FACT SHEET AND EXECUTIVE DIRECTOR'S PRELIMINARY DECISION

For proposed Texas Pollutant Discharge Elimination System (TPDES) General Permit No. TXR040000 to discharge from small municipal separate storm sewer systems (MS4s) into surface water in the state.

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Permit Action: New General TPDES Permit

I. Summary

The Texas Commission on Environmental Quality (TCEQ) is proposing to issue a general permit authorizing discharges from small municipal separate storm sewer systems (MS4s) into surface water in the state. The general permit specifies which MS4s must obtain permit coverage, which are eligible for waivers, and which must obtain individual permit coverage. The permit also specifies that where discharges will reach Waters of the United States, a storm water management program must be developed and implemented, and includes the minimum requirements for the program.

II. Executive Director's Recommendation

The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. It is proposed that the permit be issued to expire five years from date of issuance following the requirements of 30 TAC § 205.5(a).

III. Permit Applicability and Coverage

There are two ways in which a small MS4 would be required to obtain permit coverage. First, the federal NPDES Phase II storm water rules require authorization for the discharge of storm water from MS4s located within urbanized areas (UAs) as defined by the U.S. Census Bureau. These MS4s are often referred to as "regulated" MS4s. In addition, TCEQ can also "designate" an MS4 as requiring coverage. There are two groups that fall into this category. First, the rules require that TCEQ develop and apply designation criteria to MS4s located outside of a UA which serve a jurisdiction with 10,000 or more people, and that have an average density of 1,000 or more people/square mile. Secondly, the rules require TCEQ to designate any small MS4 as a regulated MS4 where the MS4 substantially contributes pollutants to a physically interconnected regulated MS4. MS4s meeting either of these criteria would be referred to as "designated" MS4s. The portion of the MS4 required to meet the conditions of the proposed general permit is that portion located within a UA, as well as any portion that is individually designated by the TCEQ. A map detailing UAs located in Texas is available at:

http://cfpub.epa.gov/npdes/stormwater/urbanmapresult.cfm?state=TX

In the preamble to the Phase II rules (See FR 64, No. 235, p. 68749), the EPA discusses instances where a municipal separate storm sewer may not be considered a system. For example, EPA used an example that a storm sewer serving only a single federal building would not be considered a system, such as a post office building or an urban office of the National Park Service. EPA further stated that storm sewers for state or federal facilities consisting of more than one building may be treated as a single building rather than as an MS4, and that the permitting authority in each state must determine whether those complexes should be regulated. The TCEQ agrees that certain complexes may have storm drainage structures that operate independently of each other (such as roof top drains flowing to the city street) rather than as a system. The TCEQ believes that most elementary and secondary schools do not operate a system, and that each school building would normally drain to a city's MS4 rather than to a system of drains operated by a school district. Similarly, a public office building complex may include roof and parking lot drains that flow to another entity's system. Universities, federal facilities, and many other public complexes do have a constructed drainage system, which would be defined as a small MS4, even if the drains eventually reached another MS4. In this general permit, the definition for small MS4 excludes storm drains associated with municipal (publicly owned) office and education complexes, where the complexes serve a nonresidential population, and where the buildings are not part of a larger MS4.

A. Regulated MS4s Subject to Permitting

The proposed general permit would authorize the discharge of storm water runoff and certain non-storm water discharges from the following small MS4s:

1. MS4s located wholly or partially within an urbanized area (UA) as defined by the U.S. Census Bureau in the 1990 or the 2000 census, and

2. MS4s individually designated by the TCEQ as described in Section III.B. below.

B. Designated MS4s Subject to Permitting

Certain MS4s may be designated by the TCEQ as requiring permit coverage based on federal requirements at 40 CFR § 122.32(a)(2). The TCEQ has developed the following criteria, one or more of which may be considered in designating an MS4:

1. Controls for discharges are determined to be necessary for source water protection of public drinking water resources based on the results of source water assessments by the TCEQ.

2. Controls for discharges are necessary to protect sea grass areas of Texas bays as delineated by the Texas Parks & Wildlife Department.

3. Controls for discharges are necessary to protect receiving waters designated as having an exceptional aquatic life use.

4. Controls are required for pollutants of concern expected to be present in discharges to a receiving water listed on the Clean Water Act Section 303(d) list based on an approved total maximum daily loading plan.

5. Discharges from an adjacent small MS4 are determined by TCEQ to be significantly contributing pollutants to the regulated MS4. The TCEQ would make this determination after receiving a written request by a regulated adjacent MS4 operator.

6. Additional factors relative to the environmental sensitivity of receiving watersheds.

Specific thresholds are not established for each of the designation criteria. Instead, designation must occur following a case-by-case consideration and is based on a finding that controls are necessary to protect water quality. If designated, the MS4 operator will be notified by the Executive Director and allowed to apply for authorization under either the proposed general permit or an individual TPDES storm water permit. The application for either permit must be submitted within 180 days of the notice.

The TCEQ applied these designation criteria to the small MS4s located outside of a UA which serve a jurisdiction with 10,000 or more people, and which have an average density of 1,000 or more people/square mile. At this time, the TCEQ has not designated any MS4 or portion of an MS4 that is not located within an urbanized area (UA). Additional MS4s may be designated in the future, and designated MS4s will be required to submit an NOI and SWMP within 180 days of being notified in writing of that designation.

C. Permit Waivers

Two potential waivers from permitting requirements, as allowed in the federal Phase II rules (40 CFR § 122.32), are included in the proposed permit.

1. Waiver Option No. 1: The MS4 within an urbanized area may qualify for a waiver if it serves a population of less than 1,000, *and*:

   a. the MS4 is not contributing substantially to the pollutant loadings of a physically interconnected MS4 that is regulated by the TPDES or NPDES storm water program (40 CFR § 122.32(d)) and

   b. if the MS4 discharges any pollutant(s) identified as a cause of impairment to a receiving water body, and storm water controls are determined as not needed based on wasteload allocations that are part of an EPA approved or established "total maximum daily load" (TMDL) that addresses the pollutant(s) of concern.

   c. In order to meet this waiver, an MS4 must submit a letter requesting the waiver including the certifying statement that the above-described criteria for Waiver Option No. 1 are met.

2. Waiver Option No. 2: The MS4 within an urbanized area may qualify for a waiver if it

serves a population of less than 10,000 and the TCEQ has evaluated all Waters of the United States (including small streams, tributaries, lakes, and ponds) that receive a discharge from the MS4; and

a. for all such waters, the TCEQ has determined that storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established TMDL that addresses the pollutant(s) of concern or, if a TMDL has not been developed or approved, an equivalent analysis that determines sources and allocations for the pollutant(s) of concern; and

b. the TCEQ has determined that future discharges from the MS4 do not have the potential to exceed water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

The receiving waters' evaluation is a TMDL-equivalent evaluation that may be performed by the MS4 using TCEQ protocol with appropriate guidance from the TCEQ. The evaluation would need to include the pollutants of concern, including at a minimum: biochemical oxygen demand (5-day); sediment (or a parameter that addresses sediment such as total suspended solids, turbidity, or siltation); pathogens; oil and grease; and any other pollutant that has been identified as a cause of impairment of any receiving water body. The MS4 must coordinate with TCEQ Wastewater Permitting staff and Water Quality Assessment staff prior to initiating such a study.

Because of the comprehensive nature of the required receiving water evaluation, and the necessary finding that future discharges from the MS4 could not potentially exceed water quality standards, Waiver Option No. 2 will be difficult to obtain. However, this option is allowed by federal rules and is therefore included in the proposed general permit and made available to certain small MS4s.

D. Ineligible Discharges

The following discharges are not eligible for permit coverage under the proposed general permit and must obtain coverage under either an individual or an alternative general TPDES permit:

1. Discharges from medium and large MS4s based on 1990 U.S. Census Bureau data;

2. Discharges from small MS4s that would cause or contribute to a violation of water quality standards or that would fail to protect and maintain existing designated uses of receiving waters;

3. New sources or new discharges of the constituents of concern to impaired waters, unless otherwise allowable under TCEQ rules, applicable state law, and any TMDL and TMDL implementation plan that exists for the applicable receiving water;

4. Storm water discharges that combine with sources of non-storm water, unless the non-

storm water source is an allowable non-storm water discharge described in the proposed general permit, or the non-storm water source is authorized under a separate TPDES permit; and

5. Discharges otherwise prohibited under existing state rules.

E. Allowable Non-storm Water Discharges

The following non-storm water sources may be discharged from the MS4 and are not required to be addressed in the MS4's Illicit Discharge and Detection measure, or other minimum control measures (MCMs), provided that they have not been determined by the MS4 operator to be substantial sources of pollutants to the MS4:

1. water line flushing (excluding discharges of hyperchlorinated water, unless the water is first dechlorinated and discharges are not expected to adversely affect aquatic life);
2. runoff or return flow from landscape irrigation, lawn irrigation, and other irrigation utilizing potable water, groundwater, or surface water sources;
3. discharges from potable water sources;
4. diverted stream flows;
5. rising ground waters and springs;
6. uncontaminated ground water infiltration;
7. uncontaminated pumped ground water;
8. foundation and footing drains;
9. air-conditioning condensation;
10. water from crawl space pumps;
11. individual residential vehicle washing;
12. flows from wetlands and riparian habitats;
13. dechlorinated swimming pool discharges;
14. street wash water;
15. discharges or flows from fire fighting activities (fire fighting activities do not include washing of trucks, runoff water from training activities, test water from fire suppression systems, and similar activities); and

16. other similar occasional incidental non-storm water discharges, unless the TCEQ develops permits or regulations addressing these discharges.

Discharge of the waters listed above may contain pollutants that would need to be addressed by the MS4. For example, discharges from water line flushing could contain levels of chlorine that could have an impact on aquatic life, in which case the MS4 may need to require that controls be put on the discharge of chlorinated water line flushing.

F. Discharges from MS4 Construction Activities

The proposed general permit provides the MS4 with authorization to discharge of storm water runoff, and certain non-storm water runoff, from construction sites where the MS4 can meet and maintain the status as the operator of the construction activity. In order for the MS4 operator to cover these activities under this general permit, an optional storm water minimum control measure (MCM) must be developed and implemented to address these activities. The MCM must describe the general procedures the MS4 operator will take to develop and implement a storm water pollution prevention plan (SWP3), with consideration for local weather and soil conditions, and the steps to be taken to meet and maintain the status as operator at MS4 construction sites. The permittee must also describe in the MCM the area within which construction related discharges will be authorized under this general permit. The permittee may choose to cover activities exclusively within the urbanized area boundary, within corporate limits or extra territorial jurisdictions (for cities), within special districts (for municipal utility districts and other similar entities), or within other similar jurisdictional boundaries of the permittee. However, discharges from construction activities outside of the regulated area, such as outside of the urbanized area or outside of the area(s) designated by TCEQ, are only eligible for authorization under this general permit for those areas where the MS4 operator meets the requirements of Parts III.A.1. through III.A.6 of the general permit, related to MCMs. The notice of intent (NOI) will require the permittee to provide information or a description on the boundary of coverage.

A separate detailed SWP3 must be developed and implemented for each specific construction site. Contractors at an MS4 construction site are not required to obtain separate authorization for storm water discharges where the MS4 operator can meet and maintain the status of sole operator for the site, where the contractor does not meet the definition of operator for the site, and where the SWP3 is developed to address the activities of the contractor.

40 CFR § 122.28(b)(2)(i), as adopted by reference in Title 30, Texas Administrative Code (TAC) Chapter 205, requires the submittal of an NOI to authorize certain discharges under a general permit. While 40 CFR § 122.28(b)(2)(v) does allow some exceptions to this requirement, it does not exclude the permittee from the requirement to submit an NOI for authorization of discharges of storm water runoff associated with industrial activity. Because federal rules at 40 CFR § 122.26(b)(14)(x) includes large construction sites in its definition of industrial activity, discharges of construction activity of five or more acres (including activities which are part of a larger common plan of development) are required to submit an NOI. Therefore, if an MS4 operator seeks to obtain coverage for these discharges under this proposed general permit, then

the MS4 operator must include information on the construction activities on its NOI required under this general permit. The applicant must develop site-specific information on how construction activities will be conducted and SWP3s developed to control pollution. This information must be formalized as an MCM and incorporated as a part of the MS4 operator's storm water management program (SWMP).

The SWMP that is submitted with the NOI must include this optional MCM in order for the permittee's construction activities to be eligible for authorization under this general permit. The NOI will include a certification statement that the MS4 can elect to choose, in which the MS4 operator agrees to comply with the conditions and requirements of the general permit. This certification on the NOI will satisfy the previously cited regulatory requirement regarding the NOI. Separate NOIs for each construction activity are not required, provided that the appropriate information is included in the optional control measure. The MS4 operator must subsequently develop a separate SWP3 for each large and small construction activity, and must post a construction site notice that includes a signed certification that a SWP3 was developed and is implemented according to the conditions and requirements of this general permit. The site notice can be signed by a person properly authorized by the MS4 operator under 30 TAC § 305.128, regarding delegation of signatory authority for reports.

If the MS4 operator determines that it does not wish to implement the optional seventh MCM at the time of original application under this general permit, and at a later date does choose to utilize this option, then a notice of change (NOC) will be equivalent to the NOI required under the rules.

If this optional MCM is not developed by the MS4 operator, then discharges of storm water runoff from large and small construction activities must be authorized under a separate TPDES storm water permit. Additionally, if the MS4 operator either cannot or chooses not to meet and maintain the status as the sole operator for any specific construction activity, then authorization under a separate TPDES permit must be obtained for the additional operators, during construction activities at that specific site.

IV. Permit Conditions

A. Notice of Intent

The proposed permit would require MS4s to submit to the TCEQ a notice of intent (NOI) to comply with the conditions of the general permit, and a Storm Water Management Program (SWMP).

B. Public Notice and Public Participation

An applicant under the proposed general permit would be subject to the following procedures:

1. The applicant must submit the NOI and attached SWMP to the executive director.

2. After the applicant receives written instructions from the TCEQ's Office of Chief Clerk, the applicant must publish notice of the executive director's preliminary determination on

the NOI and SWMP.

3. The notice must include:

   a. the legal name of the small MS4 operator;

   b. identify whether the NOI is for a new MS4 or is a renewal of an existing operation;

   c. the address of the applicant;

   d. a brief summary of the information included in the NOI, such as the general location of the MS4 and a description of the classified receiving waters that receive the discharges from the MS4;

   e. the location and mailing address where the public may provide comments to the TCEQ;

   f. the public location where copies of the NOI and SWMP, as well as the executive director's general permit and fact sheet, may be reviewed; and

   g. if required by the executive director, the date, time, and location of the public meeting.

4. This notice must be published at least once in the newspaper of largest circulation in the county where the small MS4 is located. If the small MS4 is located in multiple counties, the notice must be published at least once in the newspaper of largest circulation in the county containing the largest resident population. This notice must provide opportunity for the public to submit comments on the NOI and SWMP. In addition, the notice must allow the public to request a public meeting. A public meeting will be held if the TCEQ determines that there is significant public interest.

5. The public comment period begins on the first date the notice is published and ends 30 days later, unless a public meeting is held. If a public meeting is held, the comment period will end at the closing of the public meeting. The public may submit written comments to the TCEQ Office of Chief Clerk during the comment period detailing how the NOI or SWMP for the small MS4 fails to meet the technical requirements or conditions of this general permit.

6. If significant public interest exists, the executive director will direct the applicant to publish a notice of the public meeting and to hold the public meeting. The applicant must publish notice of a public meeting at least 30 days before the meeting and hold the public meeting in a county where the small MS4 is located. TCEQ staff will facilitate the meeting.

7. If a public meeting is held, the applicant must describe the contents of the NOI and SWMP. The applicant must also provide maps and other data on the small MS4. The

applicant must provide a sign in sheet for attendees to register their names and addresses and furnish the sheet to the executive director. A public meeting held under this general permit is not an evidentiary proceeding.

8. The applicant must file with the Chief Clerk a copy and an affidavit of the publication of notice(s) within 60 days of receiving the written instructions from the Office of Chief Clerk.

9. The executive director, after considering public comment, must approve or deny the NOI based on whether the NOI and SWMP meet the requirements of this general permit.

10. Persons whose names and addresses appear legibly on the sign in sheet from the public meeting and persons who submitted written comments to the TCEQ will be notified by the TCEQ's Office of Chief Clerk of the executive director's decision regarding the authorization.

C. Storm Water Management Program (SWMP)

1. Small MS4s must develop a SWMP, according to the provisions of this general permit, to the extent allowable under state and local law, to address the portions of the MS4 that are either located within the UA or that are designated by the TCEQ, with discharges that reach Waters of the United States. Waters of the United States are defined in the general permit. Waters of the United States do not include waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition). This exclusion applies only to manmade bodies of water that neither were originally created in Waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of Waters of the United States. Waters of the United States do not include prior converted cropland.

   The SWMP is a comprehensive document that details the steps that the MS4 will take to reduce or eliminate pollutants in storm water discharges to the maximum extent practicable (MEP). To the extent allowable under local law means that MS4s must develop any necessary ordinances, regulations, or other regulatory controls to meet the general permit requirements to the extent that their authority to make such ordinances is not prohibited by state or federal statutes or regulations. Where the permittee lacks the authority to develop ordinances or to implement enforcement actions, the general permit states that the permittee must attempt to enter into inter-local agreements with municipalities in which the MS4 is located. These inter-local agreements must include procedures for enforcement and inspections to the extent necessary to meet the goals of the general permit. Where the permittee is unable to enter into an inter-local agreement, the permittee may report instances of non-compliance or possible illicit discharges to the TCEQ's Field Operations Division for possible follow-up investigations and/or enforcement

   The proposed SWMP requirements were developed based on federal Phase II rules (published in the *Federal Register* 12/08/99), a model MS4 permit that was developed by

the Environmental Protection Agency, as well as comments from a stakeholder workgroup. The proposed general permit would allow MS4s to share resources in meeting the responsibilities of the SWMP with other regulated MS4s that are either physically interconnected or that are located in the same watershed. This allowance will help to foster a more coordinated approach to resolving local water quality issues and to provide a more efficient use of local MS4 resources. MS4s may combine or share efforts necessary to meet the SWMP requirements of the permit, but each MS4 must be separately authorized (individual NOIs are required). Additionally, individual SWMPs must be developed and maintained by each of the MS4s. Each operator is separately responsible for compliance with the conditions of the general permit and the SWMP, even if efforts are combined or shared between the MS4s.

2. The small MS4 must develop a SWMP to include the following six MCMs, which is based on federal rules at 40 CFR § 122.34(b). For each MCM, the small MS4 operator must keep relevant records in the SWMP:

   a. Public Education and Outreach on Storm Water Quality Issues

      Federal rules at 40 CFR § 122.34(b)(1) require small MS4 operators to develop a public education program to distribute educational materials to the community or to conduct equivalent outreach activities that will be used to inform the public. The draft general permit allows the MS4 operator to determine the most appropriate sections of the population at which to direct the program; however, they must consider specific groups as listed in the general permit, or must provide justification in the SWMP if a listed group is not included in the program.

      The outreach must inform the public about the impacts that pollution in storm water runoff can have on water quality, hazards associated with illegal discharges and improper disposal of waste, and ways they can minimize their impact on storm water quality.

   b. Public Involvement/Participation

      The MS4 operator must implement a public involvement/participation program to include opportunities for constituents within the MS4 area to participate in the SWMP development and implementation. This requirement is consistent with 40 CFR § 122.34(b)(2). Correctional facilities will not be required to implement this MCM.

   c. Illicit Discharge Detection and Elimination

      (1) Illicit Discharges: The small MS4 operator must develop a section within the SWMP to establish a program to detect and eliminate illicit discharges to the MS4. To the extent allowable under state and local law, an ordinance or other regulatory mechanism must be utilized to prohibit and eliminate illicit discharges. Program elements must include:

(a) Detection: The SWMP must list the techniques used for detecting illicit discharges; and

(b) Elimination: The SWMP must include appropriate actions and, to the extent allowable under State and local law, establish enforcement procedures for removing the source of an illicit discharge.

(2) Allowable Non-Storm Water Discharges: The non-storm water flows listed in the general permit will not need to be considered by the small MS4 operator as an illicit discharge unless the operator of the MS4 identifies the flow as a significant source of pollutants to the MS4. In lieu of considering non-storm water sources on a case-by-case basis, the MS4 operator may develop a list of common and incidental non-storm water discharges that will not be addressed as illicit discharges requiring elimination. If developed, the listed sources must not be reasonably expected to be significant sources of pollutants either because of the nature of the discharge or the conditions that have been established by the MS4 operator prior to accepting the discharge to the MS4. All local controls and conditions established for these discharges must be described in the SWMP and any changes from the initial SWMP must be implemented according to Part II.D.3. of the general permit, and included in the annual report as described in Part IV.B.2. of the permit.

(3) Storm Sewer Map: The general permit requires that a map of the storm sewer system must be developed and must include the following:

(a) the location of all outfalls;

(b) the names and locations of all waters of the U.S. that receive discharges from the outfalls; and

(c) any additional information needed to implement the SWMP.

The above mapping requirements are consistent with the federal Phase 2 rules at 40 CFR § 122.34(b)(3)(ii)(A). In the Phase 2 *Federal Register* (FR) 64 68756 dated December 8, 1999,the EPA describes that a map with the location of all outfalls will help the regulated MS4 to conduct dry weather field screening for non-storm water flows and to respond to illicit discharge reports from the public. EPA recommended that the MS4 operator collect any existing information from public records, and follows up with field surveys to verify locations of outfalls.

The SWMP must include the source of information used to develop the storm sewer map, including how the outfalls were verified and how the map will be regularly updated.

d. Construction Site Storm Water Runoff Control

The MS4 operator, to the extent allowable under State and local law, must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre or if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more of land. Where discrete construction projects within a larger common plan of development or sale are located greater than or equal to 1/4 mile apart, and the area between the projects is not being disturbed, each individual project can be treated as a separate plan of development or sale, provided that any interconnecting road, pipeline or utility project that is part of the same "common plan" is not concurrently being disturbed. For example, if a utility company was constructing new trunk lines off an existing transmission line to serve separate residential subdivisions located more than 1/4 mile apart, the two trunk line projects could be considered to be separate projects. If separate construction projects occur that are part of the same overall project and are less than 1/4 mile apart, then it would be appropriate to consider the combined acreage in determining the larger common plan.

The MS4 operator is not required to develop, implement, nor enforce a program to reduce pollutant discharges from sites where the construction site operator has obtained a waiver from permit requirements under TPDES General Permit TXR150000 based on a low potential for erosion.

(1) The program must include the development and implementation of, at a minimum, an ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State and local law.

(2) Requirements for construction site contractors to, at a minimum:

   (a) implement appropriate erosion and sediment control BMPs; and

   (b) control waste such as discarded building materials, concrete truck washout water, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality.

(3) The MS4 operator must develop procedures for:

   (a) site plan review which incorporate consideration of potential water quality impacts;

   (b) receipt and consideration of information submitted by the public; and

   (c) site inspection and enforcement of control measures to the extent allowable under State and local law.

e. Post-Construction Storm Water Management in Areas of New Development and Redevelopment

As required under 40 CFR § 122.34(b)(5), the MS4 operator must develop, implement, and enforce a program (to the extent allowable under State and local law) to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre of land that discharge into the MS4. The program must ensure that controls are in place that would prevent or minimize water quality impacts. The MS4 operator is required to:

(1) Develop and implement strategies which include a combination of structural and/or nonstructural BMPs appropriate for the community;

(2) Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State and local law; and

(3) Ensure adequate long-term operation and maintenance of BMPs.

f. Pollution Prevention / Good Housekeeping Measures for Municipal Operations

The general permit requires that a section within the SWMP be developed to establish an operation and maintenance program that will help to prevent or reduce pollutant runoff from municipal operations.

(1) Good Housekeeping and BMPs: The small MS4 operator must identify (and either implement or continue) housekeeping measures and BMPs to prevent or reduce pollutant runoff from municipal operations such as parks and fleet maintenance areas.

(2) Training: The operator must develop a training program for all employees responsible for the municipal operations which are subject to the pollution prevention/good housekeeping program. This training must include materials directed at preventing and reducing storm water pollution from municipal operations. Materials may be developed, or obtained from other organizations and sources, and examples or descriptions of the materials must be included in the SWMP.

(3) Structural Control Maintenance: The MS4 operator must maintain any structural controls at a frequency determined by the MS4 operator, consistent with maintaining the effectiveness of the BMP.

(4) Disposal of Waste: Waste removed from the MS4 and waste that is collected as a result of maintenance of storm water structural controls must be properly disposed. A section within the SWMP must be developed to include procedures for the proper disposal of waste, including dredge spoil,

accumulated sediments, and floatables.

(5) Municipal Operations and Industrial Activities: The SWMP must include a list of all municipal operations that are subject to the operation, maintenance, or training program developed under the conditions of this section; as well as municipally owned or operated industrial activities that are subject to TPDES storm water regulations.

3. The small MS4 may develop an optional seventh MCM for discharges from construction activities, and may obtain authorization under this general permit for discharges from construction activities where the MS4 is the operator. In order to qualify for this provision, MS4s must maintain control over the plans and specifications of the construction activity, or must maintain the status of the operator with day-to-day operational control over the construction site, to the extent necessary to meet the requirements of the SWP3 for that site. Implementation of this minimum measure allows the MS4 to obtain this necessary authorization under the terms of this five-year term permit and replaces the requirement to seek separate permit coverage for each construction activity that it conducts. Where the MS4 is able to demonstrate itself to be the sole operator for these activities, by meeting both criteria listed in the definition of "construction site operator," contractors would not have to seek separate authorization. This provision is allowed for construction activities located in the regulated area, such as within a UA or within an area designated by TCEQ, MS4s are required to summarize in the annual report pertinent information related to the construction activities performed in the previous year. As discussed above in Section III.E., MS4s electing this provision must notify the TCEQ upon submittal of the NOI form, along with an attached SWMP that includes this measure. Utilization of the optional seventh MCM does not preclude an MS4 from obtaining coverage under the TPDES Construction General Permit, TXR150000, or under an individual TPDES permit.

4. SWMP Implementation.

The SWMP may be implemented on a scheduled stepwise basis throughout the term of the general permit. If full development and implementation of the SWMP is not practicable, then the program must be developed with targeted milestones establishing a schedule that represents the "maximum extent practicable." Implementation must be initiated upon receipt of written approval from the TCEQ of the NOI and SWMP The general permit contains provisions that allow revisions to the SWMP throughout the term of the permit, without immediate notification to the TCEQ, so that SWMPs can be adjusted based on experiences and findings to become more effective and efficient. Schedules for SWMP implementation, the status of the implementation schedules, and modifications to the SWMP must be summarized in the annual report. These permit provisions allow MS4s to develop and implement SWMPs according to available funding, manpower, and ability and allow for revisions where more efficient or effective BMPs are identified. Complete implementation of the SWMP is required within five years from the date of issuance of the general permit.

Federal rules at 40 CFR § 123.35(g) require permitting authorities to issue a menu of BMPs to assist small MS4s in complying with the Phase 2 regulations. The TCEQ has adopted the EPA menu of BMPs by including that menu as a resource to small MS4s through
a link on the TCEQ storm water web page at:

http://cfpub.epa.gov/npdes/stormwater/menuofbmps/menu.cfm.

D. Reporting Requirements

1. The proposed general permit requires MS4s to provide documentation on the development, implementation, and evaluation of the SWMP. The documentation must be included as a part of the SWMP and may be required to be submitted in the annual report. The preparation and review of the annual report by the MS4 may ensure progressive improvement of storm water controls and reduce pollutants to the maximum extent practicable. At a minimum, the documentation must include:

   a. a list of any public or private entities assisting with the development or implementation of the SWMP;

   b. a list of all best management practices (BMPs) and measurable goals for each of the MCMs;

   c. a description of how each measurable goal will be evaluated;

   d. a summary that addresses the overall program, including how the BMP's and measurable goals were selected;

   e. if applicable, a list of all permittees which share responsibilities for implementing an SWMP or portions of an SWMP, and a list of each of their responsibilities for the development and implementation of the SWMP; and

   f. if applicable, a summary that describes why the permittee chose to share resources to fulfill the SWMP, and how each participant benefit.

2. Additionally, the MS4 must evaluate the following items and must include the information in an annual report:

   a. program compliance;

   b. the appropriateness of the chosen BMPs; and

   c. progress toward achieving identified measurable goals.

V. Addresses

Questions concerning this proposed draft general permit should be sent to:

Storm Water & Pretreatment Team
Wastewater Permitting Section (MC-148)
Water Quality Division
TCEQ
P.O. Box 13087
Austin, TX 78711-3087
(512) 239-4671

Comments regarding the proposed draft general permit should be sent to:

Chief Clerk's Office (MC-105)
TCEQ
P.O. Box 13087
Austin, TX 78711-3087

Supplementary information on this Fact Sheet is organized as follows:

VI. Legal Basis
VII. Regulatory Background
VIII. Permit Coverage
IX. Technology-Based Requirements
X. Water Quality-Based Requirements
XI. Monitoring
XII. Procedures for Final Decision
XIII. Administrative Record

VI. Legal Basis

§ 26.121 of the Texas Water Code (TWC) makes it unlawful to discharge pollutants into or adjacent to water in the state except as authorized by a rule, permit, or order issued by the commission. TWC, § 26.027 authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state. TWC, § 26.040 provides the commission with authority to amend rules adopted under TWC § 26.040 prior to amendment of the statute by House Bill (HB) 1542 in 1997, and to authorize waste discharges by general permit. On September 14, 1998, the TCEQ received authority from the United States Environmental Protection Agency (EPA) to administer the Texas Pollutant Discharge Elimination System (TPDES). The TCEQ and the EPA have signed a Memorandum of Agreement (MOA) which authorizes the administration of the National Pollutant Discharge Elimination System (NPDES) program to the TCEQ as it applies to the State of Texas.

CWA, §§ 301, 304, and 401 (33 United States Code (USC), §§ 1331, 1314, and 1341) include provisions which state that NPDES permits must include effluent limitations requiring authorized discharges to: (1) meet standards reflecting levels of technological capability; (2) comply with EPA-approved state water quality standards; and (3) comply with other state requirements adopted under authority retained by states under CWA, § 510, 33 USC, §1370.

VII. Regulatory Background

The 1972 amendments to the Federal Water Pollution Control Act, later referred to as the Clean Water Act (CWA), prohibit the discharge of any pollutant to navigable waters of the United States from a point source unless the discharge is authorized by an NPDES permit. Efforts to improve water quality under the NPDES program traditionally have focused on reducing pollutants in industrial process wastewater and municipal sewage treatment plant discharges. Over time, it has become evident that more diffuse sources of water pollution, such as storm water runoff from MS4s, are also significant contributors to water quality problems. EPA developed permit requirements for MS4s that are intended to improve water quality by reducing the quantity of pollutants that storm water discharges into storm sewer systems during storm events.

In 1990, EPA promulgated rules establishing Phase I of the NPDES storm water program. Phase I addresses discharges from medium and large MS4s, which are those MS4s serving a population more than 100,000 people, based on the 1990 census. Phase I MS4s were required by the EPA to obtain individual NPDES permits. No additional Phase I MS4s will be created by later census results. The federal Phase II storm water regulations extend permitting requirements to certain "small" MS4s, and require a more general storm water management program than was required for medium and large MS4s. The Phase II regulations were published on December 8, 1999 in the *Federal Register,* requiring affected small MS4s to obtain permit coverage by March 10, 2003. The Phase II regulations are identified in federal rules at 40 CFR §§ 122.30 through 122.37, which were adopted by the TCEQ at 30 TAC § 281.25(b). This proposed TPDES general permit would offer the necessary authorization for these MS4 discharges.

VIII. Permit Coverage

A. The proposed general permit would apply to discharges of storm water runoff associated with small MS4s. The guidelines for small MS4s were published in the *Federal Register* on December 8, 1999 (64 FR 68722).

B. Applicants seeking authorization to discharge storm water runoff from small MS4s under the conditions and requirements of the proposed general permit must submit a completed Notice of Intent (NOI) on a form approved by the executive director, as well as a description of the SWMP. The NOI form will include at a minimum, the legal name and address of the owner and operator, the facility name and address, specific description of its location, (including the street address, if applicable, and county), the type of facility and discharge, the name of the receiving water, the boundary of the area where construction activities are covered under the general permit (if the optional MCM is developed), and any other information requested by the TCEQ. The NOI must be signed according to TCEQ rules at 30 TAC § 305.44, which establishes requirements regarding who may sign an application for a permit applicant, and requires that a legal certification be made regarding the permit application. The specific language in this rule can be found at http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac, by searching Title 30, Texas Administrative Code (TAC), Chapter 305, Subchapter C (related to Application for Permit).

MS4 operators can locate information regarding the classified segment(s) receiving the discharges from the MS4 in the "Atlas of Texas Surface Waters" at the following TCEQ web address. This document includes identification numbers, descriptions, and maps:

http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-316/index.html

MS4 operators can find the latest EPA-approved list of impaired water bodies (the Texas 303(d) List) at the following TCEQ web address:

http://www.tceq.state.tx.us/compliance/monitoring/water/quality/data/wqm/305_303.html

C. Submission of an NOI and SWMP is an acknowledgment by the regulated MS4 that the conditions of this general permit are applicable to the proposed discharges and that the applicant agrees to comply with the conditions of the general permit. Discharge authorization begins when the applicant is notified by TCEQ that the NOI and SWMP have been administratively and technically reviewed, and the applicant has followed the public participation provisions in the general permit. The documents must be submitted by certified mail, return receipt requested, to the address indicated on the NOI form. Following review of the NOI, SWMP, and any public comments received on the application, the Executive Director will determine that: 1) the submission is complete and confirm coverage by providing a notification and an authorization number, 2) the NOI and/or SWMP are incomplete and deny coverage until a complete NOI and/or SWMP are submitted, or 3) approve the NOI and/or SWMP with revisions and provide a written description of the required revisions along with any compliance schedule(s), or 4) deny coverage and provide a deadline by which the MS4 operator must submit an application for an individual permit. Denial of coverage under the general permit is subject to the requirements of 30 TAC § 205.4(c). After receiving written approval from the TCEQ, the applicant must implement the approved SWMP in accordance with the terms and conditions of the general permit.

D. If the operational control of the MS4 changes, the present operator must submit an NOT and the new operator must submit an NOI and SWMP to obtain authorization under this general permit. The NOT and NOI must be submitted concurrently no greater than 10 days after the change occurs.

E. A permittee must submit current information to the executive director by submitting a Notice of Change (NOC) not later than 30 days before a change in information previously provided to the executive director within an NOI occurs. An NOC is also required for changes to the SWMP that are made after TCEQ has approved the NOI and SWMP. If changes are proposed before the applicant has received written approval of the NOI and SWMP from the TCEQ, then this information must be submitted in a letter as supplemental application information. An NOC must be signed according to TCEQ rules at 30 TAC § 305.44.

F. A discharger may terminate coverage under this general permit by providing a Notice of Termination (NOT) on a form approved by the executive director. The NOT must be signed according to TCEQ rules at 30 TAC § 305.44. Authorization to discharge terminates at midnight on the day that an NOT is postmarked for delivery to the TCEQ. If TCEQ provides for electronic submission of NOTs during the term of this permit, authorization to discharge terminates 24 hours following confirmation of receipt of the electronic NOT form by the TCEQ.

IX. Technology-Based Requirements

The conditions established by this general permit are based on Section 402(p)(3)(B) of the Clean Water Act (CWA) which mandates that a permit for discharges from MS4s must:

A. effectively prohibit the discharge of non-storm water to the MS4; and

B. require controls to reduce pollutants in discharges from the MS4 to the maximum extent practicable (MEP) including best management practices (BMPs), control techniques, and system, design and engineering methods, and such other appropriate provisions.

The conditions of the proposed general permit have been developed to comply with the technology-based standards of the Clean Water Act. The draft general permit includes an SWMP requirement that includes MCMs utilizing a series of BMPs, rather than numeric limitations, to address the minimization of pollutants in storm water discharges to Waters of the United States. The Federal Phase II regulations define a small MS4 SWMP as a program comprising of at least six MCMs that collectively are expected to result in significant reductions of pollutants discharged into receiving water bodies. Implementation of the MEP standard will typically require the development and implementation of BMPs and the achievement of measurable goals to satisfy each of the six MCMs. TCEQ believes that the requirements of the general permit, if properly implemented, will meet the MEP standard required in the federal rules at 40 CFR § 122.34.

A statement is included in the general permit which indicates that the BMPs included in the SWMP constitute effluent limitations for the purposes of compliance with 30 TAC Chapter 319, Subchapter B.

The proposed general permit provides for development of an optional 7th MCM that would authorize an MS4 to discharge storm water runoff from construction activities disturbing one or more acres where it is the operator. This provision allows the MS4 the option of separate coverage for these construction activities under TPDES general permit TXR040000 rather than the Construction General Permit, TXR150000. The following proposed limitations and monitoring frequencies are applicable to storm water discharges from concrete batch plants authorized as a support activity at regulated construction sites:

	Limitations	**Monitoring**
Parameter	Daily Maximum	Frequency
Total Suspended Solids	65 mg/l	1/Year
Oil and Grease	15 mg/l	1/Year
pH	between 6 and 9 standard units	1/Year

X. Water Quality-Based Requirements

The Texas Surface Water Quality Standards (TSWQS) found at 30 TAC Chapter 307 state that "surface waters will not be toxic to man, or to terrestrial or aquatic life." The methodology outlined in the "Procedures to Implement the Texas Surface Water Quality Standards" is designed to ensure compliance with 30 TAC Chapter 307. Specifically, the methodology is designed to ensure that no source will be allowed to discharge any waste which: (1) results in instream aquatic toxicity; (2) causes a violation of an applicable narrative or numerical state water quality standard; (3) results in the endangerment of a drinking water supply; or (4) results in aquatic bioaccumulation which threatens human health.

TPDES permits contain technology-based effluent limits reflecting the best controls available. Where these technology-based permit limits do not protect water quality or the designated uses, additional conditions are included in the TPDES permits, which may include discharge limitations. State narrative and numerical water quality standards are used in conjunction with EPA criteria and other toxicity databases to determine the adequacy of technology-based permit limits and the need for additional water-quality-based controls.

TPDES storm water permits do not typically contain water-quality-based effluent limits (WQBELs). As stated in 30 TAC § 307.8(e), controls on the quality of permitted storm water discharges are largely based on implementing BMPs and/or technology-based limits in combination with instream monitoring to assess standards attainment and to determine whether additional controls on storm water are needed. Also, according to EPA rules at 40 CFR § 122.34(a), narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements (including reductions of pollutants to the maximum extent practicable) and to protect water quality for small MS4s. It has been preliminarily determined that where permit requirements are properly implemented no significant degradation is expected and existing uses will be maintained and protected.

XI. Monitoring

If the MS4 discharges storm water from a construction project authorized under this general permit that includes a supporting concrete batch plant, compliance monitoring is required. Discharges from the batch plant must be sampled at a minimum frequency of once per year (1/year).

The MS4 operator may additionally sample discharges from the MS4 in order to assess the effectiveness of storm water MCMs, measure the effectiveness of BMPs, to detect illicit discharges to the system, or for other similar reasons.

XII. Procedures for Final Decision

The MOA between the EPA and TCEQ provides that EPA has no more than 90 days to comment, object, or make recommendations to the draft general permit before it is proposed for consideration by the Commissioners of the TCEQ. According to 30 TAC Chapter 205, when the initial draft general permit is submitted for public comment prior to being proposed to the Commission of the TCEQ, notice must be published, at a minimum, in at least one newspaper of statewide or regional circulation. The commission may also publish notice in additional newspapers of statewide or regional circulation. Mailed notice must also be provided to the following:

A. the county judge of the county or counties in which the discharges under the general permit could be located;

B. if applicable, state and federal agencies for which notice is required in 40 CFR, §124.10(c);

C. persons on a relevant mailing list kept under 30 TAC § 39.407, relating to Mailing Lists; and

D. any other person the executive director or chief clerk may elect to include.

After notice of the initial draft permit is published in the *Texas Register* and the newspaper, the public will have 30 days to provide public comment on the IDP.

Any person, agency, or association may make a request for a public comment meeting on the proposed general permit to the executive director of the TCEQ before the end of the public comment period. A public comment meeting will be granted when the executive director or commission determines, on the basis of requests, that a significant degree of public interest in the draft general permit exists. A public comment hearing is intended for the taking of public comment, and is not a contested case proceeding under the Administrative Procedure Act. The executive director may call and conduct public meetings in response to public comment.

If the executive director calls a public meeting, the commission will give a minimum of 30 days public notice in the *Texas Register* of the date, time, and place of the meeting, as required by commission rules. The public notice for the draft general permit and for the public meeting(s) may be combined. The public comment is automatically extended until the conclusion of all public meetings on the draft general permit. The executive director shall prepare a response to all significant public comments on the draft general permit raised during the public comment period. The proposed general permit will then be filed with the commission to consider final authorization of the permit. The executive director's response to public comment shall be made available to the public and filed with the chief clerk at least ten days before the commission acts on the proposed general permit.

During the initial development of the draft permit, the TCEQ published notice of availability and an announcement of public hearings for this permit in *The Dallas Morning News*, *El Paso Times*, *The Monitor* (McAllen), *Amarillo Globe News*, *Houston Chronicle*, and *San Antonio Express News* on September 27, 2002. Public meetings were held in Arlington on October 28, 2002; Houston on October 29, 2002; and San Antonio on November 4, 2002. The original comment period ended on November 15, 2002. On September 15, 2003, the U.S. 9th Circuit Court of Appeals (Court) issued a revised panel decision, which denied all petitions for rehearing and remanded portions of the rule affecting small MS4s to the EPA. The Court found that portions of the federal regulations were not consistent with the Clean Water Act, because the Phase II rules did not address permitting authority review of notices of intent (NOIs), public participation in the permitting process, and public availability of NOIs. The EPA, by memorandum dated April 16, 2004, provided guidance for permitting authorities to issue general permits consistent with the panel decision. The TCEQ proposes to publish notice of the revised draft permit in accordance with the procedures discussed above.

XIII. Administrative Record

The following section is a list of the fact sheet citations to applicable statutory or regulatory provisions and appropriate supporting references.

A. Code of Federal Regulations (CFR) and Federal Register (FR) Citations

40 CFR Chapter 122

Federal Register dated February 17, 1998 (Volume 63, No. 31, Pages 7858-2906)

Federal Register dated December 8, 1999 (Volume 64, No. 235, Pages 68722-68851)

B. Letters/Memoranda/Records of Communication

Memorandum from the U.S. EPA (Hanlon) dated April 16, 2004 from, "Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s."

Comment letters received during initial public notice period.

Stakeholder comments provided to the TCEQ.

Memo from the Water Quality Standards Team of the Water Quality Assessment Section of the TCEQ.

C. Miscellaneous

U.S. Environmental Protection Agency's Model Permit, "National Pollutant Discharge Elimination System General Permit for Discharges from Large and Small Construction Activities," draft dated September 7, 2001.

U.S. Environmental Protection Agency's Fact Sheet No. 2.0, "Storm Water Phase II Final Rule - Small MS4 Storm Water Program Overview," January 2000 (EPA 833-F-00-002).

U.S. Environmental Protection Agency's Fact Sheet No. 2.1, "Storm Water Phase II Final Rule - Who's Covered? Designation and Waivers of Regulated Small MS4s," January 2000 (EPA 833-F-00-003).

U.S. Environmental Protection Agency's Fact Sheet No. 2.2, "Storm Water Phase II Final Rule - Urbanized Area - Definition and Description," December 1999 (EPA 833-F-00-004).

The Clean Water Act, 33 U.S.C. Chapter 26

Quality Criteria for Water (1986), EPA 440/5-86-001, 5/1/86.

The State of Texas Water Quality Inventory, 13th Edition, Publication No. SFR-50, Texas Natural Resource Conservation Commission, December 1996.

Texas Surface Water Quality Standards, 30 TAC Sections 307.1 - 307.10 (21 TexReg 9765, 4/30/97).

"Procedures to Implement the Texas Surface Water Quality Standards," Texas Commission on

Environmental Quality, January 2003.

TCEQ Rules.

30 TAC Chapters 39, 205, 213, 281, 311, 305, 307, 309, 319, 321, 331