

The Texas Natural Resource Conservation Commission (commission or TNRCC) proposes new §305.539, Additional Requirements for Shrimp Aquaculture Facilities Within the Coastal Zone.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The new section is proposed to implement Senate Bill (SB) 873, which became law as an act of the 76th Texas Legislature, 1999. Among other requirements, this proposal addresses the provisions of SB 873 by requiring a commercial aquaculture facility engaged in shrimp production and located within the “coastal zone” as defined by the Texas Natural Resources Code, §33.004, to obtain or maintain an individual Texas Pollutant Discharge Elimination System (TPDES) wastewater discharge permit if the facility will discharge into water in the state. Currently, all seven existing commercial shrimp aquaculture facilities operate under individual permits as required by §321.272(b)(3)(B) concerning Discharges from Aquaculture Production Facilities. This proposed rule would ensure that these operations will not be eligible to operate under an aquaculture general permit in accordance with SB 873.

SECTION BY SECTION DISCUSSION

Proposed new §305.539(a) sets requirements for commercial aquaculture facilities located within the coastal zone and engaged in the production of shrimp that will discharge into water in the state. The coastal zone is defined under Texas Natural Resources Code, §33.004, to mean that portion of the coastal area within the boundaries established by the Texas Coastal Management Program under Texas Natural Resources Code, §33.053(a)(1) and §33.2053(k), and rules of the Coastal Coordination Council. A description of this boundary is included in 31 TAC §503.1 and includes areas along the

Texas coast of the Gulf of Mexico in portions of Cameron, Willacy, Kenedy, Kleberg, Nueces, San Patricio, Aransas, Refugio, Calhoun, Victoria, Jackson, Matagorda, Brazoria, Galveston, Harris, Chambers, Jefferson, and Orange Counties. Under proposed §305.539(a)(1), each such facility, hereinafter referred to as “facility,” must submit an application for an individual TPDES permit, including a copy of the site-assessment environmental report submitted to the Texas Department of Agriculture (TDA) and a copy of the emergency plan approved by the Texas Parks and Wildlife Department (TPWD), unless the application was submitted for an existing facility prior to January 26, 1998.

Proposed new §305.539(a)(2) requires a facility to obtain an individual TPDES wastewater discharge permit prior to discharging into water in the state unless the facility is an existing facility that submitted an application for an individual permit prior to January 26, 1998 and the application has not been withdrawn by the applicant or denied by the commission.

Proposed new §305.539(a)(3) requires a facility to obtain an amendment to an individual TPDES permit prior to an increase in the amount of discharge above the level allowed in the existing permit or a change in the nature of the discharge, unless the facility obtains a temporary or emergency order authorizing the discharge, under Chapter 35, Subchapter F.

Proposed new §305.539(a)(4) allows a facility, during times of flooding or other defined emergencies, to discharge wastewater in excess of permitted flow rates in order to prevent the release of exotic species or the violation of a quarantine condition imposed by the TPWD or the executive director.

Emergency discharges are proposed to be allowed only to the extent necessary to comply with the emergency plan approved by TPWD. The proposed new rule also contains reporting requirements and other requirements related to discharges by a facility under an emergency plan approved by TPWD. For example, a facility must notify the appropriate TNRCC regional office at least 48 hours before initiating any action under an Emergency Plan in response to an emergency event, under proposed §305.539(a)(4)(B). Then, a follow-up report is required within 30 days following initiation of the Emergency Plan, according to the requirements of proposed §305.539(a)(4)(D). Proposed §305.539(a)(4)(C) requires the facility to control discharges made under an Emergency Plan in the most environmentally sound practicable manner. Proposed §305.539(a)(4)(E) places the responsibility on the facility of demonstrating that the discharges were necessary and that conditions required initiation of the Emergency Plan.

Proposed new §305.539(a)(5) requires a facility to immediately notify the TNRCC regional office and Wastewater Permitting Section, and TPWD in order to report shrimp mortalities due to apparent disease. The facility must have the cause of the mortality diagnosed by a pathologist as soon as practicable, must immediately notify the executive director of the results of the diagnosis, and must act to prevent the transmission of the disease to aquatic life endemic to the state. The executive director may require suspension or termination of the discharge of effluent from infected portions of the facility in order to protect aquatic life.

Proposed new §305.539(a)(6) requires a facility to immediately notify the TNRCC regional office and Wastewater Permitting Section when TPWD places the facility under quarantine. This proposed

paragraph also prohibits any discharge from a facility under quarantine unless the discharge is approved by the executive director under certain conditions, such as to allow implementation of the facility's emergency plan approved by TPWD.

Proposed new §305.539(a)(7) requires a facility to comply with the terms and conditions of their individual TPDES permit except as provided in paragraph (4), discussed earlier in this preamble. The proposed new rule also provides that the permit shall include conditions related to suspended solids based on levels and measures adequate to prevent a potential significant adverse response in aquatic organisms, changes in receiving waters flow patterns, and excessive sedimentation of bays, and adequate to prevent a potential significant adverse response in aquatic plants caused by reduction in light due to suspended solids in discharges.

Proposed new §305.539(b) provides that individual TPDES permits applications to which the requirements of this section apply are subject to review by a three-member application review committee comprised of one representative each from the executive director, TPWD, and TDA.

Proposed new §305.539(c) requires the commission, when determining whether to approve an application for a TPDES permit for an aquaculture facility, to consider the applicant's site-assessment environmental report, any sensitive aquatic habitat guidelines established by TPWD, and comments by the three-member application review committee.

FISCAL NOTE

Jeff Grymkoski, Director, Strategic Planning and Appropriations, has determined that for the first five-year period that the proposed rule is in effect, there will be no significant fiscal implications to units of state and local government to implement the provisions of this rule.

The proposed rule would implement certain provisions of SB 873, 76th Legislature, 1999 (An Act relating to the regulation of aquaculture). Specifically, the rule would require shrimp farms operating within the coastal zone to obtain or maintain a site-specific wastewater discharge permit.

PUBLIC BENEFIT

Mr. Grymkoski has also determined that for each of the first five years this rule is in effect, the anticipated public benefit will be increased compliance with the provisions of a wastewater discharge permit by the issuance of site-specific permits for shrimp farms operating within the coastal zone of Texas to protect public health and the environment.

The rule is not anticipated to affect seven shrimp farms operating within the coastal zone of Texas which are currently required to obtain or maintain a site-specific wastewater discharge permit. The rule will require shrimp farms intending to operate in the coastal zone to obtain an individual TPDES permit which is anticipated to cost \$5,000 to \$10,000 in consulting fees, \$2,000 for analysis, \$350 application fee, and up to \$5,000 in annual fees.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSES

Shrimp farmers operating within the coastal zone of Texas that are determined to be a small or micro-business will experience no adverse fiscal implications as a result of implementation of this rule.

The proposed rule would implement certain provisions of SB 873, 76th Legislature, 1999 (An Act relating to the regulation of agriculture). Specifically, the rule would require shrimp farms operating within the coastal zone to obtain or maintain a site-specific wastewater discharge permit.

The rule is not anticipated to affect seven shrimp farms operating within the coastal zone of Texas which are currently required to obtain or maintain a site-specific wastewater discharge permit. This rule will require shrimp farms intending to operate in the coastal zone to obtain an individual TPDES permit which is anticipated to cost \$5,000 to \$10,000 in consulting fees, \$2,000 for analysis, \$350 application fee, and up to \$5,000 in annual fees.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of 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 Texas Government Code. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Current rules

require commercial aquaculture facilities located in the coastal zone engaged in shrimp production to obtain individual TPDES permits. This proposal is intended to make current rules consistent with new statutory language that prevents commercial aquaculture facilities engaged in shrimp production from obtaining coverage for wastewater discharge under a general permit. This rule is proposed with the specific intent of protecting the environment by requiring commercial aquaculture facilities located within the coastal zone and engaged in the production of shrimp that will discharge into water in the state to obtain an individual TPDES wastewater discharge permit that will include conditions relating to suspended solids as well as other environmentally protective requirements. However, the rulemaking is not a major environmental rule because it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rule is consistent with legislation enacted in 1999 by the 76th Legislature in SB 873 which expressly sets out in statute many of the requirements which were already being required of commercial aquaculture facilities under the commission's general authority in Chapter 26 of the Texas Water Code (TWC).

Even if the proposed rule is a major environmental rule, the rule is not subject to a full regulatory analysis under §2001.0225 of the Texas Government Code because the rule does not meet one of the four threshold requirements in that statute. The proposed rule does not exceed a standard set by federal law which is not specifically required by state law because each requirement set out in the rule is expressly required by state law enacted by the 76th Legislature in SB 873. For the same reason, the proposed rule does not exceed an express requirement of state law that is not specifically required by federal law. The proposed rule does not exceed a requirement of a delegation agreement or contract

between the state and federal government to implement a federal program. Rather, the proposed rule is consistent with the September 14, 1998 Memorandum of Understanding (MOU) between the United States Environmental Protection Agency and TNRCC, which authorizes the TNRCC to implement the National Pollutant Discharge Elimination System (NPDES) program in Texas, because the MOU provides that the TNRCC will require a TPDES permit for facilities that will discharge wastewater into waters in the United States. Finally, the rule is not proposed under the general powers of the TNRCC, but rather, under specific state law enacted by the 76th Legislature in SB 873.

TAKING IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to implement changes made by SB 873, 76th Legislature, 1999. Current rules require commercial aquaculture facilities located in the coastal zone engaged in shrimp production to obtain individual TPDES permits. This proposal is intended to make current rules consistent with new statutory language that prevents commercial aquaculture facilities engaged in shrimp production from obtaining coverage for wastewater discharge under a general permit. The proposed rule will maintain standards for commercial aquaculture facilities located within the coastal zone and engaged in the production of shrimp that will discharge into water in the state by requiring them to maintain or obtain an individual TPDES wastewater discharge permit. Promulgation and enforcement of this rule will not burden private real property which is the subject of the rule because the rulemaking is intended to make the current rules consistent with statutory language. This rulemaking does not constitute a taking of private property because a commercial shrimp aquaculture facility located in the coastal zone which discharges

into water in the state will still be able to operate, provided the facility obtains an individual TPDES permit from the commission.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed this rulemaking and found that the proposal is a rulemaking subject to the Texas Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for this proposed rule pursuant to 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are those related to discharge of industrial wastewater to coastal waters in 31 TAC §501.14(f)(1). These policies require that commission rules comply with the requirements of the federal Clean Water Act and implementing regulations; provide for the assessment of water quality on a coastal watershed basis once every two years; to the greatest extent practicable, provide that all permits for the discharge of wastewater within a given watershed contain the same expiration date; identify and rank waters that are not attaining designated uses and establish total maximum daily loads according to the rankings; and require that increases in pollutant loads to coastal waters shall not impair designated uses of coastal waters or result in degradation of coastal waters that exceed swimmable/fishable quality except when necessary for important economic or social development. Current rules require commercial aquaculture facilities located in the coastal zone engaged in shrimp production to obtain individual TPDES permits. This proposal is intended to make current rules consistent with new statutory language that prevents

commercial aquaculture facilities engaged in shrimp production from obtaining coverage for wastewater discharge under a general permit. Promulgation and enforcement of this proposed rule would be consistent with the applicable CMP goals and policies because the rule would maintain standards for commercial aquaculture facilities located within the coastal zone and engaged in the production of shrimp that will discharge into water in the state by requiring them to maintain or obtain an individual TPDES wastewater discharge permit that will include conditions relating to suspended solids as well as other environmentally protective requirements. This will protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs and is consistent with the applicable policies set out above. In addition, the proposed rule does not violate any applicable provisions of the CMP's stated goals and policies. The commission invites public comment on the consistency of the proposed rule.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis and Assessment, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-035-305-WT. Comments must be received by 5:00 p.m., June 5, 2000. For further information, please contact Yvonna Pierce, Wastewater Permitting Section, (512) 239-4618.

STATUTORY AUTHORITY

The new section is proposed under TWC, §5.102, which provides the commission with general powers to carry out duties under the TWC and §§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. The new section is also proposed under TWC, §26.0345, which requires the commission to establish permit conditions relating to suspended solids in discharge permits for shrimp aquaculture facilities located in the coastal zone; Texas Agriculture Code, §134.013, which requires commercial shrimp aquaculture facilities located in the coastal zone to obtain an individual permit from the commission prior to discharging wastewater into water in the state and requires the applicant to provide an environmental site assessment report as part of its application for a permit; Texas Agriculture Code, §134.031, which requires the commission, TPWD, and TDA to enter into a memorandum of understanding related to regulation of aquaculture and the establishment of a three-member application review committee, comprised of one member each appointed by the commission, TPWD, and TDA, to review permit applications to ensure that the proposed discharge will not adversely affect water in the state; Texas Parks and Wildlife Code, §66.007(j), which provides that an aquaculture facility placed under quarantine condition by TPWD may not discharge wastewater from the facility except with approval of the TPWD and authorization from the commission; and Texas Parks and Wildlife Code, §66.007(k), which provides that even if under a quarantine condition, an aquaculture facility shall discharge wastewater as necessary to comply with an emergency plan approved by TPWD and incorporated into a wastewater discharge authorization issued by the commission.

The new section implements TWC, §26.0345; Texas Agriculture Code, §134.013 and §134.031; and Texas Parks and Wildlife Code, §66.007(j) and §66.007(k).

SUBCHAPTER O: ADDITIONAL CONDITIONS AND PROCEDURES
FOR WASTEWATER DISCHARGE PERMITS AND SEWAGE SLUDGE PERMITS

§305.539

§305.539. Additional Requirements for Shrimp Aquaculture Facilities Within the Coastal Zone.

(a) A commercial aquaculture facility located within the coastal zone as delineated under rules of the Coastal Coordination Council, 31 TAC §503.1, and engaged in the production of shrimp that will discharge into water in the state shall comply with the following requirements.

(1) The applicant shall apply for an individual Texas Pollutant Discharge Elimination System (TPDES) permit to the executive director. Unless the application was submitted for an existing facility before January 26, 1998, the application, in addition to the information required by the application form, shall include:

(A) a copy of the site-assessment environmental report submitted to the Texas Department of Agriculture (TDA) as part of the application for an aquaculture license; and

(B) a copy of an Emergency Plan, approved by the Texas Parks and Wildlife Department (TPWD), for incorporation into the TPDES permit.

(2) The applicant shall obtain an individual TPDES wastewater discharge permit in accordance with the requirements of this chapter before discharging into water in the state, except for an existing facility that submitted an application for an individual permit before January 26, 1998 that has not been withdrawn by the applicant or denied by the commission.

(3) The applicant shall obtain an amendment to an individual TPDES permit prior to an increase in the amount of discharge above the levels allowed in the existing permit or a change in the nature of the discharge, except as otherwise provided by Chapter 35, Subchapter F of this title (relating to Water Quality Emergency and Temporary Orders).

(4) The facility shall comply with the terms and conditions of its individual TPDES permit, and any quarantine conditions imposed by TPWD, except in cases where the facility is in imminent danger of overflow, flooding, or similar conditions that could result in either the release of exotic species that are regulated by the TPWD or that would result in the violation of a quarantine condition imposed by the executive director or the TPWD. In such cases, the facility may discharge effluent in excess of the permitted flow rates, but only to the extent necessary to comply with an Emergency Plan that is approved by the TPWD, and the following provisions shall also apply.

(A) The facility is not subject to effluent limitations, discharge flow limitations, and other effluent monitoring requirements in the permit for discharges that comply with an Emergency Plan approved by the TPWD.

(B) A facility shall notify the appropriate TNRCC regional office at least 48 hours prior to initiating any action under an Emergency Plan in response to an emergency event, such as landfall of a hurricane, and shall notify the regional office as soon as practicable following initiation of the Emergency Plan.

(C) The facility shall control discharges made under an Emergency Plan in the most environmentally sound manner that is practicable.

(D) Within 30 days following initiation of the Emergency Plan, the facility shall submit a written report to the appropriate TNRCC regional office that includes the following information:

(i) the reason for initiation of the plan;

(ii) actions taken to prevent or mitigate impacts of the discharge to the receiving stream;

(iii) volumes of wastewater discharged;

(iv) the dates that discharges occurred; and

(v) a general summary of receiving stream conditions at the time of the discharges.

(E) The facility is responsible for demonstrating that the discharges were necessary and that conditions required initiation of the Emergency Plan.

(5) A facility engaged in the propagation and/or rearing of shrimp which suffer mortalities due to apparent disease shall immediately report the apparent disease to the TNRCC regional office and Wastewater Permitting Section, and to TPWD, and shall have the cause of mortality diagnosed by a pathologist as soon as practicable. The executive director shall be immediately notified of the results of the diagnosis. Any actions which are deemed necessary by the discharger to prevent transmission of the disease to aquatic life endemic to waters in the state shall be implemented as soon as possible. The executive director may require suspension or termination of the discharge of effluent from infected portions of the facility as is necessary to protect aquatic life in the receiving stream from potential adverse effects.

(6) A facility required to hold a permit from TPWD regulating the possession and sale of exotic fish and shellfish shall immediately notify the TNRCC regional office and Wastewater Permitting Section if the TPWD places the facility under quarantine condition. There shall be no discharge during the quarantine period, except upon approval by the executive director. The executive director may suspend or terminate the prohibition on discharge to allow for implementation of the facility's

Emergency Plan approved by TPWD, following the lifting of the quarantine condition by TPWD, or based on other relevant factors.

(7) Except as provided in paragraph (4) of this subsection, a facility shall comply with the terms and conditions in its individual TPDES permit, which shall include conditions related to suspended solids based on levels and measures adequate to prevent:

(A) a potential significant adverse response in aquatic organisms, changes in flow patterns of receiving waters, or excessive sedimentation of bays; and

(B) a potential significant adverse response in aquatic plants caused by reduction of light due to suspended solids in discharges.

(b) All new, amendment, or renewal applications for an individual TPDES permit to which the requirements of this section apply are subject to review by a three-member application review committee comprised of one representative each from the executive director, TPWD, and TDA.

(c) In considering whether to approve an application for a new, amended, or renewed individual TPDES permit for a commercial aquaculture facility located within the coastal zone and engaged in the production of shrimp, the commission shall consider the following:

(1) the site-assessment environmental report provided by the applicant under subsection (a)(1)(A) of this section;

(2) any sensitive aquatic habitat guidelines established by TPWD; and

(3) any comments on the application provided by the three-member application review committee referred to in subsection (b) of this section.

