate to their relative degree of similarity or remoteness to the facility or the activity that is the subject of the general permit.

Proposed §205.4(e) states, "The commission, after hearing, shall deny or suspend a discharger's authority to discharge under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations. A hearing under

this subsection is not subject to Texas Government Code, Chapter 2001.” The commission is proposing to define “compliance history,” as discussed earlier in this preamble.

Section 205.4(f) is proposed to be amended to add the opening phrase “The general permit shall describe,” consistent with the aforementioned approach of changing the perspective of the rules toward what the general permit must require or can allow; and to add the phrase “if one is required by” after “NOI” in the first sentence. Section 205.4(f) is also proposed to be amended to add to the first part of the second sentence the phrase “At a minimum, the NOI.”

Section 205.4(g) is proposed to be amended to add the opening phrase “The general permit may require a,” and to delete “shall” from this sentence, which changes the rules from prescriptive to permissive, with regard to application fees for general permits. Also in the first sentence, the term “commission” is proposed to be changed to “agency.” Section 205.4(g) is also proposed to be amended to change the second sentence to read as follows: “The amount of the fee may be set in accordance with §305.53 of this title (relating to Application Fee) or may be specified in each general permit and NOI form.” The third sentence in this subsection is proposed to be amended to correct the rule reference from “subsection (e)” to “subsection (c) or (e),” and to change “the application fee” to “any application fee.”

Section 205.4(h) is proposed to be amended to add the opening phrase “The general permit shall require a,” and to replace the phrase “new NOI” with the phrase “notice of change” to more appropriately describe the purpose of the notice. Also in the first sentence, the term “commission” is proposed to be

changed to “agency.” The second sentence in this subsection is proposed to be amended to read as follows: “In cases where the general permit requires that an NOI be submitted, the general permit shall require that when the ownership of the facility changes or is transferred, a notice of termination be submitted by the present owner, and a new NOI be submitted by the new owner, not later than ten days prior to the change in ownership.” The commission notes that the proposed new terms “notice of change” and “notice of termination” are defined under proposed §205.1, as discussed earlier in this preamble.

Section 205.4(i) is proposed to be amended to add “or commission” to the second sentence, to replace “an NOI” with “authorization,” add “county or,” and change “will” to “shall,” so that this sentence is proposed to read as follows: “If the executive director or commission denies authorization for a proposed discharge in the county or municipality, the executive director shall notify the county judge or mayor.”

Section 205.5, concerning Permit Duration, Amendment, and Renewal, is proposed to be amended to allow the commission to continue to authorize dischargers under an expired general permit in cases where the commission has proposed to renew the general permit before the expiration date. Thus, §205.5(b) is proposed to be amended to add the following: “If before its expiration, the commission proposes to renew a general permit, the general permit shall remain in effect after the expiration date for those existing discharges covered by the general permit. The general permit shall remain in effect for these dischargers until the date on which the commission takes final action on the proposed permit renewal. No new notices of intent (NOIs) will be accepted or new authorizations honored for

authorization under the general permit after the expiration date.” Section 205.5(c) is proposed to be amended to add the following clarifying phrase to replace the term “the facility:” to “all facilities, including those covered under the expired general permit,” and to require submittal of an NOI, if one is required by the general permit.

Section 205.5(d) is proposed to be amended to add more details to the requirements concerning submittal of applications for individual permits when a general permit is about to expire. Thus, this subsection is proposed to read as follows: “If the commission has not proposed to renew a general permit at least 90 days before its expiration date, dischargers authorized under the general permit shall submit an application for an individual permit before the general permit’s expiration. If an application for an individual permit is submitted before the general permit’s expiration, authorization under the expired general permit remains in effect until the issuance or denial of an individual permit.”

Section 205.5(f) is proposed to be amended to clarify the requirements concerning consistency of general permits with the Texas Coastal Management Plan, and is proposed to read as follows: “Before issuing a general permit, the commission shall review the general permit for consistency with the Texas Coastal Management Plan (CMP). The commission must find that the general permit is consistent with the applicable CMP goals and policies and that it will not adversely affect any applicable coastal natural resource areas as identified in the CMP before the commission may issue the general permit.”

Section 205.6, concerning Annual Fee Assessments, is proposed to be amended to correct a reference that has changed since the rules were adopted, and to clarify that the commission has the authority to

charge an annual watershed monitoring and assessment fee, but is not necessarily required to do so.

Thus, this section is proposed to read as follows: “A person authorized by a general permit shall 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); and may be subject to an annual watershed monitoring and assessment fee under TWC, §26.0135(h), consistent with §220.21 of this title (relating to Water Quality Assessment Fees).”

New proposed §205.7, concerning Additional Characteristics and Conditions for General Permits, is taken from §321.141, in anticipation of the future repeal of Chapter 321. Section 205.7 is proposed to read as follows: “40 Code of Federal Regulations (CFR) §122.28, as amended through April 2, 1992, at 57 FedReg 11413, is adopted by reference, except 40 CFR §122.28(b)(3)(ii) and (c), and except as follows: where 40 CFR §122.28 refers to an ‘NPDES permit,’ the references are more properly made, for state law purposes, to a ‘TPDES permit,’ as applicable; and where 40 CFR §122.28(b)(3)(iii) refers to 40 CFR §122.21, the reference is more properly made, for state law purposes, to applicable sections of this chapter, Chapter 281 of this title (relating to Application Processing), and Chapter 305 of this title (relating to Consolidated Permits).” The aforementioned 1992 *Federal Register* citation is proposed in order to include a specific promulgation date, and is the most recent date for any amendment to 40 CFR §122.28, up to the date of TPDES program authorization.

FISCAL NOTE

Jeffrey Horvath, with Strategic Planning and Appropriations, has determined for the first five-year period the proposed amendments are in effect, there will be no adverse fiscal implications for TNRCC

or for units of local government as a result of administration and enforcement of the proposed rules.

The proposed rules implement certain provision of HB 1283, 76th Legislature, 1999, by removing the limitation that general permits cannot authorize discharges of more than 500,000 gallons in any 24-hour period and by providing that the commission may issue a general permit for storm water discharges.

The proposed rules would implement HB 1283 which amended TWC, §26.040, and clarify the requirements and procedures for issuing general wastewater permits and obtaining authorization for storm water discharge under a general permit.

Under the bill, the proposed rules would also add a requirement that the commission deny or suspend a discharger's authority under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct; and clarify the language and organizational structure of the rules.

HB 1283 allows TNRCC to more effectively implement the TPDES by not requiring the agency to individually permit wastewater discharges. Removing the 500,000 gallon per 24-hour period cap allows the agency to cover larger numbers of wastewater dischargers. Currently cities and industries must apply for individual permits for wastewater discharge. Under a general permit with the 500,000 gallon per 24-hour limit for discharges removed, the process for permit holders for permit applications are streamlined and costs may be reduced. Legal and consultant costs are also assumed to be reduced. The cost savings cannot be quantified due to variability in the types of individual permits now in effect.

The proposed rules do not specifically implement the storm water program but do allow the commission

to issue a general permit for storm water discharges. HB 1283 provided TNRCC with the authority to issue general permits to authorize discharges of wastewater of any amount in any 24-hour period and to specifically allow the category of storm water under general permits. The Legislature appropriated \$608,669 from wastewater treatment inspection fees for fiscal year 2000 and \$1,647,575 for fiscal year 2001 from the wastewater treatment inspection fee account to implement the storm water permitting program which is not addressed by these rules relating to storm water discharges. The permits are anticipated to be proposed at later dates, as TNRCC assumes responsibility for various aspects of the storm water program. The storm water program regulates polluted rain water run-off from cities, certain classes of industry, and construction sites. This program was delegated to the agency as a NPDES program to be implemented in stages and as existing federal permits expire.

PUBLIC BENEFIT

Mr. Horvath has also determined for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result of the administration of and compliance with the rules will be that the process for wastewater permit holders for permit applications will be streamlined and costs may be reduced. Legal and consultant costs are also anticipated to be reduced. The cost savings cannot be quantified due to variability in the types of individual permits now in effect. In addition, public health and safety will continue to be protected as there will be no change in the degree of regulation for affected entities.

SMALL AND MICRO-BUSINESS IMPACT ANALYSES

No adverse economic effects are anticipated to small businesses and micro-businesses as a result of

implementing the proposed amendments. The proposed rules implement HB 1283, by removing the limitation that general permits cannot authorize discharges of more than 500,000 gallons in any 24-hour period and by providing that the commission may issue a general permit for storm water discharges. As a result of the administration of and compliance with the rules by small and micro-businesses, that may anticipate that the process for obtaining wastewater permits will be streamlined and costs may be reduced. Legal and consultant costs are also anticipated to be reduced. The cost savings cannot be quantified due to variability in the types of individual permits now in effect.

DRAFT REGULATORY IMPACT ASSESSMENT

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The proposal would not adversely effect in a material way on 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 for two reasons. First, the proposed rules implement what is already allowed under TWC, §26.040. The proposed rules do not go beyond that which is already statutorily allowed. Second, the proposed rules will result in overall economic savings, while protecting of the public health and safety and environment. There is economic savings because many of the entities that would otherwise be required to obtain an individual permit will be able to obtain coverage under one standard permit, a general permit. This improves efficiency in the permitting process which results in overall economic savings. The general permits issued under these rules will undergo the same permitting scrutiny of an individual permit, thus ensuring the protection of public health and safety and the

environment. Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these proposed rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these proposed rules is to implement HB 1283, 76th Legislature, 1999, and clarify the requirements and procedures for issuing a general permit and obtaining authorization for discharge under a general permit. The proposed rules would substantially advance this stated purpose by amending Chapter 205 to remove the limitation that general permits cannot authorize discharges of more than 500,000 gallons in any 24-hour period; by providing that the commission may issue a general permit for storm water discharges without having to make the findings required by TWC, §26.040(a)(1)-(5) for other categories of discharges; add a requirement that the commission deny or suspend a discharger's authority under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct; and clarify the language and organizational structure of the rules. Promulgation and enforcement of these proposed rules would not burden private real property which is the subject of the rules because the proposal would remove a restriction and clarify other portions of the rules. The subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not restrict or limit the owner's right to property that would otherwise exist in the absence of the regulations. In other words, because these rules broaden the applicability of general permits, which provide a less burdensome avenue for gaining authorization for discharges than do

alternative permitting schemes, and because these rules clarify the requirements and procedures for issuing a general permit and obtaining authorization for discharge under a general permit, they do not restrict the owner's right to property. Therefore, these proposed rules will not constitute a takings under the Texas Government Code, §2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The executive director has reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11.

The commission has prepared a consistency determination for the proposed rules pursuant to 31 TAC §505.22, and has found the proposed rulemaking consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the proposed rules are the protection, preservation, restoration and enhancement of the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the requirement that discharges of municipal and industrial wastewater in the coastal zone shall comply with water-quality-based effluent limits. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the proposed rules will result in more efficient and cost-effective use of public resources regulating wastewater facilities, while maintaining protection of the quality of the surface water resources of the state. Dischargers would be subject to requirements in the permit. In addition, the rules specifically require the executive director to deny authorization under an

existing general permit if the discharge is located where it poses or could pose an adverse impact upon a critical area, and it is practicable to locate the discharge in a more suitable location. The commission invites public comment on the consistency of the proposed rules.

PUBLIC HEARING

A public hearing on this proposal will be held in Austin on June 29, 2000 at 10:00 a.m. in Building F, Room 3202A at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. Individuals may present oral statements when called upon in the order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, 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 1999-034-205-WT. Comments must be received by 5:00 p.m., July 3, 2000. For further information, please contact Steve Ligon, Wastewater Permitting Section, (512) 239-4527.

STATUTORY AUTHORITY

The proposed amendments are proposed under and implement TWC, §26.040, which provides the commission with the authority to regulate certain waste discharges by general permit, and TWC, §26.040(m), which authorizes the commission to adopt rules as necessary to implement TWC, §26.040.

These amendments are also proposed under the TWC, §5.102, which provides the commission with general powers to carry out duties under the TWC, §§5.103, 5.105, and 5.120, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state and to establish and approve all general policies of the commission.

SUBCHAPTER A : GENERAL PERMITS FOR WASTE DISCHARGES

§§205.1-205.7 [§§205.1-205.6]

§205.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) **Compliance history** - The record of all notices from the commission, including notices of violation from the executive director; and of all orders of the commission, of any other agency or political subdivision of the State of Texas and of the United States Environmental Protection Agency (USEPA) pertaining to an applicant's adherence to environmental laws and rules of the State of Texas or the United States; with the terms of any permit, compliance agreement or order issued by the commission or the USEPA; and with any final judicial decision or settlement addressing the applicant's adherence to such environmental laws and rules. The history shall be for the five-year period before the date on which the NOI is filed or, if an NOI is not required, the five-year period before the permittee begins operating under the general permit. It shall not include any order that is precluded by its terms or by law from becoming part of the applicant's compliance history.

(2)[(1)] **General permit** - A permit issued under the provisions of this chapter authorizing the discharge of waste into or adjacent to water [waters] in the state for one or more

categories of waste discharge within a geographical area of the state or the entire state as provided by Texas Water Code (TWC), §26.040. [§26.040, Texas Water Code.]

(3)[(2)] Individual permit - A permit, as defined in the TWC, §26.001, [§26.001 of the Texas Water Code,] issued by the commission or the executive director to a specific person or persons in accordance with the procedures prescribed in the TWC, Chapter 26, [Chapter 26 of the Texas Water Code] (other than TWC, §26.040 [§26.040 of the Water Code]).

(4) Notice of change or NOC - A written submittal to the executive director from a discharger authorized under a general permit providing information on changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the discharge.

(5)[(3)] Notice of intent or NOI - A written submittal to the executive director from a discharger requesting coverage under the terms of a general permit.

(6) Notice of termination or NOT - A written submittal to the executive director from a discharger authorized under a general permit requesting termination of coverage.

[(4) Same or similar monitoring requirements - Requirements for periodic testing or sampling applied to all dischargers of a category covered by a general permit to determine compliance with effluent limitations in general permits which will be applied with the same or similar frequency,

sample type, or reporting requirements. This may include conditions which are applied in accordance with a distinct formula in the general permit, such as a sampling frequency based upon the quantity or rate of discharge.]

[(5) Same or substantially similar types of operations - An operation engaged in wastewater management activities, or wastewater management activities as defined in a general permit. Examples of substantially similar types of operations include manufacturing processes relating to a specific industrial category or standard industrial classification, a specific type of agricultural production activity, publicly owned treatment works, or storm water management and control activities by municipalities.]

[(6) Same requirements regarding operating conditions - Requirements applied to all dischargers in a category covered by a general permit including, but not limited to, requirements for maintenance, monitoring, reporting, best management practices, facility management, the integrity of analytical testing, and record keeping.]

[(7) Same types of waste - A category of waste containing the same or similar type constituents that can be safely and appropriately controlled using a similar treatment technology, or that can be safely and appropriately controlled through the same requirements regarding effluent limitations. Examples of such waste types include domestic wastewater, contact storm water from concrete batch operations, or filter backwash from water treatment.]

(7)[(8)] **Texas Pollutant Discharge Elimination System [Systems] (TPDES)** - The state program authorized under Clean Water Act, §§307, 318, 402, and 405 for issuing, amending, terminating, monitoring, and enforcing permits, and imposing and enforcing pretreatment requirements under [Clean Water Act §§307, 402, 318 and 405,] the Texas Water Code and Texas Administrative Code regulations.

§205.2. Purpose and Applicability.

(a) The commission may issue a general permit to authorize the discharge of waste into or adjacent to water [waters] in the state by category [of dischargers] if the commission finds the discharges [dischargers] in the category are storm water or the dischargers in the category:

- (1) engage in the same or substantially similar types of operations;
- (2) discharge the same types of waste;
- (3) are subject to the same requirements regarding effluent limitations or operating conditions; [and]
- (4) are subject to the same or similar monitoring requirements; and
- (5) are more appropriately regulated under a general permit than under individual

permits, on the basis that both:

(A) the general permit can be readily enforced and the executive director can adequately monitor compliance with the terms of the general permit; this requirement being satisfied if the provisions of the general permit are clear and unambiguous and it requires adequate monitoring, record keeping, and reporting, appropriate to the type of activity authorized; and

(B) the category of discharges covered by the general permit will not include a discharge of pollutants that will cause significant adverse affects to surface or groundwater quality.

(b) The commission may issue a general permit to authorize the discharge of waste by categories of dischargers designated under [pursuant to] subsection (a) of this section either within the entire state or within a discrete geographical area identified by an appropriate division or combination of geographic or political boundaries.

(1) General permits granted for discrete geographical areas may be based upon, but not limited to, factors such as related water quality standards, climatological conditions, and watershed specific standards in accordance with Chapter 311 of this title (relating to Watershed Protection).

(2) Discharges to be regulated with effluent limitations specific to a particular water body may be covered under a general permit limited to a particular watershed or geographical area.

[For example, certain dischargers of the same type of waste may be covered under one statewide

general permit. General permits granted for discrete geographical areas may be based upon, but not limited to, factors such as related water quality standards, climatological conditions, and watershed specific standards in accordance with Chapter 311 of this title (relating to Watershed Protection).

Discharges to be regulated with effluent limitations specific to a particular water body may be covered under a general permit limited to a particular watershed or geographical area.]

(c) Authorization to discharge under a general permit does not confer a vested right. [The commission may issue a general permit pursuant to subsection (a) of this section only if it finds the dischargers in the category are more appropriately regulated under a general permit than under individual permits, on the basis that both:]

[(1) the general permit can be readily enforced and that the commission can adequately monitor compliance with the terms of the general permit. This requirement is satisfied if the provisions of the general permit are clear and unambiguous and it requires adequate monitoring, record keeping, and reporting, appropriate to the type of activity authorized; and]

[(2) the category of discharges covered by the general permit will not include a discharge either of pollutants that will cause significant adverse effects to surface or ground water quality or of more than 500,000 gallons into surface water during any 24-hour period.]

§205.3. Public Notice, Public Meetings, and Public Comment.

(a) Notice shall be published as follows.

(1) If the draft general permit will not have statewide applicability, the agency shall publish notice of each draft general permit in the *Texas Register* and in a daily or weekly newspaper of general circulation in the area affected by the activity that is the subject of the proposed general permit.

(2) For draft general permits with statewide applicability, notice shall be published in the *Texas Register* and in at least one newspaper of statewide or regional circulation.

(3) The public notice shall be published not later than the 30th day before the commission considers the approval of a general permit. [The commission shall publish notice of a draft general permit in a daily or weekly newspaper of general circulation in the area affected by the activity that is the subject of the proposed general permit and in the *Texas Register*. If the draft general permit will have statewide applicability, then the requirement for newspaper notice shall be accomplished by publishing notice in the daily newspaper of largest general circulation within each of the following metropolitan areas: Dallas; Houston; San Antonio; Austin; Tyler; Corpus Christi; the Lower Rio Grande Valley; Amarillo; Lubbock; the Permian Basin; and El Paso.]

(b) For Texas Pollutant Discharge Elimination System [TPDES] general permits, mailed notice of the draft general permit will also be provided to the following:

(1) the county judge of the county or counties in which the dischargers under the

general permit could be located;

(2) if applicable, persons [state and federal agencies] for which notice is required in 40 Code of Federal Regulations (CFR) [CFR], §124.10(c); and

(3) [persons on a relevant mailing list kept under §39.7 of this title (relating to Mailing Lists); and] any other person the executive director or chief clerk may elect to include.

(c) The contents of a public notice of a draft general permit shall:

(1) include the applicable information described in §39.11 of this title (relating to Text of Public Notice);

(2) include an invitation for written comments by the public regarding the draft general permit;

(3) specify a comment period of at least 30 days; and

(4) include either a map or description of the permit area. [be in accordance with §39.11 of this title (relating to Text of Public Notice) except where clearly not applicable. Each notice must include an invitation for written comments by the public regarding the draft general permit. The public notice will specify a comment period of at least 30 days and the public notice will be published

not later than the 30th day before the commission considers the approval of a general permit. Additionally, the public notice of a draft TPDES general permit must include either a map or description of the permit area.]

(d) Requirements relating to public meetings are as follows. [Public Meetings.]

(1) The agency [executive director or commission] may hold a public meeting to provide an additional opportunity for public comment and shall hold such a public meeting when [either] the executive director [or commission] determines, on the basis of requests, that a significant degree of public interest in a draft general permit exists.

(2) Notice of [The commission shall give notice of] a public meeting shall be [under this subsection] by publication in the *Texas Register* not later than the 30th day before the date of the meeting.

(3) Notice [Mailed notice] of the public meeting shall be mailed [will also be provided] to the following:

(A) the county judge of the county or counties in which the dischargers under the general permit could be located;

(B) if applicable, persons [state and federal agencies] for which notice is

required in 40 CFR, §124.10(c);

(C) [persons on a relevant mailing list kept under §39.7 of this title (relating to Mailing Lists)]any other person the executive director or chief clerk may elect to include; and

~~(D)~~~~(E)~~ persons who filed public comment or request for a public meeting on or before the deadline for filing public comment or request for a public meeting.

(4) The contents of a public notice of a public meeting shall include the applicable information described in [be in accordance with] §39.11 of this title (relating to Text of Public Notice) [except where clearly not applicable]. Each notice must include an invitation for written or oral comments by the public regarding the draft general permit.

(5) The public comment period shall automatically be extended to the close of any public meeting held by the agency on the proposed general permit.

(e) If the agency [commission] receives public comment during the comment period relating to issuance of a general permit, the executive director [commission] shall respond [may issue the general permit only after responding] in writing to these comments, and this response shall be made available to the public and filed with the chief clerk at least ten days before the commission considers the approval of the general permit. The response shall address written comments received during the comment period and oral or written comments received during any public meeting held by the agency

[commission]. The commission shall consider all public comment in making its decision and shall either adopt the executive director's response to public comment or prepare its own response.

(1) The commission shall issue its written response to comments on the general permit at the same time the commission issues or denies the general permit.

(2) A copy of any issued general permit and response to comments shall [will] be made available to the public for inspection at the agency's [commission's Wastewater Permits Section in its] Austin office and also in the appropriate regional offices.

(3) A notice of the commission's action on the proposed general permit and a copy of its response to comments shall [will] be mailed to each person who made a comment.

(4) A notice of the commission's action on the proposed general permit and the text of its response to comments shall [will] be published in the *Texas Register*.

(f) Except as specified in subsection (g) of this section, the requirements of subsections (a)-(e) of this section apply to processing of a new general permit, an [and to] amendment, renewal, revocation, or cancellation of a general permit.

(g) A general permit may be proposed for minor amendment or minor modification, as described in §305.62(c)[(2)] of this title (relating to Amendment), without newspaper publication.

§205.4. Authorizations and Notices of Intent.

(a) A qualified discharger may obtain authorization to operate under a general permit by complying with the general permit's conditions for gaining coverage. [New Permittees. A discharger who is not covered by an individual permit may submit to the executive director a written notice of intent to be covered by the general permit in accordance with this section. The executive director may deny the request for coverage under the general permit, in accordance with subsection (e) of this section.]

(1) A general permit shall specify either an applicable deadline for filing the notice of intent (NOI), or that an NOI is not required prior to commencement of a qualifying discharge.

(2) No new discharge under the authority of a general permit may commence after a general permit is expired.

(3) For those general permits requiring an NOI, a discharger may begin discharging under the general permit after the date or period of time specified in the general permit unless the executive director or commission before that time notifies the discharger pursuant to subsections (c) or (e) of this section that the discharger is not eligible for authorization under the general permit.

(4) The executive director shall provide written notice to a discharger if the executive director determines that the discharger is not eligible for authorization under the general permit. The

content of the notice is described in subsections (c) and (d) of this section.

(5) An NOI shall be submitted to the executive director by certified mail, return receipt requested.

(b) The following requirements apply to existing individual permittees [Existing Individual Permittees].

(1) The general permit shall specify how a discharger covered by an individual permit may substitute authorization to discharge waste under the general permit. At a minimum, the general permit shall provide that coverage under the general permit shall not commence until: [A discharger who is covered by an individual permit may obtain substitute authorization to discharge waste under a general permit if, at least 180 days prior to the expiration date of the individual permit, the permittee submits a notice of intent as specified by subsection (g) of this section. The discharger shall also request that the individual permit be canceled or that the existing permit be amended to remove an authorization pertaining to an affected outfall. The commission will cancel or amend the permit if the executive director does not deny the NOI under subsection (e) of this section.]

(A) the permittee has submitted an NOI, if one is required by the general permit, as specified by subsection (f) of this section; and

(B) the executive director has received the discharger's written request that the

individual permit be canceled.

(2) [(4)] The general permit may allow a [A] discharger who is covered by an individual permit to [may] obtain authorization to discharge waste from a new outfall under a general permit [if the discharger submits a written NOI as specified in subsection (f) of this section]. Agency action on a new discharge does not affect the status of the discharger's existing individual permit. The general permit shall describe how to obtain authorization to discharge waste from a new outfall. Authorization under the general permit shall not commence until the discharger: [(2) The individual permit will be automatically canceled when authorization under the general permit becomes effective.]

(A) submits an NOI, if one is required by the general permit, as specified in subsection (f) of this section; and

(B) requests and receives written approval from the executive director of a minor modification to their individual permit exempting the new outfall from coverage under the individual permit.

(3) Except as provided under subsection (b)(2) of this section, the commission shall cancel an individual permit if the executive director or commission does not deny the NOI or authorization under subsection (c) or (e) of this section [If the NOI is denied under subsection (e) of this section, the discharger shall apply for renewal of the individual permit prior to the expiration date of the individual permit to maintain authorization to discharge, in accordance with §305.63 of this title

(relating to Renewal)].

(c) The following requirements apply to denial of an authorization or notice of intent [A general permit will specify any applicable deadline for filing the notice of intent. A discharger may begin discharging under the general permit on the 31st day after the executive director receives the discharger's notice of intent unless the executive director before that time notifies the discharger pursuant to subsection (e) of this section that the discharger is not eligible for authorization under the general permit. A NOI must be submitted to the executive director by certified mail, return receipt requested].

(1) The executive director shall provide written notice to a discharger if the executive director denies the discharger's NOI or authorization to discharge under a general permit, including, at a minimum, a brief statement of the basis for this decision.

(2) The executive director shall deny authorization to discharge under an existing general permit for the following reasons:

(A) the quantity of discharge, the type of waste, or the type of operation does not comply with the general permit;

(B) the discharge is required to be authorized under the Texas Pollutant Discharge Elimination System (TPDES), and discharging under the general permit would result in

backsliding prohibited under 40 Code of Federal Regulations §122.44(l), as amended and adopted under §305.531(3) of this title (relating to Establishing and Calculating Additional Conditions and Limitations for TPDES Permits);

(C) the discharge is a significant contributor of pollutants impairing the quality of surface or groundwater in the state. In making this determination, the executive director shall consider the following factors:

(i) the location of the discharge;

(ii) the size of the discharge;

(iii) the quantity and nature of pollutants discharged;

(iv) whether the discharge would impair existing or potential uses of ground water, inconsistent with the policy specified in the Texas Water Code (TWC), §26.401; and

(v) other factors relating to the protection of water quality standards;

(D) the discharge is located where it causes or could cause an adverse impact upon a critical area, as defined in 31 TAC §501.3 (relating to Definitions and Abbreviations), and there is a suitable location that is available and capable of being used in light of cost, technology, and

logistics;

(E) the discharger or facility:

(i) has failed to pay any portion of a delinquent fee or charge assessed
by the executive director;

(ii) is the subject of an unresolved agency enforcement action in which
the executive director has issued written notice that enforcement has been initiated;

(iii) is not in compliance with all requirements, conditions, and time
frames specified in an unexpired commission final enforcement order relating to the activity regulated
by the general permit; or

(iv) is subject to an unexpired enforcement order that requires the
facility to comply with operating conditions different from or additional to the requirements of the
general permit;

(F) the discharge would be inconsistent with the state water quality
management plan (WQMP).

(3) The executive director may deny authorization to discharge under an existing

general permit for reasons including, but not limited to, the following:

(A) a change has occurred in the availability of demonstrated technology or practices for the prevention, control, or abatement of pollutants applicable to the discharge necessary to be implemented to meet applicable federal or state standards;

(B) specific effluent limitation guidelines are promulgated for a discharge covered by the general TPDES permit, but the general permit has not yet been amended to incorporate the new effluent limitation guidelines;

(C) the owner and/or the operator of the facility has not filed an NOI in accordance with §305.43 of this title (relating to Who Applies);

(D) the discharger has been determined by the executive director to have been out of compliance with any rule, order, or permit of the commission, including non-payment of fees assessed by the executive director.

(4) If authorization to discharge is denied under this subsection, the executive director may require the person whose authorization is denied to apply for and obtain an individual permit. If the discharger is seeking to replace its individual permit with general permit coverage, but the discharger's general permit authorization is denied, the discharger shall apply for renewal of the individual permit prior to the expiration date of its individual permit to maintain authorization to

discharge, in accordance with §305.63 of this title (relating to Renewal).

(d) The following requirements apply to suspensions of authorizations and NOIs [Authorization to discharge under a general permit does not confer a vested right. After written notice to the discharger, the executive director may suspend a discharger's authority to discharge under a general permit. The executive director may require a person discharging under a general permit to immediately cease the discharge. The executive director may also require the person to apply for and obtain an individual permit. The notice of suspension to such a person shall include a brief statement of the basis for this decision under subsection (f) of this section, a statement of whether the discharger shall immediately cease the discharge, an application form, a statement setting the deadline for filing the application for an individual permit, and a statement that the person's discharge authorization under the general permit shall be suspended on the effective date of the commission's action on the individual permit application unless the commission expressly provides otherwise. If an application is not received by the deadline specified, the executive director shall suspend a discharger's authority to discharge under a general permit].

(1) The general permit shall describe the procedures for suspension of authorization and NOIs under a general permit. The general permit shall require the executive director to provide written notice to a discharger that the executive director intends to suspend a discharger's authority to discharge under a general permit, including:

(A) a brief statement of the basis for this decision under this subsection;

(B) a statement of whether the discharger shall immediately cease the discharge;

(C) a statement setting the deadline for filing the application for an individual permit; and

(D) a statement that the person's discharge authorization under the general permit shall be suspended on the effective date of the commission's action on the individual permit application unless the commission expressly provides otherwise;

(2) If a discharger's authorization under a general permit is suspended, the discharger shall immediately cease the discharge.

(3) The executive director may require the person whose authorization to discharge is suspended to apply for and obtain an individual permit.

(4) After providing written notice to the discharger, the executive director shall suspend authorization to discharge under an existing general permit for the following reasons:

(A) the quantity of discharge, the type of waste, or the type of operation does not comply with the general permit;

(B) the discharge is a significant contributor of pollutants impairing the quality of surface or groundwater in the state. In making this determination, the executive director shall consider the following factors:

(i) the location of the discharge;

(ii) the size of the discharge;

(iii) the quantity and nature of pollutants discharged; and

(iv) whether the discharge would impair existing or potential uses of groundwater, inconsistent with the policy specified in the TWC, §26.401;

(v) other factors relating to the protection of water quality standards;

(C) the discharger or facility:

(i) has failed to pay any portion of a delinquent fee or charge assessed by the executive director;

(ii) is the subject of an unresolved agency enforcement action in which the executive director has issued written notice that enforcement has been initiated;

(iii) is not in compliance with all requirements, conditions, and timeframes specified in an unexpired commission final enforcement order relating to the activity regulated by the general permit, or

(iv) is subject to an unexpired enforcement order that requires the facility to comply with operating conditions different from or additional to the requirements of the general permit;

(D) the discharge is inconsistent with the state WQMP;

(E) an application is not received by the deadline specified by rule or in the general permit.

(5) After providing written notice to the discharger, the executive director may suspend authorization to discharge under an existing general permit for reasons including, but not limited to, the following:

(A) a change has occurred in the availability of demonstrated technology or practices for the prevention, control, or abatement of pollutants applicable to the discharge necessary to be implemented to meet applicable federal or state standards;

(B) specific effluent limitation guidelines are promulgated for a discharge

covered by the general TPDES permit, but the general permit has not yet been amended to incorporate the new effluent limitation guidelines;

(C) the owner and/or the operator of the facility has not filed an NOI in accordance with §305.43 of this title;

(D) circumstances have changed since the time of the NOI so that the discharge is no longer appropriately controlled to meet applicable water quality standards under the general permit, or either a temporary or permanent reduction, or elimination of the authorized discharge is necessary;

(E) the discharger has been determined by the executive director to have been out of compliance with any rule, order, or permit of the commission, including non-payment of fees assessed by the executive director.

(6) The executive director's decisions on NOIs under this chapter are subject to §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

(e) The commission, after hearing, shall deny or suspend a discharger's authority to discharge under a general permit if the commission determines that the discharger operates any facility for which the discharger's compliance history contains violations constituting a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make

a timely and substantial attempt to correct the violations. A hearing under this subsection is not subject to Texas Government Code, Chapter 2001. [The executive director shall deny an NOI to discharge under an existing general permit and may require the person to apply for and obtain an individual permit if the discharger is not eligible for authorization under the general permit for reasons including, but not limited to, the following:]

[(1) The quantity of discharge, the type of waste, or the type of operation does not comply with the general permit;]

[(2) In the case of determining eligibility to discharge under the Texas Pollutant Discharge Elimination System (TPDES), a determination that backsliding under 40 CFR §122.44(1) would occur if the general permit replaced the individual permit;]

[(3) The discharge is a significant contributor of pollutants impairing the quality of surface or ground water in the state. In making this determination, the executive director shall consider the following factors:]

[(A) The location of the discharge;]

[(B) The size of the discharge;]

[(C) The quantity and nature of pollutants discharged; and]

[(D) Whether the discharge would impair existing or potential uses of ground water, inconsistent with the policy specified in §26.401 of the Texas Water Code;]

[(E) Other factors relating to the protection of water quality standards;]

[(4) The discharge is located where it poses or could pose an adverse impact upon a critical area, as defined in 31 TAC §501.3 (relating to Definitions and Abbreviations), and it is practicable to locate the discharge in a more suitable location. An alternative is practicable if it is available and capable of being done in light of cost, technology, and logistics;]

[(5) The discharger or facility:]

[(A) has failed to pay any portion of a delinquent fee or charge assessed by the commission;]

[(B) is the subject of an unresolved TNRCC enforcement action in which the executive director has issued written notice that enforcement has been initiated;]

[(C) is not in compliance with all requirements, conditions, and timeframes specified in an unexpired TNRCC final enforcement order relating to the activity regulated by the general permit, or]

[(D) is subject to an unexpired enforcement order that requires the facility to comply with operating conditions different from or additional to the requirements of the general permit;]

[(6) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the discharge necessary to be implemented to meet applicable federal or state standards;]

[(7) Specific effluent limitation guidelines are promulgated for a discharge covered by the general TPDES permit, but the general permit has not yet been amended to incorporate the new effluent limitation guidelines; or]

[(8) The discharge would be inconsistent with the state Water Quality Management Plan.]

[(f) The executive director may suspend a discharger's authorization under a general permit, and may require the discharger to immediately cease the discharge. The executive director may also require the person to apply for and obtain an individual permit if the discharger is not eligible for authorization under the general permit for reasons including, but not limited to, the following:]

[(1) The owner and/or the operator of the facility has not filed a notice of intent in accordance with §305.43 of this title (relating to Who Applies);]

[(2) The quantity of discharge, the type of waste, or the type of operation does not comply with the general permit;]

[(3) In the case of determining eligibility to discharge under the Texas Pollutant Discharge Elimination System (TPDES), a determination that backsliding under 40 CFR §122.44(l) would occur if the general permit replaced the individual permit;]

[(4) Circumstances have changed since the time of the NOI so that the discharge is no longer appropriately controlled to meet applicable water quality standards under the general permit, or either a temporary or permanent reduction or elimination of the authorized discharge is necessary;]

[(5) The discharge is a significant contributor of pollutants impairing the quality of surface or ground water in the state. In making this determination, the executive director shall consider the following factors:]

[(A) The location of the discharge;]

[(B) The size of the discharge;]

[(C) The quantity and nature of pollutants discharged;]

[(D) Whether the discharge would impair existing or potential uses of ground

water, inconsistent with the policy specified in §26.401 of the Texas Water Code; and]

[(E) Other factors relating to the protection of water quality standards;]

[(6) The discharge is located where it poses or could pose an adverse impact upon a critical area, as defined in 31 TAC §501.3 (relating to Definitions and Abbreviations), and it is practicable to locate the discharge in a more suitable location. An alternative is practicable if it is available and capable of being done in light of cost, technology, and logistics;]

[(7) The discharger has been determined by the commission to have been out of compliance with any rule, order, or permit of the commission, including non-payment of fees assessed by the commission;]

[(8) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the discharge necessary to be implemented to meet applicable federal or state standards;]

[(9) Specific effluent limitation guidelines are promulgated for a discharge covered by the general TPDES permit, but the general permit has not yet been amended to incorporate the new effluent limitation guidelines; or]

[(10) The discharge would be inconsistent with the state Water Quality Management

Plan.]

(f) [(g)] The general permit shall describe the [The] content of the NOI [notice of intent], if one is required by [shall be specified in] the general permit. At a minimum, the NOI [which] shall require the submission of information necessary for adequate program implementation including, at a minimum, the legal name and address of the owner and operator, the facility name and address, specific description of its location, type of facility or discharges, and the receiving water(s). An [A] NOI shall be signed in accordance with §305.44 of this title (relating to Signatories to Applications).

(g) [(h)] The general permit may require a [A] person seeking authorization by general permit to [shall] submit an application fee payable to the agency[commission] at the time of filing an NOI. The amount of the fee may [shall] be set in accordance with §305.53 of this title (relating to Application Fee) or may [will] be specified in each general permit and NOI form. If a person is denied coverage under the general permit in accordance with subsection (c) or (e) of this section, any [the] application fee will be applied to the application fee required for an individual permit application for the same discharge.

(h) [(i)] The general permit shall require a [A] person authorized to discharge waste under a general permit to [must] submit up-to-date information to the executive director in a notice of change [new NOI] not later than ten [10] days prior to a change in previous information provided to the agency or any other change with respect to the nature or operations of the facility or the characteristics of the discharge. In cases where the general permit requires that an NOI be submitted, the general permit

shall require that when [When] the ownership [owner] of the facility changes or is [has been] transferred, a notice of termination be submitted by the present owner, and a new NOI [must] be submitted by the new owner, not later than ten [10] days prior to the change in ownership.

(i) [(j)] When requested by a county or municipality, the commission may establish a provision in a general permit for notification by the discharger to a county judge or mayor of a municipality of NOIs that would allow discharges within their respective jurisdiction. If the executive director or commission denies authorization [an NOI] for a proposed discharge in the county or municipality, the executive director shall [will] notify the county judge or mayor.

§205.5. Permit Duration, Amendment, and Renewal.

(a) A general permit may be issued for a term not to exceed five years. After notice and comment as provided by §205.3 of this title (relating to Public Notice, Public Meetings, and Public Comment), a general permit may be amended, revoked, or canceled by the commission or renewed by the commission for an additional term or terms not to exceed five years each.

(b) A general permit remains in effect until amended, revoked, or canceled by the commission or, unless renewed by the commission, until it expires. If before its expiration, the commission proposes to renew a general permit, the general permit shall remain in effect after the expiration date for those existing discharges covered by the general permit. The general permit shall remain in effect for these dischargers until the date on which the commission takes final action on the proposed permit

renewal. No new notices of intent (NOIs) will be accepted or new authorizations honored for authorization under the general permit after the expiration date.

(c) Upon issuance of a renewed or amended general permit, all facilities, including those covered under the expired general permit, [the facility] shall submit an NOI, if one is required by the general permit, [a notice of intent] in accordance with the requirements of the new permit.

(d) If the commission has not proposed to [does not] renew a general permit at least 90 days before its expiration date, dischargers authorized under the general permit shall submit an application for an individual permit before the general permit's expiration. If an application for an individual permit is submitted before the general permit's expiration, authorization under the expired general permit remains in effect until the issuance or denial of an individual permit. [, it will provide such determination prior to the expiration of the general permit, and each discharger authorized under the general permit will be provided written notice that the discharger must apply for an individual permit.]

(e) The commission may, through renewal or amendment of a general permit, add or delete requirements or limitations to the permit. The commission may provide in the general permit a reasonable time to allow existing dischargers covered by the general permit to make the changes necessary to comply with any additional requirements deemed substantive by the commission.

(f) Before issuing a general permit, the commission shall review the [A] general permit for consistency [must be consistent] with the Texas Coastal Management Plan (CMP). The commission

must find that the general permit is [A proposed general permit must be reviewed and the action of issuing a general permit must be found to be] consistent with the applicable CMP goals and policies and that it will not adversely affect any applicable coastal natural resource areas as identified in the CMP before the commission may issue the general permit.

§205.6. Annual Fee Assessments.

A person authorized by a general permit shall pay[:] an annual waste treatment inspection fee under Texas Water Code (TWC), §26.0291₂ consistent with §§305.501-305.507 of this title (relating to the Waste Treatment Inspection Fee Program); and may be subject to an annual watershed monitoring and assessment fee under TWC [Texas Water Code], §26.0135(h)₂ consistent with §220.21 [§320.21] of this title (relating to Water Quality Assessment Fees).

§205.7. Additional Characteristics and Conditions for General Permits.

40 Code of Federal Regulations (CFR) §122.28, as amended through April 2, 1992, at 57 FedReg 11413, is adopted by reference, except 40 CFR §122.28(b)(3)(ii) and (c), and except as follows: where 40 CFR §122.28 refers to an "NPDES permit," the references are more properly made, for state law purposes, to a "TPDES permit," as applicable; and where 40 CFR §122.28(b)(3)(iii) refers to 40 CFR §122.21, the reference is more properly made, for state law purposes, to applicable sections of this chapter, Chapter 281 of this title (relating to Application Processing), and Chapter 305 of this title (relating to Consolidated Permits).