

S [REDACTED] 2002 Stormwater TNRCC/ TX Coalition

Coalition



TEXAS CITIES COALITION ON STORMWATER

PO Box 1588 Austin, Texas 78768-1588

(512) 404-7800

Fax (512) 703-2765

MEMORANDUM

To: TCCOS Members

From: Jim Mathews
Joe Freeland

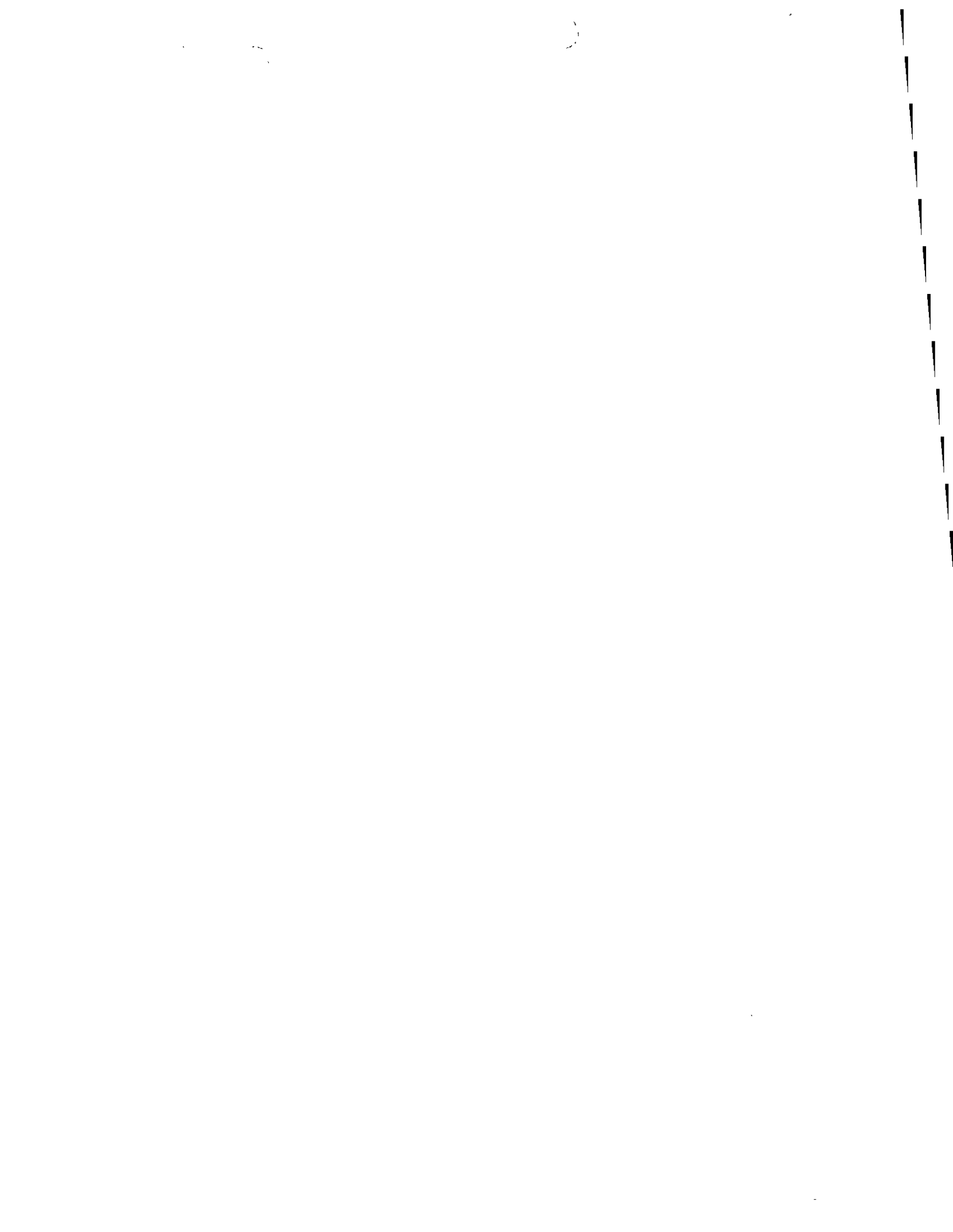
Re: UPDATE ON PHASE II STORM WATER PERMITTING FOR SMALL MUNICIPALITIES

Date: September 30, 2002

TCCOS is alive and well. We have not communicated with the group as a whole this year because we have been waiting for any significant developments such as a decision by the Ninth Circuit Court of Appeals or issuance of a proposed general permit by the Texas Commission on Environmental Quality ("TCEQ"), which used to be the TNRCC. While we continue to wait for a decision from the Court, we now have a proposed general permit.

Has the TCEQ (formerly TNRCC) proposed a General Storm Water Permit for small municipalities? On September 27, 2002, the TCEQ published notice in the Texas Register of a proposed general permit for regulated small MS4s (27 Tex Reg 9189). This draft general permit also sets out the criteria that the TCEQ will use to determine whether those cities on the potentially designated list or other non-listed cities will be required to obtain permit coverage. A copy of this permit can be obtained at <http://www.tnrcc.state.tx.us/permitting/waterperm/wvperm/txr040000.pdf> or on our website at <http://www.mandf.com/txr040000.pdf>

- **What will the Proposed General Permit require?** The general permit proposed by the TCEQ looks remarkably similar to the model general permit issued by EPA more than a year ago. The proposed permit would require regulated small MS4s to implement six minimum control measures as part of a storm water management plan ("SWMP"). The permit would also require regulated small MS4s to submit a Notice of Intent ("NOI") NOI within 90 days following the effective date of the permit or March 10, 2003, whichever date is later. This NOI would contain an initial SWMP, containing the best management practices ("BMPs") and measurable goals to satisfy the six minimum control measures, and a schedule for implementation of the plan. The schedule must provide for full implementation of the SWMP by the end of the five year permit term. The permit adds an optional seventh minimum control measure that addresses municipal construction projects. Municipalities that select this option will not have to obtain separate permit coverage for their own construction projects.



- **How did the TCEQ Develop the Proposed Permit?** The TCEQ solicited input from a workgroup. TCCOS participated in the workgroup process and led two of the subgroups. The workgroup met several times during late-2001 and early-2002. After the subgroups submitted their reports, no further meetings of the workgroup were held. TCEQ never solicited any final recommendations from the workgroup. Instead, it appears that the TCEQ largely ignored the recommendations made by the subgroups and proposed a permit nearly identical to EPA's model general permit.

- **What Municipalities Need a Storm Water Permit?** All municipalities listed on EPA's automatically designated cities list, which can be viewed at <http://www.mandf.com/AffectedTexasCities.htm>. Also, all municipalities located within Urbanized Areas ("UA") as defined by the Census Bureau using data from the 2000 Census. The TCEQ has posted a "viewer" that can be used to determine whether you are within a 2000 UA — <http://gis.tnrc.state.tx.us/website/jrwwp0/viewer.htm>. Under EPA's rules, only those areas of a municipality within the Urbanized Area must be covered by a permit. TCEQ claims that its intent was the same as EPA's, but the language of the proposed general permit on this issue is unclear.

- **What can we do to try to improve the Proposed General Permit?** The TCEQ is soliciting written comment on the proposed general permit through November 15, 2002. TCCOS will develop and submit comments on the proposed permit. However, it will be important for the TCEQ to hear from as many affected municipalities as possible. Therefore, you should consider filing your own comments. The TCCOS position papers and other background documents can be found at <http://www.mandf.com/tccos>. We will post our comments on the proposed general permit after they have been reviewed by the TCCOS steering committee.

Additionally, the TCEQ is holding the following public hearings on the proposed general permit: Arlington (October 28, 2002); Houston (October 29, 2002); San Antonio (November 4, 2002). You should plan on attending one of the hearings and voicing your concerns with TCEQ's approach.

- **What is the status of the challenge to EPA's Phase II rule?** TCCOS' challenge to EPA's final Phase II rule remains pending in the Ninth Circuit Court of Appeals. The case was argued and submitted in December 2001. We are still waiting for the Court to issue a decision. Additionally, two Phase I cities filed challenges to their MS4 permits on many of the same bases raised by TCCOS in its challenge to EPA's Phase II rules. These challenges are currently pending in the Fifth Circuit Court of Appeals. The issues have been briefed but no argument date has been set.

Questions? If you have any questions regarding this memo, TCEQ's proposed permit, or what you should do now regarding the permit, please contact Joe Freeland or Jim Mathews at (512) 404-7800 or jfreeland@mandf.com or jmathews@mandf.com. Additional information can be found at <http://www.tnrc.state.tx.us/permitting/waterperm/wywp:tm/ms4.html#map>.



TEXAS CITIES COALITION ON STORMWATER

P.O. Box 1568 Austin, Texas 78768-1568
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FAX TRANSMITTAL SHEET

FROM: Steering Committee

Sunday, September 29, 2002

Texas Cities Coalition on Stormwater

TO:

City of Addison	James Pierce, Jr., P.E., DEE	City of Alamo Heights	Paul Sontag
City of Alvin	Paul Hoffmann	City of Angleton	Ruth Hertel
City of Balcones Heights	Miguel Sandoval	City of Bay City	Clark H. Young
City of Belton	Sam Listi	City of Brenham	Doug Baker
City of Brownwood	Gary Buits	City of Bryan	Kelly Wellman
City of Bunker Hill Village	Ruthie Sager	City of Burkburnett	Mike Slye
City of Canyon	Glen Metcalf	City of Castle Hills	Mark Medbury
City of Clear Lake Shores	Ted K. Guthrie, Jr.	City of Cleburne	Larry Berkman
City of College Station	Kathryn Anthony	City of Conroe	Dean Towery
City of Converse	Don Kirkland	City of Copperas Cove	Paul M. Boyer, P.E.
City of Corinth	Kenneth Seala	City of Corsicana	Connie Standridge
City of Deer Park	Ron Crabtree	City of Del Rio	Rudy Palafox
City of Denison	Tom Akins	City of Flower Mound	Mike Boles, Ken Parr, Julie Smith
City of Friendswood	Mickiel G. Hodge	City of Gainesville	Mike Land
City of Galena Park	John Cooper	City of Galveston	Brandon Wade
City of Gatesville	Brandon Emmons	City of Georgetown	George Russell
City of Grapevine	Matt Singleton	City of Groves	Davis Brinson
City of Harker Heights	Jerry Atkinson	City of Harlingen	Roel Rodriguez
City of Hedwig Village	Paul Addington	City of Henderson	Ken Taylor
City of Hewitt	Paul Holroyd	City of Hill Country Village	David J. Harris
City of Hitchcock	John Anderson	City of Hollywood Park	Harold Burris
City of Howe	Jimmy Haynes	City of Humble	Berry K. Brock
City of Hurst	Ron Haynes	City of Jersey Village	Dale Brown
City of Katy	Johnny Nelson	City of Keller	Ed Ilachner, Jr.
City of Kennedale	Ted Rowe	City of Kerrville	Paul Krippfle, P.E.
City of Killeen	Bruce A. Butscher, P.E.	City of La Marque	Gary Rose
City of La Porte	Steve Gillett	City of Lake Jackson	William P. Yenne
City of Lakeside City	Bobby Beaves	City of Lancaster	Jason Cosby
City of Leander	Christopher A. Reid, P.E.	City of Leon Valley	Hank Brummett
City of Levelland	Greg Ingham	City of Lewisville	Steven L. Bacchus
City of Longview	Jim Finley	City of Lufkin	Debra Cassidy
City of Lumberton	Norman Reynolds	City of McAllen	Lamberto Beill, P.E.
City of Mercedes	Joe Flores, Jr.	City of Mount Pleasant	Michael H. Boles, P.E.
City of Nacogdoches	David Smith	City of Nassau Bay	Chris Defrancis
City of Nederland	Steve Hamilton	City of North Richland Hills	Clifton Beck
City of Odessa	Matthew S. Squires, P.E.	City of Olmos Park	Barbara Joseph
City of Pflugerville	Ken Martin	City of Pharr	Fred Sandoval
City of Plainview	Jim Jeffers	City of Port Arthur	Leslie McMahan, P.E.
City of Port Lavaca	Barbara Gibson	City of Port Neches	A.R. Kimler

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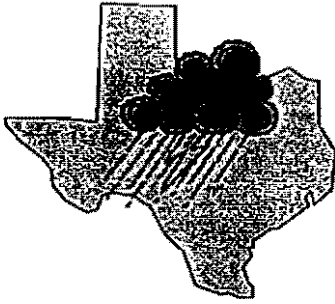
FAX TRANSMITTAL SHEET

**FROM: Steering Committee
Texas Cities Coalition on Stormwater**

Sunday, September 29, 2002

TO:

City of River Oaks	Marvin Gregory, III	City of Rockwall	Rick Crowley
City of Rosenberg	Jeff Braun	City of Seabrook	Gary Jones
City of Selma	Margie Lubianski	City of Sherman	Charles Rowland
City of South Houston	Susan Engel	City of Spring Valley	Richard Rockenbaugh
City of Sunnyvale	R.J. Ewalt	City of Temple	Jonathan Graham
City of Terrell Hills	Cal Johnson	City of Texarkana	Philip M. Ball
City of Texas City	Tom Kessler	City of Tyler	Gregory M. Morgan, P.E.
City of Vernon	Jim Murray	City of Victoria	John A. Johnston, P.E.
City of Webster	Frank Simpson	City of West Lake Hills	Stump Sowada
City of West University	Edward R. Menville	City of Westover Hills	Tim Chambers
City of Windcrest	F.R. Cain	City of Woodway	Yost Zakhary
Town of Lakeside	Bill Mohr		



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MEMORANDUM

To: TCCOS Participating Cities
From: Jim Mathews
Joe Freeland
Re: Meeting with TNRCC Commissioners
Date: April 11, 2000

Mike - a while ago I gave you an invoice from this group for membership renewal. This is an example of what they are doing for the group.
Jim

On April 6, 2000, representatives of the TCCOS Steering Committee, Texas Counties Stormwater Coalition, TML, Texas Association of Counties, and the Texas Public Works Association met with Chairman Robert Huston and Commissioner John Baker of the TNRCC and members of their staff. The TCCOS Steering Committee was represented by Jonathan Graham (Temple), Mayor Bill Lindsay and Tom Akins (Denison), Jerry Hodge and Matt Singleton (Grapevine), and Larry Barkman (Cleburne). TML was represented by Monte Akers.

The Coalition's major emphasis in the meeting was on securing a framework of cooperation with TNRCC in developing an acceptable Phase II stormwater program. Such a program must apply real solutions to real problems and avoid EPA's "one-size-fits-all" approach. Attached is a position paper summarizing our goals and requests, and identifying major issues to resolve. This was a very successful meeting and an important first step in the process of working with TNRCC to develop a workable, common sense approach to EPA's Phase II stormwater program.

Both Chairman Huston and Commissioner Baker responded positively and expressed their desire to work with the coalition in developing a rational water quality based program for Texas. Both acknowledged that the new stormwater program must be implemented carefully and thoughtfully to avoid the "one size fits all" approach frequently favored by EPA. Chairman Huston expressly stated that he had no disagreement with the goals statement included in our position paper and noted his belief that an overly prescriptive program would be doomed to fail.

If you have any questions regarding this meeting, please call us, or any of the TCCOS representatives that attended the meeting.

Note: We are developing an email contact list for use in sending out Coalition information. If you are interested in being included on the list, please send your email address to TCCOS@mandf.com.

**POSITION PAPER
TNRCC IMPLEMENTATION OF EPA'S PHASE II
STORM WATER PROGRAM FOR MS4s**

**TEXAS CITIES COALITION ON STORMWATER
TEXAS COUNTIES STORMWATER COALITION**

April 6, 2000

Goal of Meeting

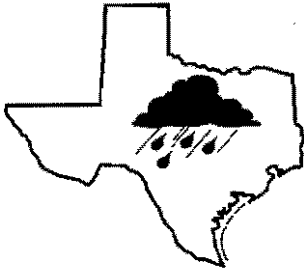
- Establish a framework of cooperation in which the TNRCC will work with Texas Cities and Counties to develop a rational, water-quality based, regulatory program for small MS4s that recognizes the current and historic efforts of local governments to improve water quality, equitably divides responsibilities on additional efforts to improve water quality, and is consistent with Texas law.

Specific Requests of the TNRCC

- Designation of a senior staff member as liaison to the Counties and Cities regarding the development of TNRCC's program.
- Adoption of specific rules to implement the Phase II MS4 program.
- Creation of an alternative permit program, as added by EPA to its final rule in response to comments from Texas Counties and Cities.
- Use of a process and criteria similar to that developed under Texas Water Code § 26.177 (water-quality based) when designating additional regulated small MS4s.

Issues to Resolve

- What modification does TNRCC intend to make to its NPDES permit program to implement the Phase II MS4 program, and when?
 - December 2000, if no statutory change is required, or
 - December 2001, if a statutory change is required.
- Will the TNRCC implement those minimum control measures that EPA cannot force local governments to do (such as public education, illicit discharge control, construction site runoff control and post-construction storm water management.)?
- If the TNRCC intends to require local governments to regulate third persons to control water quality, does the TNRCC have sufficient legal authority?
- Will the TNRCC agree to adopt "bare minimum" BMPs and specific criteria to use to require more than bare minimum?
- Will the TNRCC grant permit waivers for small MS4s that are not contributing to the impairment of a receiving stream on the § 303(d) list?



TEXAS CITIES COALITION ON STORMWATER

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(512) 404-7800 Fax (512) 703-2785

November 30, 1998

Via Fax 239-4808/First Class Mail

Lutrecia Oshoko (MC 204)
Texas Natural Resource Conservation Commission
Office of Policy and Regulatory Development
P.O. Box 13087
Austin, Texas 78711-3087

**Re: Comments on TNRCC's Proposed Municipal Pollution Control and
Abatement Rules - Proposed 30 TAC Chapter 216: Subchapter B (Rule Log
No. 97164-216-WT)**

Dear Ms Oshoko:

Enclosed please find comments concerning the TNRCC's Proposed Municipal Pollution Control and Abatement Rules (Rule Log No. 97164-216-WT) filed on behalf of the Texas Cities Coalition on Stormwater, and each individual city participating in the Coalition. We have enclosed an original and one copy of our comments and enclosures. We have also enclosed a disk with an electronic copy of the comments. Please file mark and return to me one copy of the comments and attachments, using the enclosed self addressed stamped envelope.

Thank you for your consideration of our request and comments.

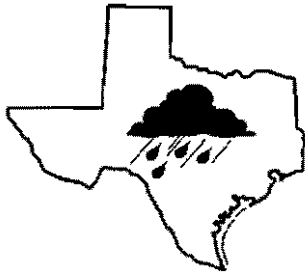
Sincerely,



Jim Mathews

Enclosures/with Attachments

cc: Participants in the Texas Cities Coalition on Stormwater
 Frank Sturzl



TEXAS CITIES COALITION ON STORMWATER

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THE TEXAS CITIES COALITION ON STORMWATER COMMENTS ON TNRCC'S PROPOSED MUNICIPAL POLLUTION CONTROL AND ABATEMENT RULES PROPOSED NEW 30 TAC CHAPTER 216: SUBCHAPTER B (RULE LOG NO. 97164-216-WT)

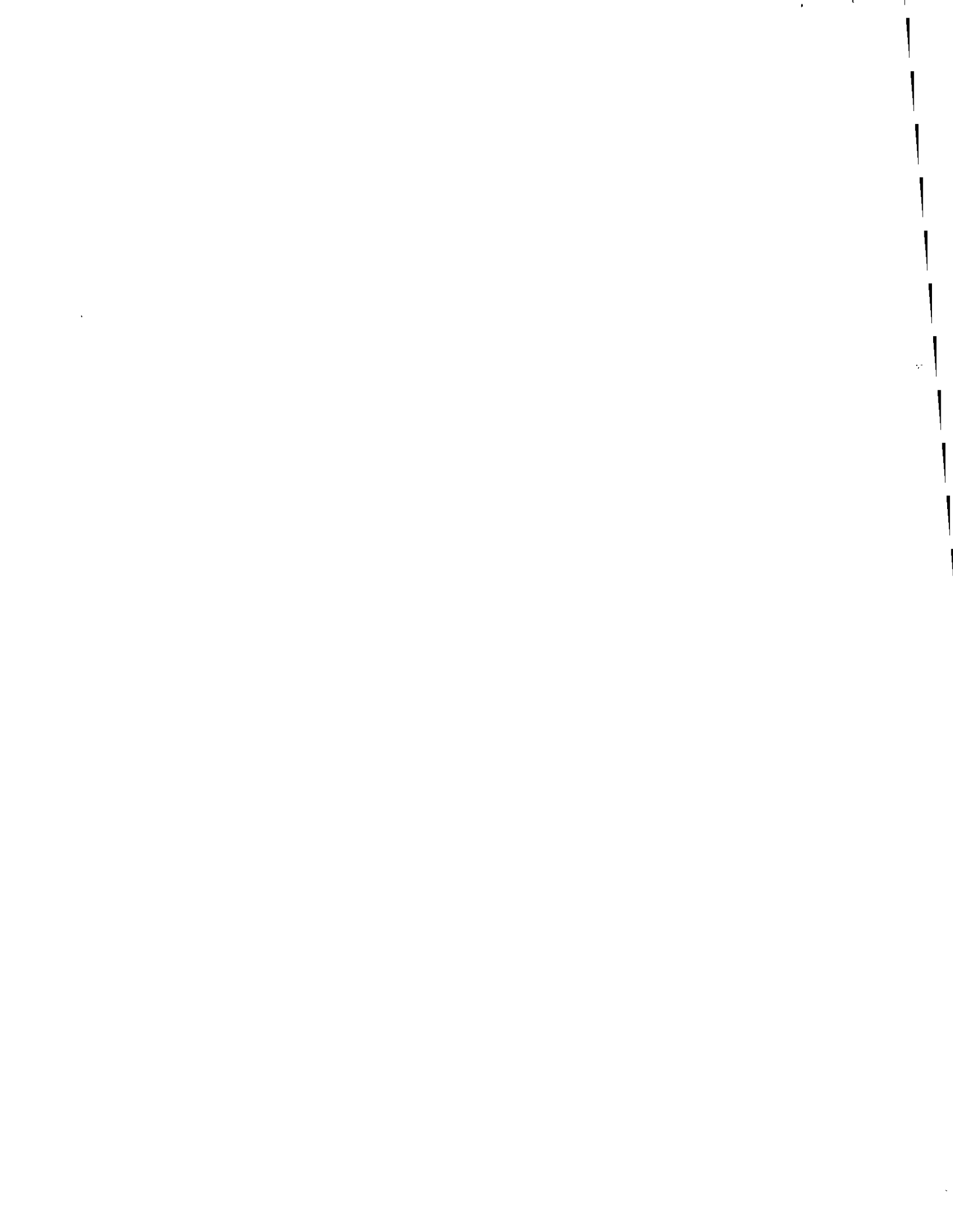
The following comments are filed on behalf of the Texas Cities Coalition on Stormwater ("The Coalition"), and each individual city participating in the coalition.¹ These comments address the TNRCC's proposed rules to implement Texas Water Code § 26.177 -- proposed new Chapter 216; Subchapter B of Title 30 of the Texas Administrative Code (Rule Log No. 97164-216-WT).

I. INTRODUCTION AND BACKGROUND ON COALITION

The Coalition is a group of 86 Texas cities representing a broad geographic and demographic cross-section of small and medium Texas cities with populations ranging from 520 to 97,478. The members of the Coalition are concerned about the quality of Texas' streams, rivers and lakes and are committed to working with the TNRCC in finding new and innovative ways to address the remaining sources of water pollution. In particular, the members of the Coalition are committed to working with the TNRCC to develop a comprehensive, systems-based approach to water quality management in Texas that addresses all sources of water pollution fairly and equitably.

The members of the Coalition initially joined together to participate in and comment upon the development of EPA's Phase II Storm Water Program. The Coalition specifically requested that EPA implement the Phase II MS4 program through State water quality management programs, developed on a watershed/water quality basis, instead of through NPDES permits. The Coalition envisions that this approach would work in the following manner. As the States conduct TMDLs and other water quality assessments, they will identify impaired water bodies and then identify the magnitude and significance of contributing sources of pollutants. The States will then prepare and/or revise plans to provide for cost-effective measures, equitably allocated among all pollutant contributors, to reduce pollutant loads. These plans will be developed with input from all stakeholders, and remedial measures may be implemented in a phased manner based on the

¹ A list of the cities participating in the Coalition as of November 30, 1998, is attached as Exhibit A.



probability of results and/or economic feasibility. The States will then periodically reassess the receiving streams to determine whether the remedial measures are working, and if not, require additional control measures using the same procedure used to establish the initial measures.

The Coalition strongly believes that the TNRCC should take a similar approach for its program to implement Section 26.177 of the Texas Water Code. The program should be an integral part of the TNRCC's ongoing Statewide Watershed Management Approach. Under the approach envisioned by the Coalition, a city's obligation to prepare a water pollution control and abatement plan would be directly linked to the TNRCC's development of a Watershed Action Plan for each of the water quality limited water bodies in the state. The details of the plan could also be linked to the equitable control programs that are supposed to grow out of the watershed planning activities.

The Coalition believes that the use of the Statewide Watershed Management Approach for Texas is the most sensible way to directly achieve the goals of protecting water quality and promoting the use of watershed planning. By focusing on water quality rather than on controls merely for the sake of control, a water-quality based approach should produce greater improvements in water quality at a lower cost than any alternative approach. Such an approach would better facilitate and promote watershed planning because it would address the entirety of a watershed and not just discrete portions and because it would not further aggravate the division between regulated and unregulated pollution sources. Also, such an approach would be the most cost-effective and least burdensome approach.

The following is a brief list of some of the principal benefits that would result from the use of the Statewide Watershed Management Approach, as envisioned by the Coalition:

- All sources of water pollution, both point and nonpoint, will be subject to control.
- Source controls will be fairly and equitably allocated among the sources of pollution based on local priorities, needs and concerns.
- The public is more likely to accept (and pay for) a program in which they are allowed to participate in defining the problem and developing the solution.

The TNRCC needs to find a way to provide cities with incentives to do more rather than penalties for doing less, and the surest way to provide such an incentive is to provide the cities with the assurance that water quality is being addressed in a comprehensive manner. Cities want clean water as much as any other governmental entity, but they believe that all levels of government must share in regulatory and political costs of achieving this goal and that all sources of pollutant load must share in reducing pollution.

II. PROCEDURAL COMMENTS

A. Takings Impact Assessment

In the Takings Impact Assessment ("TIA") prepared for this rulemaking, the TNRCC concludes that the rulemaking will not create a burden on private real property because the rule only governs actions a city must take to abate and/or prevent water pollution. Based on this conclusion, the TNRCC does not determine whether the rulemaking will constitute a taking or describe reasonable alternative actions as required by law. TEXAS GOV'T CODE ANN. § 2007.043(b) (West Pamph. 1998). The Coalition asserts that the TNRCC's conclusion is in error and that the TNRCC must prepare a full TIA as part of the final rulemaking action.

Pursuant to the Private Real Property Preservation Act (the "Act"), the TNRCC is required to identify the "burdens imposed on private real property." TEXAS GOV'T CODE ANN. § 2007.043(b). The Act does not limit the TNRCC's obligation only to burdens directly caused by the TNRCC's action. Thus, the TNRCC must identify both direct and indirect burdens resulting from the rule.

In the TIA, the TNRCC acknowledges that, as a result of this rule, cities may be required to regulate the activities of the general public, which may impose burdens on private property. The TNRCC attempts to avoid its obligation to identify these burdens by stating that actions taken by cities are exempt from the Act. However, such an exemption only applies to actions taken by cities. It does not apply to exempt the TNRCC from its obligations. The TNRCC must attempt to identify these indirect burdens in a full TIA in the final rule.

B. Regulatory Impact Analysis

In the Regulatory Impact Analysis ("RIA") prepared for this rulemaking, the TNRCC concludes that the rulemaking is not a major environmental rule because the rule will not adversely affect the economy of the state, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Additionally, the TNRCC concludes that the proposed rule does not exceed an express requirement of state law. Based on these conclusions, the TNRCC did not complete a full RIA. The Coalition asserts that the TNRCC's conclusions are in error and that the TNRCC must prepare a full RIA as part of the final rulemaking action.

The proposed rulemaking is clearly a major environmental rule. As recognized by the TNRCC, the specific intent of the rule is to protect the environment. Additionally, the rule may

adversely affect the economy of the state or a sector of the economy. As a result of the rule, cities may be forced to stringently regulate land development and construction activities. This regulation will impose additional costs on development. These costs could be significant.

The Coalition also believes that the proposed rule exceeds an express requirement of state law. As is discussed in greater detail later in these comments, this rulemaking is based on TEXAS WATER CODE ANN. § 26.177, which requires the preparation of pollution control and abatement programs if the TNRCC identifies “water pollution that is attributable to non-permitted sources in a city. . . .” The proposed rule changes this by changing the triggering finding to “identified water pollution that is *not attributable to permitted* sources.” (Emphasis added). This change alters the balance of and greatly exceeds the requirements of the statute.

The TNRCC also justifies its decision not to prepare an RIA on the basis of the limited applicability of the rule. The TNRCC states, in its RIA Checklist that application of the rule will be “limited to cities with populations over 10,000, that have a water pollution problem attributable to non-permitted sources, and do not have a federal storm water permit. This statement is inconsistent with the text of the proposed rule, which does not provide an exemption for cities with federal storm water permits. Thus, the Coalition believes that this justification cannot serve as a basis for the TNRCC not performing an RIA, unless the TNRCC includes an exemption in the rule for cities with federal storm water permits.

III. SPECIFIC COMMENTS

A. Introduction

The following are the Coalition’s specific comments on the text of the proposed rule, arranged generally in the order of the proposed rule. The Coalition is also attaching as Exhibit B an alternative version of the rules (Coalition’s Alternative Rule), which the Coalition believes achieves the goals of the statute in the most efficient manner. Although the Coalition has endeavored to explain all of the differences between its version of the rules and the TNRCC’s proposed rules, it is possible that some minor issues have been overlooked in the specific comments. Therefore, the Coalition asks the TNRCC to look not only at its specific written comments but also at the Coalition’s Alternative Rule.

B. Purpose and Policy

The Coalition objects to the first sentence of proposed § 216.21(b), which states that an “unauthorized discharge is a violation of Texas Water Code, § 26.121. This introductory provision

is not needed for purposes of this rule. Section 216.21(b) appears to be a reservation of the TNRCC's authority. As such, the first sentence adds nothing to this section. Moreover, the provision is an overstatement of the law. Generally, § 26.121 of the Texas Water Code prohibits the discharge of "waste" and "pollutants." Unauthorized discharges not containing waste or pollutants are generally not violations of the Texas Water Code. The Coalition recommends that this sentence be deleted from the final rule, such as shown on the Coalition's Alternative Rule.

C. Applicability

The Coalition objects to the TNRCC's decision regarding the applicability of this proposed subchapter, as set out in proposed §§ 216.21(a) and 216.22(a). In the proposed rule, the TNRCC dramatically alters the applicability limits of the statute. Pursuant to the statute, the preparation of pollution control and abatement programs is required if the TNRCC identifies "water pollution that is *attributable to non-permitted* sources in a city. . . ." TEXAS WATER CODE ANN. § 26.177 (emphasis added). The proposed rule changes this by changing the triggering finding to "identified water pollution that is *not attributable to permitted* sources." Proposed § 216.22(a) (emphasis added). This change, although subtle, could have serious consequences for cities. Under the statute, the TNRCC would have to prove that water pollution was attributable to non-permitted sources; under the rule, the TNRCC could require the preparation of a program if there was water pollution of unknown origin, unless the city could show that the pollution was not caused by permitted sources. The proposed rule potentially changes the burden of proof and requires cities to prove a negative, which could be next to impossible.

Although the problem identified above could be addressed merely by using the statutory language, the Coalition urges the TNRCC to articulate a clear and objective test for applicability through these rules. The statutory language alone is too vague. Many of the terms used in the statute and the proposed rule (such as "source," and "attributable") are not defined and are ambiguous. For instance, neither the statute nor the rule addresses how "attributable" is linked to causation and to the relative size of contribution. If it is determined that "water pollution" exists in a receiving stream and that a drop of material from a non-permitted source within a city is present in that receiving stream, then is the water pollution attributable to the non-permitted source? Clear and objective criteria are needed in order to insure consistency and predictability in applying the rules.

The Coalition suggests that the TNRCC use a test that is based on language that has a more developed meaning, such as language from 40 CFR Part 130, and that is consistent with other water quality related programs, such as the TNRCC's Statewide Watershed Management Approach. For example, the test could be tied directly to the establishment and implementation of Watershed Action Plans (TMDLs); that is, the test could be set at whether pollutants discharged by non-permitted

sources within the city are preventing or expected to prevent attainment of water quality standards. Thus, the use of this test would dovetail nicely with the implementation of TMDLs and the development of Watershed Action Plans and would make applicability of these rules consistent with TMDL development and regulation based on water quality problems.

Additionally, the Coalition believes that applicability should not be triggered by the presence of sources over which a city has no regulatory jurisdiction. A city may not have jurisdiction over a source controlled by the State of Texas or by the United States Government, and a city may have no power to compel the source to do anything. Additionally, a city may have no power to control a source of pollution because of other legal or physical barriers. In such cases, the applicability of this subchapter should not be triggered.

Another issue that needs to be addressed by the rule is the relationship between the federal storm water permitting program for municipal separate storm sewer systems ("MS4 permit") and these rules. The Coalition believes that a city that has an MS4 permit should not be also subject to these rules. The content of the city's MS4 permit and the accompanying storm water management program ("SWMP") more than satisfy the requirements of the statute. Moreover, the TNRCC has indicated in the Regulatory Impact Analysis accompanying this proposed rule that the rule is not intended to apply to cities that have a federal stormwater permit. This position must be clearly reflected in the language of the final rule.

The Coalition also objects to the language of the last sentence of the proposed § 216.22(a), which states: "Cities meeting applicability shall be required to satisfy applicable provisions of this subchapter upon receipt of notice issued by the executive director pursuant to § 216.25 of this title." This language could be interpreted to mean that municipalities must develop and implement programs immediately after the Executive Director determines applicability and long before the TNRCC enters an order requiring the development of a program. Certainly this is not the TNRCC's intention.

The Coalition has prepared alternative language that meets the purpose and goals of the statute but does not suffer from the problems in the proposed rule. This language is in the Coalition's Alternative Rule.

D. Definitions

Permitted Sources - The Coalition objects to the definition of "Permitted Sources" in § 261.23(3). This definition suffers from a number of serious problems. First of all, it makes no sense. For example, what is a "source that is required to discharge pollution."? Also, Chapter 26 of the Texas Water Code generally regulates the discharge of "waste" or "pollutants" not the

discharge of "pollution." Additionally, it is not clear whether sources that are required to have permits, but do not, are considered to be "permitted sources." Finally, as discussed previously, the statute speaks in terms of "non-permitted sources" rather than "permitted sources." Thus, the relevant term to be defined should be "non-permitted sources."

Assuming that the term to be defined is "non-permitted sources," the issue is how should that term be defined. Based on the legislative history of this provision and on the language of several related statutes, the Coalition believes that the Legislature intended "non-permitted sources" to mean "nonpoint sources." Moreover, the use of the nonpoint source concept would harmonize this rule with other related statutes and rules, such as the Clean Rivers program and the Drainage Utility statute. Also, Section 26.177(b)(5) describes a part of the control and abatement program that appears to coincide with the concept of nonpoint (or generalized) sources. The Coalition recommends that the TNRCC define this term as nonpoint source or something similar as in the Coalition's Alternative Rule.

Pollution - The Coalition objects to the definition of "pollution" as used in the proposed rules. Although this definition largely tracks the Texas Water Code definition of pollution, the Coalition believes that this definition should either be deleted or refined for purposes of this rule. We believe that the determination of whether water pollution exists should be made in reference to the surface water quality standards, which require a minimum amount of robustness in the assessment of water quality data in order to define pollution.

In the Coalition's Alternative Rule there is no definition of "pollution" because no such definition is necessary. In the Coalition's Alternative Rule, a city is required to prepare a water pollution control and abatement program if the pollutant loading from non-permitted sources in the city exceed the amount of pollutant loading allocated to this category of sources in a Watershed Action Plan. Correspondingly, the Coalition's Alternative Rule contains definitions of "load allocation," "loading capacity," and "water action plan," which are not defined in the TNRCC's proposed rule. Under the Coalition's approach, city resources can be focused on and limited to the specific sources that are causing water quality problems. The Coalition's approach also eliminates the vagueness associated with the TNRCC's proposed rule.

If the TNRCC decides to include a definition of "pollution" in the final rule, the Coalition suggests the following definition, which links the term directly to water quality:

(4) **Pollution** - An excursion above a narrative or numeric surface water quality criteria as established in Chapter 307 of this title (relating to Surface Water Quality Standards).

Significant Waste Discharge - The Coalition objects to the definition of "significant waste discharge" as used in the proposed rules because the rule is far too vague. This term controls the scope of most of the substantive requirements imposed on cities. The TNRCC needs to provide some objective test so that cities will know whether they are in compliance with the TNRCC's rules and so that cities will be able to plan and budget the necessary resources to achieve compliance. Moreover, the TNRCC's definition is too broad. Defining the term as a discharge that causes or threatens to cause pollution could extend this term to a vast array of potential discharges, including such things as runoff from every residential yard, and every parking lot. A requirement to identify, monitor, sample and control such a broad array of discharges would be unduly burdensome.

We suggest that this term be very clearly and narrowly defined. The statute requires cities to identify, monitor, and address all significant waste discharges, and it requires cities to develop and implement plans for controlling pollution attributable to generalized discharges of waste. This suggests that the Legislature did not intend for the term "significant waste discharges" to include generalized discharges of waste. The Coalition believes that this term should be limited to point sources that have been specifically identified as significant by a Watershed Action Plan. The Coalition suggests the definition included in the Coalition's Alternative Rule.

Water Pollution Control and Abatement Program - The Coalition objects to the proposed definition of "water pollution control and abatement program." This definition does not track the statutory language describing a water pollution control and abatement program. This definition appears to go well beyond the requirements of the statute and require cities to "prevent or correct water pollution problems." Moreover, this definition is not needed. The scope of the required water pollution control and abatement program is adequately described in proposed § 216.27. The Coalition recommends that the TNRCC delete this definition.

E. Water Quality Assessments and Studies

The Coalition objects to proposed § 216.24 because the proposed rule fails to appropriately limit the studies that can be used to trigger the water pollution control and abatement plan requirement. The Coalition believes that only high-quality, peer-reviewed, quantitative studies that focus on the link between urban non-point source runoff and instream pollution should be used to trigger the requirement. An example of the type of study that the Coalition believes would be acceptable is a load allocation performed under 40 CFR § 130.7.

The statute links the determination of water pollution to "watershed water quality assessment reports required by Section 26.0135 or other commission assessments or studies." The rules, therefore, should place an emphasis on watershed water quality assessment reports (category (2) in the proposed rule). Additionally, many of the reports listed in the proposed rule are inappropriate

for use to determine whether water pollution is attributable to non-permitted sources within a city. The rule should make it clear that the studies must be quality assured and must link observed water quality impairment to non-permitted sources within a city.

More importantly, however, the Coalition recommends that the TNRCC only use studies that serve as the basis for Watershed Action Plans, or other studies that establish TMDLs (including load allocations and wasteload allocations) for both point and non-point sources within a watershed, as the basis for triggering applicability. Such an approach would appropriately place this program in the TNRCC's Statewide Watershed Management Approach. Such an approach would also ensure that only the best data is used to make the determination. The Coalition's suggested language is set out in the Coalition's Alternative Rule.

F. Notice of the ED's Determination and Opportunity to Correct the Problem

The Coalition suggests that the heading of proposed § 216.25 be changed from "Notice" to "Notice of Initial Determination." Such a heading would better describe the Executive Director's action. The Coalition also objects to § 216.25(a)(4), which limits to five years the time period in which a city has to correct the problem. The Coalition believes that the Executive Director's discretion to allow a longer period of time should not be limited by regulation. The Coalition believes that any city that has a water quality problem will work diligently to find a solution to the problem without having to be forced to submit a water pollution control and abatement program. Indeed, the Coalition believes that the diversity and effectiveness of voluntarily implemented programs will far surpass any requirements forced on cities by the TNRCC. The Coalition recommends that a minimum time frame of at least five years be established in the rule. The Coalition's suggested language is in the Coalition's Alternative Rule.

G. Final Determination of Applicability

The Coalition suggests that heading of proposed § 216.26 be changed from "Public Meeting Held by Commission" to "Final Determination of Applicability." The Coalition's suggested heading would better describe the TNRCC's actions described by the section.

The Coalition objects to proposed § 216.26(a). The TNRCC should require the Executive Director to only use studies conducted after the city has taken steps to correct the water-quality problem. If the Executive Director is allowed to use assessments made before the implementation of the city's solution, those assessments will not accurately describe the water quality existing after implementation of the city's solutions. The Coalition recommends that the TNRCC use the language set out in the Coalition's Alternative Rule.

H. Procedural Issues

The Coalition objects to all the procedural requirements of proposed § 216.26. The Coalition suggests that the procedures contained in the Coalition's Alternative Rule are more appropriate for the type of action being taken by the Commission.

The Coalition objects to the requirement in proposed § 216.26(d) that would require cities to publish notice of the TNRCC's public meeting. The Coalition believes that it is inappropriate for the TNRCC to put this responsibility on affected cities. This is not a permit action. The city is not asking the TNRCC for permission to do something. Rather, the TNRCC is forcing the city to do something. It seems only fair that the TNRCC be responsible for providing public notice. Also, we see no reason why public notice needs to be in accordance with §§ 39.5 and 39.7 of the TNRCC's rules. Those rules apply to situations involving "applicants" for permits. The affected city here should not be considered to be an "applicant." Notice for the TNRCC meeting should be given in the same manner as for other meetings of the TNRCC.

The Coalition objects to the proposed § 216.26(e)(3), which gives the TNRCC the opportunity to determine that a city must prepare a water pollution control and abatement program without giving the city the opportunity to a contested case hearing to contest the factual basis for the Executive Director's determination. The Coalition believes that Texas law demands that the opportunity for a hearing be given in situations such as presented in this proposed rule, where the rights of a city are being determined by an administrative agency based on specific factual determinations. Moreover, only through a contested case hearing will the TNRCC be able to create an administrative record suitable for use for judicial review of any final TNRCC action.

The Coalition suggests that the TNRCC delete proposed § 216.26(e)(3). By making that change the TNRCC can determine that no program is required or can send the matter to SOAH for a hearing to determine the factual issues. Because public funds will be used to develop and implement the program required by the TNRCC, the TNRCC should ensure that its factual determination is made using the most open procedures available. The specific language recommended by the Coalition is contained in the Coalition's Alternative Rule.

J. Contents of Water Pollution Control and Abatement Programs

The Coalition objects to the provision of proposed §216.27(b) that states "or as may be reasonably required by the Commission." The rule fails to provide the regulated community with

sufficient notice of what these additional requirements might be. These additional "reasonable" requirements should be part of the rule.

The Coalition also objects to the provisions in §216.27(b)(4), which exceed the requirements set out in § 26.177(b) of the statute. The statute requires cities to "cooperate" with the Commission in developing procedures to obtain compliance, including where necessary the use of legal enforcement proceedings. There needs to be considerable clarification regarding how such cooperation will be achieved. The Coalition believes that the "cooperation" referred to in § 26.177 is a reference to § 26.175 (Cooperative Agreements), and to § 26.0136 (Water Quality Management). The Coalition also believes that under provisions such as § 7.355 of the Texas Water Code, the primary responsibility for investigating and obtaining compliance with permitting requirements rests in the Commission and not the city. The Coalition suggests that this provision be rewritten as set out the Coalition's Alternative Rule.

The Coalition objects to proposed §216.27(b)(6), which states that the TNRCC may impose "other requirements as may be prescribed by commission rule." Again, this is the rule in which the TNRCC should be imposing requirements. The Coalition's suggested language for this section is included in the Coalition's Alternative Rule.

K. Review and Approval of Programs

The Coalition suggests that the heading of proposed §216.28 be changed from "Submittal of Water Pollution Control and Abatement Programs" to "Review and Approval of Water Pollution Control and Abatement Programs. The Coalition believes that its suggested heading more accurately describes the actions of the TNRCC.

The Coalition objects to proposed § 216.28 because the proposed rule does not provide for a review and approval process, as required by §26.177(c) of the Texas Water Code. The Coalition believes that a procedure similar to the review and approval of permit applications should be used for the approval required here. Such a procedure needs to address what happens if the Executive Director determines that a program is deficient, and the city's recourse if it disagrees with the Executive Director's determination. Additionally, the Coalition believes that this section needs the standards by which the Executive Director will judge a program. The Coalition's suggested language to provide these additional items is contained in the Coalition's Alternative Rule.

Additionally, the Coalition objects to the requirement that a registered professional engineer certify that the program is designed to abate and prevent water pollution not attributable to permitted sources within a city. The Coalition objects to this requirement for a number of reasons. A reputable engineer might be reluctant to certify that a program will "prevent" water pollution. An

engineer might be willing to certify that the program has been developed in accordance with the applicable rules. Also, only a small part of a Water Pollution Control and Abatement Program will address engineered structural controls. The majority of such plans will be directed at such things as public education, compliance and enforcement, which are not engineering activities. The Coalition recommends that engineer's seal and certification requirement be deleted from the rule, or at least changed to a certification that the program has been developed in accordance with the applicable rules.

L. Amendment Procedures

The Coalition objects to the amendment procedures set out in the proposed rules. The Coalition believes that cities should be given great flexibility to change their programs quickly and efficiently to meet changing pollution problems and local budgetary constraints. Additionally, the Coalition believes that the rules need to clearly spell out the procedure that the Executive Director must use to force a city to amend its program if the Executive Director wants the program changed. The Coalition's suggested procedure for amendments is set out in the Coalition's Alternative Program. As with the Coalition's suggested original approval procedures, the amendment procedures are similar to the TNRCC's current procedures for a TNRCC-initiated amendment to a water quality permit. The Coalition recommends the TNRCC use the language set out in the Coalition's Alternative Rule.

IV. CONCLUSION

The Coalition hopes that the TNRCC will review the Coalition's Alternative Rule carefully and consider whether some or all of the Coalition's proposal can be incorporated into the TNRCC's final rule. As recognized by the statute, this program needs to be a cooperative effort between the TNRCC and the cities. The Coalition appreciates the opportunity to work with the TNRCC to develop rules implementing Texas Water Code § 26.177. If necessary, the members of the Coalition are willing to continue to work with the TNRCC to develop a reasonable and realistic program for the development of municipal water pollution control and abatement programs designed to address real water quality problems.

EXHIBIT A
THE TEXAS CITIES COALITION ON STORMWATER
LIST OF PARTICIPATING CITIES

November 30, 1998

City of Addison	City of Groves	City of Nederland
City of Alamo Heights	City of Harker Heights	City of North Richland Hills
City of Angleton	City of Harlingen	City of Odessa
City of Balcones Heights	City of Hedwig Village	City of Pampa
City of Bay City	City of Hewitt	City of Pflugerville
City of Baytown	City of Hill Country Village	City of Pharr
City of Belton	City of Hitchcock	City of Plainview
City of Brenham	City of Hollywood Park	City of Port Arthur
City of Brownwood	City of Howe	City of Port Lavaca
City of Bryan	City of Hurst	City of Port Neches
City of Bunker Hill Village	City of Jersey Village	City of Rockwall
City of Burkburnett	City of Katy	City of Rosenberg
City of Castle Hills	City of Keller	City of Seabrook
City of Cleburne	City of Killeen	City of Seguin
City of College Station	City of La Marque	City of Selma
City of Conroe	City of La Porte	City of Sherman
City of Copperas Cove	City of Lake Jackson	City of Sunnyvale
City of Corinth	City of Lake Worth	City of Temple
City of Corsicana	City of Lakeside	City of Texarkana
City of Deer Park	City of Lancaster	City of Texas City
City of Del Rio	City of Leon Valley	City of Tyler
City of Denison	City of Levelland	City of Vernon
City of Flower Mound	City of Lewisville	City of Victoria
City of Gainesville	City of Longview	City of Webster
City of Galena Park	City of Lufkin	City of West Lake Hills
City of Galveston	City of McAllen	City of West University Place
City of Gatesville	City of Midland	City of Windcrest
City of Georgetown	City of Mount Pleasant	City of Woodway
City of Grapevine	City of Nacogdoches	

EXHIBIT B
TEXAS CITIES COALITION ON STORMWATER
ALTERNATIVE RULE

SUBCHAPTER B : MUNICIPAL WATER POLLUTION CONTROL AND ABATEMENT
§§216.21 - 216.30

§216.21. Purpose and Policy.

(a) The purpose of this subchapter is to establish procedures and measures in accordance with Texas Water Code, §26.177(a) to address water pollution that is attributable to non-permitted sources in cities that have a population of 10,000 or more persons.

(b) Nothing in this subchapter is intended to limit or prevent the commission from abating or preventing the pollution of water in the state through permits, orders, or other enforcement actions authorized under the Texas Water Code, Chapter 26, or other applicable state or federal law.

§216.22. Applicability.

(a) This subchapter applies to a city with a population of at least 10,000 persons, based on the most recent federal decennial census, when the pollutant loading introduced into a water body by non-permitted sources within a city exceeds the load allocation for such sources specified in a watershed action plan for the water body. Provided, however, that this subchapter does not apply to a city that has obtained an NPDES or TPDES permit for discharges from its municipal separate storm sewer system.

(b) A city whose population falls below 10,000, based on the most recent federal decennial census, will no longer have a duty to satisfy the applicable provisions of this subchapter upon the executive director's receipt from the city of the most recent federal decennial census indicating that the population has fallen below 10,000.

§216.23. Definitions.

Terms defined in Chapter 3 of this title (relating to Definitions) will have the same meaning when used in this subchapter unless the definition is specifically modified in this section.

(1) **City** - A municipality or city existing, created, or organized under the general, home rule, or special laws of this state.

(2) **Extra Territorial Jurisdiction** - An area outside the corporate limits of a municipality as defined in Local Government Code, §42.021.

(3) **Load Allocation** - The portion of a receiving water's loading capacity that is attributed to nonpoint sources of pollution.

(4) **Loading Capacity** - The greatest amount of loading that a water can receive without violating water quality standards.

(5) **Non-Permitted Sources** - Sources of water pollution that are not required to obtain water quality permits under Chapter 26 of the Texas Water Code, including generalized discharges of waste that are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater.

(6) **Significant Waste Discharges** - Point source discharges of waste or pollutants to a receiving water that have been identified as significant waste discharges in a watershed action plan without regard to whether or not the discharges are authorized by the commission.

(7) **Watershed Action Plan** - A quantitative assessment of water quality problems and contributing pollutant sources, along with an implementation plan that identifies responsible parties and specifies actions needed to restore and protect a water body.

§216.24. Water Quality Assessments and Studies.

Water quality assessments and studies that may be used by the executive director to identify water pollution that is attributable to non-permitted sources shall consist of those used to develop the applicable watershed action plan, and may include the following:

(1) **Clean Rivers Program.** Watershed water quality assessments conducted in accordance with Texas Water Code, §26.0135;

(2) **Other.** Special studies, pilot projects, reports, or other quality assured assessments of water quality in the state prepared, approved, or accepted by the executive director that identify non-permitted sources of water pollution within cities.

§216.25. Notice of Initial Determination of Applicability.

(a) If the executive director determines that a city has met the criteria set forth in §216.22(a) of this title (relating to Applicability), the executive director shall notify the city. This notice shall specify the following:

(1) the basis for the executive director's determination that the city meets the criteria set forth in §216.22(a) of this title (relating to Applicability);

(2) that the executive director may undertake additional water quality assessments and studies in the impacted area as set out in §216.24 of this title (relating to Water Quality Assessments and Studies);

(3) that the city may undertake additional water quality assessments and studies in the impacted area within its jurisdiction which comply with quality assurance requirements of the executive director, which will be provided to the city upon request; and,

(4) the time period (at least five years) within which the city may try to correct the problem. The executive director may amend this time period when new or additional information or circumstances warrant such an amendment.

§216.26. Final Determination of Applicability

(a) After expiration of the time period specified in § 216.25(a)(4) of this subchapter, the executive director shall determine whether a city continues to meet the criteria set forth in § 216.22(a) of this subchapter. This determination shall be based on water quality assessments and studies performed after the time period in § 216.25(a)(4) (relating to Notice of Initial Determination of Applicability), with consideration given to the improvements that have resulted and that will result from the full implementation of the steps taken by the city after the initial determination of applicability to correct the problem.

(b) If the executive director determines that a city continues to meet the criteria set forth in § 216.22(a) of this subchapter, the executive director, at a public meeting of the commission, shall recommend to the commission that the city be required to submit a Water Pollution Control and Abatement Program.

(c) The commission shall evaluate the executive director's recommendation at a scheduled commission meeting, and may:

(1) approve an agreed order between the Executive Director and the city requiring the city to develop and implement a Water Pollution Control and Abatement Program as described in §216.27 (relating to Water Pollution Control and Abatement Program) or an amendment to an existing Program as described in §216.29 (relating to Amendment Procedures for Water Pollution Control and Abatement Programs).

(2) refer the matter for SOAH for a contested case hearing conducted pursuant to the Administrative Procedures Act to determine whether the city meets the criteria set forth in § 216.22(a); or

(3) determine that the city is not required to submit a Water Pollution Control and Abatement Program.

(d) At any contested case hearing held pursuant to this section, the executive director shall bear the burden of demonstrating that the city meets the criteria set forth in § 216.22(a).

(f) After the conclusion of a contested case hearing, if the commission determines that the city is required to submit a Water Pollution Control and Abatement Program, the commission shall enter an order specifying the pollutants and non-permitted sources of concern and the deadline for the submission of a Water Pollution Abatement and Control Program.

§216.27. Water Pollution Control and Abatement Programs.

(a) The Water Pollution Control and Abatement Program of a city shall encompass the area within a city's municipal boundaries and, subject to Texas Water Code, §26.179 (relating to Designation of Water Quality Protection Zones in Certain Areas), may include areas within its extraterritorial jurisdiction which in the judgment of the city should be included to enable the city to achieve its objectives for the area within its territorial jurisdiction.

(b) The Program shall provide for the following:

(1) The development and maintenance of an inventory of all significant waste discharges into or adjacent to the water within the city and, where the city so elects, within the extraterritorial jurisdiction of the city, without regard to whether or not the discharges are authorized by the commission.

(2) The regular monitoring of all significant waste discharges included in the inventory prepared pursuant to Subparagraph (1) of this subsection.

(3) The collecting of samples and the conducting of periodic inspections and tests of the waste discharges being monitored to determine whether the discharges are being conducted in compliance with the Water Pollution Control and Abatement Program and any applicable water quality permits, orders or rules of the commission, and whether the discharges should be covered by a permit from the commission.

(4) The development and implementation of a procedure for obtaining compliance by the waste discharges being monitored, including where necessary the use of legal enforcement proceedings. This procedure shall be a cooperative effort between the city and the commission, which shall be evidenced by a cooperative agreement between the city and the commission executed pursuant to § 26.175 of the Texas Water Code. Unless otherwise requested by the city, primary responsibility for compliance and enforcement shall remain in the commission regarding compliance with applicable water quality permits, orders or rules of the commission, and whether a permit is required. Primary responsibility for compliance and enforcement of the Water Pollution Control and Abatement Program shall remain in the city. No city shall be compelled to adopt a resolution pursuant to § 7.352 of the Texas Water Code.

(5) The development and execution of reasonable and realistic plans for controlling and abating pollution or potential pollution resulting from generalized discharges of waste that are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater.

These plans shall be evaluated based on the pollutants causing the city to meet the criteria set forth in § 216.22(a), the sources or probable sources of the discharge of those pollutants, and the reasonableness and cost to control the discharge of those pollutants.

(6) Additional services and functions which, in the judgment of the city, will provide effective water pollution control and abatement for the city.

§216.28. Review and Approval of Water Pollution Control and Abatement Programs.

(a) A Water Pollution Control and Abatement Program shall be submitted to the executive director of the commission in accordance with the order issued pursuant to §216.26 of this title (relating to Public Meeting Held by the Commission).

(b) The executive director shall review a submitted Program and shall approve the Program if it satisfies the requirements of § 216.27. If the executive director determines that the Program is insufficient, the executive director shall notify the city of the deficiency and provide the city with an opportunity to submit a revised Program. If the executive director determines that the revised Program is insufficient or if the city refuses to submit a revised Program, the executive director shall recommend to the commission that the matter be referred to SOAH for a contested case hearing to determine whether the submitted Program satisfies the requirements of § 216.27.

§216.29. Amendment Procedures for Water Pollution Control and Abatement Programs.

(a) A city may amend the Water Pollution Control and Abatement Program for that city at any time by submitting an amended Water Pollution Control and Abatement Program to the executive director of the commission.

(b) The commission may, on its own motion or in response to a petition by the executive director, request a city to amend a Water Pollution Control and Abatement Program when new or additional information or circumstances warrant such changes to effectuate the purposes of this subchapter. If the city refuses to amend its Program, or if the commission determines that the revised Program is insufficient, the commission shall refer the matter to SOAH for a contested case hearing to determine whether the submitted Program satisfies the requirements of § 216.27.

§216.30. Appeals.

Pursuant to Texas Water Code §26.177(d), any person affected by any ruling, order, decision, ordinance, program, resolution, or other act of a city relating to water pollution control and abatement outside the corporate limits of such city adopted pursuant to this subchapter or any other statutory authorization may appeal such action to the commission or district court. An appeal must be filed with the commission's chief clerk within sixty (60) days of the enactment of the ruling,

order, decision, ordinance, program, resolution, or act of the city. The issue on appeal is whether the action or program is invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality, and the commission's order on the appeal will be based on whether the city's actions or programs meet these criteria. The commission or district court may overturn or modify the action of the city. If an appeal is taken from a commission ruling, the commission ruling shall be in effect for all purposes until final disposition is made by a court of competent jurisdiction so as not to delay any permit approvals.



TEXAS CITIES COALITION ON STORMWATER

PO Box 1568 Austin, Texas 78768-1568
(512) 404-7800 Fax (512) 703-2785

MEMORANDUM

TO: Texas Phase II Cities - Participating Cities

FROM: Texas Cities Coalition on Stormwater Steering Committee

RE: Written Comments on TNRCC's Proposed Water Pollution Control and Abatement Rules

DATE: November 23, 1998

Attached are the latest draft of comments that will be submitted to the TNRCC on November 30, 1998, on behalf of the Texas Cities Coalition on Stormwater, and its participating cities. These comments were developed based on the input provided by Coalition members at the Steering Committee meeting held in San Antonio on October 29, 1998. Please provide any remaining comments you may have on these comments to Joe Freeland by fax, phone or email (jfreeland@mandf.com) before 10:00 am, November 30, 1998. Unless we hear differently from you by November 30th, your city's name will appear on the Coalition's comments.

The Steering Committee strongly encourages each participating city to submit its own comments addressing those issues of particular concern to that city. Please feel free to use those portions of the Coalition's comments that you wish. Your comments must be received by the TNRCC by 5:00 pm on November 30, 1998. Your comments should reference Rule Log No. 97164-216-WT and should be sent to the following address:

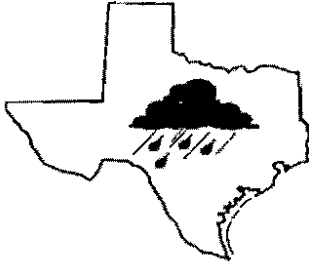
Lutrecia Oshoko (MC 204)
Texas Natural Resource Conservation Commission
Office of Policy and Regulatory Development
P.O. Box 13087
Austin, Texas 78711-3087

FAX: (512) 239-4808

We would appreciate it if you would send us a copy of any comments you file.

If you have any questions or comments, please contact Jim Mathews or Joe Freeland at (512) 404-7800.





TEXAS CITIES COALITION ON STORMWATER

PO Box 1568 Austin, Texas 78768-1568
(512) 404-7800 Fax (512) 703-2785

THE TEXAS CITIES COALITION ON STORMWATER COMMENTS ON TNRCC'S PROPOSED MUNICIPAL POLLUTION CONTROL AND ABATEMENT RULES PROPOSED NEW 30 TAC CHAPTER 216: SUBCHAPTER B (RULE LOG NO. 97164-216-WT)

I. INTRODUCTION

These comments are filed on behalf of the Texas Cities Coalition on Stormwater ("The Coalition"), and each individual city participating in the coalition.¹

The Texas Cities Coalition on Stormwater (the "Coalition") is a group of 86 Texas cities who joined together initially to address the serious and significant issues raised by EPA's Phase II Storm Water Program. The participating cities represent a broad geographic and demographic cross-section of small and medium Texas cities with populations ranging from 520 to 97,478..

The Coalition's comments on EPA's Phase II Storm Water Program were primarily aimed at EPA's failure to focus on water quality issues. In particular, the Coalition recommended that EPA use a non-NPDES permit approach using State water quality management programs instead of a traditional NPDES permit approach to allow States and municipalities to focus their resources on real pollution problems. Thus, the members are committed to working with the TNRCC to develop a comprehensive, systems-based approach to water quality management in Texas that addresses all sources of water pollution fairly and equitably.

The Coalition specifically requested that EPA implement the Phase II MS4 program through State water quality management programs, developed on a watershed/water quality basis, instead of through NPDES permits. The Coalition envisions that this approach would work in the following manner. As the States conduct TMDLs and other water quality assessments, they will identify impaired water bodies and then identify the magnitude and significance of contributing sources of pollutants. The States will then prepare and/or revise plans to provide for cost-effective measures,

¹ A list of the cities participating in the Coalition as of November 30, 1998, is attached as Exhibit A.

equitably allocated among all pollutant contributors, to reduce pollutant loads. These plans will be developed with input from all stakeholders, and remedial measures may be implemented in a phased manner based on the probability of results and/or economic feasibility. The States will then periodically reassess the receiving streams to determine whether the remedial measures are working, and if not, require additional control measures using the same procedure used to establish the initial measures.

The Coalition strongly believes that the TNRCC should take a similar approach for its program to implement Section 26.177 of the Texas Water Code. The program should be an integral part of the TNRCC's ongoing Statewide Watershed Management Approach. Under the approach envisioned by the Coalition, a city's obligation to prepare a water pollution control and abatement plan would be directly linked to the TNRCC's development of a watershed action plan for each of the water quality limited water bodies in the state. The details of the plan could also be linked to the equitable control programs that are supposed to grow out of the watershed planning activities.

The Coalition believes that the use of the Statewide Watershed Management Approach for Texas is the most sensible way to directly achieve the goals of protecting water quality and promoting the use of watershed planning. By focusing on water quality rather than on controls merely for the sake of control, a water-quality based approach should produce greater improvements in water quality at a lower cost than any alternative approach. Such an approach would better facilitate and promote watershed planning because it would address the entirety of a watershed and not just discrete portions and because it would not further aggravate the division between regulated and unregulated pollution sources. Also, such an approach would be the most cost-effective and least burdensome approach.

The TNRCC needs to find a way to provide cities with incentives to do more rather than penalties for doing less, and the surest way to provide such an incentive is to provide the cities with the assurance that water quality is being addressed in a comprehensive manner. Cities want clean water as much as any other governmental entity, but they believe that all levels of government must share in regulatory and political costs of achieving this goal and that all sources of pollutant load must share in reducing pollution.

The following is a brief list of some of the principal benefits that would result from the use of the Statewide Watershed Management Approach, as envisioned by the Coalition:

- All sources of water pollution, both point and nonpoint, will be subject to control.
- Source controls will be fairly and equitably allocated among the sources of pollution based on local priorities, needs and concerns.

- The public is more likely to accept (and pay for) a program in which they are allowed to participate in defining the problem and developing the solution.

II. PROCEDURAL COMMENTS

A. Takings Impact Assessment

In the Takings Impact Assessment ("TIA") prepared for this rulemaking, the TNRCC concludes that the rulemaking will not create a burden on private real property because the rule only governs actions a city must take to abate and/or prevent water pollution. Based on this conclusion, the TNRCC does not determine whether the rulemaking will constitute a taking or describe reasonable alternative actions as required by law. TEXAS GOV'T CODE ANN. § 2007.043(b) (West Pamph. 1998). The Coalition asserts that the TNRCC's conclusion is in error and that the TNRCC must prepare a full TIA as part of the final rulemaking action.

Pursuant to the Private Real Property Preservation Act (the "Act"), the TNRCC is required to identify the "burdens imposed on private real property." TEXAS GOV'T CODE ANN. § 2007.043(b). The Act does not limit the TNRCC's obligation only to burdens directly caused by the TNRCC's action. Thus, the TNRCC must identify both direct and indirect burdens resulting from the rule.

In the TIA, the TNRCC acknowledges that, as a result of this rule, cities may be required to regulate the activities of the general public, which may impose burdens on private property. The TNRCC attempts to avoid its obligation to identify these burdens by stating that actions taken by cities are exempt from the Act. However, such an exemption only applies to actions taken by cities. It does not apply to exempt the TNRCC from its obligations.

B. Regulatory Impact Analysis

In the Regulatory Impact Analysis ("RIA") prepared for this rulemaking, the TNRCC concludes that the rulemaking is not a major environmental rule because the rule will not adversely affect the economy of the state, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Additionally, the TNRCC concludes that the proposed rule does not exceed an express requirement of state law. Based on these conclusions, the TNRCC did not complete a full RIA. The Coalition asserts that the TNRCC's conclusions are in error and that the TNRCC must prepare a full RIA as part of the final rulemaking action.

The proposed rulemaking is clearly a major environmental rule. As recognized by the TNRCC, the specific intent of the rule is to protect the environment. Additionally, the rule may adversely affect the economy of the state or a sector of the economy. As a result of the rule, cities may be forced to stringently regulate land development and construction activities. This regulation will impose additional costs on development. These costs could be significant.

The Coalition also believes that the proposed rule exceeds an express requirement of state law. As is discussed in greater detail later in these comments, this rulemaking is based on TEXAS WATER CODE ANN. § 26.177, which requires the preparation of pollution control and abatement programs if the TNRCC identifies "water pollution that is attributable to non-permitted sources in a city. . . ." The proposed rule changes this by changing the triggering finding to "identified water pollution that is *not attributable to permitted* sources." (Emphasis added). This change alters the balance of and greatly exceeds the requirements of the statute.

The TNRCC also justifies its decision not to prepare an RIA on the basis of the limited applicability of the rule. The TNRCC states, in its RIA Checklist that application of the rule will be "limited to cities with populations over 10,000, that have a water pollution problem attributable to non-permitted sources, and do not have a federal storm water permit. This statement is inconsistent with the text of the proposed rule, which does not provide an exemption for cities with federal storm water permits. Thus, the Coalition believes that this justification cannot serve as a basis for the TNRCC not performing an RIA, unless the TNRCC includes an exemption in the rule for cities with federal storm water permits.

III. SPECIFIC COMMENTS

A. Introduction

The following are the Coalition's specific comments on the text of the proposed rule, arranged generally in the order of the proposed rule. The Coalition is also attaching an alternative version of the rules (Coalition's Alternative Rule), which the Coalition believes achieves the goals of the statute in the most efficient manner. Although the Coalition has endeavored to explain all of the differences between its version of the rules and the TNRCC's proposed rules, it is possible that some minor issues have been overlooked in the specific comments. Therefore, the Coalition asks the TNRCC to look not only at its specific written comments but also at the Coalition's Alternative Rule.

B. Purpose and Policy

The Coalition objects to the first sentence of proposed § 216.21(b), which states that an “unauthorized discharge is a violation of Texas Water Code, § 26.121. This introductory provision is not needed for purposes of this rule. Section 216.21(b) appears to be a reservation of the TNRCC’s authority. As such, the first sentence adds nothing to this section. Moreover, the section is an overstatement of the law. Generally, § 26.121 of the Texas Water Code prohibits the discharge of “waste” and “pollutants.” Unauthorized discharges not containing waste or pollutants are generally not violations of the Texas Water Code. The Coalition recommends that this sentence be deleted from the final rule, such as shown on the Coalition’s Alternative Rule.

C. Applicability

The Coalition objects to the TNRCC’s decision regarding the applicability of this proposed subchapter, as set out in proposed §§ 216.21(a) and 216.22(a). In the proposed rule, the TNRCC dramatically alters the applicability limits of the statute. Pursuant to the statute, the preparation of pollution control and abatement programs is required if the TNRCC identifies “water pollution that is *attributable to non-permitted* sources in a city. . . .” TEXAS WATER CODE ANN. § 26.177 (emphasis added). The proposed rule changes this by changing the triggering finding to “identified water pollution that is *not attributable to permitted* sources.” Proposed § 216.22(a) (emphasis added). This change, although subtle, could have serious consequences for cities. Under the statute, the TNRCC would have to prove that water pollution was attributable to non-permitted sources; under the rule, the TNRCC could require the preparation of a program if there was water pollution of unknown origin, unless the city could show that the pollution was not caused by permitted sources. The proposed rule potentially changes the burden of proof and requires cities to prove a negative, which could be next to impossible.

Although the problem identified above could be addressed merely by using the statutory language, the Coalition urges the TNRCC to articulate a clear and objective test for applicability through these rules. The statutory language alone is too vague. Many of the terms used in the statute and the proposed rule (such as “source,” and “attributable”) are not defined and are ambiguous. For instance, neither the statute nor the rule addresses how “attributable” is linked to causation and to the relative size of contribution. If it is determined that “water pollution” exists in a receiving stream and that a drop of material from a non-permitted source within a city is present in that receiving stream, then is the water pollution attributable to the non-permitted source? Clear and objective criteria are needed in order to insure consistency and predictability in applying the rules.

The Coalition suggests that the TNRCC use a test that is based on language that has a more developed meaning, such as language from 40 CFR Part 130, and that is consistent with other water quality related programs, such as the TNRCC's Statewide Watershed Management Approach. For example, the test could be tied directly to the establishment and implementation of Watershed Action Plans (TMDLs); that is, the test could be set at whether pollutants discharged by non-permitted sources within the city are preventing or expected to prevent attainment of water quality standards. Thus, the use of this test would dovetail nicely with the implementation of TMDLs and the development of Watershed Action Plans and would make applicability of these rules consistent with TMDL development and regulation based on water quality problems.

Additionally, the Coalition believes that applicability should not be triggered by the presence of sources over which a city has no regulatory jurisdiction. A city may not have jurisdiction over a source controlled by the State of Texas or by the United States Government, and a city may have no power to compel the source to do anything. Additionally, a city may have no power to control a source of pollution because of other legal or physical barriers. In such cases, the applicability of this subchapter should not be triggered.

Another issue that needs to be addressed by the rule is the relationship between the federal storm water permitting program for municipal separate storm sewer systems ("MS4 permit") and these rules. The Coalition believes that a city that has an MS4 permit should not be also subject to these rules. The content of the city's MS4 permit and the accompanying storm water management program ("SWMP") more than satisfy the requirements of the statute.

The Coalition also objects to the language of the last sentence of the proposed § 216.22(a), which states: "Cities meeting applicability shall be required to satisfy applicable provisions of this subchapter upon receipt of notice issued by the executive director pursuant to § 216.25 of this title." This language could be interpreted to mean that municipalities must develop and implement programs immediately after the Executive Director determines applicability and long before the TNRCC enters an order requiring the development of a program. Certainly this is not the TNRCC's intention.

The Coalition has prepared alternative language that meets the purpose and goals of the statute but does not suffer from the problems in the proposed rule. This language is in the Coalition's Alternative Rule.

D. Definitions

Permitted Sources - The Coalition objects to the definition of "Permitted Sources" in § 261.23(3). This definition suffers from a number of serious problems. First of all, it makes no sense. For example, what is a "source that is required to discharge pollution."? Also, Chapter 26 of the Texas Water Code generally regulates the discharge of "waste" or "pollutants" not the discharge of "pollution." Additionally, it is not clear whether sources that are required to have permits, but do not, are considered to be "permitted sources." Finally, as discussed previously, the statute speaks in terms of "non-permitted sources" rather than "permitted sources." Thus, the relevant term to be defined should be "non-permitted sources."

Assuming that the term to be defined is "non-permitted sources," the issue is how should that term be defined. Based on the legislative history of this provision and on the language of several related statutes, the Coalition believes that the Legislature meant "nonpoint sources" when it said "non-permitted sources." Moreover, the use of the nonpoint source concept would harmonize this rule with other related statutes and rules, such as the Clean Rivers program and the Drainage Utility statute. Also, Section 26.177(b)(5) describes a part of the control and abatement program that appears to coincide with the concept of nonpoint (or generalized) sources. The Coalition recommends that the TNRCC define this term as in the Coalition's Alternative Rule.

Pollution - The Coalition objects to the definition of "pollution" as used in the proposed rules. Although this definition largely tracks the Texas Water Code definition of pollution, the Coalition believes that this definition should either be deleted or refined for purposes of this rule. We believe that the determination of whether water pollution exists should be made in reference to the surface water quality standards, which require a minimum amount of robustness in the assessment of water quality data in order to define pollution.

In the Coalition's Alternative Rule there is no definition of "pollution" because no such definition is necessary. In the Coalition's Alternative Rule, a city is required to prepare a water pollution control and abatement program if the pollutant loading from non-permitted sources in the city exceed the amount of pollutant loading allocated to this category of sources in a Watershed Action Plan. Correspondingly, the Coalition's Alternative Rule contains definitions of "load allocation," "loading capacity," and "water action plan," which are not defined in the TNRCC's proposed rule. Under the Coalition's approach, city resources can be focused on and limited to the specific sources that are causing water quality problems. The Coalition's approach also eliminates the vagueness associated with the TNRCC's proposed rule.

If the TNRCC decides to include a definition of "pollution" in the final rule, the Coalition suggests the following:

(4) **Pollution** - An excursion above a narrative or numeric surface water quality criteria as established in Chapter 307 of this title (relating to Surface Water Quality Standards).

Significant Waste Discharge - The Coalition objects to the definition of "significant waste discharge" as used in the proposed rules because the rule is far too vague. This term controls the scope of most of the substantive requirements imposed on cities. The TNRCC needs to provide some objective test so that cities will know whether they are in compliance with the TNRCC's rules and so that cities will be able to plan and budget the necessary resources to achieve compliance. Moreover, the TNRCC's definition is too broad. Defining the term as a discharge that causes or threatens to cause pollution could extend this term to a vast array of potential discharges, including such things as runoff from every residential yard, and every parking lot. A requirement to identify, monitor, sample and control such a broad array of discharges would be unduly burdensome.

We suggest that this term be very clearly and narrowly defined. The statute requires cities to identify, monitor, and address all significant waste discharges, and it requires cities to develop and implement plans for controlling pollution attributable to generalized discharges of waste. This suggests that the Legislature did not intend for the term "significant waste discharges" to include generalized discharges of waste. The Coalition believes that this term should be limited to point sources that have been specifically identified as significant by a watershed action plan. The Coalition suggests the definition included in the Coalition's Alternative Rule.

Water Pollution Control and Abatement Program - The Coalition objects to the proposed definition of "water pollution control and abatement program." This definition does not track the statutory language describing a water pollution control and abatement program. This definition appears to go well beyond the requirements of the statute and require cities to "prevent or correct water pollution problems." Moreover, this definition is not needed. The scope of the required water pollution control and abatement program is adequately described in proposed § 216.27. The Coalition recommends that the TNRCC delete this definition.

E. Water Quality Assessments and Studies

The Coalition objects to proposed § 216.24 because the proposed rule fails to appropriately limit the studies that can be used to trigger the water pollution control and abatement plan requirement. The Coalition believes that only high-quality, peer-reviewed, quantitative studies that focus on the link between urban non-point source runoff and instream pollution should be used to trigger the requirement. An example of the type of study that the Coalition believes would be acceptable is a load allocation performed under 40 CFR § 130.7.

The statute links the determination of water pollution to "watershed water quality assessment reports required by Section 26.0135 or other commission assessments or studies." The rules, therefore, should place an emphasis on watershed water quality assessment reports (category (2) in the proposed rule). Additionally, many of the reports listed in the proposed rule are inappropriate for use to determine whether water pollution is attributable to non-permitted sources within a city. The rule should make it clear that the studies must be quality assured and must link observed water quality impairment to non-permitted sources within a city.

More importantly, however, the Coalition recommends that the TNRCC only use studies that serve as the basis for watershed action plans, or other studies that establish TMDLs (including load allocations and wasteload allocations) for both point and non-point sources within a watershed, as the basis for triggering applicability. Such an approach would appropriately place this program in the TNRCC's Statewide Watershed Management Approach. Such an approach would also ensure that only the best data is used to make the determination. The Coalition's suggested language is set out in the Coalition's Alternative Rule.

F. Notice of the ED's Determination and Opportunity to Correct the Problem

The Coalition suggests that the heading of proposed § 216.25 be changed from "Notice" to "Notice of Initial Determination." Such a heading would better describe the Executive Director's action. The Coalition also objects to § 216.25(a)(4), which limits to five years the time period in which a city has to correct the problem. The Coalition believes that the Executive Director's discretion to allow a longer period of time should not be limited by regulation. The Coalition believes that any city that has a water quality problem will work diligently to find a solution to the problem without having to be forced to submit a water pollution control and abatement program. Indeed, the Coalition believes that the diversity and effectiveness of voluntarily implemented programs will far surpass any requirements forced on cities by the TNRCC. The Coalition recommends that a minimum time frame of at least five years be established in the rule. The Coalition's suggested language is in the Coalition's Alternative Rule.

G. Final Determination of Applicability

The Coalition suggests that heading of proposed § 216.26 be changed from "Public Meeting Held by Commission" to "Final Determination of Applicability." The Coalition's suggested heading would better describe the TNRCC's actions described by the section.

The Coalition objects to proposed § 216.26(a). The TNRCC should require the Executive Director to only use studies conducted after the city has taken steps to correct the water-quality

problem. If the Executive Director is allowed to use assessments made before the implementation of the city's solution, those assessments will not accurately describe the water quality existing after implementation of the city's solutions. The Coalition recommends that the TNRCC use the language set out in the Coalition's Alternative Rule.

H. Procedural Issues

The Coalition objects to all the procedural requirements of proposed § 216.26. The Coalition suggests that the procedures contained in the Coalition's Alternative Rule are more appropriate for the type of action being taken by the Commission.

The Coalition objects to the requirement in proposed § 216.26(d) that would require cities to publish notice of the TNRCC's public meeting. The Coalition believes that it is inappropriate for the TNRCC to put this responsibility on affected cities. This is not a permit action. The city is not asking the TNRCC for permission to do something. Rather, the TNRCC is forcing the city to do something. It seems only fair that the TNRCC be responsible for providing public notice. Also, we see no reason why public notice needs to be in accordance with §§ 39.5 and 39.7 of the TNRCC's rules. Those rules apply to situations involving "applicants" for permits. The affected city here should not be considered to be an "applicant." Notice for the TNRCC meeting should be given in the same manner as for other meetings of the TNRCC.

The Coalition objects to the proposed § 216.26(e)(3), which gives the TNRCC the opportunity to determine that a city must prepare a water pollution control and abatement program without giving the city the opportunity to a contested case hearing to contest the factual basis for the Executive Director's determination. The Coalition believes that Texas law demands that the opportunity for a hearing be given in situations such as presented in this proposed rule, where the rights of a city are being determined by an administrative agency based on specific factual determinations. Moreover, only through a contested case hearing will the TNRCC be able to create an administrative record suitable for use for judicial review of any final TNRCC action.

The Coalition suggests that the TNRCC delete proposed § 216.26(e)(3). By making that change the TNRCC can determine that no program is required or can send the matter to SOAH for a hearing to determine the factual issues. Because public funds will be used to develop and implement the program required by the TNRCC, the TNRCC should ensure that its factual determination is made using the most open procedures available. The specific language recommended by the Coalition is contained in the Coalition's Alternative Rule.

J. Contents of Water Pollution Control and Abatement Programs

The Coalition objects to the provision of proposed §216.27(b) that states "or as may be reasonably required by the Commission." The rule fails to provide the regulated community with sufficient notice of what these additional requirements might be. These additional "reasonable" requirements should be part of the rule.

The Coalition also objects to the provisions in §216.27(b)(4), which exceed the requirements set out in § 26.177(b) of the statute. The statute requires cities to "cooperate" with the Commission in developing procedures to obtain compliance, including where necessary the use of legal enforcement proceedings. There needs to be considerable clarification regarding how such cooperation will be achieved. We believe that the "cooperation" referred to in § 26.177 is a reference to § 26.175 (Cooperative Agreements), and to § 26.0136 (Water Quality Management). We also believe that under provisions such as § 7.355 of the Texas Water Code, the primary responsibility for investigating and obtaining compliance with permitting requirements rests in the Commission and not the city. We suggest that this provision be rewritten as set out the Coalition's Alternative Rule.

The Coalition objects to proposed §216.27(b)(6), which states that the TNRCC may impose "other requirements as may be prescribed by commission rule." Again, this is the rule in which the TNRCC should be imposing requirements. The Coalition's suggested language for this section is included in the Coalition's Alternative Rule.

K. Review and Approval of Programs

The Coalition suggests that the heading of proposed §216.28 be changed from "Submittal of Water Pollution Control and Abatement Programs" to "Review and Approval of Water Pollution Control and Abatement Programs. The Coalition believes that its suggested heading more accurately describes the actions of the TNRCC.

The Coalition objects to proposed § 216.28 because the proposed rule does not provide for a review and approval process, as required by §26.177(c) of the Texas Water Code. The Coalition believes that a procedure similar to the review and approval of permit applications should be used for the approval required here. Such a procedure needs to address what happens if the Executive Director determines that a program is deficient, and the city's recourse if it disagrees with the Executive Director's determination. Additionally, the Coalition believes that this section needs the standards by which the Executive Director will judge a program. The Coalition's suggested language to provide these additional items is contained in the Coalition's Alternative Rule.

Additionally, the Coalition objects to the requirement that a registered professional engineer certify that the program is designed to abate and prevent water pollution not attributable to permitted sources within a city. The Coalition objects to this requirement for a number of reasons. A reputable engineer might be reluctant to certify that a program will "prevent" water pollution. An engineer might be willing to certify that the program has been developed in accordance with the applicable rules. Also, only a small part of a Water Pollution Control and Abatement Program will address engineered structural controls. The majority of such plans will be directed at such things as public education, compliance and enforcement, which are not engineering activities. The Coalition recommends that engineer's seal and certification requirement be deleted from the rule, or at least changed to a certification that the program has been developed in accordance with the applicable rules.

L. Amendment Procedures

The Coalition objects to the amendment procedures set out in the proposed rules. The Coalition believes that cities should be given great flexibility to change their programs quickly and efficiently to meet changing pollution problems and local budgetary constraints. Additionally, the Coalition believes that the rules need to clearly spell out the procedure that the Executive Director must use to force a city to amend its program if the Executive Director wants the program changed. The Coalition's suggested procedure for amendments is set out in the Coalition's Alternative Program. As with the Coalition's suggested original approval procedures, the amendment procedures are similar to the TNRCC's current procedures for a TNRCC-initiated amendment to a water quality permit.

**TEXAS CITIES COALITION ON STORMWATER
ALTERNATIVE RULE**

**SUBCHAPTER B : MUNICIPAL WATER POLLUTION CONTROL AND ABATEMENT
§§216.21 - 216.30**

§216.21. Purpose and Policy.

(a) The purpose of this subchapter is to establish procedures and measures in accordance with Texas Water Code, §26.177(a) to address water pollution that is attributable to non-permitted sources in cities that have a population of 10,000 or more persons.

(b) Nothing in this subchapter is intended to limit or prevent the commission from abating or preventing the pollution of water in the state through permits, orders, or other enforcement actions authorized under the Texas Water Code, Chapter 26, or other applicable state or federal law.

§216.22. Applicability.

(a) This subchapter applies to a city with a population of at least 10,000 persons, based on the most recent federal decennial census, when the pollutant loading introduced into a water body by non-permitted sources within a city exceeds the load allocation for such sources specified in a watershed action plan for the water body. Provided, however, that this subchapter does not apply to a city that has obtained an NPDES or TPDES permit for discharges from its municipal separate storm sewer system.

(b) A city whose population falls below 10,000, based on the most recent federal decennial census, will no longer have a duty to satisfy the applicable provisions of this subchapter upon the executive director's receipt from the city of the most recent federal decennial census indicating that the population has fallen below 10,000.

§216.23. Definitions.

Terms defined in Chapter 3 of this title (relating to Definitions) will have the same meaning when used in this subchapter unless the definition is specifically modified in this section.

(1) **City** - A municipality or city existing, created, or organized under the general, home rule, or special laws of this state.

(2) **Extra Territorial Jurisdiction** - An area outside the corporate limits of a municipality as defined in Local Government Code, §42.021.

(3) **Load Allocation** - The portion of a receiving water's loading capacity that is attributed to nonpoint sources of pollution.

(4) **Loading Capacity** - The greatest amount of loading that a water can receive without violating water quality standards.

(5) **Non-Permitted Sources** - Sources of water pollution that are not required to obtain water quality permits under Chapter 26 of the Texas Water Code, including generalized discharges of waste that are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater.

(6) **Significant Waste Discharges** - Point source discharges of waste or pollutants to a receiving water that have been identified as significant waste discharges in a watershed action plan without regard to whether or not the discharges are authorized by the commission.

(7) **Watershed Action Plan** - A quantitative assessment of water quality problems and contributing pollutant sources, along with an implementation plan that identifies responsible parties and specifies actions needed to restore and protect a water body.

§216.24. Water Quality Assessments and Studies.

Water quality assessments and studies that may be used by the executive director to identify water pollution that is attributable to non-permitted sources shall consist of those used to develop the applicable watershed action plan, and may include the following:

(1) **Clean Rivers Program.** Watershed water quality assessments conducted in accordance with Texas Water Code, §26.0135;

(2) **Other.** Special studies, pilot projects, reports, or other quality assured assessments of water quality in the state prepared, approved, or accepted by the executive director that identify non-permitted sources of water pollution within cities.

§216.25. Notice of Initial Determination of Applicability.

(a) If the executive director determines that a city has met the criteria set forth in §216.22(a) of this title (relating to Applicability), the executive director shall notify the city. This notice shall specify the following:

(1) the basis for the executive director's determination that the city meets the criteria set forth in §216.22(a) of this title (relating to Applicability);

(2) that the executive director may undertake additional water quality assessments and studies in the impacted area as set out in §216.24 of this title (relating to Water Quality Assessments and Studies);

(3) that the city may undertake additional water quality assessments and studies in the impacted area within its jurisdiction which comply with quality assurance requirements of the executive director, which will be provided to the city upon request; and,

(4) the time period (at least five years) within which the city may try to correct the problem. The executive director may amend this time period when new or additional information or circumstances warrant such an amendment.

§216.26. Final Determination of Applicability

(a) After expiration of the time period specified in § 216.25(a)(4) of this subchapter, the executive director shall determine whether a city continues to meet the criteria set forth in § 216.22(a) of this subchapter. This determination shall be based on water quality assessments and studies performed after the time period in § 216.25(a)(4) (relating to Notice of Initial Determination of Applicability), with consideration given to the improvements that have resulted and that will result from the full implementation of the steps taken by the city after the initial determination of applicability to correct the problem.

(b) If the executive director determines that a city continues to meet the criteria set forth in § 216.22(a) of this subchapter, the executive director, at a public meeting of the commission, shall recommend to the commission that the city be required to submit a Water Pollution Control and Abatement Program.

(c) The commission shall evaluate the executive director's recommendation at a scheduled commission meeting, and may:

(1) approve an agreed order between the Executive Director and the city requiring the city to develop and implement a Water Pollution Control and Abatement Program as described in §216.27 (relating to Water Pollution Control and Abatement Program) or an amendment to an existing Program as described in §216.29 (relating to Amendment Procedures for Water Pollution Control and Abatement Programs).

(2) refer the matter for SOAH for a contested case hearing conducted pursuant to the Administrative Procedures Act to determine whether the city meets the criteria set forth in § 216.22(a); or

(3) determine that the city is not required to submit a Water Pollution Control and Abatement Program.

(d) At any contested case hearing held pursuant to this section, the executive director shall bear the burden of demonstrating that the city meets the criteria set forth in § 216.22(a).

(f) After the conclusion of a contested case hearing, if the commission determines that the city is required to submit a Water Pollution Control and Abatement Program, the commission shall enter an order specifying the pollutants and non-permitted sources of concern and the deadline for the submission of a Water Pollution Abatement and Control Program.

§216.27. Water Pollution Control and Abatement Programs.

(a) The Water Pollution Control and Abatement Program of a city shall encompass the area within a city's municipal boundaries and, subject to Texas Water Code, §26.179 (relating to Designation of Water Quality Protection Zones in Certain Areas), may include areas within its extra-territorial jurisdiction which in the judgment of the city should be included to enable the city to achieve its objectives for the area within its territorial jurisdiction.

(b) The Program shall provide for the following:

(1) The development and maintenance of an inventory of all significant waste discharges into or adjacent to the water within the city and, where the city so elects, within the extraterritorial jurisdiction of the city, without regard to whether or not the discharges are authorized by the commission.

(2) The regular monitoring of all significant waste discharges included in the inventory prepared pursuant to Subparagraph (1) of this subsection.

(3) The collecting of samples and the conducting of periodic inspections and tests of the waste discharges being monitored to determine whether the discharges are being conducted in compliance with the Water Pollution Control and Abatement Program and any applicable water quality permits, orders or rules of the commission, and whether the discharges should be covered by a permit from the commission.

(4) The development and implementation of a procedure for obtaining compliance by the waste discharges being monitored, including where necessary the use of legal enforcement proceedings. This procedure shall be a cooperative effort between the city and the commission, which shall be evidenced by a cooperative agreement between the city and the commission executed pursuant to § 26.175 of the Texas Water Code. Unless otherwise requested by the city, primary responsibility for compliance and enforcement shall remain in the commission regarding compliance with applicable water quality permits, orders or rules of the commission, and whether a permit is required. Primary responsibility for compliance and enforcement of the Water Pollution Control and Abatement Program shall remain in the city. No city shall be compelled to adopt a resolution pursuant to § 7.352 of the Texas Water Code.

(5) The development and execution of reasonable and realistic plans for controlling and abating pollution or potential pollution resulting from generalized discharges of waste that are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater.

These plans shall be evaluated based on the pollutants causing the city to meet the criteria set forth in § 216.22(a), the sources or probable sources of the discharge of those pollutants, and the reasonableness and cost to control the discharge of those pollutants.

(6) Additional services and functions which, in the judgment of the city, will provide effective water pollution control and abatement for the city.

§216.28. Review and Approval of Water Pollution Control and Abatement Programs.

(a) A Water Pollution Control and Abatement Program shall be submitted to the executive director of the commission in accordance with the order issued pursuant to §216.26 of this title (relating to Public Meeting Held by the Commission).

(b) The executive director shall review a submitted Program and shall approve the Program if it satisfies the requirements of § 216.27. If the executive director determines that the Program is insufficient, the executive director shall notify the city of the deficiency and provide the city with an opportunity to submit a revised Program. If the executive director determines that the revised Program is insufficient or if the city refuses to submit a revised Program, the executive director shall recommend to the commission that the matter be referred to SOAH for a contested case hearing to determine whether the submitted Program satisfies the requirements of § 216.27.

§216.29. Amendment Procedures for Water Pollution Control and Abatement Programs.

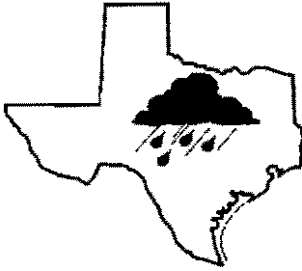
(a) A city may amend the Water Pollution Control and Abatement Program for that city at any time by submitting an amended Water Pollution Control and Abatement Program to the executive director of the commission.

(b) The commission may, on its own motion or in response to a petition by the executive director, request a city to amend a Water Pollution Control and Abatement Program when new or additional information or circumstances warrant such changes to effectuate the purposes of this subchapter. If the city refuses to amend its Program, or if the commission determines that the revised Program is insufficient, the commission shall refer the matter to SOAH for a contested case hearing to determine whether the submitted Program satisfies the requirements of § 216.27.

§216.30. Appeals.

Pursuant to Texas Water Code §26.177(d), any person affected by any ruling, order, decision, ordinance, program, resolution, or other act of a city relating to water pollution control and abatement outside the corporate limits of such city adopted pursuant to this subchapter or any other statutory authorization may appeal such action to the commission or district court. An appeal must be filed with the commission's chief clerk within sixty (60) days of the enactment of the ruling,

order, decision, ordinance, program, resolution, or act of the city. The issue on appeal is whether the action or program is invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality, and the commission's order on the appeal will be based on whether the city's actions or programs meet these criteria. The commission or district court may overturn or modify the action of the city. If an appeal is taken from a commission ruling, the commission ruling shall be in effect for all purposes until final disposition is made by a court of competent jurisdiction so as not to delay any permit approvals.



TEXAS CITIES COALITION ON STORMWATER

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MEMORANDUM

TO: Texas Cities Coalition on Stormwater - Participating Cities
FROM: Mathews & Freeland, L.L.P.
RE: TNRCC Storm Water Rulemaking
DATE: October 23, 1998

IMPORTANT NOTICE TNRCC PROPOSES STORM WATER RULES FOR CITIES WITH POPULATIONS OF 10,000 OR GREATER

On October 7, 1998, the TNRCC Commissioners approved for proposal draft rules to implement Section 26.177 of the Texas Water Code. A copy of the draft that was approved by the Commissioners is attached. The TNRCC anticipates that the proposed rules will be published in the *Texas Register* on October 30, 1998; that a public hearing will be held on the proposed rules on November 10, 1998; and that public comments will be due by November 30, 1998. These rules, if adopted as proposed, will require cities with populations greater than **10,000** to prepare and implement water pollution control and abatement plans if TNRCC determines that water pollution is attributable to non-permitted sources within the City. A copy of the proposed rules is attached.

Along with TML, we provided comments to the TNRCC staff on two prior drafts of these proposed rules. In response to our comments, the TNRCC significantly improved the rules. However, the proposed rule continues to suffer from some major defects. As drafted, the rule does not adequately spell out the conditions that would trigger a city to implement a pollution control and abatement plan. Thus, the TNRCC could choose to implement the rule broadly and require water pollution control and abatement plans from virtually every city in the state with a population of 10,000 or greater. Additionally, the rule does not provide for a contested-case hearing if a municipality wants to challenge the Executive Director's determination that a water pollution control and abatement plan is required.

We plan on convening a meeting of the Steering Committee during the TML annual meeting in San Antonio on October 29, 1998, from 10:00 to noon at the Marriot Riverwalk (the "old" Marriot) -- Bowie Room to discuss the Coalition's position regarding these rules. Representatives from the Participating Cities are welcome to attend. If the Steering Committee authorizes the filing of comments, we will provide a copy of the comments to all Participating Cities in time to use the Coalition's comments as a model for their own comments.

If you have any questions, please call me or Joe Freeland at (512) 404-7800.



Jim Mathews

cc: Frank Sturzl

The Texas Natural Resource Conservation Commission (commission) proposes new §§216.21-216.30 concerning municipal water pollution control and abatement. These sections will form a new Subchapter B under Chapter 216 concerning Municipal Water Pollution Control and Abatement Plans.

EXPLANATION OF RULE

The proposed rules will implement revisions to Texas Water Code, §26.177 made by House Bill 1190 (1997) passed during the 75th Texas Legislature (1997). The bill revised Texas Water Code §26.177 and made the section permissive for any community regardless of population, and required only for communities with populations of 10,000 or greater where the Clean Rivers Regional Assessment of Water Quality or other commission assessments or studies demonstrate a water pollution impact not associated with permitted sources. The proposed rulemaking provides flexibility in allowing affected cities the opportunity to correct the problems using those resources available to them within a reasonable time, but not to exceed five years.

Representatives of potentially impacted municipalities participated in the development of the rule providing suggested language and comment on the requirements of the rule.

In developing the rule, program staff has also considered other related matters such as: federal permitting under Phase II of the storm water permitting program; delegation of the National Pollutant Discharge Elimination System permitting program to the state; revision of state and federal water quality standards to address wet weather conditions; evolving federal policy on Total Maximum Daily

Loads; and the development of a state coastal nonpoint source management program in compliance with Section 6217 of the Coastal Zone Management Act.

Proposed new §216.21, relating to Purpose and Policy, explains that the purpose of these rules is to establish procedures and measures to address water pollution, identified in cities of 10,000 or more, that is not attributable to a permitted source. This section also establishes that this subchapter is not intended to prevent the commission from abating or preventing the pollution of water through permits, orders or other actions.

Proposed new §216.22, relating to Applicability, explains that the proposed rule applies to cities with populations of 10,000 or more in which a water quality assessment report has identified a water pollution problem that is not attributable to a permitted source.

Proposed new §216.23, relating to Definitions, includes definitions that apply to this subchapter and are not included in 30 TAC, Chapter 3.

Proposed new §216.24, relating to Water Quality Assessments and Studies, specifically identifies the related water quality assessments and studies which may be used by the executive director to identify water pollution that is not attributable to permitted sources. Water quality assessments and studies which may be used by the executive director to identify water pollution that is not attributable to permitted sources include, but are not limited to, the Commission's program to develop Total Maximum Daily Loads (TMDLs) in accordance with §303(d) of the federal Clean Water Act. In this

scenario, cities and other stakeholders located in watersheds of waterbodies that do not meet applicable water quality standards would be encouraged and given an opportunity to work with the Commission in the development of TMDLs for the segment. TMDLs are technical analyses performed to determine how much pollution a waterbody can receive without violating its water quality standards. If, during the development of a TMDL, sources, other than permitted, in a city are determined to be contributing to the violation of water quality standards, the city will be notified by the executive director and given a reasonable amount of time to correct the problem. Actions undertaken by the city to correct the problem will need to be coordinated with the TMDL Implementation Plan adopted for the waterbody.

Proposed new §216.25, relating to Notice, explains that the executive director will notify a city if it is determined that an assessment or study has identified water pollution that is not attributable to with permitted sources.

Proposed new §216.26, relating to Public Meeting Held by the Commission, explains that unless the executive director and the city agree that the city should be required to develop and implement a water pollution control and abatement program after expiration of a specified time period, the commission at a commission meeting shall evaluate and take action on the executive director's recommendation. The subsection further explains that the commission may find that the city continues to meet the criteria and needs to implement a program, refer the matter to SOAH, determine that the city is not required to develop a Water Pollution Control and Abatement Program, or issue any other order the commission deems appropriate.

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Proposed new §216.27, relating to Water Pollution Control and Abatement Program, explains that a water pollution control and abatement program under this subchapter shall encompass areas within the city's municipal boundaries and its extra-territorial jurisdiction and explains the elements of such a program.

Proposed new §216.28, relating to Submittal of Water Pollution Control and Abatement Programs, details the process for a city submitting a water pollution control and abatement program to the commission.

Proposed new §216.29, relating to Amendment Procedures for Water Pollution Control and Abatement Programs, details the process for the city to submit an amendment to the program for commission review and approval. The proposed rule also provides that the commission may, on its own motion or in response to a petition by the executive director, require the city to amend its program.

Proposed new §216.30, relating to Appeals, explains that any person affected by any ruling by a city related to waste pollution control and abatement outside of the corporate limits, may appeal such an action to the commission or the appropriate state district court.

FISCAL NOTE

Mr. Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five years these proposed sections are in effect, there will be fiscal implications as a result of enforcement and administration of the sections. The effect on state government will be an increase in

cost associated with the development and administration of a program that will include the review of water quality assessment data, processing notifications, preparing for public meetings and contested hearings, and processing appeals and amendments to water pollution control and abatement plans. The cost to state government is estimated to be approximately \$65,000 per year for the first five years the rules are in effect. The net effect of the provisions of House Bill 1190 and these proposed rules will be to reduce the potential costs to local governments of compliance with Water Code §26.177 because of the repeal of the mandatory provisions for development of a pollution abatement plan. The effect on local government will be the costs to those cities of greater than 10,000 population that demonstrate a water pollution impact not attributable to permitted sources. The costs to any one city that makes such demonstration will vary according to the plan the city develops to resolve the problem and will also vary according to the level and extent of problem, size of city, and complexity of the plan. The actual costs to any affected city can only be determined on a site-specific basis. No additional fees will be imposed on any affected city to implement this program.

PUBLIC BENEFIT

Mr. Minick has also determined that for the first five years these proposed new sections are in effect, the public benefit anticipated as a result of enforcement of and compliance with these sections will be improvements in the control and abatement of water pollution coming from non-point sources in the areas and municipalities where water quality assessments have identified water pollution problems. Another public benefit expected is the improvement of the quality of surface water resources in the State. The provisions of House Bill 1190 and these rules as proposed impose costs only on certain cities with demonstrated water quality problems. Other than those costs that have been described for

affected cities under this rule, there are no economic costs to any person, including any small business, anticipated as a result of compliance with the rule as proposed.

REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirement of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because the rule is not a "major environmental rule" as defined in that section of the code and does not exceed any standard, requirement or authority set by federal or state law or delegated agreement. Although the proposed rule is intended to protect the environment, it does not meet the other of the two separate requirements that must be met for the definition to apply. The proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Furthermore, even if the proposed rule met the definition of a "major environmental rule": (1) the proposed rule does not exceed a standard set by federal law; (2) the proposed rule does not exceed any expressed requirement of state law; (3) there is no delegation agreement or contract directly applicable to the proposed rule, and (4) the rule is not adopted solely under the general powers of the commission, but is adopted under the specific authority of Texas Water Code §26.177.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to implement requirements of §26.177 of the Texas Water Code. The

proposed rule will substantially advance this specific purpose by establishing procedures to address water pollution that is not attributable to permitted sources in cities with populations of 10,000 or more. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the rule governs actions a city must take to abate and/or prevent water pollution occurring within its jurisdiction. The rule requires cities to identify and regulate discharges into waters in the state which are non-permitted and may be contributing to the pollution of a water body. To the extent a municipality must enact an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure to address the issue of non-permitted discharges which might have an effect on real private property, §2007.003(b)(4) of the Texas Government Code exempts a municipality from application of the Private Real Property Act.

COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the proposed rulemaking and found that the rule does not govern air pollution emissions, on site sewage disposal systems, or underground storage tanks or other specific nonpoint source control related actions expressly identified under Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor does it govern or authorize actions listed in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the CMP. However, the development and implementation of water pollution control and abatement plans, where appropriate, will provide significant protection for coastal natural resources and will be an integral part of the state's coastal non-point source pollution control program.

PUBLIC HEARING

A public hearing on the proposal will be held on November 10, 1998 at 10:00 a.m. in Room 2210 of the TNRCC Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured to receive oral or written comments by interested persons. Individuals may present oral statements, when called upon, in the order of registration. Open discussion within the audience will not occur during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Written comments on the proposal should refer to Rule Log No. 97164-216-WT and may be mailed to Lutrecia Oshoko, MC 204, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

Written comments must be received by 5:00 p.m., November 30, 1998. Such comments will not receive individual responses, but will be addressed in the preamble of the adopted rules and published in the *Texas Register*. For more information, please contact Arthur Talley of the Data Collection Section at (512) 239-4546.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Water Code, §5.103 and §26.011 which provides the commission authority to adopt rules necessary to carry out its powers and duties under the provisions of the Texas Water Code, and under §26.177 which provides the Commission with the authority to

establish rules providing the criteria for the establishment of water pollution control and abatement programs and the review and approval of those programs.

There are no other codes, statutes or rules that will be affected by this proposal.

SUBCHAPTER B : MUNICIPAL WATER POLLUTION CONTROL AND ABATEMENT

§§216.21 - 216.30

§216.21. Purpose and Policy.

(a) The purpose of this subchapter is to establish procedures and measures in accordance with Texas Water Code, §26.177(a) to address water pollution that is not attributable to permitted sources in cities that have a population of 10,000 or more persons.

(b) An unauthorized discharge is a violation of Texas Water Code, §26.121. Nothing in this subchapter is intended to limit or prevent the commission from abating or preventing the pollution of water in the state through permits, orders, or other enforcement actions authorized under the Texas Water Code, Chapter 26, or other applicable state or federal law.

§216.22. Applicability.

(a) This rule applies to any city with a population of at least 10,000 persons, based on the most recent federal decennial census, and in which a water quality assessment report required by Texas Water Code, §26.0135 or other commission assessment or study, as described in §216.24 of this title (relating to Water Quality Assessments and Studies), has identified water pollution that is not attributable to permitted sources. Cities meeting applicability shall be required to satisfy applicable

provisions of this subchapter upon receipt of notice issued by the executive director pursuant to §216.25 of this title (relating to Notice).

(b) A city whose population falls below 10,000, based on the most recent federal decennial census, will no longer have a duty to satisfy the applicable provisions of this subchapter upon the executive director's receipt from the city of the most recent federal decennial census indicating that the population has fallen below 10,000.

(c) A Water Pollution Control and Abatement Program submitted under this subchapter is not a Water Pollution and Abatement Plan as provided by Texas Water Code, §26.121(a)(2)(B).

§216.23. Definitions.

Terms defined in Chapter 3 of this title (relating to Definitions) will have the same meaning when used in this subchapter unless the definition is specifically modified in this section.

(1) City - A municipality or city existing, created, or organized under the general, home rule, or special laws of this state.

(2) Extra Territorial Jurisdiction - An area outside the corporate limits of a municipality as defined in Local Government Code, §42.021.

(3) Permitted Sources - A source that discharges or is required to discharge pollution into or adjacent to waters in the state as authorized by a valid permit, general permit, or rule pursuant to the Texas Water Code, the federal Clean Water Act, or other applicable state or federal law.

(4) Pollution - The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to public health, safety or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose. This definition includes, but is not limited to, nonpoint sources of pollution as those sources are defined and identified pursuant to Chapter 220 of this title (relating to Regional Assessments of Water Quality), the federal Clean Water Act, the Coastal Management Act, Chapter 6217, and other applicable state and federal statutes, regulations, policies, and guidance.

(5) Significant Waste Discharge - The discharge of waste to waters in the state which causes or threatens to cause pollution.

(6) Water Pollution Control and Abatement Program - A program developed pursuant to this Chapter that includes personnel, services, functions, schedules, and reports developed by a city to prevent or correct water pollution problems within its jurisdiction.

§216.24. Water Quality Assessments and Studies.

Water quality assessments and studies that may be used by the executive director to identify water pollution that is not attributable to permitted sources shall consist of one or more of the following:

(1) State Water Quality Inventory. The state program which assesses the quality of surface and ground waters resulting in a report describing the status of water quality in the state in accordance with the Federal Clean Water Act, §305(b):

(2) Clean Rivers Program. Watershed water quality assessments conducted in accordance with Texas Water Code, §26.0135:

(3) State Nonpoint Source Assessment. The state program implemented in compliance with Federal Clean Water Act, §319(a) which identifies surface and ground waters in the state which cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of the federal Clean Water Act without additional controls for nonpoint sources of pollution:

(4) Total Maximum Daily Load. Pursuant to Clean Water Act §303(d), the identification and prioritization of waters within the state for which the effluent limitations required by

§301(b)(1)(A) and (B) of the Clean Water Act are not stringent enough to implement any water quality standard applicable to such waters; or,

(5) Other. Special studies, pilot projects, reports, or other quality assured assessments of water quality in the state prepared, approved, or accepted by the executive director that identify non-permitted sources of water pollution within cities, including information used by the executive director for the purpose of updating the state's list of impaired waters prepared in accordance with the federal Clean Water Act, §303(d).

§216.25. Notice.

(a) If it is determined by the executive director that a city has met the criteria set forth in §216.22(a) of this title (relating to Applicability) or the executive director is requiring the city to amend an existing water pollution control and abatement program, the executive director shall notify the city. This notice shall specify the following:

(1) the basis for the executive director's determination;

(A) That the city meets the criteria set forth in §216.22(a) of this title (relating to Applicability); or,

(B) That the city's existing Water Pollution Control and Abatement Program should be amended:

(2) that the executive director may undertake additional water quality assessments and studies in the impacted area as set out in §216.24 of this title (relating to Water Quality Assessments and Studies);

(3) that the city may undertake additional water quality assessments and studies in the impacted area within its jurisdiction which comply with quality assurance requirements of the executive director; and,

(4) the time period (not to exceed five years) within which the city may try to correct the problem. The executive director may amend this time period when new or additional information or circumstances warrant such an amendment.

§216.26. Public Meeting Held by the Commission.

(a) After expiration of the time period specified in §216.25(a)(4) of this subchapter, the executive director shall determine whether a city still meets the criteria set forth in §216.22(a) of this subchapter based on water quality assessments and studies set out in §216.24 performed subsequent to the initial determination, taking into consideration any measures taken by the city to correct the problem.

(b) If the executive director determines that a city continues to meet the criteria set forth in §216.22(a) of this subchapter, the executive director at a public meeting held by the commission shall recommend that the city be required to submit a Water Pollution Control and Abatement Program or, when appropriate, amend an existing Water Pollution Control and Abatement Program.

(c) No public meeting shall be required if the executive director and the city agree that the city should be required to develop and implement a Water Pollution Control and Abatement Program, or amend an existing Program. In lieu of a public meeting, the city, based on an agreement with the executive director, may request that the commission issue an agreed order to submit a Program as described in §216.27 (relating to Water Pollution Control and Abatement Program) or an amendment to an existing Program as described in §216.29 (relating to Amendment Procedures for Water Pollution Control and Abatement Programs).

(d) The city shall cause notice of the public meeting to be published in accordance with Sections 39.5 and 39.7 of Chapter 39 of this title (relating to Public Notice, General Provisions and Text of Public Notice) informing the public of the meeting and that the public has thirty (30) days prior to the public meeting to provide written comment to the commission on whether the city should be required to develop and implement a Water Pollution Control and Abatement Program or amend an existing Water Pollution Control and Abatement Program.

(e) After consideration of the matter at the public meeting, the commission may:

(1) refer the matter to SOAH for a contested case hearing conducted pursuant to the Administrative Procedure Act (APA) to determine whether the city continues to meet the criteria set forth in §216.22(a);

(2) determine that the city is not required to submit a Water Pollution Control and Abatement Program;

(3) determine that the city continues to meet the criteria set forth in §216.22(a) of this subchapter and approve the executive director's recommendation that the city be required to develop, or where appropriate amend, and implement a Water Pollution Control and Abatement Program ; or

(4) issue any other order the commission deems appropriate.

(f) The public meeting held by the commission pursuant to this section shall satisfy the requirement of the public hearing mandated by Texas Water Code Section 26.177.

(g) A commission order issued pursuant to subsection e) of this section is a final and appealable order under Texas Water Code §5.351. As a prerequisite to appeal, a motion for rehearing under §80.271 of this title (relating to Motion for Rehearing) must be filed within twenty (20) days after the date the city or the city's attorney of record is notified of the commission's final decision or order under this subchapter.

§216.27. Water Pollution Control and Abatement Programs.

(a) The Water Pollution Control and Abatement Program of a city shall encompass the area within a city's municipal boundaries and, subject to Texas Water Code, §26.179 (relating to Designation of Water Quality Protection Zones in Certain Areas), may include areas within its extra-territorial jurisdiction which in the judgment of the city should be included to enable the city to achieve its objectives for the area within its territorial jurisdiction.

(b) The city shall include in the Program the services and functions which, in the judgment of the city or as may be reasonably required by the commission, will provide effective water pollution control and abatement for the city, including the following services and functions:

(1) the development and maintenance of an inventory of all significant waste discharges into or adjacent to the water within the city and, where the city so elects, within the extraterritorial jurisdiction of the city, without regard to whether or not the discharges are authorized by the commission;

(2) the regular monitoring of all significant waste discharges included in the inventory prepared pursuant to Subparagraph (1) of this subsection;

(3) the collecting of samples and the conducting of periodic inspections and tests of the waste discharges being monitored to determine whether the discharges are being conducted in

compliance with this chapter and any applicable permits, orders, or rules of the commission, and whether they should be covered by a permit from the commission;

(4) a procedure for obtaining compliance by the waste dischargers being monitored, including where necessary the use of legal enforcement proceedings;

(5) the development and execution of reasonable and realistic plans for controlling and abating pollution or potential pollution resulting from generalized discharges of waste which are not traceable to a specific source, such as storm sewer discharges and urban runoff from rainwater; and

(6) any additional services, functions, or other requirements as may be prescribed by commission rule to effectuate the purposes of this subchapter.



§216.28. Submittal of Water Pollution Control and Abatement Programs.

A Water Pollution Control and Abatement Program shall be submitted to the executive director of the commission in accordance with the order issued pursuant to §216.26 of this title (relating to Public Meeting Held by the Commission). The Water Pollution Control and Abatement Program for the city shall be signed and sealed by a professional engineer licensed in the State of Texas who shall certify that the city's Program is designed to abate and prevent water pollution not attributable to permitted sources located within the city.

§216.29. Amendment Procedures for Water Pollution Control and Abatement Programs.

(a) A city may amend the Water Pollution Control and Abatement Program for that city at any time by submitting an amended Water Pollution Control and Abatement Program to the executive director of the commission. The amended Water Pollution Control and Abatement Program for the city shall be signed and sealed by a professional engineer licensed in the State of Texas who shall certify that the city's Program is designed to abate and prevent water pollution not attributable to permitted sources located within the city.

(b) The executive director may require a city to amend a Water Pollution Control and Abatement Program for that city when new or additional information or circumstances warrant such changes to effectuate the purposes of this subchapter.

(c) The notice, public meeting, and hearing requirements provided under §§216.25(a) (relating to Notice) and 216.26 (relating to Public Meeting Held by the Commission) of this subchapter shall apply to an amendment of a Water Pollution Control and Abatement Program.

§216.30. Appeals.

Pursuant to Texas Water Code §26.177(d), any person affected by any ruling, order, decision, ordinance, program, resolution, or other act of a city relating to water pollution control and abatement outside the corporate limits of such city adopted pursuant to this subchapter or any other statutory authorization may appeal such action to the commission or district court. An appeal must be filed with the commission's chief clerk within sixty (60) days of the enactment of the ruling, order, decision, ordinance, program, resolution, or act of the city. The issue on appeal is whether the action or program is invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality, and the commission's order on the appeal will be based on whether the city's actions or programs meet these criteria. The commission or district court may overturn or modify the action of the city. If an appeal is taken from a commission ruling, the commission ruling shall be in effect for all purposes until final disposition is made by a court of competent jurisdiction so as not to delay any permit approvals.

