EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENT

On March 5, 2003, at a regularly scheduled public meeting, the Commission on Environmental Quality (TCEQ or Commission) approved Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR150000. The general permit authorizes the discharges of storm water associated with construction activities and certain nonstorm water discharges from construction sites. After considering all public comment and the responses to such comment, the commission, by resolution, issued the revised general permit as recommended by the executive director and adopted the executive director's Response to Public Comment (Response). This notice is issued in accordance with 30 Texas Administrative Code (TAC) §205.3(e)(4).

The executive director (ED) of the commission files this Response on proposed TPDES general permit No. TXR150000. As required by Texas Water Code (TWC), §26.040(d) and 30 TAC §205.3(c), before a general permit may be issued, the ED shall prepare a response to all timely, relevant, and material, or significant comments. The response shall be made available to the public and filed with the Office of the Chief Clerk at least ten days before the commission considers the approval of the general permit. This response addresses all received public comments in a timely manner, whether or not withdrawn. The Office of the Chief Clerk received comment letters from the following persons: Association of Electric Companies of Texas (AECT); American Electric Power (AEP); Austin Energy (Austin Energy); Carter & Burgess (CB); CenterPoint Energy Houston (CenterPoint); City of Arlington (Arlington); City of Austin (Austin); City of Cleburne (Cleburne); City of Dallas (Dallas); City of Houston (Houston); City Public Service (San Antonio); Dallas/Fort Worth Airport (DFW); Gardere (Gardere); Harris County Flood Control District (HCFCD); Harris County (Harris County); High Plains Environmental Resources; (HPER); Home Builders Association of Greater Dallas (HBAGD); Mr. Zane N. Homelsey (Homelsey); Horizon Environmental Services, Inc. (Horizon); Lower Colorado River Authority (LCRA); New Fields (NF); Oncor Energy Delivery Company (ONCOR); Paradigm Engineering (Paradigm); Reliant Energy (Reliant); Save Our Springs Alliance (SOSA); Southwestern Bell Telephone L.P. (SWBT); Texas Association of Builders (TAB); Texas Chemical Council (TCC); Texas Department of Criminal Justice (TDCJ); Texas Department of Transportation (TXDOT); TXU Business Services Company (TXU Energy); United States Fish and Wildlife Services (USFWS); University of Texas at Arlington (UTA); and Vinson & Elkins L.L.P. (V&E).

Additionally, the following persons representing various entities provided oral comments at the November 7, 2002 public meeting regarding the proposed TPDES construction general permit: David Sievwright and Bryce K. Smith, representing the City of Dallas (Dallas); Deena DePalma, representing DFW Airport (DFW); Myron M. Harris, representing Harris County (Harris); Brian R. Kizer, representing Paradigm Engineering (Paradigm); Larry Harrell, representing Southwestern Bell Telephone (SWB); Robert Berndt, representing Tarrant County (Tarrant); Steve Rothwell, representing the University of Texas at Arlington (UTA); and Charlie Brady, representing the University of Texas System (UTS).

BACKGROUND

TCEQ is proposing to issue a TPDES general permit that would authorize discharges of storm water associated with construction activities and certain nonstorm water discharges from construction sites. This permit is proposed in accordance with TWC, §26.040. Storm water and certain nonstorm water discharges from construction projects that disturb five or more acres of land, projects defined in federal regulations as Phase I construction activities, are currently authorized under a National Pollutant

Discharge Elimination System (NPDES) general permit. This permit was issued by the United States Environmental Protection Agency (EPA) according to requirements in 40 Code of Federal Regulations (CFR) §122.26 and expires July 7, 2003. Federal Phase II regulations extend storm water permitting requirements to smaller construction projects, specifically those that disturb one or more acres, but less than five acres of land. Issuance of the proposed general permit would allow continued coverage for Phase I construction activities and provide initial coverage for Phase II construction activities under the TPDES permit program. The conditions and requirements of the proposed general permit are similar to the conditions and requirements of the current NPDES general permit.

As proposed, construction sites located in the State of Texas shall only be authorized to discharge storm water under this general permit following either the development and implementation of storm water pollution prevention plans (SWP3s), meeting a waiver condition, or certifying that the activities will occur during defined periods of low potential for erosion. Each SWP3 must be developed according to the minimum measures defined in the permit, and must also be tailored to the specific operations and activities conducted at the construction site.

Notice of availability and an announcement of public hearings was published in *The Dallas Morning News*, *El Paso Times*, *Hildago Monitor*, *Amarillo Globe News*, *Houston Chronicle*, and *San Antonio Express News* on September 27, 2002. A public meeting was held in Austin, Texas on November 7, 2002 and the comment period ended on November 15, 2002.

Due to the large number of comments received, some separate comments are combined with other related comments. Comments and responses are organized by section with general comments first. Some comments have resulted in changes to the draft permit. Those comments resulting in changes have been identified in the respective responses. All other comments resulted in no changes.

COMMENTS AND RESPONSES
General Comments

Comment 1: USFWS commented that the proposed general permit does not contain adequate procedures to determine if SWP3s that have been developed and implemented under the requirements of the permit will minimize harm to listed endangered species and critical habitats to acceptable levels. USFWS commented that the permit does not specifically identify the aquatic and water-dependent federally listed species as a part of the TCEQ review process for authorizing permits. Additionally, USFWS commented that the permit does not specifically address the potential for discharges to adversely affect listed species.

Response 1: The draft permit was previously submitted to USFWS; they evaluated the permit and did not request any changes to the permit to address the potential impact on any endangered species. The permit does not specifically include the federally listed species that might be impacted by the permit because the minimum SWP3 permit requirements must be met regardless of whether or not the discharge of storm water from the site is to a receiving water that serves as habitat for a listed species. The permit requires compliance with water quality standards approved by EPA for all areas of the state. These water quality standards are established in accordance with 30 TAC Chapter 307 to protect both aquatic and aquatic dependent species. Water quality standards approved by EPA are reviewed and analyzed by USFWS for consistency with the Endangered Species Act (ESA) mandates. Additionally, Part II.G.2. of the general permit allows the ED to require individual permits for construction site operators if the activity is determined to cause a violation of water quality standards.

Comment 2: The USFWS commented that the EPA and TCEQ should address the concerns provided in the USFWS comments on the proposed permit during EPA review of the proposed TPDES permit.

Response 2: Accompanying the Memorandum of Understanding (MOU) between TCEQ and EPA, delegating the federal NPDES to Texas, was a biological opinion prepared for the delegation by USFWS and required by the ESA for activities that constitute an "agency action" as defined by the ESA. The biological opinion contains USFWS's evaluation of the potential impact to protected species by Texas' assumption of the NPDES program, specifically including the storm water program. In its opinion USFWS states: "[i]t is the Service's biological opinion that the action of EPA's approval of the State of Texas' assumption of the NPDES permitting program, as proposed, is not likely to jeopardize the continued existence of all of the listed species considered in this opinion, and is not likely to destroy or adversely modify the designated critical habitat considered in this opinion."

In addition, the MOU states that "endangered species concerns will be addressed through interagency coordination" and sets out specific procedures to accomplish this coordination. The procedures specify that, if USFWS has concerns with the permit, TCEQ will work with USFWS to resolve relevant issues. Should TCEQ not change the permit in response to USFWS concerns, EPA would be notified and provided the opportunity to review the draft permit.

In accordance with these procedures, USFWS and EPA were provided a copy of the draft permit and an opportunity to comment on it. TCEQ and USFWS worked together, with input from EPA, to ensure that USFWS's questions were answered. As a result of this coordination, no changes to the draft permit were necessary based on USFWS's review and there are no outstanding ESA issues.

Following consideration of all comments received during the public comment period and the revision of the permit based on these comments, the TCEQ will again provide EPA the opportunity to review the revised draft permit.

Comment 3: SOSA commented that the fact sheet focuses primarily on increases of sediment discharges from actual construction activities and that it: 1) "ignores" discharges of other man-made pollutants not typically found on undeveloped sites, including paint, solvents, detergents, building materials, and construction equipment; 2) "ignores" increased stream bank erosion from both construction and postconstruction surfaces; and 3) "tends to ignore the effects of increased discharges of a broad range of pollutants from post-construction, or developed site, conditions." CB expressed concern that SWP3s do not address postconstruction storm water management. CB also requested that velocity dissipation devices be required at discharge locations.

Response 3: The fact sheet addresses total suspended solids (TSS) because it is the primary pollutant expected during the actual construction activities. In response to comment that the fact sheet ignores the "man-made pollutants" listed in item 1), in the previous paragraph, the authorization under the permit is limited to storm water associated with construction activities and from certain concrete and asphalt batch plants. In addition, discharge of paint, solvents, and similar "man-made" pollutants may constitute a violation of the TWC and as such, could not be authorized under this permit.

In response to the comments in items 2) and 3) from Comment 3, that the fact sheet ignores postconstruction conditions, the authorization under the proposed permit is limited to storm water discharges that occur commencing with initial disturbance of the site and lasting until the site is finally stabilized.

In response to stream bank erosion and item 2), the proposed permit does not contain requirements to limit the volume or velocity of storm water that leaves a construction site. The potential for erosion in receiving waters would be very site specific, dependant on local topography, soils, rainfall, and other factors. Operators of municipal separate storm sewer systems in urbanized areas and in cities with a population of 100,000 or more are subject to NPDES and TPDES storm water permits. These permits require the development of storm water management programs that address postconstruction runoff in areas of new development and redevelopment and better address this potential problem at a more site-specific local level.

However, many of the controls developed for compliance with this permit, such as sediment traps and basins, will result in a slower runoff rate, metering runoff to receiving waters over a longer period of time, and help lessen the potential for down stream erosion of stream banks. In response to the comments, TCEQ has added the following language as Part III.F.5.(d), Other Controls, of the permit: "Velocity dissipation devices shall be placed at discharge locations and along the length of any outfall channel to provide a non-erosive flow velocity from the structure to a water course so that the natural physical and biological characteristics and functions are maintained and protected."

Comment 4: SOSA comments that the USFWS draft biological opinion of July 19, 2001, concluded that the current EPA construction general permit both causes "jeopardy" to the survival and recovery of the Barton Springs salamander and violates Texas surface water quality standards. Although the final opinion of the USFWS that was issued in May 2002 removes the conclusions of "jeopardy" to the Barton Springs salamander and violation of stream standards, SOSA commented that these conclusions were based on the limited time frame of less than two years for the remaining term of the EPA permit. SOSA noted that the TCEQ proposed permit would be for a full five years and would not only include development disturbing more than five acres, but also development disturbing between one and five acres of land.

Response 4: USFWS's final opinion is the appropriate version to use as it represents USFWS's complete analysis of all information regarding potential impacts. For example, it includes data that was not available for the draft biological opinion. This opinion was prepared for EPA's general permit, not for TCEQ's construction general permit, which requires that construction sites smaller than five acres, but larger than one acre, comply with the permit requirements. This will provide additional protection as the federal program did not cover these sites. In addition, USFWS evaluated potential impacts associated with the storm water program in the biological opinion prepared for delegation of the NPDES program as discussed in Response to Comment 2. The conclusions reached by the biological opinion on the EPA general permit are not based on the remaining time frame of the EPA permit. While the opinion does note that "the incremental contribution of pollutants from projects covered by the permit during the next 14 months is expected to be small" it does take into account long term impacts of the permit. The biological opinion relies on an EPA water quality analysis submitted to USFWS on April 18, 2002. That analysis estimates the increase in pollutants on an annual basis throughout the five-year term of the permit as well as estimating the increase in impervious cover and projecting the increase in surface water pollutant loads for postconstruction for the permit term.

Comment 5: SOSA commented that any analysis by TCEQ on the likely effects of its proposed permitting activities on water quality in the Barton Springs watershed must start with an estimate of the number of acres likely to be developed in the watershed over the five-year term of the proposed permit. SOSA commented that absent such an estimate, it becomes impossible to make the subsequent estimates of likely discharges of pollution from construction, postconstruction, and increased stream bank erosion.

Response 5: The TPDES permit is proposed for statewide applicability and is not based on watershed-specific evaluations. Additionally, the permit is proposed to authorize discharges of storm water runoff from construction activities commencing with the initial disturbance of the site and lasting until the site is stabilized and construction activities have ceased. Therefore, the permit would not address postconstruction discharges. The issue of stream bank erosion was addressed in the Response to Comment 3.

Comment 6: SOSA commented that the TCEQ must determine that the issuance of a permit will not cause or contribute to a violation of water quality standards before issuing a permit. SOSA asserted that there is nothing in the record, such as modeling or scientific studies, to predict discharges likely to be authorized during the life of the permit in any particular watershed or that TCEQ has undertaken adequate analysis to make this determination. SOSA pointed out that "when individual applicants seek permission to discharge into waters of the State of Texas, extensive modeling is done of the discharges they will be allowed to put into state waters." Volume and concentration of key pollutants is analyzed and compared with specific watersheds to determine whether the discharges from a particular facility will cause a violation of water quality standards. SOSA expressed the belief that the same type of analysis needs to be done for the CGP and small municipal separate storm sewer (MS4) permits, such that TCEQ looks beyond numerical standards for particular pollutants and also looks at particular watersheds and the discharges predicted for those watersheds.

Response 6: The development of individual wastewater discharge permit conditions includes consideration of a known discharge rate, predictable pollutant parameters and concentrations, instream "low flow" or "worst case" conditions, and instream receiving water uses which often includes modeling to ensure protection of instream dissolved oxygen standards. This process is described in the TCEQ's guidance document titled "Procedures to Implement the Texas Surface Water Quality Standards."

Storm water discharges, however, are intermittent and highly flow-variable and do not occur during instream low flow conditions. Therefore, procedures similar to those previously described have not been developed to set chemical-specific numeric effluent limits for storm water discharges, even in individual TPDES storm water permits. Instead, best management practices (BMPs) and technology-based controls are required to regulate the quality of storm water discharges. The proposed permit either requires that these controls be developed and implemented or that the construction activity must take place during a period when there is a low potential for erosion. This approach is consistent with EPA's Interim Permitting Approach (61 FR 43761 (November 6, 1996)) and with the 2002 "Procedures to Implement the Texas Surface Water Quality Standards" (TPDES Storm Water Permits Section), which have been approved by the TCEQ and by EPA.

Comment 7: SOSA commented that this permit, if adopted, would violate state and federal antidegradation requirements. SOSA contends that under the antidegradation standards for "Tier 2" waters as defined in 30 TAC §307.5, that there is sufficient information available to demonstrate that additional protections are needed to avoid further violations of antidegradation standards.

Response 7: The antidegradation reviews required under state law for Tier 2 waters are to ensure that, where water quality exceeds the normal range of fishable/swimmable criteria, such water quality will be maintained, unless lowering it is necessary for important economic or social development. Section 307.5 and the "Procedures to Implement Texas Surface Water Quality Standards," which are approved by EPA, set out the TCEQ's process for accomplishing such review. In accordance with these procedures, TCEQ undertook an antidegradation review of this general permit and concluded that where the permit

requirements and SWP3s are properly implemented no significant degradation is expected and existing uses will be maintained and protected.

Comment 8: SOSA commented that it had "recently submitted comments and information to the TCEQ demonstrating that Barton Creek and Barton Springs should be included on the State's § 303(d) list of impaired waters such that no permit may be issued that increase discharges of pollutant of concern."

Response 8: In the 2002 §303(d) list of impaired water bodies, which is still under review by EPA, Barton Creek is not included for any parameters. In the 2000 §303(d) list, which was recently approved by EPA, Barton Creek is listed as impaired because of elevated concentrations of fecal coliform bacteria. Until the 2002 list is approved by EPA, the 2000 §303(d) list is applicable to TPDES permits. Fecal coliform and other indicator bacteria are not pollutants of concern from construction sites that are operated in accordance with the terms of the permit.

Comment 9: SOSA commented that the issuance of this proposed permit will violate aesthetic water quality standards set forth in §307.4(b). Specifically, SOSA cited as examples discharges of sediment in Barton Springs and Eliza Springs. Sediment and associated pollutants discharged from construction authorized by the proposed permits will make aesthetic conditions worse.

Response 9: The primary pollutant of concern in storm water runoff at a construction site is TSS. Solids can become suspended and transported in runoff and cause water quality problems where excessive erosion occurs, where controls are not in place to reduce suspended solids, and where disturbed areas are not stabilized. The permit requires that the construction site operator develop and implement an SWP3 with erosion and sediment controls designed to retain sediment on-site to the extent practicable. The SWP3 requires proper installation of controls, scheduled inspections and maintenance, and clearly defined requirements for stabilization of the construction site. Additionally, the permit provides that certain small construction activities may obtain a waiver from permit requirements if those activities occur during defined periods of time, and in defined areas of the state, when there is a low potential for rainfall and erosion. This provision may serve as an incentive for some operators to complete construction during relatively dry periods of time when there is a lower potential for erosion and off-site transport of suspended solids.

These requirements in the permit provide sufficient protection for the aesthetic provisions in the Texas Surface Water Quality Standards, which state that "surface water shall be essentially free of floating debris and suspended solids that are conducive to producing adverse responses in aquatic organisms or putrescible sludge deposits or sediment layers which adversely affect benthic biota or any lawful uses (30 TAC §307.4(b)(2))" and "surface waters shall be essentially free of settleable solids conducive to changes in flow characteristics of stream channels or the untimely filling of reservoirs, lakes, and bays (30 TAC §307.4(b)(3))."

Comment 10: SOSA commented that the use of the permit in the Barton Springs watershed will cause violations of the Texas Water Quality Standard codified in §307.4(d), which states that "Surface waters will not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life." SOSA contends that there is data available to show sediment in Barton Springs is toxic to "macrobenthic" animals and will threaten aquatic species other than just the Barton Springs salamander.

Response 10: The primary pollutant of concern in storm water runoff from construction sites is TSS. Construction activities that disturb one or more acres of land are required to obtain authorization under the proposed permit. When land is disturbed, soils are subject to erosion and solids may be suspended by storm water runoff and carried to receiving waters. The proposed permit requires that operators of these construction activities must develop and implement SWP3s to reduce erosion and suspended solids, meet a waiver condition, or certify that the activities will occur during defined periods of low potential for erosion. Each SWP3 must be developed according to the minimum measures defined in the permit and must also be tailored to the specific operations and activities conducted at the construction site. Waivers and alternative permit requirements are only allowed when activities occur during times, and at locations, where there is a low potential for erosion to occur. The permit is intended to address TSS and if there are issues associated with toxicity, TCEQ can require an individual permit.

Comment 11: SOSA commented that a statewide permit is inappropriate because it does not recognize that conditions differ among watersheds throughout the state and that some watersheds are more sensitive and threatened than others to pollutant loading from sediments. SOSA further noted that USFWS has determined that some Texas watersheds are more sensitive than others and more protective permits should be issued in those areas.

Response 11: This permit is proposed for statewide applicability and does not require different levels of pollution prevention plans based on specific receiving water qualities. Instead, the permit has controls to protect aquatic and water dependent species wherever they are located in the state. The best management practices required by this permit are designed to minimize erosion and sediments in all watersheds in the state. As that is one of the objectives of the storm water program, this approach is appropriate.

It should be noted that where water quality standards are not met in a stream segment, TCEQ will evaluate potential sources of the contaminant of concern in developing the total maximum daily load (TMDL) for that segment. If storm water is a source of that contaminant, it will be addressed in the TMDL and the implementation plan developed for that segment.

Comment 12: SOSA commented that the Edwards Aquifer rules found in 30 TAC Chapter 213 are a "superficial and inadequate assurance that a gen eral permit is protective of the sensitive Edwards Aquifer and Barton Springs Watershed." SOSA contends the Edwards Aquifer rules are "vague and lack enforceable requirements" and that its provisions do not adequately address the wide range of issues necessary to protect the aquifer. In addition, SOSA attached its comments on the Edwards Aquifer rules and "ask that these comments be considered and addressed in the context of the proposed" permit.

Response 12: Compliance with the applicable conditions of the Edwards Aquifer rules is in addition to compliance with the requirements of this permit. Comments on the Edwards Aquifer rules are outside the scope of this general permit.

Comment 13: SOSA commented that the permitting activities will result in a "take" of the Barton Springs salamander in violation of the ESA. Austin, CB, Homelsey, and Horizon commented that the permit should include a specific provision to address endangered species. Horizon specifically asked if the TCEQ is "going to take responsibility for the protection of these resources or will it fall still under EPA's jurisdiction"? Austin does not believe current permit provisions "adequately address the potential impact that construction activities may have on the continued existence of the endangered species in the state." SOSA suggested that the TCEQ either modify the permit to adopt conditions that will limit the effects of discharges so that no "take" of the Barton Springs salamander will be authorized or apply for an

incidental "take" permit from USFWS to administer this specific program in the Barton Springs watershed.

Response 13: The permit does not authorize the taking of any listed species under the ESA. The permit was drafted in accordance with Chapter 307, which states that surface waters cannot be made toxic to any aquatic or terrestrial organisms. As such, the permit contains adequate safeguards to ensure that permitting activities authorized by TCEQ do not result in the "take" of any listed species and no specific provision is needed to address endangered species. Noncompliance with any provisions of the permit would fall within TCEQ's jurisdiction. However, as a federally delegated program, it is also EPA's responsibility to review this proposed permit. The TCEQ has previously provided EPA with the proposed draft permit for review and to ensure that the terms and conditions are compliant with the Clean Water Act (CWA). Following consideration of all comments received during the public comment period and following revision of the permit based on those comments, the TCEQ will provide EPA with a copy of the revised draft permit for its review. In addition, this concern was addressed in the biological opinion by USFWS where it stated: "Any take associated with these permits is anticipated by the incidental take statement in the Biological Opinion on authorization of the TPDES program and, therefore, is covered, unless the Service submits a written concern to EPA on a draft TPDES permit due to potential adverse impacts to listed species that are more than minor and such concerns remains unresolved at the time of permit issuance, or where the Service believes that the permit is likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat."

It should be noted that compliance with the general permit does not remove takings liabilities under the ESA for the permittees. ESA, §9, generally prohibits any person from "taking" a listed animal species unless the take is authorized by the ESA. If a construction activity is proposed in an area where an endangered species occurs, the operator of the activity may be required by the USFWS to obtain an "incidental take permit" and to participate in a habitat conservation plan or provide other mitigation for the activity. ESA, §10, allows persons to incidentally "take" listed animal species, whereas otherwise prohibited, through the issuance of a permit after development. These procedures were developed to allow nonfederal entities such as developers to alter habitat without incurring takings liability where "take" is minimized to the extent practicable.

Comment 14: SOSA commented that TCEQ has not tried to analyze the effects of discharges authorized by the general permit on the propagation of aquatic species as required by the CWA.

Response 14: The permit has controls to protect aquatic and water dependent species wherever they are located in the state. TCEQ has followed the procedures set out in the MOU with EPA on NPDES delegation, including consultation with USFWS (see Responses to Comments 2 and 4).

Comment 15: SOSA commented that specific site inspection, monitoring, and clearing limits should be added to the draft permits.

Response 15: Part II.F.8. of the proposed permit, "Inspections of Controls," contains requirements for the permittee to conduct site inspections in order to ensure that controls and pollution prevention measures are performing adequately and that they do not need maintenance, repair, or replacement. The permit does not limit the operator from clearing the site, but does specify that limiting the amount of disturbed area is an acceptable storm water pollution prevention measure.

Comment 16: SOSA requested that the permit clarify that all storm water pollution prevention plans, maps, inspection reports, and other required reports are subject to disclosure regardless of whether such records are in the physical possession of the TCEQ or the permittee. Additionally, SOSA requested that the procedures for public complaints, requests for information, or inspections by citizens regarding particular construction sites be included in the permit and displayed prominently on the TCEQ Web site.

Response 16: Additional language is not needed in the permit. The records noted by SOSA are subject to disclosure if they are in TCEQ's possession or if their submission to TCEQ is required by the permit or TCEQ rules. However, unless otherwise required in the permit, construction site operators need not make these items available to members of the general public. Part III.D.1. of the permit requires that the SWP3 must be made "readily available" at the time of an on-site inspection to the ED; a federal, state, or local agency approving sediment and erosion plans, grading plans, or storm water management plans; local government officials; and the operator of an MS4 receiving discharges from the site. Inspection reports by TCEQ personnel will be subject to disclosure by TCEQ.

Complaints about a construction site or suspected incidents of noncompliance with this permit or TCEQ rules may be reported to the local TCEQ region office or by calling the Environmental Violations Hotline at 1-888-777-3186. If a permittee under this permit fails to comply with all requirements of the permit, the permittee may be subject to administrative enforcement action, fines, and penalties. Additional TCEQ contact information can be found by following links at the TCEQ Web site at *http://163.234.20.106/index.html* or by going directly to *http://163.234.20.106/AC/about directory*.

The proposed permit does not provide for inspections by citizens regarding particular construction sites and specifically states in Part III.D.3. that the permit "does not provide the general public with any right to trespass on a construction site for any reason, including inspection of a site, nor does this permit require that permittees allow members of the general public access to a construction site."

Comment 17: ONCOR commented that the fact sheet states when the operation of a construction site is transferred from the current operator to a subsequent operator, the notice of termination (NOT) for the current operator and the notice of intent (NOI) for the subsequent operator must be submitted concurrently no fewer than 30 days before the change occurs. ONCOR commented that this is different than the requirement in the proposed permit.

Response 17: The TCEQ agrees with the commenter and revises the fact sheet to be consistent with the requirements of the permit. The current operator must submit a NOT within 30 days following transfer of the site and the new operator must submit an NOI at least two days before assuming operational control.

Comment 18: Harris County requested clarification on how the TCEQ will address the proposed federal effluent guidelines for construction activities, once they are finalized by EPA, in the proposed permit.

Response 18: Once EPA adopts effluent guidelines for construction activities, the TCEQ will include any applicable requirements in all subsequent TPDES authorizations that follow the date the guidelines are finalized. If this proposed permit is issued prior to the finalization of the guidelines, the new guidelines will be included in this permit when it is renewed.

Comment 19: Paradigm commented that training should be provided to developers and construction operators on storm water permit requirements, and asked what steps TCEQ is taking to provide this education and outreach.

Response 19: The TCEQ plans a series of ten storm water workshops from February through April 2003. A schedule of dates and locations will be made available on the TCEQ construction storm water Web site at *http://www.tnrcc.state.tx.us/permitting/waterperm/wwperm/construct.html*. This Web site currently contains information and guidance on permit requirements and provides links to other information resources. Additionally, the TCEQ's Small Business and Environmental Assistance Division (SB&EA) provides assistance and information to small businesses and local governments regarding compliance with TPDES regulations. They may be contacted at 1-800-447-2827. SB&EA staff are headquartered in each of the 16 TCEQ statewide regional offices.

Comment 20: Dallas commented that the permit does not address postconstruction runoff that may cumulatively affect streams and lakes as the flow volumes increase. Dallas asked if the TCEQ will address postconstruction runoff in the permit through the requirement of, for example, permanent controls or vegetative controls.

Response 20: The proposed permit implements NPDES federal rules that require the authorization of storm water runoff from small and large construction activities during the time period commencing with the initial disturbance and lasting until final stabilization of the site. Controls are required to reduce pollution in runoff during this period of construction. The proposed permit does not go beyond these federal rules to address discharges that occur following completion of construction activities. However, the TCEQ is proposing a separate TPDES general permit authorizing storm water runoff from certain small MS4s. This permit would require operators of MS4s to develop a storm water management program that addresses postconstruction runoff from areas of new development and areas of redevelopment. Operators of medium and large MS4s must currently develop similar programs to comply with NPDES and TPDES permits.

Comment 21: NF and CenterPoint commented that linear construction, such as trenching and similar activities required for the installation of utilities, should not be considered a construction activity subject to the proposed permit. NF commented that this activity is more similar to road maintenance activities, an activity that is not subject to the proposed permit.

Response 21: The federal NPDES rules require authorization for storm water discharges from construction activities that disturb one or more acres and from activities that are a part of a common plan of development that will result in the disturbance of one or more acres. There is no distinction based on the shape of the area that is disturbed. The TCEQ adopted these federal rules by reference in 30 TAC Chapter 281. The proposed permit was drafted with conditions and requirements that are in accordance with these rules.

Comment 22: CPSSA, AEP, AECT, Austin Energy, and CenterPoint requested clarification of the permit requirements for a utility provider performing work within a large site where the developer is authorized under the permit and has implemented an SWP3. CenterPoint commented that contractual arrangements between a permitted developer and a utility provider are sufficient for storm water pollution prevention and that proper storm water controls can be achieved without requiring the utility provider to obtain permit coverage. AEP and CenterPoint commented that utility companies do not meet the definition of operator.

Response 22: Many utility providers will not meet the definition of operator while installing utility service lines. Where utility installation occurs within a large area of development, such as a housing subdivision, the utility construction work will intersect many construction sites and the utility provider

will not have day-to-day operational control over the activities at these sites. In this instance the utility provider would not meet the definition of operator and would not need to apply for coverage under the permit. The operator of each construction site would be required to obtain permit coverage and the utility company must coordinate with these permittees so that utility work does not compromise the SWP3 activities at each of the sites. However, on properties where the only construction activity is the installation of utility lines, the utility provider is the operator with day-to-day control and is required to obtain permit coverage if one or more acres will be disturbed.

Comment 23: LCRA commented that many activities associated with linear projects may not fit the definition of construction and may not result in land disturbance. LCRA gave examples of surveying, gate installation, and vehicle traffic along a right-of-way as transmission lines are serviced, upgraded, and maintained. LCRA commented that the definitions of large and small construction activities should be revised to exclude activities that cause "little or no alteration or disturbance to the existing soil surface."

Response 23: Specific examples and exceptions cannot be included to address the many types of construction activities that may be subject to the permit. However, the definitions do make a distinction between maintenance activities and construction activities. Due to the fact that the periodic maintenance of right-of-ways is a common activity for utility providers, the last sentence in the definitions of small and large construction activity is revised to include "the routine clearing of existing right-of-ways" as an example of a maintenance activity.

Comment 24: HBAGD commented that the TCEQ should certify the local storm sewer control ordinances currently being enforced in the Dallas-Fort Worth area and elsewhere. HBAGD commented that if those ordinances meet TPDES requirements, small construction operators could simply meet the local requirements and in doing so be in compliance with the permit.

Response 24: The federal rules in 40 CFR §122.44(s), adopted by the TCEQ in 30 TAC §305.531 (relating to Establishing and Calculating Additional Conditions and Limitations for TPDES Permits) allow the TCEQ to include permit conditions that incorporate by reference "qualifying" local erosion and sediment control programs. The rules specify a number of specific criteria for a program to meet the definition of a "qualifying" local program and also specify how the permit must be developed to specifically address deficiencies. TCEQ has not received requests from any authority seeking approval for a qualifying program. The draft permit is proposed with the necessary requirements for compliance with the TPDES permitting requirements.

Comment 25: Dallas asked if the contents of the application for a permit are required to follow §305.45.

Response 25: Authorization under the permit is gained by submitting an NOI. The minimum requirements for the NOI are stated in the proposed permit in Part II.D.7., "Obtaining Authorization to Discharge," and were established according to 30 TAC Chapter 205 (relating to General Permits for Waste Discharges).

Title Page

Comment 26: HCFCD suggested that the TCEQ intends to require construction sites that discharge solely to an MS4 to comply with permit requirements. HCFCD and Houston commented that it is unclear whether or not pipes and other components of an MS4 are a surface water in the state. HCFCD suggested that the cover page of the permit be revised to include language specifying that an MS4 is a surface water

in the state. Houston suggested that the permit could be revised to clarify that discharges to an MS4 eventually reach surface water in the state and may require permit coverage.

Response 26: Authorization for storm water discharges is required whether the discharge is directly or indirectly to surface water in the state. Discharges to an MS4 will ultimately result in a discharge to a surface water in the state. Therefore, revisions to the permit are not necessary, as discharges of storm water directly to an MS4 from construction activities must be authorized if the activity disturbs one or more acres.

Comment 27: V&E commented that the language on the title page stating that the permit is an authorization to discharge "waste" is inaccurate. V&E commented that the regulation of storm water is derived from Federal Water Pollution Control Act, §1342(p), which pertains solely to storm water discharges. V&E commented that the Federal Water Pollution Control Act limits the regulatory oversight to municipal and industrial storm water, which is not a waste. V&E strongly recommended that the title page of the permit be changed to "General Permit to Discharge Storm Water."

Response 27: The authority to issue TPDES permits stems from the TWC. "Waste" is defined in TWC, §26.001(6) as "sewage, industrial waste, municipal waste, recreational waste, agricultural waste, or other waste as defined in this section." Storm water discharges are considered an "other waste" under the TWC and as regulated in the TPDES permit program.

Part I. Definitions

Comment 28: HCFCD suggested that, while the definition of "Best Management Practices" is largely from federal regulations and there may be justification for using it without modification, it should be modified to better relate to construction site BMPs. Houston requested that the phrase "plant site runoff" be revised to "construction site runoff." Houston requested that the phrase "or drainage from raw material storage" be revised to "or drainage from material storage areas." Houston and V&E requested the definition clarify if structural controls are a BMP. Houston requested clarification for the term "other method" as used in the definition for "Control Measure," and specifically asked if "other method" refers to structural controls.

Response 28: The definition has been revised to include the suggested changes. Additionally, local ordinances are added to the list of examples of BMPs. In making this change, the term "control measure," and the definition for the term, are removed from the permit. The definition for "Best Management Practices" now reads: "Schedules of activities, prohibitions of practices, maintenance procedures, structural controls, local ordinances, and other management practices to prevent or reduce the discharge of pollutants. BMPs also include treatment requirements, operating procedures, and practices to control construction site runoff, spills or leaks, waste disposal, or drainage from raw material storage areas."

Comment 29: TAB requested clarification for the term "initial disturbance" as used in the definition of "Commencement of Construction." TAB requested that the definition not include initial site work and asked that the following sentence be added: "This excludes soil-disturbing activities involved in geotechnical or environmental assessments of a site prior to construction, or initial surveying of the property for sale." SWBT requested that the definition be revised to state that a disturbance is "the exposure of soil surface resulting from activities such as clearing, grading, and excavating."

Response 29: Soil-disturbing activities that are not a part of a construction project, such as the example of surveying a property to establish boundaries for the purpose of sale, are not subject to the permit. However, surveying, geotechnical assessments, environmental assessments, and similar activities relating to a construction activity, rather than relating to the sale of the property are part of the construction activity and subject to the requirements of the permit. Authorization is required prior to the initiation of these activities if the sum total of all construction activities disturbs one or more acres. In response to these comments, the definition of "Commencement of Construction" is revised to read: "The exposure of soils resulting from construction activities such as clearing, grading, and excavating."

Comment 30: UTA, V&E, and Harris County requested that a definition for "common plan of development" be included in the permit, fact sheet, or provided in a separate guidance document. TDCJ requested clarification of the phrase "larger common plan of development" as used within the definitions for the terms "Large Construction Activity" and "Small Construction Activity." V&E suggested that TCEQ provide additional guidance materials for what constitutes a common plan of development and Harris County suggested that the TCEQ reference EPA's Region 6 technical guidance on this term at the TCEQ Web site.

Response 30: In response to the comment the following definition is included in the permit for the term "Common Plan of Development:" "A construction activity that is completed in separate stages, separate phases, or in combination with other construction activities. A common plan of development is identified by the documentation for the construction project that identifies the scope of the project, and may include plats, blueprints, marketing plans, contracts, building permits, a public notice or hearing, zoning requests, or other similar documentation and activities."

Comment 31: TDCJ expressed concern that it may have small construction projects throughout the state that cumulatively equal or exceed one acre and is uncertain how these may or may not be a common plan of development. The TDCJ requested exemption from permit requirements when small projects cumulatively equal or exceed one acre.

Response 31: The permit requirements requiring small construction activities of less than one acre, which are a part of a common plan of development that would ultimately exceed one acre to comply with the permit, has not changed. The NPDES rules require authorization for storm water discharges from these sites. The TCEQ has adopted these federal rules by reference in 30 TAC Chapter 281 and proposes issuance of the draft permit according to these rules. However, the specific example of several small construction activities conducted throughout the state would not be a part of a common plan of development. These construction activities occur at completely separate locations and are not linked to a common site or project.

Comment 32: UTA requested guidance for the operator of a small regulated construction activity in the event that plans are altered to the extent that the activity becomes a large construction activity.

Response 32: If a small construction activity becomes a large construction activity during the term of the project, operators must submit a completed NOI and $100 fee to the ED, and provide a copy of the NOI to any MS4 operator receiving the discharge, as soon as it becomes apparent that the project is a large construction activity.

Comment 33: DFW and Reliant Energy asked how the 70% "native background vegetative cover" criterion pertains to the definition of "Final Stabilization." Reliant Energy requested that the TCEQ

"clarify that the 70 percent requirement refers to the pre-project status of vegetative cover for the site, meaning that a site with little or no vegetation to begin with need not have vegetation incorporated into it once construction is complete." Reliant also requested that the TCEQ "clarify that 'native background vegetative cover' does not refer to the actual mix of native plants at the pre-construction site, but any appropriate native plant or plants for the site, such as fast native growing grasses."

Response 33: Final stabilization of soils at a construction site is achieved when a uniform vegetative cover is established to equal at least 70% of the background natural cover of native vegetation. For example, if the vegetation on the undisturbed site (preconstruction) covers 50% of the ground, the site must meet a final stabilization cover requirement of 35% total cover (70% of 50%). If the construction site was previously disturbed or developed, the background natural cover must be determined by examining an adjacent or nearby site that has not been developed or previously disturbed. The vegetation that is selected for stabilization does not have to be a species that was native to the site.

Comment 34: Arlington asked "what level of stabilization is required by developers before transferring individual lots to homebuilders."

Response 34: The definition of final stabilization cannot be expanded to directly address all individual situations. However, for this particular example, lots that are part of a common plan of development and that undergo final stabilization by a developer prior to sale may be excluded from the developer's SWP3 and the associated requirements whether or not the lots have been sold. When stabilized lots are sold to a homebuilder, the homebuilder must obtain authorization under this permit prior to initiating construction activities. If the developer maintains temporary stabilization of lots, and subsequently sells these lots to a homebuilder, the developer may then exclude these areas from its SWP3 following the sale. The homebuilder must then obtain authorization and comply with the terms of the permit.

Comment 35: TAB expressed concern that the definition of final stabilization requires a builder to establish and maintain temporary stabilization, including perimeter controls. TAB expressed the belief that if silt fencing or other structural controls are left in place once the homeowner takes over the property, they will be an "eye sore" and will also pose a safety concern. HCFCD and TAB commented that temporary stabilization measures in the context of a residential development should be adequate without additional perimeter controls.

Response 35: A perimeter silt fence may not be the best or most appropriate temporary stabilization method and other perimeter controls may be appropriate. Controls may not be necessary along the entire perimeter of a lot in order to prevent erosion from storm water runon and runoff and should be installed based on the site-specific conditions. Therefore, the definition of "Final Stabilization" has been revised to remove the language "including perimeter controls." In addition, requiring temporary controls to remain in place until "occupation of the home by the homeowner" may be an uncertain period of time for the homebuilder to remain responsible for temporary controls. The definition is further revised to state that the builder must maintain the controls until "the time of transfer of the ownership of the home to the buyer."

Comment 36: Cleburne commented that the definition of "Final Stabilization" contains two typographical errors, both referencing "condition 1 above," rather than referencing "condition (a) above."

Response 36: TCEQ has corrected the references.

Comment 37: Cleburne, Houston, ONCOR, and Gardere commented that the language in the definition of final stabilization regarding construction projects on land used for agricultural purposes should be separate from the language dealing with individual lots in a residential construction site.

Response 37: In response to this comment the existing language in the definition for those construction projects occurring on land used for agricultural purposes has been separated from the language regarding residential construction by changing (b)(3) under the definition to (c).

Comment 38: SWBT requested that the TCEQ exclude narrow telecommunication cable installation projects, where the trench is two feet or less in width and where cable installation is done using soil plows, from the definition of large and small construction projects. SWBT commented that the "water quality impacts along these narrow linear projects are less than those from large contiguous construction projects and should not warrant the same level of control." CenterPoint supported a provision specifying that linear utility line installations that disturb a width of two feet or less, such as trenching, not be included in the definitions of "Large Construction Activity" or "Small Construction Activity" and therefore not be subject to regulation.

Response 38: The NPDES rules require authorization for storm water discharges from construction activities that disturb one or more acres or from activities that are a part of a common plan of development that will result in the disturbance of one or more acres. The TCEQ has adopted these federal rules by reference in Chapter 281. The issuance of the draft permit is according to these rules, and does not exclude any construction activities based solely on the length or width of the disturbed areas. Permittees using technologies that limit soil disturbance, such as soil plows, may list these technologies as a best management practice in the SWP3 for that project. Additionally, the permit contains the flexibility to implement BMPs that reflect the differences between large contiguous projects and narrow linear projects.

Comment 39: HCFCD commented that the maintenance of channels should be excluded from the proposed definition of "Large Construction Activity." TCC commented that maintenance of existing pipelines and other structures should not be considered a construction activity and that the definitions of large and small construction activity should be revised to exclude these activities.

Response 39: The current definition of "Large Construction Activity" contains language that exempts routine maintenance activities to restore or maintain the designed profiles of a channel, ditch, or other similar storm water conveyance and those activities are not subject to the permit. However, replacing a deteriorated stretch of pipeline is considered a construction activity and possibly subject to the permit depending on the amount of area disturbed and whether the pipelines fall under the jurisdiction of the Texas Railroad Commission (RRC) (see Response to Comment 85).

Comment 40: Harris County requested that the TCEQ add a definition of "Maximum Extent Practicable" to the permit and commented that this term is defined in the draft TCEQ Phase II MS4 general permit.

Response 40: No change has been made in response to this comment. The term "maximum extent practicable" was developed by EPA to describe the development and implementation of storm water management programs for regulated municipal separate storm sewer systems, or MS4s. Instead, the permit is modified to delete the term from Part III.F.2.(a)(i), allowing the term to remain specific to MS4

regulations. Part III.F.2.(a)(i) is revised to substitute "to the extent practicable" for the term "maximum extent practicable."

Comment 41: Houston, Harris County, and V&E commented that the definition of "Municipal Separate Storm Sewer System" uses the term "separate storm sewer system," but that this term is not defined. Houston, Austin, and Harris County suggested using the definition of MS4 from 40 CFR §122.26(b). Harris County, and V&E requested that the phrase "that discharges to waters of the United States" be added to the definition to clarify where the storm sewer must discharge in order to be subject to permit coverage.

Response 41: Authorization under the permit is for discharges to surface water in the state. However, in response to the comment a definition for the term "separate storm sewer system," has been added and includes the definition that is consistent with the definition of this term in TPDES permit TXR050000 for storm water associated with industrial activities: "Separate storm sewer system - A conveyance or system of conveyances (including roads with drainage systems, streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains), designed or used for collecting or conveying storm water; that is not a combined sewer, and that is not part of a publicly owned treatment works (POTW)."

Comment 42: Harris County requested that the TCEQ add a definition of "Non-point Source " to the permit and include a statement that this permit does not authorize non-point source discharges.

Response 42: TCEQ declines to add a definition for "Non-point Source" in the proposed permit. The permit applies only to certain point source discharges that are delineated in Part II.A. of the permit, "Discharges Eligible for Authorization." However, the following language has been added in Part II.B.10. of the permit, to state: "Storm water discharges from agricultural activities that are not point source discharges of storm water are not subject to TPDES permit requirements. These activities may include clearing and cultivating ground for crops, construction of fences to contain livestock, construction of stock ponds, and other similar agricultural activities."

Comment 43: AECT and AEP commented that it is unclear that only operators are required to submit an NOI to obtain coverage under this permit. Harris County suggested that the TCEQ provide a reference in the definition of "Notice of Intent" regarding who will be required to submit an NOI. Harris County requested that the NOI and other permit related forms be included with the permit.

Response 43: The notice and permit requirements to obtain authorization to discharge are delineated in Part II.D. of the permit, "Obtaining Authorization to Discharge," and are specific to the operator. Instructions will be added to the NOI to make it clear that it is the duty of the operator to submit the form. TCEQ disagrees that the NOI and NOT forms should be a part of the permit as this would limit the ability to revise the forms during the term of the permit. These forms will be available on the TCEQ Web site after the permit is adopted.

Comment 44: CenterPoint, AECT, and AEP requested that the terms "owners" and "party," as used in the definition of "Operator," be replaced with the term "person(s)." CenterPoint, AECT, and AEP also suggested that the term "construction project" be replaced with the phrase "large construction activity or a small construction activity."

Response 44: The TCEQ agrees with the commenters and revises the opening phrase in the definition of "Operator" to read: "person or persons associated with a large or small construction activity. . . ."

Comment 45: AECT, AEP, and CenterPoint requested that the following language be included in the definition of "Operator:" "Operator shall not include: (1) a subcontractor hired by, or under the supervision of, the owner, general contractor or other person(s) who meets the criteria in (a)(1) or (a)(2) above, or who is otherwise required to obtain coverage under this permit; (2) a utility company, or its authorized subcontractor(s), where such person's activities at a site disturbs the earth as the result of a linear utility installation in an area permitted by another person(s) meeting the criteria in (a)(1) or (a)(2) above; or (3) the owner or a future owner of property where construction is occurring, unless the owner of such property meets the criteria in (a)(1) or (a)(2) above."

Response 45: TCEQ disagrees with the need to revise the definition. For suggested item 1), a subcontractor hired by an operator would not meet the definition of operator in most instances. However, in circumstances where the subcontractor does have day-to-day operational control or otherwise meets the definition of an operator, the proposed revision would not be appropriate.

For suggested item 2), the determination of whether a utility company is an operator is not based on whether or not activities occur on a currently permitted construction site, but on whether or not the utility company meets either of the two criteria in the current definition of operator. In circumstances where the subcontractor does have day-to-day operational control or otherwise meets the definition of an operator, the proposed exclusion based solely on the nature of the activity being conducted would not be appropriate.

For suggested item 3), the current definition is sufficient to delineate if an owner qualifies as an operator of a construction site.

Comment 46: TAB commented that the definition of "Operator" should be revised to clearly state what constitutes "day-to-day operational control." TAB asserted that this may vary depending on the type of construction and suggests the following revision of the definition: "Residential-Operator means the land developer and/or general contractor in charge of the land development. During homebuilding, the homebuilder is the only entity that meets the definition of operator."

Response 46: The party meeting the definition of an operator may vary based on a number of site-specific circumstances. TCEQ disagrees with the proposed revisions that would limit the homebuilder as the sole party meeting the definition of an operator at residential developments. Whether a party is an operator is not dependant on the party's title, but on their authority. For example: 1) The owner is an operator when the owner has operational control of plans and specifications that would limit a contractor's ability to develop and implement SWP3; 2) The contractor is an operator when the contractor is not limited by plans and specifications and has sufficient authority to develop and implement an SWP3; and 3) The subcontractor is an operator if the contractor extends to the subcontractor the authority necessary to develop and/or implement the SWP3.

Therefore, depending on the site and the relationship between the parties, there can either be a single party acting as a site operator responsible for obtaining permit coverage or there can be two or more operators who need permit coverage.

Comment 47: Dallas commented that the definition of "Pollutant" is not consistent with the EPA's definition of the term and that it should be modified to list sediment as an example.

Response 47: TCEQ disagrees with the need to revise the definition. The definition of "Pollutant" is taken from TWC, §26.001(13), and the definition does not attempt to list all possible examples.

Comment 48: V&E commented that the phrase "surface runoff and drainage" within the definition of "storm water" is not limited to storm water and snow melt. Substances other than storm water and snow melt may result in surface runoff and drainage. V&E recognized that the definition "is taken from the U. S. EPA's storm water regulations," but recommended that the word "thereof" be added at the end of the sentence in this definition "to make clear what kinds of surface runoff and drainage are addressed."

Response 48: The phrase "surface runoff and drainage" could be interpreted to occur as a result of something other than rainfall, snowfall, and other types of atmospheric precipitation. As noted by V&E, the definition of storm water in the proposed permit is the exact wording found in the federal storm water regulations, NPDES storm water permits, and it is also included in other TPDES permits. Therefore, to maintain consistency, no change has been made to the current definition.

Comment 49: Cleburne commented that the definition of "Structural Control" includes many controls that by convention are usually referred to as non-structural controls, such as drain inlet protection.

Response 49: Drain inlet protection is considered a structural control because it fits the definition of a "device" to prevent pollution in storm water runoff as stated in the definition of "Structural Control."

Comment 50: TAB commented that the examples listed in the definition of "Structural Control (or Practice)" are mostly for highway and large scale construction projects. TAB requested the definition include controls that are specific for homebuilding. TAB suggested that the TCEQ add the following to the last sentence: "cutback curb, maintain existing vegetation, erosion control matting, landscape barriers, and sediment logs."

Response 50: The definition contains many examples, but not an inclusive list of all structural controls. The definition does not limit the use of structural controls to the listed examples. The definition does not attempt to list all possible examples.

Comment 51: Houston commented that the definition of "surface water in the state" specifies that "waters in treatment systems which are authorized by state or federal law, regulation, or permit, and which are created for the purpose of waste treatment are not considered to be water in the state." Houston expressed the belief that if storm water is considered a waste, then Houston's MS4 is a "treatment system . . . authorized by state or federal permit" and is not a surface water in the state. Houston stated that if this is accurate, discharges from a construction site to Houston's MS4 would not be covered by the proposed permit.

Response 51: Discharges from a construction site to an MS4 require authorization if the construction activity disturbs one or more acres. Authorization for storm water discharges is required whether the discharge is directly to surface water in the state or to an MS4 will ultimately discharge to a surface water in the state.

Comment 52: Houston commented that at the small MS4 storm water general permit public meeting held in Houston on October 29, 2002, TCEQ staff stated that "most discharges to surface water in the state would also constitute discharges to waters of the United States" and that exceptions "would be limited to discharges to playa lakes and similar discharges that are absorbed into the ground." Houston

wanted TCEQ to "clarify that these statements are correct." V&E requested an example of where a discharge to surface water in the state would not ultimately reach waters of the United States.

Response 52: Surface water in the state includes certain playa lakes and isolated wetlands that may not be waters of the United States. Also, storm water that infiltrates or is absorbed into soil, and that is not allowed to runoff, is not a discharge to surface water in the state or a discharge to waters of the United States. However, "playa lakes and similar discharges that are absorbed into the ground" were provided as possible examples and there may be other instances that where discharges to surface water in the state are not discharges to waters of the United States.

Comment 53: HPER recommended adding "playa lakes" to the definition of "Surface Water in the State."

Response 53: TCEQ disagrees with the need to modify the definition of "Surface Water in the State." The definition is taken directly from 30 TAC §307.3(57), relating to Texas Surface Water Quality Standards. The TCEQ has a separate policy statement regarding playa lakes and the requirements for discharges to these types of waters.

Comment 54: Harris County and V&E wanted to know the difference between surface water in the state and waters of the United States. V&E requested that written guidance be provided to the regulated community.

Response 54: MS4 is a term that is defined in the permit as well as in the Multi-Sector General Permit and at 40 CFR §122.26. Generally, it is any publicly owned system of storm water conveyances. Surface water in the state is defined in the permit and is in accordance with the definition in Chapter 307 (relating to Texas Surface Water Quality Standards). Portions of an MS4 may also be a surface water in the state. However, discharges from construction activities that result in the disturbance of one or more acres must be authorized by TPDES permits regardless of whether they are discharges to surface water in the state or discharges to surface water in the state through an MS4.

Comment 55: Harris County requested to know the difference between a surface water in the state and an MS4. V&E requested clarification on how to determine where an MS4 ends and surface water in the state begins if man-made ditches (such as those maintained by the Harris County Flood Control District) are used. V&E asked if these ditches are an MS4, a surface water in the state, or both. Houston requested clarification regarding whether the streets, gutters, ditches, and storm sewers that constitute an MS4 are surface water in the state.

Response 55: The definition of an MS4 is included in the permit. An MS4 is generally a publicly owned system, designed and used for collecting and conveying storm water, that may include roads with drainage systems, streets, catch basins, curbs, gutters, man-made channels, storm drains, and ditches. The definition of surface water in the state is included in the permit. Surface waters in the state are generally any of a number of bodies of surface water (with the exception of waste treatment systems), fresh or salt, navigable or nonnavigable, that are wholly or partially inside or bordering the state and subject to the jurisdiction of the State of Texas.

There are instances where water may be both a surface water in the state and an MS4 though it is not possible to articulate all scenarios where it is one or the other or both. For example, portions of an MS4 system, including ditches, may be a surface water in the state. As pointed out by EPA in the preamble to

its Phase II storm water permit (64 FR 68722), a ditch may be part of an MS4. As with other determinations of jurisdictional provisions of the CWA, that determination, however, requires case-specific evaluations of fact. Once a body of water is identified as a surface water in the state, it remains a surface water in the state down-gradient or down stream from that point. If construction activities result in the disturbance of one or more acres, storm water discharges from the site must be authorized regardless of whether the discharge is to surface water in the state or to an MS4. The construction site operator must provide either a copy of the construction site notice or NOI to the operator of any MS4 that receives the discharge, regardless of whether or not that portion of the MS4 is a surface water in the state. These distinctions are not necessary to determine if the discharge requires authorization or whether or not an MS4 operator must be noticed of the discharge.

Comment 56: V&E asked, if an MS4 is both an MS4 and a surface water in the state, for clarification on how the regulated community is to distinguish between an MS4 operated by an MS4 operator and the surface water in the state to which the discharge is made.

Response 56: It is not necessary for operators to make this distinction in order to determine if authorization under the permit is necessary. Operators of construction activities that result in the disturbance of one or more acres must obtain authorization for discharges of storm water runoff whether the discharge is directly or indirectly to surface water in the state. Discharges to an MS4 will ultimately result in a discharge to a surface water in the state. However, all MS4s are required to develop and submit as part of their authorization a map or maps of their system which may be consulted to determine if the MS4 exercises jurisdiction of the water into which a construction site is discharging.

Comment 57: V&E, Houston, and Harris County commented that the definition for "Waters of the United States" in the permit does not parallel the definition in the federal storm water regulations in 40 CFR §122.2. V&E stated that the language excluding water treatment systems and prior converted croplands has been omitted. V&E requested that these exclusions be added to the definition in the proposed permit.

Response 57: The definition of "Waters in the United States" in the permit is amended to add the following language omitted from the federal definition: "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) are not waters of the United States. This exclusion applies only to man-made bodies of water which 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. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the CWA, the final authority regarding CWA jurisdiction remains with EPA."

Comment 58: HPER recommended that a definition for "Temporary Stabilization" be added to the permit.

Response 58: The following definition has been added to the permit: "Temporary Stabilization - A condition where exposed soils or disturbed areas are provided a protective cover, which may include temporary seeding, geotextiles, mulches, and other techniques to reduce or eliminate erosion until either final stabilization can be achieved or until further construction activities take place."

Part II.A. Discharges Eligible for Authorization

Comment 59: AECT and AEP commented that this section should be titled "Discharges Eligible for Authorization by Operators." AECT, AEP, and CenterPoint asked that the language in Part II.A.1. and 2. be revised to refer to operators of construction activities to make clear that it is the operator that must obtain the necessary authorization under the permit.

Response 59: Part II.A. of the permit specifically describes the types of discharges that are eligible for authorization. Part II.D. of the permit, "Obtaining Authorization to Discharge," specifies that it is the operator of a construction activity that must obtain authorization for the discharges covered under the permit.

Comment 60: HCFCD supported allowing ancillary sites such as borrow pits to be covered under the proposed permit. Borrow pits and other ancillary sites are commonly located further from the main construction activity than the proposed language allows, particularly in urban areas of the state. HCFCD did not agree with the requirement that such sites be located "adjacent to, or in close proximity to" the main construction activity. HCFCD suggested that the TCEQ allow ancillary sites directly related to the main construction site to develop their own SWP3 and to be covered under the same NOI. HCFCD asserted that "this should be allowed when the functional link between sites can be clearly demonstrated."

Response 60: Certain temporary supporting industrial activities should be allowed coverage under the permit where they directly support the construction activity. This provides an efficient means for obtaining the necessary authorization for these sites while encouraging coordinated pollution prevention activities between the associated sites. For example, the permit allows authorization for ancillary concrete batch plants and asphalt plants. These plants are usually temporary or mobile operations that move to the area of the construction site and provide direct support to the construction activity. When the construction activity is completed these operations typically move to the next construction site. As suggested, these sites can be addressed in an SWP3 and authorized when the construction site operator submits the NOI for the construction activity. Because the authorization for these supporting sites is included in the authorization for the main construction activity, the sites must be located in close proximity to the actual construction activity. Borrow pits are not like concrete and asphalt batch plants because they are typically not temporary or mobile and, as described by HCFCD, are not typically located at or near the construction activity. Where the supporting activities are remotely located, they may be authorized under the industrial storm water permit, TPDES permit number TXR050000. In Response to Comment 63, TCEQ proposes to establish a requirement that supporting activities may qualify for authorization under the construction operator's storm water permit if the supporting site is within one mile from the construction site boundary.

Part II.A.1. Storm Water Associated with Construction Activity

Comment 61: Harris County requested that the statement "discharges of storm water runoff from small and large construction activities may be authorized under this general permit" be revised to state that the discharges "are authorized" under the general permit.

Response 61: TCEQ disagreed with the proposed revision. Some construction activities may not qualify for coverage, as described in Part II.B. of the general permit titled "Limitations on Permit Coverage," and coverage is conditional and based on compliance with the terms and conditions of the permit. Also, it is possible to authorize discharges of storm water under an individual TPDES permit.

Part II.A.2. Discharges of Storm Water Associated with Other Industrial Activities

Comment 62: Harris County requested that the statement "Discharges of storm water runoff from concrete batch plants, asphalt batch plants, equipment staging areas, material storage yards, material borrow areas, and excavated material disposal areas may be authorized under this general permit provided . . . " be revised to read "Discharges of storm water runoff from construction support activities including concrete batch plants, asphalt batch plants, equipment staging areas, ..."

Response 62: TCEQ agrees with the commenter and revises Part II.A.2. of the draft permit to read: "Discharges of storm water runoff from construction support activities, including concrete batch plants, asphalt batch plants, equipment staging areas, material storage areas, material borrow areas, and excavated material disposal areas may be authorized under this general permit provided . . . ."

Comment 63: V&E requested the basis for requiring that the supporting activity must be located at, adjacent to, or in close proximity to the permitted construction site in order to be covered under the authorization for the construction activity. V&E further requested clarification on what "close proximity" means. Houston requested that this section of the permit be revised to delete the requirement that the supporting activity must be "located at, adjacent to, or in close proximity to the permitted construction site."

Response 63: The permit includes the provision for coverage of supporting industrial activities in order to provide an efficient means for the necessary authorization while encouraging coordinated pollution prevention activities between associated sites. The activities at supporting sites can be addressed in an SWP3 and authorized when the construction site operator submits the NOI for the construction activity. Because the authorization for these supporting sites is included in the authorization for the main construction activity, it is required that the supporting sites be located in close proximity to the actual construction activity. Where the supporting activities are remotely located, they may be authorized under the industrial storm water permit, TPDES Permit Number TXR050000. In order to provide guidance, the permit is revised to require that the supporting activity must be located within a one-mile distance from the construction site boundary.

Comment 64: V&E requested "clarification on whether an off-site supporting activity that is used by the same operator to support construction activities at several different locations is still eligible for coverage under the permit so long as the off-site support area is identified and has storm water management controls for that area in at least one of the pollution prevention plans for the individual construction projects."

Response 64: Storm water discharges from an off-site supporting activity can only be included under the authorization for a single "supported" construction activity at any one time. While operating under that authorization, the site can provide support to additional construction activities and also sell their services and products to the public in general. When the authorization for the supported construction activity is terminated, the supporting site may be covered under another authorized supported site by amending the SWP3 of the authorized site to include the off-site supporting activity. Alternatively, the off-site supporting activity may obtain coverage under the industrial storm water permit, TPDES Permit Number TXR050000.

Part II.A.2.(c)

Comment 65: TXDOT commented that the difference between industrial and construction activity should be clarified. Equipment staging areas, material storage yards, material borrow areas, and

excavated material disposal areas may be associated with the actual construction activity, but are not industrial activities themselves.

Response 65: In response to the commenter, the title of Part II.A.2. is revised to read; "Discharges of Storm Water Associated with Construction Support Activities."

Part II.A.3. Nonstorm Water Discharges

Comment 66: Part II.A.3. of the general permit contains a list of nonstorm water discharges that are eligible for authorization under the general permit. Austin recommended including a qualifier that these discharges, except for discharges from fire fighting activities, are eligible for authorization if they would not result in a pollutant discharge. Houston requested that the permit clarify that these discharges are not allowed where the MS4 operator has determined that the discharge is a "substantial source of pollutants to the MS4."

Response 66: These nonstorm water discharges are common discharges that may be characterized as "de minimis sources" of pollutants. However, MS4 operators may, based on site-specific conditions, local water quality issues, and other factors, restrict these discharges to their systems through local ordinances and controls. Additionally, any problematic discharges may be reported to a TCEQ regional field office for investigation.

Comment 67: Houston expressed the belief that the permit appears to allow the discharge of wash water from cement trucks, which can contain significant levels of pollutants and should not be allowed.

Response 67: A discharge of water from washing concrete truck chutes and related equipment would not be authorized under this permit. However, some operators may establish a best management practice of washing the exterior of trucks and equipment immediately prior to their leaving the construction site to prevent or reduce the off-site tracking of mud. Therefore, Part II.A.3.(c) is revised to read: "(c) vehicle, external building, and pavement wash water where detergents and soaps are not used, where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed; and if local state, or federal regulations are applicable, the materials are removed according to those regulations), and where the purpose is to remove mud, dirt, and dust;"

Comment 68: Cleburne commented that "pavement wash water at a new construction site often contains a great deal of sand, soil, or sediment" and that "language should be added to prevent this from being an authorized discharge to the storm drain system."

Response 68: The construction site operator authorized under the general permit must control erosion through the development and implementation of BMPs that either prevent or limit the off-site transport of soils. Paved areas that are covered in sand, soil, and sediment may be evidence of ineffective or nonexistent best management practices. However, it is acceptable to develop a BMP in the event of this situation to remove this material with a shovel and broom prior to washing the surface. It would not be an acceptable BMP to simply wash these materials into a storm drain system.

Comment 69: V& E commented that Part II.A.3.(c) of the general permit contains a restriction for the discharge of wash water where spills or leaks of toxic or hazardous materials have not occurred, unless all spilled material has been removed. V&E commented that "the focus should be on those spill events that impact or have the ability to impact such wash waters" and recommended insertion of the clause "in areas

where such wash waters may come into contact with these spills and leaks" after the words "have not occurred." V&E also questioned the use of the word "all" in the permit language and asked if this means that "every molecule of the substance that has spilled or leaked or does it mean to the extent either reasonably removed under the circumstances or as required by law." V&E also asked where there has been a hydrocarbon release from a storage tank and the site has been remediated to the extent required by TCEQ such that a "no further action" or similar closure letter has been issued, has "all" of the spilled or leaked material been removed.

Response 69: Spills must be cleaned up in accordance with applicable regulations. For clarification Part II.A.(c) has been revised to state that unless all spilled material has been removed; and if local, state, or federal regulations are applicable, the materials are removed according to those regulations. See Response to Comment 67 for the full text of the section.

Part II.A.3.(g)

Comment 70: V&E recommended that "trench dewatering flows" be expressly included in subpart (g). If the change is not made, V&E wants to know the "rationale for such refusal and whether the agency acknowledges that trench dewatering is nevertheless covered under the Construction GP."

Response 70: Water that accumulates in a trench will usually originate either from rainfall or groundwater infiltration. The permit authorizes the discharge of storm water and uncontaminated groundwater. Best management practices should be developed for construction sites where this activity is necessary. The BMP should ensure that the discharge does not erode soils downstream, does not contain excessive suspended solids that would affect receiving waters, and does not exhibit characteristics of a contaminated groundwater, such as groundwater containing petroleum distillates, solvents, and other pollutants.

Comment 71: Harris County requested that the TCEQ revise the language in Part II.A.3.(g) from "including foundation or footing drains" to "and foundation or footing drains" to be consistent with EPA Region 6 construction general permit language. Austin recommended modifying the phrase "uncontaminated ground water or spring water, including foundation or footing drains where flows are not contaminated with industrial materials such as solvents" to include at the end ". . . solvents or other pollutants."

Response 71: Part II.A.3.(g) is revised to read, "uncontaminated ground water or spring water, including foundation or footing drains where flows are not contaminated with industrial materials such as solvents and other pollutants."

Part II.A.4. (Now Part II.A.3.) Other Permitted Discharges

Comment 72: Houston and Harris County requested clarification of what is meant by the phrase "separate TPDES or TCEQ permit" as used within this section and throughout the proposed permit. Houston and Harris County stated that this language should also include a reference to NPDES permits because some NPDES storm water permits remain in effect.

Response 72: The phrase "separate TPDES or TCEQ permit" refers to any other TPDES or TCEQ individual or general permit. The permit has been revised in response to this comment to substitute the

phrase “separate NPDES, TPDES, or TCEQ Permit” for the existing phrase “separate TPDES or TCEQ permit” throughout the permit.

Part II.B. Limitations on Permit Coverage

Comment 73: Cleburne noted that “items 3, 4, and 6 refer to special circumstances where use of the general permit may be denied by TCEQ and the executive director may” require an individual permit. Cleburne commented that these specialized conditions would require the developer or builder to be aware of water quality standards, the quality of receiving waters, and designation of water quality areas, which is not generally known by Texas citizens. Cleburne asked “how will the TCEQ make it known to potential permit applicants if their location will fall within an area that would deny them use of this general permit?”

Response 73: In regard to Part II.B.3., “Compliance With Water Quality Standards,” TCEQ will directly notify the operator upon becoming aware that an application for an individual permit or coverage under a separate general permit is necessary to ensure compliance with water quality standards and for other factors described in Part II.G.2. of the permit. In regard to Part II.B.4., “Discharges to Water Quality-Impaired Receiving Waters,” TCEQ will notify permittees and operators submitting NOIs if a TMDL implementation plan is developed that would directly affect storm water discharges authorized under the permit. In regard to Part II.B.6., “Discharges to Specific Watersheds and Water Quality Areas,” operators must review 30 TAC Chapter 311 (relating to Watershed Protection), to determine if any restrictions or prohibitions would restrict planned discharges at a construction site. This rule, and any restrictions stemming from the rule, are separate from the conditions of this permit.

Comment 74: Cleburne stated that if TCEQ denies permit coverage for construction activities, this may dramatically affect municipalities that must, as a requirement of their Phase I MS4 permit, enforce storm water runoff from construction sites. Cleburne stated that if TCEQ denies coverage for a site, a city may be found in violation of its Phase I permit where building permits have been issued and construction has commenced. However, Cleburne stated that if a municipality attempts to deny a development permit to an operator based on lack of TPDES coverage, then that act may constitute a taking. Cleburne stated that this permit provision could become a liability and a legal issue for those involved.

Response 74: TCEQ disagrees that if the TCEQ denies or suspends a construction operator’s authorization under this permit, the municipality receiving the discharge is in violation of its MS4 Phase I permit. The Phase I MS4 permit requires the municipality to develop and implement an illicit discharge detection and elimination program and to develop ordinances as necessary to enforce the program. If the municipality discovers through implementation of this program that a contractor was denied TPDES permit coverage and that construction activities continue, the municipality may find the contractor in violation of the ordinance. The municipality should also notify the applicable TCEQ regional office. These are actions that the municipality can take that are compliant with their Phase I permit requirements. It is not a Phase I MS4 requirement that the issuance of a building permit by a municipality be contingent on the applicant having a TPDES storm water permit.

Part II.B.2.

Comment 75: Harris County requested that the term “storm water associated with construction activity” be revised to “storm water runoff associated with construction activity” to be consistent with the EPA Region 6 construction general permit language.

Response 75: TCEQ disagrees with the proposed change. The definition of "storm water associated with construction activity" in the permit includes "storm water runoff from a construction activity . . . ."

Part II.B.3: Compliance With Water Quality Standards

Comment 76: Harris County requested that the first sentence stating, "Discharges to surface water in the state 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 are not eligible for coverage under this general permit" be revised to refer to storm water "discharges from construction sites to surface water in the state." Harris County stated that this would be consistent with the language in the federal permit for construction activities.

Response 76: TCEQ disagrees with the need for this revision as the permit defines the scope of discharges eligible for authorization in Part II., "Permit Applicability and Coverage."

Comment 77: Harris County requested that the TCEQ clarify what it means by "alternative general permit" in the second sentence of Part II.B.3. Harris County noted that Part II.G. of the permit only describes "Alternative Coverage Under an Individual TPDES Permit."

Response 77: In response to this comment, the title of Part II.G. has been revised to read, "Alternative TPDES Permit Coverage." Item Part II.G.3, is added to state: "Any discharge eligible for coverage under this general permit may alternatively be authorized under a separate, applicable general permit according to 30 TAC Chapter 205 (relating to General Permits for Waste Discharges)." Additionally, the reference "(see Part II.G.3)" has been added after "alternative general permit" in Part II.B.3.

Part II.B.4. Discharges to Water Quality-Impaired Receiving Waters

Comment 78: TXDOT requested that the permit be revised to clarify that impaired waters are those that are listed on "the EPA approved Clean Water Act §303(d) list" to avoid confusion regarding which list is applicable.

Response 78: TCEQ agrees with the comment and has made the suggested revision. The latest EPA-approved CWA, §303(d) list of impaired waters is the applicable list for implementation of the permit. Currently, the 2000 §303(d) list is in effect.

Comment 79: TXDOT commented that a TMDL implementation plan should be satisfied by the erosion and sediment control provisions in the proposed permit and that the permit should be sufficient to protect waters impaired for sediment related issues.

Response 79: Compliance with the provisions of the proposed permit should ensure protection of receiving waters from suspended solids associated with storm water runoff from construction sites. TMDL implementation plans are necessarily predicted on numerous site-specific factors. Therefore, it is not possible to definitively conclude that these plans will not require some additional, future control.

Comment 80: TCC requested that TCEQ "provide additional clarification" on how the requirements of the permit will apply to construction projects that discharge storm water runoff to an impaired receiving water. TCC gave the specific example of a construction site, located "on pastured land," that discharges

to a creek that is listed as impaired due to elevated levels of bacteria. TCC asked if such a site would need to be authorized under an individual permit.

Response 80: The permit contains certain restrictions for new sources or new discharges of the constituents of concern to impaired waters. Additional controls would only be necessary for a construction site if contained in an approved TMDL or specifically required by an implementation plan those controls for storm water associated with construction activity. In the example, construction activities would not be expected to contribute bacteria to storm water runoff. However, where TMDL identified storm water associated with industrial activities is a source of the constituent of concern and where additional specific controls are required, these controls could either be included in the SWP3 for the site and covered under the general permit or an individual permit.

Comment 81: HBAGD commented that this section may cause confusion since the list of impaired waters is not readily available to typical homebuilders. In some areas, builders may unknowingly cause some storm water discharge into impaired waters.

Response 81: The list of impaired waters is available on the TCEQ Web site at *www.tnrcc.state.tx.us/admin/topdoc/sfr/058-99/index.html*. Additionally, if an approved TMDL specifically addresses storm water associated with construction activities, the TCEQ may screen notices of intent as they are processed to identify those that may be affected by the TMDL. The TCEQ may additionally modify the permit, if necessary, to address discharges to these waters. In response to the comment, the website address for the most recently adopted §303(d) list is added to Part II.D.2. of the permit.

Comment 82: Harris County commented that the EPA Region 6 construction general permit does not authorize storm water discharges from construction sites that will cause, or have reasonable potential to cause or contribute to, violations of water quality standards. Thus, EPA limits coverage on the basis of the discharge and does not restrict coverage based on the condition of the receiving waters. Harris County recommended that TCEQ modify the section to be more consistent with the federal permit and to limit permit coverage based on the discharges rather than on the condition of the receiving waters.

Response 82: Part II.B.3. of the permit, "Compliance with Water Quality Standards," prohibits authorization of discharges that "would cause or contribute to the violation of water quality standards . . . ." However, according to 30 TAC Chapter 307 (relating to Texas Surface Water Quality Standards), discharges must protect and maintain existing designated uses of receiving waters. Therefore, TPDES permits must be developed with consideration for both the quality of the proposed discharge and the quality and nature of the receiving waters.

Part II.B.5. Discharges to the Edwards Aquifer Recharge Zone

Comment 83: UTS and TXDOT requested that the requirement to attach a copy of the Water Pollution Abatement Plan (WPAP) to the SWP3 be removed from the permit because of the size of the WPAP document.

Response 83: The permit has been revised to remove the following requirement: "A copy of the agency-approved Water Pollution Abatement Plan, required by the Edwards Aquifer Rule, must be attached as a part of any SWP3 that is developed as a requirement of this general permit."

Comment 84: TXDOT requested clarification on the requirements to submit copies of NOIs to the TCEQ regional offices for activities within or ten miles upstream of the Edwards Aquifer recharge zone. TXDOT commented that "ten miles upstream" is a vague requirement and should be changed to be consistent with the Edwards Aquifer Rules and TCEQ's definition of contributing zone. TXDOT asked for guidance on notice for small construction activities where no NOI is required and also for electronically submitted NOIs. TXDOT commented that TCEQ should be responsible for forwarding copies of the NOI to the relevant regional office. LCRA commented that the permit language should be reorganized based on the different requirements for new and existing discharges.

Response 84: In response to the commenter the permit has been revised to require that copies of NOIs be provided to the appropriate TCEQ regional office for large construction activities occurring on the Edwards Aquifer contributing zone. There is no requirement for operators of small construction activities to provide similar notice. This is consistent with the current requirements of 30 TAC Chapter 213, Subchapter B (relating to Contributing Zone to the Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis, and Williamson Counties). Part II.B.5. is revised as: "Discharges cannot be authorized by this general permit where prohibited by 30 Texas Administrative Code (TAC) Chapter 213 (relating to Edwards Aquifer). (a) For new discharges located within the Edwards Aquifer Recharge Zone, or within that area upstream from the recharge zone and defined as the Contributing Zone, operators must meet all applicable requirements of, and operate according to, 30 TAC Chapter 213 (Edwards Aquifer Rule) in addition to the provisions and requirements of this general permit; (b) For existing discharges, the requirements of the agency-approved Water Pollution Abatement Plan under the Edwards Aquifer Rules are in addition to the requirements of this general permit. BMPs and maintenance schedules for structural storm water controls, for example, may be required as a provision of the rule. All applicable requirements of the Edwards Aquifer Rule for reductions of suspended solids in storm water runoff are in addition to the requirements in this general permit for this pollutant. For discharges from large construction activities located on the Edwards Aquifer contributing zone, applicants must also submit a copy of the NOI to the appropriate TCEQ regional office."

Part II B.9: Oil and Gas Production

Comment 85: Austin requested that the TCEQ provide clarification related to jurisdiction over the construction of pipelines for the transportation of other types of petroleum (such as natural gas liquids, gasoline, and other refined products).

Response 85: Under TWC, §26.131(a)(F), the RRC has jurisdiction over activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel. Construction of a pipeline is an activity associated with the transportation or distribution of oil and gas. The RRC and TCEQ have entered into an MOU that further details the responsibilities of each agency. Under the MOU, the RRC has responsibility for activities associated with the exploration, development, or production of oil, gas, or geothermal resources including transportation of crude oil and natural gas by pipeline. Therefore, RRC has jurisdiction over the construction of pipelines used for transportation or distribution of natural gas and natural gas liquids prior to the use of such gas in any manufacturing process or as a residential or industrial fuel. The TCEQ has jurisdiction over the construction of pipelines used for the transportation of refined oil products such as gasoline.

Part II.C. Deadlines for Obtaining Authorization to Discharge

Comment 86: TXDOT commented that ongoing small construction is defined as construction that is ongoing as of March 10, 2003, but ongoing large construction is defined as construction that is ongoing as of the date of permit issuance. TXDOT requested that the permit be modified for consistency to allow for a 90-day grace period for all construction activities authorized under this permit.

Response 86: Large construction activities are Phase I storm water activities that are currently regulated by the EPA under an NPDES general permit. The proposed TPDES permit is an assumption by TCEQ of the Phase I federal permitting responsibilities for large construction activities and also includes Phase II storm water discharges from small construction activities. To assure ongoing compliance with Phase I regulations, the proposed permit does not include a grace period.

The Phase II federal rules, finalized in 64 FR 68722 (December 9, 1999), set a deadline of three years and 90 days from the publication of the federal rules in the *Federal Register* for small construction sites to obtain permit coverage. Thus, the deadline per federal regulations for small construction activities to obtain coverage is March 10, 2003.

Part II.C.2. Small Construction Activities

Comment 87: HPER pointed out that the fact sheet states that operators of small construction sites are not required to submit an NOI, but must develop an SWP3. Language in Part II.C.2. of the permit states that these construction sites must be authorized. HPER wanted to know how these operators are authorized.

Response 87: Part II.D, "Obtaining Authorization to Discharge," describes the process for obtaining authorization. Generally, operators of small construction sites can be authorized in two ways. If a waiver condition can be met, the operator can sign and post a construction site notice and provide a copy of the notice to the operator of any MS4 that receives the discharge. Alternatively, the operator can develop and implement an SWP3, sign and post the construction site notice, and provide a copy of the notice to the operator of any MS4 that receives the discharge.

Part II.D. Obtaining Authorization to Discharge

Comment 88: Harris County requested that the TCEQ revise the phrase "site notice" to "construction site notice."

Response 88: TCEQ agrees with the commenter and has revised these references.

Comment 89: Cleburne commented that the permit does not address how TCEQ will provide notification of the operator if TCEQ denies use of the permit after an NOI has been filed or, in the case of a small construction site, after the operator posts a notice and proceeds with construction.

Response 89: TCEQ will directly notify the applicant in writing as soon as possible after the determination to deny use of the permit.

Part II.D.1.

Comment 90: CenterPoint, AECT, and AEP requested that the language in the opening sentence of the first paragraph of this section be revised to read: "Operators that engage in small construction activities

occurring during periods of low potential for erosion may be automatically authorized under this general permit, and operators of these sites are not required to develop a storm water pollution plan or submit a notice of intent (NOI) provided:"

Response 90: The sentence has been revised to better reflect that the operator may be authorized and not the construction site. However, whether or not the activity occurs during a period of low potential for erosion is based on meeting a specified condition that follows this sentence. Therefore, the sentence is revised to read: "Small construction activities are determined to occur during periods of low potential for erosion and operators of these sites may be automatically authorized under this general permit and not required to develop a storm water pollution prevention plan or submit a notice of intent (NOI), provided:"

Comment 91: Reliant, HPER, and HCFCD requested that the opening sentence "Small construction activities are determined to occur during periods of low potential for erosion . . ." should be revised to read "Small construction activities that are determined to occur during periods of low potential for erosion . . . ."

Response 91: TCEQ disagrees with the proposed revision and notes that if the conditions listed in the permit are met then the activity is determined to occur during a period of low potential for erosion. There is no action required by TCEQ to make the determination. Rather, this condition is predetermined to occur when Part II.D.1.(a) - (c) are true.

Comment 92: Austin recommended that the opening sentence, "Small construction activities are determined to occur during periods of low potential for erosion and may be automatically authorized under this general permit . . . ," should be revised to read: "Small construction activities scheduled to occur during periods of low potential for erosion may be . . . ."

Response 92: TCEQ disagrees with the proposed revision. Part II.D.1.(a) - (c) are intended to delineate the conditions that define construction activities that occur during periods of low potential for erosion and that can, therefore, meet a lesser requirement for permit compliance. The scheduled time frame for construction may be very different from the period of actual construction because of unforseen delays. Activities not meeting the conditions delineated in (a) - (c) would not be occurring during periods of low potential for erosion and would necessarily need to be authorized under other provisions of the permit, such as Part II.D.2. or Part II.D.3.

Comment 93: Houston and Harris County asked how the TCEQ will enforce permit requirements if they are not notified of small construction activities. Cleburne commented that it appears the TCEQ is relinquishing its responsibility to enforce the TPDES construction permit by only requiring notification to an MS4 operator. V&E asked if the TCEQ is attempting to delegate its regulatory oversight of small construction activities to MS4 operators. Cleburne commented that operators of MS4s may not have any means to issue or revoke the TPDES permit. Cleburne commented that some contractors may not know who the MS4 operator is and requested that these notices be sent to the TCEQ. Harris County requested the permit be revised to require that a copy of the construction site notice, site address, and a site map be provided to the TCEQ. TXDOT disagreed that small construction site operators should be required to notify the receiving MS4. Notifying the MS4 operator when it is not necessary to notify TCEQ would create an additional administrative burden to both the permittee and the MS4 operator that would result in no significant environmental benefit. Cleburne commented that it would be less confusing and more streamlined if all construction projects authorized under this permit were required to submit an NOI.

Response 93: TCEQ is responsible for the issuance and revocation of TPDES authorizations. TCEQ will be the primary agency responsible for enforcement of the proposed permit, while EPA retains oversight of the program and also retains enforcement authority. TCEQ will continue to authorize operators of large construction activities under the proposed permit by requiring operators to submit an NOI. However, TCEQ has determined that submitting an NOI for small construction activities would be inappropriate. The authorization of small construction activities will involve complicated issues, including: 1) statewide, thousands of small construction activities will commence each month; 2) there is an increased administrative cost to operators to submit NOIs and NOTs for these small activities; 3) there is an increased administrative cost to the TCEQ to process NOIs and NOTs, enter notice data into an electronic database for tracking, and make the data available to TCEQ inspectors in the regional offices; and 4) small construction activities are relatively short term and may be completed before the operator could be notified by TCEQ that the NOI was received. To address these challenges, the proposed permit includes procedures for authorizing these sites in a timely manner, reducing the administrative costs, and providing necessary regulatory oversight. Small construction site operators must post the construction site notice where it is readily available for viewing by the general public, local, state, and federal authorities. This provides an immediate indication of permit compliance or, in the instance where a site notice is not posted, noncompliance. The TCEQ field office storm water investigators will respond to complaints and also conduct scheduled inspections of construction sites.

Cities with a population of 100,000 or more have individual storm water permits authorizing the discharges from their MS4s. Operators of small MS4s located in urbanized areas will be required to obtain storm water permits for their systems. These MS4 permits contain requirements for the operators to develop a program to prevent illicit storm water discharges to their systems and requirements to develop controls in their areas of jurisdiction for runoff from construction activities. The operators of small permitted MS4s will be required to provide an annual report to TCEQ that summarizes the number of construction site notices received each year and activities performed to meet the construction site-related requirements of their MS4 permits. Therefore, requiring operators of small construction sites to provide notice to these MS4 operators will assist the MS4 operators toward compliance with the provisions of their MS4 permits, better ensure that construction operators have the necessary authorization, and allow TCEQ to track overall permit compliance through review of the MS4 permittee's annual reports.

Comment 94: TCC commented that it supports the decision to not require an NOI to be submitted for small construction activities. TCC commented that the TCEQ would otherwise be unnecessarily burdened with the enormous amount of NOIs and NOTs.

Response 94: TCEQ agrees with the comment and adds that this provision may assist MS4 permittees in meeting their permit requirements and additionally provide for better enforcement of the permit as described in response to the previous comment.

Part II.D.1.(a)

Comment 95: HPER recommended that the section be rewritten from "the construction activity occurs at a location defined in Appendix A" to "the construction activity occurs in a county listed in Appendix A;"

Response 95: TCEQ has revised the permit accordingly.

Part II.D.1.(c)

Comment 96: TXDOT commented that the "initiation of final stabilization cannot be a precondition of automatic authorization; automatic authorization occurs before earth-disturbing activities begin."

Response 96: TCEQ agrees in part with this comment. A permittee agrees to comply with the provisions of the permit by signing and posting the construction site notice (see Attachment 1 of the permit). If the requirements for authorization under this provision of the permit cannot be met, then the permittee is out of compliance. For example, if a contractor is not able to establish final stabilization within the defined time, a separate authorization for storm water discharges must be obtained until the site is finally stabilized. However, in response to the comment, the first sentence of the construction site notice certification has been changed to the following: "I _____ certify under penalty of law that I have read and understand the eligibility requirements for claiming an authorization by waiver under Part II.D.1. of TPDES General Permit TXR150000 and agree to comply with the terms of this permit."

Part II.D.1.(e)

Comment 97: HPER commented that the permit requires that the site notice be "posted at the construction site in a location where it is readily available for viewing . . . ." HPER asked to whom the site notice must be available and if posting the notice inside an administrative building, where the public has access, is sufficient.

Response 97: The site notice must be readily available for viewing by the general public, local, state, and federal authorities. The notice must be posted at the construction site. If the construction project is a long, linear project (e.g., pipeline, highway, etc.), the notice must be placed in a publicly accessible location near where construction is active and accessible to the public, such as at roadway crossings. The notice would not be readily available for viewing if it were located in a building.

Part II.D.1.(f)

Comment 98: Cleburne commented that the construction site notice form has a space for a permit number, but does not include instructions on how the operator would determine this number in order to fill out this form.

Response 98: Attachments 1 and 2 of the permit, the construction site notices, are revised to remove the space for the individual permit authorization number. The site notices will continue to contain the reference to the permit number, TXR150000.

Comment 99: TXDOT commented that dischargers into its systems should notify TXDOT and not the local MS4 operator.

Response 99: For TXDOT storm water conveyances that fit the definition of an MS4, TXDOT is the local MS4 operator and thus the notice would be provided to TXDOT.

Comment 100: Austin, Houston, and Harris County requested that Part II.D.1.(f) be revised to require the small construction site operator to supply a copy of the certified construction site notice to the operator of the MS4 at least two days prior to commencing construction activity.

Response 100: TCEQ agrees with the comment and has revised the permit to include that all notices to the operators of MS4s who receive discharges must be submitted to the operator of the MS4 at least two days prior to commencement of construction activities.

Comment 101: Harris County requested that the requirement for the operator to supply a copy of the certified site notice "to the operator of any municipal separate storm sewer system receiving the discharge" be revised to require that the notice be supplied to the "operator of the municipal separate storm sewer system where the construction site is located."

Response 101: TCEQ disagrees with the proposed revision. The construction site may be located within the jurisdictional boundaries of a number of MS4 operators and yet only discharge to one MS4. MS4 operators that have a TPDES permit for storm water discharges from those systems must develop and implement programs to eliminate illicit discharges to their systems and to address storm water discharges from construction activities that enter their systems. The requirement to submit the construction site notice to the MS4 operator receiving the discharge will assist the MS4 operator in meeting the provisions of its MS4 permit. There is no similar additional benefit to supplying notice to other area MS4 operators that do not receive discharges from the construction activity.

Part II.D.2.

Comment 102: AECT, AEP, and CenterPoint requested that the language in Part II.D.2. that reads, "Small construction activities not described in Part II.D.1. above may be automatically authorized . . ." be revised to read, "Operators that engage in small construction activities . . . ."

Response 102: TCEQ has revised the language to read, "Operators of small construction activities not described in Part II.D.1. above may be automatically authorized . . . ."

Comment 103: TXDOT requested that Part II.D.2.(a) be revised to state that only the applicable elements of the SWP3 must be implemented prior to commencing construction activities.

Response 103: TCEQ disagrees with the need to revise the permit language. The requirements for development of the SWP3 are delineated in Part III of the permit. It is clear in Part III that some required components of the SWP3 apply to preconstruction activities, some apply to ongoing construction activities, and some address postconstruction activities.

Part II.D.2.(b)

Comment 104: Houston and Harris County requested that the reference at Part II.D.2.(b) to "Attachment 1" be corrected to reference "Attachment 2."

Response 104: TCEQ has corrected the reference.

Part II.D.2.(d)

Comment 105: Arlington requested that this section include a requirement that the permittee submit a copy of the signed and certified notice to the local municipality. TXDOT suggested that the language in Part II.D.2.(e) requiring the discharger to provide a copy of the construction site notice to the operator of any MS4 receiving the discharge be revised to require the notice be provided to the operator of any MS4

"directly receiving the discharge . . . ." Houston expressed the belief that the TCEQ should require notice to the local governmental entity with jurisdiction over the construction site (i.e., the municipality or county, if the site is in an unincorporated area). Harris County requested the permit be revised from "operator of the municipal separate storm sewer system receiving the discharge" to "operator of the municipal separate storm sewer system where the construction site is located."

Response 105: The construction site may be located within the jurisdictional boundaries of a number of MS4 operators and yet only discharge to one MS4. MS4 operators that have a TPDES permit for storm water discharges from those systems must develop and implement programs to eliminate illicit discharges to their systems and to address storm water discharges from construction activities that enter their systems. The requirement to submit the construction site notice to the MS4 operator receiving the discharge will assist the MS4 operator in meeting the provisions of the MS4 permit. There is no similar additional benefit to supplying notice to other area MS4 operators that do not receive the discharge.

Comment 106: Houston expressed the belief that the TCEQ should also require notice to the local governmental entity with jurisdiction over the construction site, such as the municipality or county, if the site is in an unincorporated area. Houston commented that the MS4 may not be operated by the municipality or county in which the construction activity is occurring. Additionally, the MS4 operator may not have inspection and enforcement authority to ensure compliance with the permit.

Response 106: The construction site may be located within the jurisdictional boundaries of a number of MS4 operators and yet only discharge to one MS4. MS4 operators that have a TPDES permit for storm water discharges from those systems must develop and implement programs to eliminate illicit discharges to their systems and to address storm water discharges from construction activities that enter their systems. The requirement to submit the construction site notice to the MS4 operator receiving the discharge will assist the MS4 operator in meeting the provisions of the MS4 permit. There is no similar additional benefit to supplying notice to additional area MS4 operators that do not receive the discharge. If the operator of the noticed MS4 lacks enforcement authority to regulate discharges entering their system, they may contact the TCEQ regional office and report violations.

Comment 107: HBAGD commented that many municipalities have adopted a storm water control ordinance. In these cities, enforcement is performed during routine construction inspections. HGBAD asked why small construction site operators have to submit a notice to the municipality when the notice has been previously submitted via application for a building permit.

Response 107: The proposed permit is a statewide permit intended to authorize discharges subject to a number of additional local, state, and federal regulations. Many local authorities do not have ordinances, have ordinances that may be revised, or are in the process of developing ordinances to address storm water discharges associated with construction activities. Therefore, a standard requirement was developed that the operator of these construction sites must supply the construction site notice to the operator of the MS4 receiving the discharge.

Part II.D.3.

Comment 108: Harris County commented that the permit should be revised to require the operator to provide a copy of the NOI, the site address, and a site map to the operator of the MS4 where the construction site is located at least two days prior to commencing the activity. Austin and LCRA commented that the permit should be revised to require the operator to submit the NOI to the MS4

operator in whose jurisdiction the construction activities are occurring prior to commencing construction activities.

Response 108: TCEQ agrees in part with the comment and includes the following additional requirements in Part II.D.3. requiring that the operator must "provide a copy of the signed NOI to the operator of any municipal separate storm sewer system receiving the discharge, at least two (2) days prior to commencing construction activities." The NOI form will include either the address of the construction site or a description of the site's location. TCEQ disagrees that the operator should be required to provide a map of the site. The site address or a description of the location will be sufficient for locating the site.

It is not required that a copy of the notice be supplied to all MS4 operators in the area of the construction site. The construction site may be located within the jurisdictional boundaries of a number of MS4 operators and yet only discharge to one MS4. MS4 operators that have a TPDES permit for storm water discharges from those systems must develop and implement programs to eliminate illicit discharges to their systems and to address storm water discharges from construction activities that enter their systems. The requirement to submit the construction site notice to the MS4 operator receiving the discharge will assist the MS4 operator in meeting the provisions of the MS4 permit. There is no similar additional benefit to supplying notice to other area MS4 operators. If a governmental entity has some jurisdictional control over the construction activity that is not related to the TPDES permit for their MS4 system, that entity can separately request or require copies of notices as a part of that authority.

Additionally, Attachments 1 and 2 have been revised to require either a physical address for the construction site or a description of the site's location. This will provide MS4 operators with adequate information to locate the construction site. The permit is not revised to require notice to MS4 operators with systems that do not receive the discharge.

Part II.D.3(a)

Comment 109: TXDOT requested that Part III.D.3.(a) be revised to state that only the applicable elements of the SWP3 must be implemented prior to commencing construction activities.

Response 109: The requirements for development of the SWP3 are delineated in Part III of the permit. It is clear in Part III that some required components of the SWP3 apply to preconstruction activities, some apply to ongoing construction activities, and some address postconstruction activities.

Part II.D.3(b)

Comment 110: Houston, Harris County, and V&E requested the opportunity to make comments on the TPDES construction NOI form as part of the public comment process.

Response 110: TCEQ disagrees with this request as notice forms are not a part of the permit and are, therefore, not subject to public notice requirements and the formal comment period.

Comment 111: Houston commented that a copy of the NOI should be sent to the operators of all MS4s that will receive discharges from the site and to the local governmental entity with jurisdiction over the construction site, such as the municipality, or a county if the site is in an unincorporated area.

Response 111: Notice should be provided to all operators of MS4s that receive the discharge, but need not be supplied to all area MS4 operators. The construction site may be located within the jurisdictional boundaries of a number of MS4 operators and yet only discharge to one MS4. MS4 operators that have a TPDES permit for storm water discharges from those systems must develop and implement programs to eliminate illicit discharges to their systems and to address storm water discharges from construction activities that enter their systems. The requirement to submit the construction site notice to any MS4 operator receiving the discharge will assist the MS4 operator in meeting the provisions of the MS4 permit and ensure that all of these MS4s are noticed. There is no similar additional benefit to supplying notice to other area MS4 operators that do not receive storm water discharges from the site.

Comment 112: ONCOR commented that requiring operators to identify the addresses of all MS4s receiving the discharge would be an administrative burden. ONCOR commented that a copy of the NOIs should only be sent to regulated MS4s.

Response 112: Though it may be an administrative burden for operators to identify the addresses of all MS4s receiving the discharge, it is necessary to ensure that the appropriate MS4s have notice of the construction activity. MS4 operators that have a TPDES permit for storm water discharges from those systems must develop and implement programs to eliminate illicit discharges to their systems and to address storm water discharges from construction activities that enter their systems. The requirement to submit the construction site notice to any MS4 operator receiving the discharge will assist the MS4 operator in meeting the provisions of the MS4 permit and ensure that all of the regulated MS4s are noticed.

Comment 113: V&E commented that in situations where a landlord has a tenant who is conducting a regulated construction activity, both parties will be required to sign and make certifications on the same NOI. V&E advocated that in those instances where a tenant is conducting a regulated construction activity that is not the responsibility of the landlord, only the signature and certification of the tenant is required on the NOI.

Response 113: The operator, whether landlord or tenant, of a construction site eligible for coverage under this permit is required to obtain the necessary authorization. The permit requirements are specific to the operator, a term that is defined in Part I of the permit, and not determined by the landlord/tenant relationship.

Part II.D.3.(d)

Comment 114: HBAGD commented that it is not necessary for operators to post an NOI form at the site. Operators should simply be required to post the "construction site notice" as found in Attachment 2 of the permit.

Response 114: The permit requires that the operator post a copy of the document containing information on the construction activity and the operator's signature certifying intent to comply with the conditions of the permit. For small construction activities described in Parts II.D.1. and II.D.2., that document is the construction site notice. For large construction activities described in Part II.D.3., that document is the NOI.

Part II.D.4.(b) Effective Date of Coverage

Comment 115: TXDOT commented that the effective date of coverage should be consistent with the date the NOI is submitted and not dependent on how the NOI is submitted. TXDOT suggested that coverage should begin either 24 hours or two days after the NOI is submitted.

Response 115: The federal storm water Phase I permit for large construction activities allowed provisional authorization two days from the date that an NOI was postmarked and the TCEQ proposes to continue this expedited process of authorization in this permit. In an effort to maintain consistency with prior NPDES permits for these same discharges, the time frame for provisional coverage was not changed and has also been included in other proposed general TPDES permits for consistency. The TCEQ is proposing to develop an electronic submission process for permittees in order to more quickly process notices and provide confirmation of receipt of the notice to the permittee. Because the electronic notice will be delivered more quickly to the TCEQ for review, the permit provides for a quicker provisional authorization. This may also serve as an incentive to operators to use this more efficient notice method.

Part II.D.5 Notice of Change (NOC) Letter

Comment 116: Houston commented that the construction site operator should submit a copy of the NOC to the operators of all MS4s that will receive discharges. Houston and Austin commented that the operator should submit a copy of the NOC to the local governmental entity with jurisdiction over the construction site. Harris County commented that a copy of the NOC should be submitted to the operator of the MS4 where the construction site is located.

Response 116: An NOC should be provided to all operators of MS4s that should have received an NOI because they are receiving storm water discharges from the construction activity. In response to the comments, the permit has been revised to add a sentence at the end of Part II.D.5. that says, "A copy of the NOC must be provided to the operator of any MS4 receiving the discharge."

Part II.D.6. Signatory Requirement for NOI Forms, NOT Forms and NOC Letters

Comment 117: Tarrant County stated that NOIs, NOTs, and NOCs should be the only items that require a signature according to 30 TAC §305.44. Tarrant County commented that all other documents that require a signature as a provision of the permit should be signed according to §305.128.

Response 117: The signature requirements in the permit for NOI forms, NOT forms, and NOC letters are found in §305.44. However, construction site notices are signed by the applicant with the same certifying statement regarding compliance with the terms of the permit as is included in the NOI forms. Part II.D.6. is revised to clarify that the construction site notices, Attachments 1 and 2 of the permit, must also be signed according to §305.44.

Part II.D.7.d Contents of the NOI

Comment 118: Houston commented that the NOI should include confirmation that the SWP3 will be compliant with any applicable "local sediment and erosion control plans, ordinances or regulations." Houston has a local sediment and erosion control plan and expressed the belief that construction site operators should be required to confirm that their SWP3 will be compliant with the ordinance.

Response 118: Construction activities may be subject to additional local, state, or federal requirements. The cover page of the permit contains the statement, "Neither does this permit authorize any invasion of personal rights nor any violation of federal, state, or local laws or regulations." Compliance with, and

enforcement of, these additional regulations is not dependant upon the issuance of this proposed permit or the authorizations that result from the issuance of the permit. Part II.B.7. of the permit states: "This general permit does not limit the authority or ability of federal, other state, or local governmental entities from placing additional or more stringent requirements on construction activities or discharges from construction activities. For example this permit does not limit the authority of a home-rule municipality provided by Texas Local Government Code, Section 401.002."

Comment 119: UTS requested that the NOI form include the number of acres of land disturbed to the nearest tenth of an acre.

Response 119: Part II.D.7. of the permit has been revised to state that the NOI form will require that the operator specify the number of acres disturbed to the nearest whole acre. Many of the requirements and provisions of the permit are based on the number of whole acres disturbed so the NOI form will be consistent throughout the permit.

Part II.E. Application to Terminate Coverage

Comment 120: Dallas and Cleburne commented that operators of small construction activities should be required to submit an NOT to the TCEQ and to the MS4 operator. Cleburne commented that if an NOT must be submitted, it will allow a way of tracking to determine those sites that are still under the control of the builder that submitted the original construction site notice.

Response 120: TCEQ only requires an NOT for those operators that submit an NOI for initial coverage. Operators of small construction activities are not required to submit either an NOI or NOT. However, there is nothing in the permit to prevent local MS4s from requiring small construction activity operators to submit an NOI and NOT to the MS4 receiving the discharge.

Comment 121: TXDOT commented that the effective date for termination of permit coverage should be consistent with the date the NOT is submitted and not dependent on how the NOT is submitted. TXDOT suggested that coverage should terminate at midnight on the day the NOT is submitted, regardless of whether it is mailed or electronically submitted.

Response 121: The federal storm water Phase I permit for large construction activities stated that the authorization was terminated at midnight on the day that the NOT form was postmarked for delivery. TCEQ proposes to continue this expedited process of termination in this permit and has provided similar provisions in other TPDES general permits. Currently, the TCEQ is developing an electronic submission process for permittees to expedite notice processing time. Electronic notices will be delivered more quickly to the TCEQ for review and confirmation of receipt will be more efficient. Thus, when the electronic submission process becomes available, the date of termination will be based on notice from TCEQ to the operator that the NOT was received. However, based on the comment, Part II.E. is revised to state that "authorization to discharge under this permit terminates immediately following confirmation of receipt of the NOT by the TCEQ."

Comment 122: Harris County commented that a copy of the NOT should be submitted to the MS4 where the construction project site is located. Houston commented that a copy of the NOT should be sent to the operators of all MS4s that will receive discharges from the site. Houston and Austin commented that a copy of the NOT should be sent to the local governmental entity with jurisdiction over the construction site.

Response 122: Part II.E. is revised to include a requirement that the operator must submit a copy of the NOT to any operator of an MS4 receiving the discharge at the time that the NOT is submitted to the TCEQ. Notice does not need to be supplied to all area MS4 operators or governmental entities with a jurisdiction over the construction site. The construction site may be located within the jurisdictional boundaries of a number of MS4 operators and yet only discharge to one MS4. MS4 operators that have a TPDES permit for storm water discharges from those systems must develop and implement programs to eliminate illicit discharges to their systems and to address storm water discharges from construction activities that enter their systems. The requirement to submit the construction site notice to the MS4 operator receiving the discharge will assist the MS4 operator in meeting the provisions of the MS4 permit. There is no similar additional benefit to supplying notice to other area MS4 operators. If a governmental entity has some jurisdictional control over the construction activity that is not related to the TPDES permit for its MS4 system, that entity can separately request or require copies of notices as a part of that separate authority.

Part II.E.1: Notice of Termination Required

Comment 123: Houston commented that the permit current wording of the permit allows an NOT to be submitted by the operator after simply removing all silt fences and other temporary erosion controls, regardless of whether final stabilization had occurred. Houston suggested the section be revised to clarify that an NOT may be filed when either: 1) final stabilization has been achieved on all portions of the site that is the responsibility of the permittee; 2) another permitted operator has assumed control over all areas of the site that have not been finally stabilized; and 3) all silt fences and other temporary erosion controls have either been removed, established to be removed on a schedule defined in the SWP3, or transferred to a new operator if the new operator has applied for permit coverage.

Response 123: In response to the commenter Part II.E.1. is revised to read: "The NOT must be submitted to TCEQ, and a copy of the NOT provided to the operator of any MS4 receiving the discharge, within thirty (30) days after: (a) final stabilization has been achieved on all portions of the site that is the responsibility of the permittee; or (b) another permitted operator has assumed control over all areas of the site that have not been finally stabilized; and (c) all silt fences and other temporary erosion controls have either been removed, scheduled for removal as defined in the SWP3, or transferred to a new operator if the new operator has sought permit coverage. Erosion controls that are designed to remain in place for an indefinite period, such as mulches and fiber mats, are not required to be removed or scheduled for removal."

Comment 124: Houston asked what happens when an operator submits an NOT in the scenario where a residential property has been temporarily stabilized and transferred to the homeowner. Its assumption is that an "NOT cannot be submitted even if the residence has been transferred to the homeowner if final stabilization has not occurred."

Response 124: Part II.E.1. provides that an NOT may be submitted if the site has undergone final stabilization. The definition of "final stabilization" provided in the permit has been modified to specifically state that the operator may submit an NOT when a lot is temporarily stabilized and ownership is transferred to the homeowner. However, if the construction site operator has additional lots within the same development that have not been stabilized or transferred, an NOT would not be appropriate, as continued authorization for discharges from those lots is necessary. Instead, the operator would simply exclude each lot from the SWP3 as the condition of each lot meets the definition of final stabilization or is transferred to another operator.

Comment 125: Houston and Harris County requested the opportunity to make comments on the NOT form as part of the public comment process on the permit.

Response 125: Notice forms are not a part of the permit and are therefore not subject to public notice requirements and the formal comment period. The NOT form will be consistent with the minimum information required for NOIs in 30TAC §205.4 (relating to General Permits for Waste Discharges).

Comment 126: Dallas commented that if a new construction site operator takes over a site and the permitted operator submits an NOT, the NOT should include information about the new construction site operator.

Response 126: A new operator will need to submit this information in the form of an NOI if the activities require continued coverage. If the activities do not require permit coverage, and an NOI will not be submitted, then the information is not necessary.

Part II.E.2.(e)

Comment 127: TXDOT commented that the certification statement language in (e) should be revised to include at minimum: "a signed certification that either all storm water discharges requiring authorization under this general permit have (sic) will no longer occur, or that the applicant to terminate coverage is no longer the operator of the facility or construction site."

Response 127: In response to this comment, Part II.E.2.(e) is revised to read: "a signed certification that either all storm water discharges requiring authorization under this general permit will no longer occur, or that the applicant to terminate coverage is no longer the operator of the facility or construction site, and that all temporary structural erosion controls have either been removed, will be removed on a schedule defined in the SWP3, or transferred to a new operator if the new operator has applied for permit coverage. Erosion controls that are designed to remain in place for an indefinite period, such as mulches and fiber mats, are not required to be removed or scheduled for removal.

Part II.F. Waivers from Coverage

Comment 128: Cleburne requested language clarifying the effective date of a waiver after the waiver form has been submitted to the TCEQ.

Response 128: TCEQ agrees with the comment. The effective date for a waiver is set at two days from the date that the completed waiver request is postmarked for delivery to TCEQ, which is consistent with the effective date for authorization following a mailed NOI under the permit. Existing Part II.F.2 is renumbered as Part II.F.3., and Part II.F.2. is titled "Effective Date of Waiver" and states: "Operators of small construction activities are provisionally waived from the otherwise applicable requirements of this general permit two (2) days from the date that a completed waiver certification form is postmarked for delivery to TCEQ."

Comment 129: Cleburne asked whether Appendix A, which shows periods of low erosion potential, should be referenced as an additional possibility for a waiver under Part II.F.1.(a).

Response 129: The rainfall erosivity R factor for construction activities that occur in locations and during the time periods delineated in Appendix A have been calculated and previously determined to

meet the waiver requirements. Therefore, use of Appendix A provides a simpler authorization process for these qualifying activities than is described in Part II.D.1., "Obtaining Authorization to Discharge." The erosivity R factor calculations used to define Appendix A were conservative and were based on those areas within each county with the highest precipitation. Therefore, the operator of a construction activity may elect to calculate the rainfall erosivity R factor for the specific site rather than using Appendix A. If the calculation results in a longer qualifying period for construction than the period defined in Appendix A, the operator may elect to apply for a waiver.

Part II.F.2.(b)

Comment 130: Gardere, TXDOT, and Cleburne commented that the permit requires small construction activities that qualify for a waiver and that have activities extending beyond the waiver period to develop an SWP3 and submit an NOI. Gardere, TXDOT, and Cleburne stated that, according to Part II.D. of the permit, an NOI is not otherwise required for authorization of small construction activities and that the requirement to submit an NOI for a small construction site in this situation should be removed from the permit.

Response 130: In response to this comment, Part II.F.3.(b), formally Part II.F.2.(b), is revised to read: "obtain authorization under this general permit according to the requirements delineated in either Part II.D.2. or Part II.D.3. at least two (2) days before the end of the approved waiver period."

Part II.G. Alternative Coverage Under an Individual TPDES Permit

Comment 131: Cleburne, TCC, and Harris County commented that a faster individual permit approval process should be provided and that a deadline for TCEQ approval should be established. Cleburne supported a provision that an application for an individual permit should be required only 30 days prior to commencement of construction. Gardere commented that it is not realistic for a developer to submit an individual permit application at least 330 days before the commencement of construction activities. Instead, Gardere suggested that the permit should allow permit holders to include best management practices in the SWP3 that are consistent with the surrounding watershed requirements and thereby take into consideration the special conditions of an approved TMDL or implementation plan. HCFCD requested clarification as to the technical and legal basis for requiring applications at least 330 days prior to the commencement of discharge. HCFCD commented that the long-standing NPDES requirement of applying 180 days prior to the commencement of discharge should be incorporated. Houston expressed the belief that the TCEQ should allow for a shorter period for submitting an individual permit application where an individual permit is required by TCEQ (as opposed to situations where the applicant chooses to apply for individual coverage). Without such a provision, Houston and Harris County felt that the TCEQ could find itself in the situation where a TMDL has been approved, individual permit coverage is required, and all ongoing construction must stop and no new construction can begin for 330 days.

Response 131: New individual TPDES permit applications must be processed according to 30 TAC Chapter 281 (relating to Applications Processing), and 30 TAC Chapter 305 (relating to Consolidated Permits), and must follow the public participation requirements of 30 TAC Chapter 55, Subchapter E (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment). There are no legal or statutory mandated time frames for processing TPDES permit applications. However, the 330-day time frame necessary to process an application for an individual permit prior to commencement of construction activities represents a realistic individual permit application processing time based on the mandatory public participation and notice requirements and the necessary technical review. In response

to the comment, Part II.G.1. has been revised to state that applications for individual permit coverage should be submitted at least 330 days prior to commencement of construction activities "to ensure timely issuance." Additionally, in response to the comments that a TMDL may result in the halting of construction activities while individual permit applications are processed, Part II.B.4. of the permit, "Discharges to Water Quality-Impaired Receiving Waters" provides that operators may incorporate the provisions contained in an implementation plan or TMDL into an SWP3 and obtain or continue coverage under the permit.

Part II.G.1.

Comment 132: Houston and Harris County commented that the permit should be revised to allow for authorization under an alternative general permit**.**

Response 132: Although there is no alternative general permit currently available for construction activities, the title of Part II.G. is revised to read: "Alternative TPDES Permit Coverage" and to add Part II.G.3. that reads: "Any discharge eligible for coverage under this general permit may alternatively be authorized under a separate, applicable, general TPDES permit according to 30 TAC Chapter 205 (relating to General Permits for Waste Discharges)."

Part II.G.2.

Comment 133: Harris County asked if the TCEQ currently has any approved TMDL or TMDL implementation plans, or intends to propose any TMDL or TMDL implementation plan during the public comment process on the permit.

Response 133: A total of 27 TMDLs have been approved by EPA and 45 TMDL implementation plans have been approved by TCEQ. A list of these TMDLs and additional information on the development of TMDLs may be found at *http://www.tnrcc.state.tx.us/water/quality/tmdl/sumtable.html*.

Part II.G.2.(a)

Comment 134: TCC commented that the current proposed alternative of submitting an individual permit for construction activities in the situations outlined in this section is an extra burden on entities seeking to construct facilities. Many construction projects proposed to be covered by this permit have shorter planning cycles than the time required to submit a permit application for an individual permit and receive the final permit. TCC expressed the belief that an alternative application process needs to be in place to reduce the permitting burden upon entities desiring to perform construction activities to a more reasonable time frame. Gardere comments that the permit should allow permit holders to include BMPs in the SWP3 that are consistent with the surrounding watershed requirements and thereby take into consideration the special conditions of an approved TMDL or TMDL implementation plan.

Response 134: New individual TPDES permit applications must be processed according to 30 TAC Chapter 281 (relating to Applications Processing) and 30 TAC Chapter 305 (relating to Consolidated Permits), and must follow the public participation requirements of 30 TAC Chapter 55, Subchapter E (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment). There are no legal or statutory mandated time frames for processing TPDES permit applications. However, the 330-day requirement for submitting an application for an individual permit prior to commencement of construction activities represents a realistic individual permit application processing time based on the

mandatory public participation and notice requirements and the necessary technical review. Rather than relying solely on a requirement for individual permits in the event that implementation plans are developed to address storm water discharges associated with construction activities, Part II.B.2. of the permit, titled "Discharges to Water Quality-Impaired Receiving Waters," is provided. In most instances this should provide these dischargers with a quick authorization process.

Part II.G.2(b)

Comment 135: HCFCD commented that designated uses are a component of water quality standards. Therefore, the requirement to apply for an individual TPDES permit when an activity is found "to cause, or contribute to, the loss of a designated use" should be deleted. HCFCD contended that the previous statement, requiring an application for an individual TPDES permit when the activity "is determined to cause a violation of water quality standards," is sufficient.

Response 135: TCEQ concurs that the requirement for an individual permit when an activity "is determined to cause a violation of water quality standards" does imply protection of water quality related uses. However, the additional emphasis on protection of uses is appropriate, since this mirrors provisions of Tier 1 of the TCEQ antidegradation policy in 30 TAC §307.5, concerning Texas Surface Water Quality Standards.

Part II.G.2.(c)

Comment 136: TCC found the use of history of substantive permit noncompliance to be inappropriate and requested that this provision be removed from the permit. TCC stated that a finding of substantive permit non-compliance requires judgement of the regulatory community or the agency inspector, and since the state has not defined the term "substantive permit non-compliance" in 30 TAC Chapter 205, the provision should be removed from the permit.

Response 136: As currently worded, Part II.G.2.(c) implies that the term "substantive permit noncompliance" is defined in Chapter 205 and TCC is correct to note that it is not. Part II.G.2.(c) has been revised to read, "any other considerations defined in 30 TAC Chapter 205 would include the provision at 30 TAC § 205.4(c)(3)(D), which allows TCEQ to deny authorization under the permit and require an individual permit if a 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.'"

Part III.

Comment 137: Dallas asked if a copy of the NOI is required to be included in the storm water pollution prevention plan.

Response 137: Including a copy of the NOI in the storm water pollution plan is not required.

Comment 138: Arlington asked who is qualified to prepare an SWP3.

Response 138: The permit does not contain any restrictions or minimum certification requirements for the individual who actually prepares an SWP3. It may be prepared by the operator, an employee of the operator, or a person contracted by the operator as long as the plan meets the requirements of the permit.

Comment 139: HCFCD commented that the requirement to prepare an SWP3 appears to be restricted to sites where storm water discharges "reach Waters of the United States." HCFCD was concerned that operators may incorrectly decide they are not required to develop and implement an SWP3 because they believe that discharges into HCFCD's MS4 system do not reach waters of the United States. HCFCD, therefore, requested that TCEQ "include clarifying language indicating that sites with discharges to MS4 systems draining to Waters of the United States must prepare and implement an SWP3."

Response 139: The permit has been revised to state that storm water pollution prevention plans must be prepared for storm water discharges "that will reach waters of the United States, including discharges to MS4 systems and privately owned separate storm sewer systems that drain to waters of the United States, ..."

Comment 140: TXDOT commented that the language in the opening paragraph to Part III could require "a borrow area five miles removed from the construction site to be included in the construction site's SWP3." Part II.A.2 states "Discharges of storm water runoff from. . . material storage yards, material borrow areas, and excavated material disposal areas may be authorized under this permit provided the activity is located at, adjacent to, or in close proximity to the permitted construction site. . . ." The permittee should be given the option of permitting off-site areas separately from the construction site. TXDOT stated that this is an important distinction in situations that involve multiple permittees. TXDOT suggested modifying the language as follows: ". . . to address potential sources of pollution that are reasonably expected to affect the quality of discharges from the permitted area."

Response 140: Off-site areas that support the construction activity may be authorized under the same authorization for the primary site or may be covered under an independent authorization. For example, Part II.A.2. describes the conditions for authorizing supporting activities at concrete batch plants, but the batch plant may be alternatively covered under TPDES General Permit TXR050000, authorizing storm water associated with industrial activities or under an individual TPDES permit.

Comment 141: TXDOT commented that Part II.A.2.(c) of the permit indicates that it is the intent of this permit to allow off-site areas to be included in the authorization for the primary construction site and addressed in the SWP3 only if the off-site area is not operated after the completion of the primary construction activity. TXDOT commented that this language requires "off-site supporting activities used solely by the permitted project to be addressed" in the SWP3, "regardless of the area's use before the project began or after the completion of the project."

Response 141: The proposed permit allows certain off-site supporting industrial activities that require authorization for discharges of storm water to obtain coverage under the authorization and SWP3 of the construction site. These off-site supporting activities may include temporary concrete batch plants and asphalt plants that would otherwise require authorization for storm water discharges either under the TPDES multisector General Permit TXR050000 or under an individual TPDES permit. If these supporting activities continue beyond the authorization of the construction site, they must be separately authorized at the time that the authorization for the construction activity is terminated. Off-site material storage areas, overburden and stockpiles of dirt, borrow areas, and other sites that are a part of the construction activity must be stabilized prior to terminating permit coverage for the construction activity or addressed in the SWP3 for another permitted construction site and included in the authorization for that site if it continues to operate and begins to support another construction activity.

Comment 142: Austin recommended "modifying the list of potential sources of pollution that must be addressed in the SWP3 such that it includes equipment staging, vehicle repair, and fueling areas."

Response 142: The list of potential sources of pollutants that are listed in Part III is not an all-inclusive list. However, in response to the comment, the permit is revised to include the areas recommended by Austin.

Comment 143: CB, Dallas, and Harris County commented that the permit should require all permittees to certify their SWP3 as required under the NPDES Phase I construction general permit. Arlington requested that the certification of the SWP3 be required "by owners and operators." Harris County asked whether language "should be added for certification of the SWP3 as well as signature for each participant."

Response 143: Certification of the SWP3 is not necessary because those operators that are required to prepare an SWP3 must sign either the NOI or construction site notice agreeing to comply with the provisions of the permit. The requirements for preparation and implementation of the SWP3 are provisions of the permit. If the SWP3 is inadequate or has not been fully implemented, these infractions would be a violation of the permit and of the regulations.

Part III.A.1.

Comment 144: Houston, Harris County, and Cleburne commented that the last sentence of this subsection appears to be missing a clause or contains some typographical error.

Response 144: Part III.A.1. has been revised to delete the incomplete sentence that reads: "If the general permit numbers have not."

Comment 145: HCFCD requested that the word "include" be substituted for the word "delineate" in the requirement that the "SWP3 must delineate the date that the NOI was submitted to TCEQ by each operator."

Response 145: In response to the comment, the wording is revised by substituting the word "specify" for the word "delineate."

Comment 146: HPER asked how to include the date that the NOI was submitted in the SWP3 when the SWP3 must be completed prior to the submission of the NOI.

Response 146: Storm water pollution prevention plans must be developed prior to submission of the NOI. However, the SWP3 is a document that should be revised and modified to include new and updated information or to include additional or revised pollution prevention measures. Therefore, the operator of the construction site may provide a place for the date the NOI was submitted when developing the SWP3 and simply "fill in the blank" when that event occurs.

Part III.B: Responsibilities of Operators

Comment 147: Houston stated that the "EPA permit includes a third separate subsection detailing the responsibilities of permittees with operational control over only a portion of a larger project." Houston asked whether TCEQ believes that these permittees do not have responsibilities for their portion of the

project or whether it believes that these permittees are adequately regulated under the two subsections in Part III.B.

Response 147: The proposed permit contains provisions to address complex construction sites with numerous operators having various degrees of control or responsibility. All operators of eligible small and large construction activities must obtain authorization for discharges of storm water from these construction sites. The definition of an operator in the permit is a person with either day-to-day operational control at the site or one that maintains control over plans and specifications that would restrict or limit a separate operator from developing and implementing an SWP3 and complying with the permit requirements for that site. Part III.B.1. and 2. of the permit describes the coordinating responsibilities of operators for the areas where they have some control. Each operator must obtain authorization, but only for the part of the project where they are an operator. If an SWP3 is required, each operator may develop an SWP3 for the area where they are an operator. Alternatively, a single SWP3 that clearly defines the numerous operators, responsibilities, and areas of responsibility may be developed for the entire larger common plan of development, according to Part III.A. of the permit.

Part III.B.1.

Comment 148: Austin commented that the section contains a typographical error and that the word "with" should be deleted from the phrase " . . . requirements and conditions of this general permit with must: . . . ."

Response 148: "With" has been deleted from the phrase.

Part III.C.1(b): Deadlines for SWP3 Preparation and Compliance

Comment 149: Houston commented that the permit states that the SWP3 must be implemented "prior to commencing construction activities that result in soil disturbance." However, Houston noted that the permit does not address other activities related to the construction activity, such as material storage areas, where soil disturbing activities may take place. Houston commented that the permit should require implementation of the SWP3 prior to "any" activity at a site that will result in soil disturbance.

Response 149: The term "commencement of construction" is defined in the permit as the initial disturbance of soils associated with clearing, grading, excavating activities, or other similar activities. If the first activities to occur at a site are those necessary to provide a material storage area, the example provided, and this results in soils disturbance, that activity would be the commencement of construction.

Part III.C.1.(d)

Comment 150: HPER commented that "this section is an incomplete phrase."

Response 150: In response to the comment Part III.C.1.(d) is revised to read, "prepared so that it provides for compliance with the terms and conditions of this general permit."

Part III.D.1.

Comment 151: Arlington asked "what constitutes a readily available plan (30 min, 1 hr, 1 day. . .)"?

Response 151: The SWP3 is the document that outlines how an activity will be conducted in a manner to reduce or eliminate pollution in storm water runoff. It is, therefore, reasonable that the document must be readily accessible to operators with the responsibility of implementing the plan. If the document is maintained on-site, the operator should be able to produce the SWP3 the same day as the request. If the SWP3 is maintained off-site, then it should be made available as soon as is reasonably possible. In most instances, it is reasonable that the document should be made available within 24 hours of the request. Many site investigations performed by TCEQ will be arranged in advance and, therefore, the SWP3 would be expected to be available at the time of the inspection.

Comments 152: HPER requested clarification regarding where the site notice must be posted.

Response 152: The site notice must be readily available for viewing by the general public, local, state, and federal authorities. The notice must be posted at the construction site. If the construction project is a long, linear project (e.g., pipeline, highway, etc.), the notice must be placed in a publicly accessible location near where construction is active and accessible to the public, such as at roadway crossings. The notice would not be readily available for viewing if it were located in a building.

Comment 153: Harris County requested that the TCEQ revise the permit to include the requirement that the SWP3 also be made available to the "operator of the municipal separate storm sewer system where the construction site is located," in addition to the MS4 that receives discharges from the site.

Response 153: In addition to the requirement that the SWP3 be readily available to any MS4 who receives discharges from the site, the permit also requires the SWP3 be available to "local government officials." This language requires that the SWP3 for applicable construction projects be available for review by county officials in the county where the construction site is located.

Comment 154: LCRA commented that site notices should not be required to be provided to the operator of any MS4 operator who receives the discharge, but instead should be provided to operators of regulated MS4s.

Response 154: Determining whether an MS4 operator is regulated, authorized under a waiver, or not regulated is more burdensome to the construction site operator than simply providing the required notice. The current requirements ensure that the notices will be made available to any MS4 operator receiving discharges from the construction site.

Part III.D.3.

Comment 155: HCFCD commented that this section should contain language "stating that the permit grants no public access rights."

Response 155: TCEQ disagrees with this comment. The permit does not grant public access rights; it only requires that notices be posted in "publically accessible" locations.

Part III.E. Keeping Plans Current

Comment 156: HCFCD commented that the permit language requiring the permittee to "amend" the SWP3 implies a formal change. HCFCD suggested "revise" or "update" be substituted "to more

accurately describe the nature of the SWP3 as a living document which should be subject to more or less ongoing or routine maintenance occurring throughout the life of the project."

Response 156: The requirement is revised to read: "The permittee must revise or update the storm water pollution prevention plan whenever: . . . ."

Part III.E.2.

Comment 157: Houston stated that Part III.D.1. of the permit requires that operators allow inspection by local agencies that approve sediment and erosion plans and by local government officials. Houston commented that the current wording of Part III.E.2. of the permit may not allow local governments to require changes in an SWP3, unless that government was involved in approving sediment and erosion plans. Houston commented that "local government officials" should be added to the list of those who can require SWP3 changes. Houston felt that this change would be especially important because without it they will not be able to require changes in SWP3s for entities that are within their jurisdiction, but that do not discharge to their MS4 (e.g., sites that discharge directly to a bayou).

Response 157: Part III.D.1. of the permit requires that the SWP3 must be made available to "local government officials." This requirement does not, however, provide local government officials with an authority to inspect a site or to require modifications to the SWP3. However, Part II.B.7. of the permit states: "This general permit does not limit the authority or ability of federal, state, or local governmental entities from placing additional or more stringent requirements on construction activities or discharges from construction activities. For example, this permit does not limit the authority of a home-rule municipality provided by § 401.002 of the Texas Local Government Code."

Houston may adopt other local controls and ordinances for dischargers within the area of their jurisdiction. Finally, Houston may refer instances of permit noncompliance or inadequate SWP3 measures to the TCEQ regional office.

Part III.F.(c) Contents of SWP3

Comment 158: UTS commented that the language in Part III.F.1.(c), requiring the SWP3 to specify the "number of acres of the site where construction activities will occur," should be revised to require the "number of acres of the site where earth disturbing activities occur." UTS commented that this is the only point in the permit where earth disturbing activities is defined and that this ties in with the NOI and determining if it is a small project or a large project. Harris County commented that the provision should include "fill areas" on the list of example areas that must be considered when determining the total number of acres where construction activities will occur.

Response 158: Part III.F.1.(c) requires information on the size of the entire site and also the size of the site where construction activities will take place. The definitions for small construction activities and for large construction activities clarify that these activities are those that will result in soil disturbance. However, in response to the comment, Part III.F.1.(c) is revised to read: "the total number of acres of the entire property and the total number of acres where construction activities will occur, including off-site material storage areas, overburden and stockpiles of dirt, and borrow areas;"

Part III.F.1.(d)

Comment 159: Cleburne commented that the language in III.F.1.(d), requiring an estimate of the runoff coefficient of the site for both preconstruction and postconstruction conditions is ambiguous and inquired why these items are a necessary part of the SWP3. Cleburne commented that requirements for postconstruction storm water runoff should be handled by the locality where construction is occurring as a part of local development requirements. Cleburne commented that this requirement should be deleted from the permit.

Response 159: Requiring an estimate of the runoff coefficient was removed in response to the comment and subsection (d) now reads: "data describing the soil or the quality of any discharge from the site."

Part III.F.1.(f)

Comment 160: TXU Energy commented that "many projects, especially large or linear construction projects, can seldom be depicted on a single map, particularly at a scale to show the detail required by this Section." Additionally, TXU Energy indicated that some areas may be located some distance off-site. TXU Energy recommended the language be modified to say, "a detailed site map (maps) indicating. . . . "

Response 160: TCEQ agrees that not all projects can be depicted on a single map. Therefore, the permit is revised to state "a detailed site map (or maps) that indicate the following: . . . ."

Comment 161: Dallas commented that the map should depict the locations of on-site waste, borrow areas, equipment storage areas, material storage areas, chemicals, and bathroom facilities.

Response 161: The current requirements are intended to depict areas where construction activities will occur, areas where structural controls and soil stabilization practices are employed, and adjacent surface waters. These features are included so that site personnel and inspectors can locate the pollution prevention measures for inspection and maintenance and also to depict any receiving waters that could be potentially affected by discharges. Equipment and material storage areas and similar on-site features are not required to be included on the map as they will be generally visually apparent, and the map would need to be revised each time that they are relocated. The map requires that these features be identified if they are located off-site as their locations would not be apparent to an inspector. Bathroom facilities need not be included on the site map whether on- or off-site.

Part III.F.1.(f)(v)

Comment 162: Harris County requested that the permit be revised to include fill areas on the list of locations that must be included on the site map.

Response 162: The list has been revised to include "fill" areas.

Part III.F.2.

Comment 163: Cleburne commented that "non-structural controls" are not defined, but are referred to in Part III.F.2.

Response 163: Part III.F.2. of the permit is revised to refer to "best management practices" instead of referring to "structural" and "non-structural controls." The term "best management practices" includes both "structural" and "non-structural controls."

Comment 164: Reliant commented that the SWP3 should not be required to list the "party responsible for implementation" of structural and nonstructural controls. Reliant commented that it should be the ultimate responsibility of the permittee to ensure that these controls are properly in place.

Response 164: The reference to the "party responsible for implementation" has been deleted from the permit. It is each permittee's responsibility to install and manage any necessary controls. For those large construction sites where multiple operators are working and where a shared SWP3 is developed, Part III.A. of the permit already contains requirements that the SWP3 specify precisely which operator is responsible for each element of the SWP3.

Part III.F.2.(a) Erosion and Sediment Controls

Comment 165: Harris County commented that the requirement that controls must be developed to "limit off-site transport of litter, construction debris, and construction materials" is not stringent enough. Harris County commented that the permit should require controls to eliminate the off-site transport of these materials.

Response 165: TCEQ responds that it will be impossible to prevent off-site transport of materials under all conditions, for example, during severe storm conditions. However, in response to the commenter, Part II.F.2.(a)(i) of the permit is revised to state that controls "must also be designed and utilized to reduce the off-site transport of suspended sediments and other pollutants . . . ."

Comment 166: HCFCD commented that the permit should require that erosion and sediment controls be developed based not only on local topography and rainfall, but also with consideration for soil types. HCFCD commented that practices "should differ in design and implementation in clay soils than in sandy soils."

Response 166: Part III.F.2.(a)(i) of the permit is revised to require that controls be designed "with consideration for local topography, soil type, and rainfall."

Comment 167: Houston and Harris County commented that the permit should contain a section to address the dewatering of construction sites. In areas with flat topography, it is often necessary to clear standing storm water from an active construction site after a significant rain event and this water usually contains a significant amount of sediment. Pumping or channeling sediment-charged water following a storm event can have the same effect as failing to implement sediment control measures, such as silt fencing. Houston requested that the following, or similar language, be added to this subsection: "If it is necessary to pump or channel standing storm water from the site to continue construction, appropriate Control Measures shall be used during the dewatering operation to limit the off-site transport of suspended sediments and other pollutants."

Harris County requested that the following language be added under a new subsection (Part III.F.2.a.vi.): "If necessary to pump or channel standing storm water from the site to continue construction, appropriate BMPs shall be used during the dewatering operation to limit the off-site transport of suspended sediments and other pollutants."

Response 167: TCEQ agrees with the commenters and adds the following provision to the existing requirements of Part III.F.2.(a)(i): "Controls must also be designed and utilized to reduce the off-site transport of suspended sediments and other pollutants if it is necessary to pump or channel standing water from the site."

Part III.F.2(a)(ii): Erosion and Sediment Controls – Maintenance of Controls

Comment 168: Houston stated that it has been its experience while enforcing the EPA general permit for construction activities that operators believe that they must only fix ineffective BMPs if they discover the problem during a required inspection and that upon discovery they only need to fix the problem before the next required inspection. Houston asked that the TCEQ clarify this issue by adding language to Part III.F.2(a)(ii) that requires that "[i]f periodic inspections or any other information indicates a control has been used incorrectly, damaged, or otherwise rendered ineffective, the operator must replace, modify or repair the control as soon as possible after discovery."

Response 168: This provision is related to the initial selection and installation of controls and how the performance must be reviewed to determine if another better suited control should be installed, or whether modifications are necessary to enhance performance of a selected control. Maintenance and repair of controls identified as the result of routine inspections is addressed in Part III.F.8. of the permit. However, in response to the comments, the last sentence in Part III.F.2(a)(ii) is revised to read: "If periodic inspections or other information indicates a control has been used incorrectly, or that the control is performing inadequately, the operator must replace or modify the control as soon as practicable after discovery that the control has been used incorrectly, is performing inadequately, or is damaged."

Part III.F.2.(b) - Stabilization Practices

Comment 169: Reliant commented that site stabilization "provisions are overly prescriptive." Reliant expressed the belief that there are too many site-specific variables for construction sites to warrant a single, uniform set of minimum requirements for site stabilization within a prescribed time frame, particularly for temporary stabilization. Reliant and LCRA commented that the current requirements for temporary stabilization when construction has temporarily ceased should be modified to allow perimeter structural controls as an acceptable temporary stabilization measure.

Response 169: TCEQ has revised the permit, in response to a previous comment, to provide the following definition of temporary stabilization: "A condition where exposed soils or disturbed areas are provided a protective cover, which may include temporary seeding, geotextiles, mulches, and other techniques to reduce or eliminate erosion until either final stabilization can be achieved or until further construction activities take place."

TCEQ disagrees that the requirement to provide temporary stabilization under certain circumstances when construction is temporarily halted is overly prescriptive. The permit contains examples of temporary stabilization methods that may be appropriate based on site-specific situations. A recommended perimeter control, such as a silt fence, may be an appropriate temporary control for some sites. However, as Reliant pointed out, there are many site-specific variables at construction sites that could make a perimeter silt fence inappropriate under the circumstances (e.g., a site with excessive slope).

Part III.F.2.(b)(iii)

Comment 170: TXU Energy commented that this provision of the permit contains a typographical error referencing items "(i) through (iii) below" when the reference should be to items "(a) through (c) below."

Response 170: The provision has been revised accordingly.

Part III.F.3.(a) Structural Control Practices

Comment 171: Austin requested that the basic requirement to install a sediment basin should be clearly stated, and "followed by a provision for the use of alternative controls if the primary requirement is not feasible." HCFCD commented that the requirement for sediment basins "where feasible" is too vague to be effective. HCFCD requested that the permit be revised to require precipitation patterns, site geometry, site vegetation, infiltration capacity, geotechnical factors, relative cost, and depth to groundwater in the list of factors that must be considered to determine if the basin is feasible.

Response 171: TCEQ is not requiring installation of a sediment basin be mandatory in all circumstances. The draft permit contains language that sediment basins are required, except where they are not feasible. The permit then lists a number of factors a permittee may consider in determining the feasibility of installing a sediment basin. The factors listed in the permit are site soils, slope, available area on site, public safety, and other similar considerations. In response to the comment from HCFCD, the permit is revised to add precipitation patterns, site geometry, site vegetation, infiltration capacity, geotechnical factors, and depth to groundwater to the list of factors to consider in determining whether a sediment basin is feasible.

Comment 172: Austin requested that the permit language stating "where sediment basins are not feasible, alternative sediment controls, which may include a series of smaller sediment basins, must be used" should be revised to require "equivalent control measures" instead of "alternative sediment controls." Austin expressed the belief that this was consistent with the requirements of the EPA Region 6 general permit for construction activities and establishes the expectation that alternative control must provide a level of treatment equal to the temporary sediment basin.

Response 172: The permit is revised to require "equivalent control measures" instead of "alternative sediment controls."

Comment 173: Houston and Harris County commented that EPA allows sediment basins to be designed to provide 3,600 cubic feet of storage per acre drained only if the runoff from a two-year, 24-hour storm event has not been calculated. Houston was concerned that using 3,600 cubic feet of storage per acre of drainage as the default storage volume without consideration of the calculated storage volume using the two-year, 24-hour rainfall frequency may result in an undersized sedimentation basin. Harris County expressed the belief that this section is ambiguous and the reader may interpret that a choice can be made to either use the calculated runoff volume from the two-year, 24-hour rainfall event from the acreage drained or to design the sedimentation basin to provide 3,600 cubic feet of storage per acre drained.

Response 173: Existing EPA permit requirements allow a construction site operator to base the size of a sedimentation basin on the site-specific two-year, 24-hour storm event and runoff coefficient as an alternative to using a 3,600 cubic feet per acre sizing standard. In consideration of the comments and of the existing NPDES permit requirements, Part III.F.3.a of the permit is revised to say: "Sediment basins are required, where feasible for common drainage locations that serve an area with ten (10) or more acres disturbed at one time, a temporary (or permanent) sediment basin that provides storage for a calculated volume of runoff from a 2-year, 24-hour storm from each disturbed acre drained, or equivalent control measures, shall be provided

where attainable until final stabilization of the site. Where rainfall data is not available or a calculation cannot be performed, a temporary (or permanent) sediment basin providing 3,600 cubic feet of storage per acre drained is required where attainable until final stabilization of the site.

Additionally, Part III.F.3.b. is revised in part to read: "Sediment traps and sediment basins may also be used to control solids in storm water runoff for drainage locations serving less than ten (10) acres. At a minimum, silt fences, vegetative buffer strips, or equivalent sediment controls are required for all down slope boundaries (and for those side slope boundaries deemed appropriate as dictated by individual site conditions) of the construction. Alternatively, a sediment basin that provides storage for a calculated volume of runoff from a 2-year, 24-hour storm from each disturbed acre drained, or equivalent control measures, may be provided or where rainfall data is not available or a calculation cannot be performed, a temporary (or permanent) sediment basin providing 3,600 cubic feet of storage per acre drained may be provided.

Part III.F.4: Permanent Storm Water Controls

Comment 174: Houston stated that this subsection provides that "[p]ermittees are only responsible for the installation and maintenance of storm water management measures prior to final stabilization of the site and prior to submission of a NOT." Houston commented that this language would hold an operator liable for maintenance of storm water measures even after another permitted operator has assumed control of the site if final stabilization has not occurred. Houston requested that in the previous sentence, the conjunction "and" be changed to "or."

Response 174: TCEQ agrees with the suggested revision and has made the requested change.

Part III.F.5. Other Controls

Comment 175: Austin requested "including a requirement that the SWP3 identify all potential sources of nonstorm water discharges (except for flows from fire fighting activities) and ensure that appropriate pollution prevention measures are implemented for the nonstorm water components(s) of the discharge." Austin commented that this language is consistent with the EPA Region 6 construction general permit.

Response 175: This requirement is included in Part III.F.9. of the draft permit. It requires that "the SWP3 must identify and ensure the implementation of appropriate pollution prevention measures for all eligible nonstorm water components of the discharge."

Comment 176: CB requested that the permit contain language found in the EPA C.P. permit to prohibit the discharge of building materials to waters of the United States and that the SWP3 "consistent with applicable local waste disposal, sanitary sewer and septic system regulations."

Response 176: The scope of the authorization under this proposed permit is defined in Part II.A., "Discharges Eligible for Authorization" and does not include the discharge of building materials. It is not necessary to include requirements for permittees to comply with local regulations. The cover page of the permit contains the statement: "Neither does this permit authorize any invasion of personal rights nor any violation of federal, state, or local laws or regulations." Compliance with, and enforcement of, these additional regulations is not dependant upon the issuance of this proposed TPDES permit or the authorizations that result from the issuance of the permit. Part II.B.7. of the permit states: "This general permit does not limit the authority or ability of federal, other state, or local government entities from placing additional or more stringent requirements on construction activities or discharges from construction activities.

For example this permit does not limit the authority of a home-rule municipality provided by Section 401.002 of the Texas Local Government Code."

Part III.F.7. Maintenance

Comment 177: Harris County and Dallas commented that the proposed inspection and maintenance requirements are identical to those in the current federal NPDES permit for storm water associated with construction activities and that these requirements are ambiguous and difficult to enforce. Harris County commented that the current wording can lead to confusion whereby permittees think they have a 21-day window to address maintenance issues (inspections every 14 days to note any problems, and then seven days to correct the problems). Harris County commented that Part III.F.2.(a) should be revised to include the following provision: "The 14-day and 0.5-inch rain event inspections are intended to assess the effectiveness of properly installed and maintained erosion and sediment controls. Erosion and sediment controls that have been improperly installed or have been intentionally disabled, run-over, removed, or otherwise rendered ineffective must be replaced or corrected immediately upon discovery."

Response 177: TCEQ has revised Part III.F.7. of the permit titled "Maintenance," to include the following provision in response to the comment: "Erosion and sediment controls that have been intentionally disabled, run-over, removed, or otherwise rendered ineffective must be replaced or corrected immediately upon discovery."

Part III.F.8.(a)

Comment 178: HCFCD requested changing the post storm inspection requirement from "within 24 hours" to within "one working day, as defined by the construction schedule." Tarrant and Harris County commented that the provision should be revised to require inspections within either 24 hours or one working day from the end of a storm event of 1/2-inch or more. Reliant commented that weekend and holiday inspections "add disproportionately to the cost of inspections, without a commensurate benefit." Reliant recommended doing the inspection no later than the first business day beyond the 24 hours after a weekend or holiday storm event. CB commented that the inspection frequency should be the same as listed for other inspections, at least once every 14 calender days and within 24 hours of the end of a storm event 1/2-inch or greater. TXU Energy commented that the requirement to conduct an inspection within 24 hours of the end of a storm event of 1/2-inch or greater does not seem to consider legitimate weather-related delays to flooding. TXU Energy proposed the following sentence be added to the end of the first paragraph: "In the event of flooding or other uncontrollable situations which prohibit access to the inspection sites, inspections must be conducted as soon as access is practicable."

Response 178: A working day at a construction site is not easily defined and may not occur for a number of days or weeks when weather is inclement and where, for example, heavy equipment can not be operated. The proposed requirement is based, instead, on the need to maintain or repair controls following a significant storm event and prior to the potential for further rainfall and erosion to occur. TCEQ agrees with the language suggested by TXU Energy and has included the following opening statement in Part III.F.8.: "In the event of flooding or other uncontrollable situations that prohibit access to the inspection sites, inspections must be conducted as soon as access is practicable." Additionally, in response to this comment, the permit is revised to include a new alternative monitoring schedule in Part III.F.8. (a) - (c) that reads: "As an alternative to the above-described inspection schedule of once every fourteen (14) calendar days and within twenty four (24) hours of a storm event of 0.5 inches or greater, the SWP3 may be developed to require that these inspections will occur at least once every seven (7) calendar days. If this alternative schedule is

developed, the inspection must occur on a specifically defined day, regardless of whether or not there has been a rainfall event since the previous inspection."

Part III.F.8.(a) Inspection of Controls

Comment 179: Arlington and Dallas asked what the qualifications are for an inspector of permitted sites. Dallas commented that the permit should require inspectors to be delegated this responsibility in a letter from TCEQ.

Response 179: There are no certifications or other credentials recognized by TCEQ as necessary for individuals who inspect storm water controls. Inspectors do not need to obtain a letter from TCEQ prior to being allowed to perform inspections. The permittee is in the best position to ensure that the selected personnel have read the SWP3 and are sufficiently familiar with the site to perform these inspections.

Part III.F.8.(b)

Comment 180: V&E, Harris County, and Houston asked how utility operators will be required to comply with the permit. V&E recommended including requirements for utility operators to cooperate with the construction site operator to avoid compromising implementation of the SWP3 for the site and to avoid the requirement for utility contractors to comply with the permit requirements for regulated construction sites. Houston asked how utility installers will be regulated under the permit. CB requested that the provision be reworded.

Response 180: TCEQ disagrees that the provision needs rewording. At construction sites where a utility provider fits the definition of an operator, and where those construction activities result in the disturbance of one or more acres, or where the activity is a part of a larger common plan of development that will result in the disturbance of one or more acres, the utility operator must obtain permit coverage and comply with the provisions of the permit. Typically, utility line installers will fit the definition of an operator while installing cross-country utilities, as they will be the operator with day-to-day operational control. Utility line installations occurring within a housing subdivision will typically not be conducted by an operator with day-to-day operational control over the properties that the activity transverses. In this example, the utility contractor would need to coordinate with the authorized construction site operators to make certain that the utility construction activities do not defeat or compromise the SWP3 controls and measures on permitted sites.

Comment 181: Houston stated that there have been significant problems with utility installers disabling or otherwise interfering with other construction operators' BMPs in the Houston area. Houston and Harris County suggested that the TCEQ should make utility installers responsible for any adverse impacts on storm water quality and storm water quality structural controls that result from their presence and activities on a regulated construction site.

Response 181: It is the responsibility of the operator of the construction activity on eligible construction sites to maintain storm water quality structural controls that protect water quality. The purpose of this requirement is to place the burden of compliance on the person with the most control over the construction activity being performed. If the activity is such that the utility installer is the operator of the construction activity, the utility installer is required to obtain coverage under this permit.

Comment 182: LCRA commented that linear construction projects often cross private land where landowners object to certain erosion control methods. Silt fences may be eaten by livestock, separate

livestock, and block cultivation activities. LCRA asked what the permittee's responsibility is when faced with landowner conflicts that impede or prevent the permittee from properly maintaining adequate controls.

Response 182: It is the permittee's responsibility to develop and implement appropriate erosion controls. In some instances silt fences may not be the appropriate alternative. Permittees may consider alternative controls, limit the amount of soil disturbed, coordinate with landowners regarding the timing of the construction activity, and take other measures. The required inspections of erosion controls will ensure that the need for any necessary repairs or maintenance is determined in a timely manner. Additionally, Part III.F.2.(a)(i) has been revised to state that erosion and sediment controls must be designed to retain sediment on-site to the "extent practicable" rather than to the "maximum extent practicable." Thus, for the examples cited in the comment more appropriate erosion and sediment controls may be adopted to minimize impacts to landowners in these situations.

Part III.F.8.(c)

Comment 183: HCFCD commented that this paragraph appears to duplicate Part III.F.8.(a).

Response 183: TCEQ agrees that the two provisions are almost identical and has combined the language in Part III.F.8.(a) with that in Part II.F.8(c) and renumbered the remaining sections accordingly.

Part IV.A: Numeric Effluent Limitations

Comment 184: Houston expressed the belief that this section should clarify that the numeric effluent limitations apply to concrete batch plants associated with large or small construction activity.

Response 184: Part IV.A. states that all discharges of storm water runoff from concrete batch plants must be monitored at the prescribed monitoring frequencies and must comply with the numeric effluent limitations. This only applies to those facilities that are authorized under this permit, a permit authorizing discharges associated with large and small construction activities.

Comment 185: Houston asked whether given a monitoring frequency of once a year, does a batch plant that operates for less than a year at a site have to do any monitoring. Houston noted that if this is the case, it "would seem to limit the application of this section to only the largest construction projects."

Response 185: This monitoring frequency is the same as for other TPDES and NPDES permits. If there is a discharge, then that discharge must be monitored at least once per year. For sites that are scheduled to operate for only a short period of time, sampling the first available discharge would limit the chance that the facility would be noncompliant with the permit.

Comment 186: Austin requested that asphalt batch plants be added to the requirement to monitor discharges.

Response 186: Sites that manufacture asphalt emulsions are subject to categorical numeric effluent limitations for storm water discharges based on the Asphalt Emulsion Subcategory of the Paving and Roofing Materials (Tars and Asphalt) Manufacturing Point Source Category (40 CFR §443.13). However, asphalt batch plants typically do not manufacture these materials, but instead purchase asphalt paving and roofing emulsions and combine them with rock or other materials at the batch plant site. These batch plants qualify for coverage under this permit under certain circumstances that are defined in the permit. There are no proposed numeric effluent limitations in the permit for these sites, as there have been no categorical effluent

limitations established for these discharges. Instead, the permit requires pollution prevention controls to eliminate or reduce pollution in storm water runoff.

Storm water discharges from the emulsion manufacturing facilities must obtain TPDES authorization for storm water discharges under either the TPDES multi-sector General Permit TXR050000 or under an individual TPDES permit. Similarly, this general permit allows authorization for the discharge of storm water from certain concrete batch plants, but not from facilities that manufacture cement, another industry subject to storm water categorical effluent limitations.

Comment 187: Austin requested that the permit include a statement that associates the batch plant to a construction site or construction activities.

Response 187: Part IV.A. is revised to include the statement: "All discharges of storm water runoff from concrete batch plants that qualify for coverage and that are authorized to discharge storm water under the provisions of this general permit, must be monitored at the following monitoring frequency and must comply with the following numeric effluent limitations:"

Comment 188: Austin commented that although most construction activities requiring a dedicated asphalt or concrete batch plant may be active for a comparatively longer duration than most construction sites, the activities at the site remain temporary in nature relative to fixed industrial facilities. Austin requested that the required monitoring frequency be increased, at minimum, to twice per year.

Response 188: Storm water discharges from concrete batch plants may alternatively be authorized under the TPDES multi-sector General Permit TXR050000 for storm water discharges associated with industrial activities. The effluent limitations and monitoring frequencies proposed in this permit are consistent with the requirements in the alternative general permit.

Part IV.B. Reporting Requirements

Comment 189: Houston and Harris County stated that this provision incorrectly references Attachment 2 as the discharge monitoring report. Both commented that the reference should be made to Attachment 3 of the permit.

Response 189: TCEQ agrees with the comment and has corrected the reference in the permit.

Part V. Retention of Records

Comment 190: Cleburne commented that the retention of records for three years after the NOT is submitted, or after the site is stabilized or transferred to another operator, places an "undue burden" on construction operators. Cleburne commented that large firms "may participate in hundreds of projects over the course of a year and could accumulate huge volumes of records that would have to be stored and periodically reviewed to determine when they can be destroyed." Small builders that build within larger common development plans often work using their truck as an office. Cleburne commented that the retention time should be shortened to a period of months.

Response 190: TCEQ disagrees that the retention period should be shortened to less than three years. The general permit rules in 30 TAC Chapter 205 require that a general permit contain "adequate monitoring, recordkeeping, and reporting appropriate to the type of activity authorized." (see 30 TAC §205(a)(5)(A)).

A three-year record retention requirement is consistent with other TCEQ rules, e.g., for monitoring activities found in 30 TAC §319.7(c), which states: "All records and information resulting from the required monitoring activities, including, but not limited to, all records concerning measurements and analyses performed and concerning calibration and maintenance of flow measurement and other instrumentation, shall be retained for a minimum of three years, or for a longer period if requested by the executive director or his designee."

Part VII.A: Application Fees

Comment 191: Harris County noted that given "the large number" of large construction sites "currently regulated under the Region 6 C.P. submitting a check for $100 for each of these sites to continue coverage under the proposed C.P. places an immense burden on the regulated community." Houston and Harris County requested that provisions be made so that entities that engage in a large number of simultaneous construction projects can use one check for multiple application fees, provided that the applications are submitted at the same time.

Response 191: Operators may submit any number of NOIs together in a single envelope, with a single check to cover the application fee for these sites. However, applicants are encouraged to keep copies of all documents that are submitted as a part of their records in the event that there is any question arising from the submission of the NOI or NOIs.

Comment 192: HPER asked whether small construction projects are subject to the $100 application fee.

Response 192: Part VII.A. of the permit states, "An application fee of $100 must be submitted with each NOI for coverage of a large construction activity." The application fee is required only in situations where a NOI is submitted. Since NOIs are not required for small construction sites, there is no fee to obtain authorization.

Comment 193: TXDOT commented that fees between state agencies should be required only if absolutely necessary. The proposed fees would have little or no net value to the taxpayer when the administrative cost to both agencies is considered. If a fee is absolutely necessary, TXDOT suggested that the MOU between TCEQ and TXDOT be modified to allow for a more straightforward payment process. Thus, one payment could be submitted to cover a number of projects.

Response 193: The requirement for fees is not based on the source of the fee. The application fee amount is based on the cost to the agency for processing the application and tracking the information in an electronic database. The annual water quality fee is utilized to help fund the agency's inspection programs that ensure compliance with the TPDES permitting program. TCEQ will work with TXDOT and other state agencies to minimize administrative costs that ultimately affect state taxpayers. A single check may be submitted in the same envelope with multiple NOIs.

Part VII.B Waste Treatment Inspection Fees

Comment 194: TCC expressed the belief that the current proposed annual waste treatment inspection fee of $100 to be a duplicate fee that has already been included in the annual consolidated water quality fee. TCC commented that only the regulated community that does not already pay the annual consolidated water quality fee should be subjected to this requirement.

Response 194: The waste treatment inspection fee and the water quality assessment fee were "combined" into a single water quality fee under 30 TAC Chapter 281. The permit is revised to reflect that large construction activities are subject to an annual water quality fee of $100 under TWC, §26.0291, and according to 30 TAC Chapter 205 (relating to General Permits for Waste Discharges).

Comment 195: Houston and TXDOT commented that waste treatment fees are not appropriate for permits that authorize the discharge of storm water runoff. V&E requested the rationale for imposing a waste treatment inspection fee on applicants for storm water discharge permits and recommended the removal of the waste treatment inspection fee from the permit. Gardere requested guidance as to whether TCEQ believes that large construction sites will be subject to water quality assessment fees consistent with §220.21. V&E also asked if the reference to §220.21 is accurate.

Response 195: The permit is revised to reflect that the fee is an annual water quality fee, as described in the previous response, rather than an annual waste treatment fee and watershed monitoring and assessment fee.

Comment 196: TXDOT commented that the annual fee should only be applied to sites that TCEQ actually inspects. TXDOT expressed the belief that annual fees are inappropriate to activities that may only last a few months.

Response 196: The nominal $100 fee helps support the agency's compliance inspection program. If the TCEQ bills only those sites that are inspected for the costs related to the inspection, the fees would be significantly higher. Not all authorized large construction sites will be billed the annual fee. Only those authorizations that are current at the time of billing, in September at the beginning of the fiscal year, will be subject to the annual fee.

Comment 197: HCFCD commented that the language regarding the possible imposition of a watershed monitoring and assessment fee should be deleted in the permit. HCFCD also commented that §26.0135(h) of the statute appears to only allow the TCEQ to recover costs from "users of water and wastewater permit holders," which seems to suggest that a fee could not be collected on "waste" discharges authorized by this proposed permit.

Response 197: The waste treatment inspection fee and the water quality assessment fee were "combined" in a single water quality fee under Chapter 281. The permit is revised to reflect that large construction activities are subject to an annual water quality fee under TWC, §26.0291 and according to Chapter 205.

Attachments 1 and 2 of the Permit

Comment 198: HCFCD, Harris County, Arlington, and Tarrant County requested that the notice include additional information, such as a physical address, detailed location description, and a map of the construction activity that will make it possible for the receiving MS4 operator to implement its construction program. Cleburne suggested that a form such as the NPDES or TPDES NOI form be used rather than the notice in order to provide the level of information that is needed. Arlington requested that Attachment 1 and 2 "require a site address and/or a location plan to be included with the Construction Site Notice."

Response 198: The construction site notices of the permit are revised to require a physical address of the site or a description of the location and Attachment 1 is revised to specify where the SWP3 is maintained. These additional requirements should allow persons supplied a copy of the notice the information necessary to locate the construction site.