Dated: June 15, 1998.

Donald G. Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 98–16407 Filed 6–18–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00544; FRL–5798–9]

State FIFRA Issues Research and Evaluation Group (SFIREG); Open Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The State FIFRA Issues Research and Evaluation Group (SFIREG) will hold a 2–day meeting, June 29 and 30, 1998. This notice announces the location and times for the meeting and sets forth the tentative agenda topics. The meetings are open to the public.

DATES: The SFIREG will meet on Monday, June 29, 1998, from 8:30 a.m. to 5 p.m. and Tuesday, June 30, 1998, from 8:30 a.m. to 12 noon.

ADDRESSES: The meeting will be held at: The Ronald Reagan National Airport Doubletree Hotel, 300 Army Navy Drive, Arlington-Crystal City, VA.

FOR FURTHER INFORMATION CONTACT: By mail: Elaine Y. Lyon, Field and External Affairs Division, Office of Pesticide Programs (7506C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: 1921 Jefferson Davis Highway, Arlington-Crystal City, VA, CM–II, (703) 305–5306, (703) 308–1850 (fax); e-mail: lyon.elaine@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: The tentative agenda of the State FIFRA Issues Research and Evaluation Group includes the following:

1. Outcome of the Second Annual Antimicrobial National Workshop.
2. Consumer Information Sheets for Treated Wood.
3. Pesticide Use/Usage Data.
4. Pesticide Residue Data.
5. Update on Biotechnology.
6. OPP Updates on the following:
   - Quality Assurance Project Plan (QAPP)
   - Food Quality Protection Act
     - (i) Section 18 Rule
     - (ii) Tolerance Reassessment Advisory Committee
     - (iii) Impact on 24c
   - Worker Protection Standard
   - Certification and Training Advisory Group
   - International Activities - (NAFTA)
   - Bee Labeling
   - Chlorine Gas RED
   - PR Notice for Pesticide Products Used in Greenhouses
   - Label Language - mandatory vs. advisory
7. Update on the Office of Enforcement and Compliance Assurance activities.
8. Regional and Committee Reports - Presentation of Issue Papers.
9. Other topics as appropriate.

List of Subjects

Environmental protection.

Dated: June 15, 1998.

Jay Ellenberger,

Director, Field and External Affairs Division, Office of Pesticide Programs.

[FR Doc. 98–16573 Filed 6–18–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6108–9]

Settlement Under Section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); In the Matter of Spiegelberg Superfund Site, Green Oak Township, MI

AGENCY: Environmental Protection Agency (EPA).

ACTION: Settlement of CERCLA section 107 Cost Recovery Matter.

SUMMARY: EPA is proposing to settle a cost recovery claim with a potentially responsible party (PRP) with regard to past costs at the Spiegelberg site (the Site) in Green Oak Township, Michigan. EPA is authorized under section 122(h) of the CERCLA to enter into this administrative settlement.

Response costs totaling $200,873.35 were incurred by EPA, between December 30, 1993 and September 30, 1997, in connection with the remedial action at the Site. On September 25, 1997 and October 22, 1997, EPA sent the PRP demands for reimbursement of the EPA's past costs. The Settling Party has agreed to pay $194,000 to settle EPA's claim for reimbursement of response costs related to the Site. The U.S. Department of Justice has approved this settlement, consistent with section 122(h)(1) of CERCLA.

The EPA is proposing to approve this administrative settlement because it reimburses EPA, in part, for costs incurred during its response activities at this Site.

DATES: Comments on this administrative settlement must be received by no later than July 20, 1998.

ADDRESSES: Written comments relating to this settlement, Docket Number V–W–98–C–461, should be sent to Cynthia N. Kawakami, Associate Regional Counsel, U.S. Environmental Protection Agency, Region 5, Mail Code: C–14J, 77 West Jackson Boulevard, Chicago, Illinois 60604–3590.

FOR FURTHER INFORMATION CONTACT: Copies of the Agreement and the Administrative Record for this Site are available at U.S. Environmental Protection Agency, Region 5, Superfund Division, Emergency Response Branch, 77 West Jackson Boulevard, Chicago, Illinois 60604–3590. It is strongly recommended that you telephone Ms. Denise Williams at (312) 886–9481 before visiting the Region 5 Office.

Authority: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 et seq.

Dated: May 22, 1998.

William E. Muno,

Director, Superfund Division.

[FR Doc. 98–16405 Filed 6–18–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6111–6]

State Program Requirements; Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Application for approval of Texas Pollutant Discharge Elimination System.

SUMMARY: The State of Texas has submitted a request for approval of the Texas Pollutant Discharge Elimination System (TPDES) program pursuant to section 402(b) of the Clean Water Act (CWA or ''the Act''). With this request, the Texas Natural Resource Conservation Commission (TNRCC) seeks approval to administer a major category partial permit program for all discharges of pollutants into waters of the United States under its jurisdiction. Today, EPA Region 6 is providing public notice of Texas' request for TPDES program approval and of both a public hearing and public comment period on the State's program approval submission. EPA will either approve or disapprove the State's request after considering all comments it receives.

ADDRESSES FOR VIEWING/OBTAINING COPIES OF DOCUMENTS: Copies of Texas' TPDES program approval submission

(referred to throughout this notice as Texas' ''application'') and all other documents in the official record (Docket No. 6WQ–98–1) are available for inspection from 9 am to 4 pm, Monday through Friday, excluding legal holidays, at EPA Region 6, 12th Floor Library, 1445 Ross Ave., Dallas, Texas 75202.

A copy of Texas' TPDES application is also available for inspection from 8 am to 5 pm, Monday through Friday, excluding State holidays, at Record Services, Room 1301, Building F, TNRCC, 12100 Park 35 Circle, Austin, Texas 78753. You may contact Records Services at (512) 239–0966.

Chapters 1–8 of Texas' TPDES application are available for review, but not copying, at the following TNRCC Regional Offices:

Region 1 (Amarillo): 3918 Canyon Dr., Amarillo, TX 79109–4996, (806) 353-9251, FAX (806) 358–9545

Region 2 (Lubbock): 4630 50th St., Suite 600, Lubbock, TX 79414–3509, (806) 796–7092, FAX (806) 796–7107

Region 3 (Abilene): 209 S. Danville, Suite B200, Abilene, TX 79605–1451, (915) 698–9674, FAX (915) 692–5869

Region 4 (Arlington): 1101 E. Arkansas Ln., Arlington, TX 76010–6499, (817) 469–6750, FAX (817) 795–2519

Region 5 (Tyler): 2916 Teague Dr., Tyler, TX 75701–3756, (903) 535–5100, FAX (903) 595–1562

Region 6 (El Paso): 7500 Viscount Blvd., Suite 147, El Paso, TX 79925–5633, (915) 778–9634, FAX (915) 778–4576

Region 7 (Midland): 3300 North A St., Bldg. 4, Suite 107, Midland, TX 79705–5421, (915) 570–1359, FAX (915) 570–4795

Region 8 (San Angelo): 301 W. Beauregard Ave., Suite 202, San Angelo, TX 76903–6326, (915) 655–9479, FAX (915) 658–5431

Region 9 (Waco): 6801 Sanger Ave., Suite 2500, Waco, TX 76710–7807, (254) 751–0335, FAX (254) 772–9241

Region 10 (Beaumont): 3870 Eastex Fwy., Suite 110, Beaumont, TX 77703–1892, (409) 898–3838, FAX (409) 892–2119

Region 11 (Austin): 1921 Cedar Bend, Suite 150, Austin, TX 78758–5336, (512) 339–2929, FAX (512) 339–3795

Region 12 (Houston): 5425 Polk Ave., Suite H, Houston, TX 77023–1486, (713) 767–3500, FAX (713) 767–3520

Region 13 (San Antonio): 140 Heimer Rd., Suite 360, San Antonio, TX 78232–5042, (210) 490–3096, FAX (210) 545–4329

Region 14 (Corpus Christi): 6300 Ocean Dr., Suite 1200, Corpus Christi, TX 78412–5503, (512) 980–3100, FAX (512) 980–3101

Region 15 (Harlingen): 134 E. Van Buren, Suite 301, Harlingen, TX 78550–6807, (956) 425–6010, FAX (956) 412–5059

Copies of the entire State TPDES application are available in paper format. Copies of most documents are also available in electronic format.

Part or all of the State's application (which comprises approximately 4106 pages) may be copied at the TNRCC office in Austin, or EPA's office in Dallas, at a minimal cost per page. A paper copy of the entire application may be obtained from the TNRCC office in Austin for a $510.00 fee. The cost of the principal documents, i.e the Attorney General's Statement, Memorandum of Agreement, Program Description, water quality Continuing Planning Process (Continuing Planning Process + Implementation Procedures) and the Enforcement Management System (Enforcement Guidelines + Compliance Procedures Manual) all *without* their other associated appendices is $152.00.

Copies of the following portions of the TPDES application are available in both paper and electronic format:

Chapter 1—Memorandum of Agreement Between TNRCC and EPA
Chapter 2—Overview of the TNRCC
Chapter 3—Permitting Program Description
Chapter 4—Pretreatment Program Description
Chapter 5—Sewage Sludge Program Description
Chapter 6—Enforcement Program Description
Chapter 7—Program Cost and Funding Description
Chapter 8—Attorney General's Statement of Legal Authority
Table 1 TPDES Estimated Program Costs (Existing Employees)
Table 2 TPDES Estimated Program Costs (New Employees)
Appendix 2–A Facilities Permitted by the TNRCC Having Oil & Gas Related Activities
Appendix 3–C TNRCC Continuing Planning Process
Appendix 3–D Implementation of the TNRCC Standards Via Permitting
Appendix 3–E TNRCC Playa Policy
Appendix 3–I Standard Permit Provisions
Appendix 3–J Sewage Sludge Provisions
Appendix 6–A Enforcement Guidelines
Appendix 6–B Water Quality Inspection Procedures
Appendix 6–C Water Quality Inspection/Audit Forms
Appendix 6–D Water Quality Inspection Letters
Appendix 6–G Compliance Procedures Manual

The following portions of the TPDES application are only available in paper format:

Figure 2–1 TNRCC Organization
Figure 2–2 Organization of Office of Chief Clerk
Figure 2–3 Organization of Legal Division
Figure 2–4 Organization of Field Operations Division
Figure 2–5 Organization of Enforcement Division
Figure 2–6 Organization of Water Quality Division
Figure 3–1 Wastewater Permitting Process Flow Chart
Figure 5–1 Sewage Sludge Application Registration Procedure
Figure 5–2 Sewage Sludge Application Permitting Procedure
Table 3 Organizational Structure and Resources for the TPDES Program
Appendix 3–A Industrial and Municipal Wastewater Permit Application Forms
Appendix 3–B Miscellaneous Permit Application Forms
Appendix 3–F Designation of Major and Minor Discharges
Appendix 3–G Temporary and Emergency Order Application Forms/Shell Documents
Appendix 3–H Implementation of the Basin Permitting Rule
Appendix 3–K CAFO Permit Application Form
Appendix 5–A Sewage Sludge Permit and Beneficial Land Use Registration Applications
Appendix 5–B Sewage Sludge Annual Reporting Form
Appendix 5–C SSI: Beneficial Land Use Registrants and Sludge Only Permittees
Appendix 5–D SSI: POTWs and Other Treatment Works Treating Sewage Sludge in Texas
Appendix 6–E Complaints Handling
Appendix 6–F Noncompliance Reports
Appendix 7–A Position Descriptions for TPDES Functions
Appendix 7–B State Job Classifications for all TPDES Positions
Texas Rules (30 TAC)
Memorandums of Understanding
Texas Statutes

Copies of the documents available in electronic format are accessible on the Internet at the EPA Region 6 web page *http://www.epa.gov/region6/6wq/npdes/publicnotice.htm* and the TNRCC web page *http://www.tnrcc.state.tx.us.*

Every effort has been made to include each document relevant to EPA's decision on this matter in the official record for Docket No. 6WQ–98–1. However, because the documents associated with Texas' request for

TPDES program approval are voluminous and have come from many sources, EPA invites input from the public on any document that the public feels should have been included in the official record, but has not been.

DATES FOR THE PUBLIC COMMENT PERIOD AND PUBLIC HEARING: The public comment period on the State's request for approval to administer the proposed TPDES program will be from the date of publication until August 3, 1998. Comments must be received or post-marked by no later than midnight on August 3, 1998.

Both an informal public meeting and a public hearing will be held in Austin, Texas on July 27, 1998. The public meeting will include a presentation on the TPDES program approval request, a brief update on the status of the ongoing Endangered Species Act § 7 consultation, and a question and answer session. Written, but not oral, comments for the official record will be accepted at the public meeting. The public hearing will be conducted in accordance with 40 CFR 124.12, and will provide interested parties with the opportunity to provide written and/or oral comments for the official record. The public meeting will begin at 1:00 pm. The public hearing will begin at 7:00 pm. Both the public meeting and the public hearing will be held at the Holiday Inn-South, 3401 South IH 35, Austin, Texas 78741 (IH–35 and Woodward Dr.).

All public comments should reference Docket No. 6WQ–98–1 and may be in either paper or electronic format. If submitting comments in paper format, please submit the original and three copies of your comments and enclosures (including references). To ensure that EPA can read, understand and therefore properly respond to comments, the Agency would prefer that comments be typed or legibly written and that commentors cite the paragraph(s) or sections in the notice or supporting documents to which each comment refers. Commentors who want EPA to acknowledge receipt of their comments should enclose a self-addressed stamped envelope.

Send all paper copy comments to: Ms. Wilma Turner (6WQ–O), Water Quality Protection Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202. Comments may also be submitted electronically to the following e-mail address: ''tpdescomment@epa.gov''.

Electronic comments must be submitted as an ASCII file or in WordPerfect 6.0 format, avoiding the use of special characters and forms of encryption. Electronic comments should be identified by the docket number 6WQ–98–1. EPA requests that electronic comments also include the commentor's postal mailing address. No Confidential Business Information (CBI) should be submitted through e-mail. Comments and data will also be accepted on disks in WordPerfect 6.0 format or ASCII file format. For those without regular access to an e-mail system, electronic comments on this notice may be filed online at many Federal Depository Libraries.

A copy of each comment should be submitted to: Mr. Thomas W. Weber, Water Quality Division, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711–3087.

FOR FURTHER INFORMATION CONTACT: Ms. Wilma Turner at the EPA address listed above or by calling (214) 665–7516, FAX (214) 665–6490, e-mail: tpdescomment@epa.gov or Mr. Tom Weber at the TNRCC address listed above or by calling (512) 239–4576, Fax: (512) 239–4420).

SUPPLEMENTARY INFORMATION: Section 402 of the CWA created the NPDES program under which EPA may issue permits for the point source discharge of pollutants to waters of the United States under conditions required by the Act. Section 402(b) requires EPA to authorize a State to administer an equivalent state program, upon the Governor's request, provided the State has appropriate legal authority and a program sufficient to meet the Act's requirements.

The regulatory requirements for state program approval are set forth in 40 CFR part 123. 40 CFR 123.21 lists the basic elements of an approvable application. EPA Region 6 considers the documents submitted by the State of Texas administratively complete at the time of this document. EPA will not make a final decision on TPDES program approval until after (1) considering all public comments provided during the public comment period or at the public hearing, (2) completion of the ongoing consultations with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service on effects program approval may have on endangered or threatened species and their designated critical habitat, and (3) completion of ongoing consultations with the State Historic Preservation Officer on effects program approval may have on historic properties or sites listed or eligible for listing in the National Register of Historic Places.

On February 5, 1998, the Governor of Texas requested NPDES major category partial permit program approval [1] and submitted a program description (including funding, personnel requirements and organization, and enforcement procedures), an Attorney General's statement, copies of applicable State statutes and regulations, and a Memorandum of Agreement (MOA) to be executed by the Regional Administrator of EPA Region 6 and the Executive Director of TNRCC. Supplements to the State application were received by EPA Region 6 on February 12, March 16, April 15, and May 4, 1998. EPA Region 6 determined that Texas' February 5, 1998, approval request, supplemented by this additional information, constituted a complete package under 40 CFR 123.21, and a letter of completeness was sent to the Chairman of the TNRCC on May 7, 1998.

EPA is required to approve the submitted program within 90 days of submission of the complete information unless it does not meet the requirements of section 402(b) of the Act and EPA regulations, or EPA and TNRCC jointly agree to extend this deadline. (See 40 CFR 123.21(d)). To obtain such approval, the State must show, among other things, that it has authority to issue permits which comply with the Act, authority to impose civil and criminal penalties for permit violations, and authority to ensure that the public is given notice and opportunity for a hearing on each proposed permit. After close of the comment period and completion of the required consultations with other federal agencies, the Regional Administrator for EPA Region 6 will make a decision to approve or disapprove the TPDES program for implementation by the State.

EPA's final decision to approve or disapprove the TPDES program will be based on the requirements of section 402 of the CWA and 40 CFR part 123. EPA is also required by the Endangered Species Act (ESA), the National Historic Preservation Act and the Coastal Zone

[1] Major category partial permit program approval is provided for under section 402(n)(3) of the CWA. Pursuant to that section, EPA may approve a partial permit program covering a major category of discharges if the program represents a complete permit program and covers all of the discharges under the jurisdiction of the agency seeking approval, and if EPA determines the program represents a significant and identifiable part of the State program required by section 402(b) of the Act. As discussed below under ''Scope of the Partial Program,'' TNRCC seeks permitting authority for all facilities that have discharges within its jurisdiction. However, TNRCC does not have jurisdiction over all discharges within the State of Texas. A small portion of the State's discharges fall under the jurisdiction of the Texas Railroad Commission.

Management Act, to consult with other federal agencies before making a final decision in this matter. For example, the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service on the effects of federal actions (including NPDES state program approvals) on endangered species. Section 7(a)(2) of the ESA places a statutory requirement (separate and distinct from CWA § 402(b)) for EPA to ''* * * insure that any action authorized, funded or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat * * * determined to be critical * * *'' EPA Region 6 initiated formal consultation under section 7 of the ESA on January 29, 1998. EPA's responsibilities under ESA, as well as under the National Historic Preservation Act and the Coastal Zone Management Act are discussed in more detail later in this notice. Under federal law, EPA may not make a final decision on TPDES program approval until consultation under these acts are completed, and it may be necessary to seek TNRCC's agreement on an extension of the 90 day approval deadline.

If EPA approves the Texas partial program, the Regional Administrator will so notify the State and will sign the proposed MOA. Notice will be published in the **Federal Register** and, as of the date of program approval, EPA will transfer to the TNRCC NPDES permitting authority and primary enforcement responsibility for those discharges subject to the TPDES program, with certain exceptions, which are discussed below under *Scope, Transfer of NPDES Authority, and Summary of the TPDES Permitting Program*. If EPA's Regional Administrator disapproves the TPDES program, the TNRCC will be notified of the reasons for disapproval and of any revisions or modifications to the program which are necessary to obtain approval.

Public Hearing Procedures

The following procedures will be used at the public hearing:

1. The Presiding Officer shall conduct the hearing in a manner which will allow all interested persons wishing to make oral statements an opportunity to do so; however, the Presiding Officer may inform attendees of any time limits during the opening statement of the hearing.

2. Any person may submit written statements or documents for the record.

3. The Presiding Officer may, in his discretion, exclude oral testimony if such testimony is overly repetitious of previous testimony or is not relevant to the decision to approve or require revision of the submitted State program.

4. The transcript taken at the hearing, together with copies of all submitted statements and documents, shall become a part of the record submitted to the Regional Administrator.

5. The hearing record shall be left open until the deadline for receipt of comments specified at the beginning of this Notice to allow any person time to submit additional written statement or to present views or evidence tending to rebut testimony presented at the public hearing.

6. Hearing statements may be oral or written. Written copies of oral statements are urged for accuracy of the record and for use of the Hearing Panel and other interested persons. Persons wishing to make oral testimony supporting their written comments are encouraged to summarize their points rather than reading lengthy written comments verbatim into the record. All comments received by EPA Region 6 by the deadline for receipt of comments, or presented at the public hearing, will be considered by EPA before taking final action on the Texas request for NPDES program approval.

Scope, Transfer of NPDES Authority, and Summary of the TPDES Permitting Program

A. Scope of the Partial Program

The proposed TPDES program is a partial program which conforms to the requirements of section 402(n)(3) of the CWA. TNRCC's application for program approval applies to all discharges covered by the authority of that agency. This includes most discharges of pollutants subject to the federal NPDES program (e.g. municipal wastewater and storm water point source discharges, pretreatment, most industrial wastewater and storm water point source discharges, and point source discharges from federal facilities), including the disposal of sewage sludge (in accordance with section 405 of the Act and 40 CFR part 503).

The TNRCC has authority to regulate discharges from industrial facilities covered by all Standard Industrial Classification (SIC) codes except for those facilities classified as 1311, 1321, 1381, 1382, 1389, 4922, and 4925, which are regulated by the Texas Railroad Commission. Some activities at facilities within these SIC codes are regulated by the TNRCC, and a list of the ten facilities currently affected is included in Appendix 2–A of the TPDES application. EPA will retain NPDES permitting authority and primary responsibility for enforcement over all discharges not under the jurisdiction of TNRCC and therefore not subject to the TPDES program, including those within the jurisdiction of the Texas Railroad Commission. The TNRCC has authority to regulate discharges of storm water associated with industrial activity and discharges of storm water from municipal separate storm sewer systems, except at facilities regulated by the Texas Railroad Commission (see above). The TNRCC has primary responsibility for implementing a Pretreatment Program and a Sewage Sludge Program. The TNRCC has authority to regulate discharges from publicly owned and privately owned treatment works and for discharges from concentrated animal feeding operations (CAFOs) within the TNRCC's jurisdiction.

EPA would retain permitting authority and primary enforcement responsibility over discharges from CAFOs not subject to TNRCC jurisdiction. Pursuant to state statute, CAFOs authorized by TNRCC to use, and that have actually used, a playa lake that does not feed into any other surface water in the state as a wastewater retention facility before July 10, 1991 (the effective date of TNRCC's adoption of related revisions to the Texas Surface Water Quality Standards, 30 TAC Chapter 307) are not subject to water quality standards or other requirements for discharges to waters in the state. These discharges, however, if to waters of the United States, are subject to federal CWA requirements. Because TNRCC would not have jurisdiction under the TPDES program to require compliance with water quality standards for these discharges, EPA would retain permitting authority and primary enforcement responsibility over discharges into playa lakes that are waters of the United States by CAFOs that received authorization to discharge and commenced operation prior to July 10, 1991, and that are therefore not subject to TNRCC jurisdiction.

TNRCC does not have, and is not seeking, the authority to regulate discharges in Indian Country (as defined in 18 U.S.C. 1151). EPA will retain NPDES permitting authority and primary enforcement responsibility over Indian Country in Texas.

B. Transfer of NPDES Authority and Pending Actions

Upon approval of the TPDES program, authority for all NPDES permitting activities, as well as primary

responsibility for NPDES enforcement activities, within the scope of TNRCC's jurisdiction, would be transferred to the State, with some exceptions. These exceptions would be agreed to by EPA and the State under the MOA that would be signed upon program approval, and are explained below. In addition to the exceptions listed below, EPA would retain on a permanent basis its authority under section 402(d) of the CWA to object to TPDES permits proposed by TNRCC, and if the objections are not resolved, to issue federal NPDES permits for those discharges. EPA would also retain on a permanent basis its authority under sections 402(I) and 309 of the CWA to file federal enforcement actions in those instances in which it determines the State has not taken timely or appropriate enforcement action.

1. Permits Already Issued by EPA

40 CFR 123.1(d)(1) provides that EPA retains jurisdiction over any permit that it has issued unless the State and EPA have reached agreement in the MOA for the State to assume responsibility for that permit. The proposed MOA between EPA and the TNRCC provides that the TNRCC would assume at the time of program approval permitting authority and primary enforcement responsibility over all NPDES permits issued by EPA prior to program approval, with the following exceptions:

a. Jurisdiction over those discharges covered by permits already issued by EPA, but for which variances or evidentiary hearings have been requested prior to TPDES program approval. Jurisdiction over these discharges, including primary enforcement responsibility (except as provided by paragraph 3 below—Facilities With Outstanding Compliance Issues), would be transferred to the State once the variance or evidentiary hearing request has been resolved and a final effective permit has been issued.

b. Jurisdiction over all existing discharges of storm water associated with industrial or construction activity (40 CFR 122.26(b)(14)), including allowable non-storm water, authorized to discharge as of the date of program approval under one of the NPDES storm water general permits issued by EPA prior to approval of the TPDES program. The storm water general permits affected are: Baseline Construction storm water general permit (57 FR 41209), NPDES permit numbers TXR10*###; Baseline Non-construction storm water general permit (57 FR 41297), NPDES permit numbers TXR00*###; and Multi-sector storm water general permit (60 FR 51108), NPDES permit numbers TXR05*###. (For an individual facility's permit number, the * is a letter and the #'s are numbers—e.g. TXR00Z999). Jurisdiction over these storm water discharges, including primary enforcement responsibility (except as provided by paragraph 3 below—Facilities With Outstanding Compliance Issues), would be transferred to TNRCC at the earlier of the time the EPA-issued general permit expires or TNRCC issues a replacement TPDES permit, whether general or individual.

Note: EPA Region 6 is in the process of modifying the Multi-sector storm water general permit and this action is expected to be completed prior to the time a final decision on TPDES program approval is made. However, because permit modification does not trigger the transfer of permit jurisdiction under this section, the Multi-sector storm water general permit would remain under EPA's jurisdiction until it expires or is replaced by a TNRCC permit regardless of whether it is modified prior to program approval.

In addition, EPA Region 6 is in the process of reissuing the Baseline Construction storm water general permit. This action is also expected to be completed prior to a final decision on program approval. If the Baseline Construction storm water general permit is reissued prior to program approval, the permit would temporarily remain under EPA jurisdiction pursuant to this section. However, even if the permit is not reissued prior to program approval, EPA would temporarily retain jurisdiction over the permit under paragraph 2 below (Permits Proposed for Public Comment but Not Yet Final). The Baseline construction storm water general permit was proposed for public comment by EPA on June 2, 1997, and has not yet been finalized.

c. Jurisdiction over new discharges of storm water associated with industrial or construction activity, including allowable non-storm water, eligible for coverage under one of the NPDES storm water general permits issued by EPA prior to TPDES approval and listed above. Facilities eligible for but not currently covered by one of these general permits would continue to apply to EPA for coverage. Jurisdiction over these storm water discharges, including primary enforcement responsibility (except as provided by paragraph 3 below—Facilities With Outstanding Compliance Issues), would be transferred to TNRCC at the earlier of the time the EPA-issued general permit expires or TNRCC issues a replacement TPDES permit, whether general or individual.

Except as provided in paragraphs 2 and 3 below, EPA would not retain, even on a temporary basis, jurisdiction over discharges from individual storm water permits; storm water outfalls in waste water permits; and storm water discharges designated by the State in accordance with 40 CFR 123.26(g)(1)(I). The State would have jurisdiction and permitting authority, including primary enforcement responsibility, over these discharges immediately upon TPDES program approval.

d. Jurisdiction over all discharges covered by large and medium Municipal Separate Storm Sewer System (MS4) permits issued by EPA prior to TPDES program approval. Jurisdiction over EPA-issued MS4 permits, including primary enforcement responsibility (except as provided by paragraph 3 below—Facilities With Outstanding Compliance Issues), would be transferred to TNRCC at the earlier of the time the EPA-issued permit expires or TNRCC issues a renewed, amended or replacement TPDES permit.

2. Permits Proposed for Public Comment but Not Yet Final

EPA would temporarily retain NPDES permitting authority, as well as primary enforcement responsibility (except as provided by paragraph 3 below—Facilities With Outstanding Compliance Issues), over all discharges covered by general or individual NPDES permits that have been proposed for public comment by EPA but have not been issued as final at the time of program approval. Although section 402(c)(1) of the Act establishes a 90 day deadline for EPA approval or disapproval of a proposed State program and, if the program is approved, for the transfer of permit issuing authority over those discharges subject to the program from EPA to the State, this provision was intended to benefit States seeking NPDES program approval. As a result, and in the interest of an orderly and smooth transition from federal to State regulation, the time frame for transfer of permitting authority may be extended by agreement of EPA and the State. See, for example, 40 CFR 123.21(d), which allows a State and EPA to extend by agreement the period of time allotted for formal EPA review of a proposed State program. In order to render programmatic transition more efficient and less confusing for permit applicants and the public, the State of Texas and EPA have agreed to enter into an MOA that extends the time frame for transfer of permit issuing authority over those permits that EPA has already proposed for public comment, but which are not yet final at the time of program

approval. Permitting authority and primary enforcement responsibility would be transferred to the State as the permits are finalized.

3. Facilities With Outstanding Compliance Issues

EPA would temporarily retain primary NPDES enforcement responsibility for those facilities which have any outstanding compliance issues. EPA would retain jurisdiction of these facilities until resolution of these issues is accomplished in cooperation with the State. Files retained by EPA for the reasons given above would be transferred to the State as the actions are finalized. Facilities would be notified of this retained jurisdiction and again when the file is transferred to the State. Permitting authority over these facilities would transfer to the State at the time of program approval.

A list of existing Permittees that would temporarily remain under EPA permitting jurisdiction/authority is included as part of the public record and available for review. Texas would continue to provide State-only permits for those dischargers over which EPA temporarily retains permitting authority, and which need State authorization to discharge.

C. Summary of the Application Documents

The TPDES program is fully described in documents the State has submitted in accordance with 40 CFR 123.21, i.e., a letter from the Governor requesting program approval; a Memorandum of Agreement (MOA) for execution by TNRCC and EPA; a Program Description, including an Enforcement Management System, outlining the procedures, personnel and protocols that would be relied on to run the State's permitting and enforcement programs; and a Statement signed by the Attorney General that describes the legal authority which the State has to administer a program equivalent to the federal NPDES program. The State's TPDES application consists of a letter from the Governor of Texas, enclosing eight chapters and associated appendices. The content of those documents is summarized below.

1. A Letter from the Governor

Texas' application for program approval includes a letter dated February 5, 1998, from Governor George W. Bush, officially requesting NPDES program approval.

2. The EPA/TNRCC MOA (Chapter 1)

The requirements for MOAs are found in 40 CFR 123.24. A Memorandum of Agreement is a document signed by each agency, committing them to specific responsibilities relevant to the administration and enforcement of the State's regulatory program. A MOA specifies these responsibilities and provides structure for the State's program management and EPA's program oversight.

The MOA submitted by the State of Texas has been signed by Dan Pearson, Executive Director of the Texas Natural Resource Conservation Commission. The Regional Administrator of U.S. EPA Region 6 would sign the document only if the program has been determined approvable after all comments received during the comment period (including comments received at the public hearing) have been considered. The MOA submitted by TNRCC includes the following items:

Section I—General: This section contains general statements describing the purpose of the MOA.

Section II—Scope of Authorization: This section contains the statement of the scope of the NPDES program (pretreatment, storm water, sewage sludge disposal programs) TNRCC would be administering.

Section III—State and Federal Responsibilities: Lists the responsibilities of TNRCC and EPA in maintaining an effective program. Also outlines the procedures for transfer of authority over discharges over which EPA would be temporarily retaining authority and gives timing for the transition.

Section IV—Permit Processing, Review and Issuance: describes all agreements on the review and issuance of TPDES permits. It covers TNRCC's responsibilities to issue permits, the transfer of EPA files to the State, and the State's application review and permit development process. Included are such things as procedures for permit modification or reissuance, and EPA's review of TPDES drafted individual and general permits. This section includes the State's commitment for responding to public concerns and providing public participation in connection with public hearings, evidentiary hearings, and administrative and judicial enforcement actions.

Section V—Compliance Monitoring and Permit Enforcement: Describes summary agreements between EPA and TNRCC regarding EPA oversight of the TPDES enforcement program. These include those commitments on TNRCC's compliance monitoring, reviews, pretreatment audits, and inspections.

Section VI—Pretreatment Program: Describes summary agreements between EPA and TNRCC regarding EPA oversight of TPDES's implementation of the industrial pretreatment program regulating industrial users of municipal wastewater treatment plants.

Section VII—Sludge Management Program: Describes summary agreements between EPA and TNRCC regarding EPA oversight of TPDES's regulation of the disposal of biosolids (sewage sludge) generated by wastewater treatment systems.

Section VIII—Transmittal of Information: This section describes how reports and requests for information would be handled; and how information is transferred between the two agencies.

Section IX—TPDES Program Review by EPA: Explains how EPA would periodically review the TPDES program for implementation and continued consistency with Clean Water Act requirements.

Section X—Amendments To Be Approved by EPA: This section describes procedures to insure that EPA is given an opportunity to review any proposed amendment, recision or repeal of any State statute or regulation that could affect the continued viability of the TPDES program.

Section XI—Approval, Effective Date And Term Of the MOA: Describes how the MOA can be modified by EPA and TNRCC. Also establishes a commitment to review the MOA within five years and make any necessary changes. The MOA would become effective on the date of program approval.

3. Program Description (Chapters 2–7)

A program description submitted by a State seeking program approval must meet the minimum requirements of 40 CFR 123.22. It must provide a narrative description of the scope, structure, coverage and processes of the State program; a description of the organization, staffing and position descriptions for the lead State agency; and itemized costs and funding sources for the program for the first two years after program approval. It must describe all applicable State procedures (including administrative procedures for the issuance of permits and administrative or judicial procedures for their review) and include copies of forms used in the program. It must further contain a complete description of the State's compliance and enforcement tracking program. The program description submitted by TNRCC includes the following items:

Chapter 2—Overview of the TNRCC: This chapter gives an overview of the history, authority, and organization of the TNRCC.

Chapter 3—Permitting Program Description: Describes how TNRCC staff

would develop effluent limitations; the permitting process, including procedures for public participation in decision making process; and the process for determining the Total Maximum Daily Load a surface water can assimilate and still support its designated beneficial uses (e.g., swimming, fishing, public water supply, etc.).

The Continuing Planning Process (CPP) and its associated Implementation Procedures (IP) used by the TNRCC to develop and implement water quality standards and assess the condition of surface waters of the State are found in two appendixes to Chapter 3 (Appendix 3–C: ''TNRCC Continuing Planning Process'' and Appendix 3–D: ''Implementation of the TNRCC Standards Via Permitting''). Portions of the CPP and IP previously approved by EPA when TNRCC was not proposed to be the NPDES permitting authority would be superseded by agreements found in the section IV.B. of the proposed MOA between TNRCC and EPA. The issues addressed by these superseding agreements include: suspension of the use of biological surveys in the Implementation Procedures; determining cessation of lethality in biomonitoring; use of alternate test species for biomonitoring; calculation of Dioxin/Furan permit limits; development of water quality-based effluent limitations for discharges into the Rio Grande; ensuring all final limitations in a TPDES permit would be consistent with the EPA-approved Water Quality Management Plan (including any applicable Total Maximum Daily Loads); ensuring variance from water quality standards would not be used to establish an effluent limitation for a TPDES permit until the standards variance has been reviewed and approved by EPA; and ensuring appropriate limitations would be included in general permits to ensure compliance with water quality requirements. Texas has committed to incorporating the MOA agreements into the CPP and IP during the next update to the CPP and IP. Taken together, these three documents constitute the CPP required under 40 CFR 130.5(c) for the Administrator's approval of a state program.

Chapter 4—Pretreatment Program Description: This chapter gives the authority for the TNRCC pretreatment program; and the components of the program such as, the establishment of limits for indirect users, fundamentally different factors, categorical determination requests, reporting requirements, inspections and enforcement.

Chapter 5—Sewage Sludge Program Description: This Chapter gives a brief description of the TNRCC sewage sludge program, its history, and statutory framework. It describes sludge permits and reports required.

Chapter 6—Enforcement Program Description: This chapter gives the legal authority for TNRCC enforcement actions, outlines TNRCC policies related to compliance and enforcement and provides a description of State enforcement actions. It also gives a brief overview of compliance review activities for inspections, Discharge Monitoring Reports and other required reports to be submitted by the permittee, and describes the Permits Compliance System and the types of data tracked by it.

States seeking approval of their permitting and enforcement program under NPDES have the option of adopting EPA's enforcement policies, procedures, and guidance; or providing in their program package a complete description of their own enforcement authority and compliance evaluation program (40 CFR 123.26 and 123.27). Texas submitted its own enforcement management system (EMS) (Appendices 6–A through 6–G). An EMS outlines the way the State systematically and efficiently identifies instances of noncompliance and provides timely and appropriate enforcement actions to achieve the final objective of full compliance by the permittee with the Clean Water Act. An EPA memo dated October 2, 1989, titled ''Final Version of the Revised Enforcement Management System,'' describes seven basic principles that are common to an effective EMS:

—Maintain a source inventory that is complete and accurate;
—Handle and assess the flow of information available in a systematic and timely basis;
—Accomplish a pre-enforcement screening by reviewing the flow of information as soon as possible after it is received;
—Perform a more formal enforcement evaluation where appropriate, using systematic evaluation screening criteria;
—Institute a formal enforcement action and follow-up whenever necessary;
—Initiate field investigations based on a systematic plan; and
—Use internal management controls to provide adequate enforcement information to all levels of organization.

The TNRCC's Enforcement Management System (EMS) is a written outline or guide which discusses the procedures that would be followed to ensure that both federal and State regulatory requirements and goals are accomplished in a timely and appropriate manner. For the purpose of review, EPA considers the TNRCC EMS to consist of the seven appendices to Chapter 6.

The inspection and enforcement functions of the TNRCC reside in the Field Operations Division, Compliance Support Division, and Enforcement Division of the Office of Compliance & Enforcement. The Field Operations Division, with 16 regional offices across the State, is responsible for inspecting all permitted and unpermitted facilities which have or are believed to have a surface water discharge and is primarily responsible for the investigation and resolution of all citizen complaints involving waters of the State. The Compliance Support Division provides agency sponsored or administered training courses and technical assistance aimed at development of environmental expertise by agency staff and those regulated by the TNRCC. The Enforcement Division, in coordination with the Field Operations Division, is responsible for addressing non-compliance with the agency's regulations through enforcement actions.

The TNRCC has not adopted EPA's civil penalty policy, but uses their own policy to assess and collect administrative penalties. The penalty policy is discussed in detail in Appendix VI.

Chapter 7—Program Cost and Funding: This chapter gives a budget summary on the projected costs and funding sources for the TPDES program for the first two years after program approval.

4. Attorney General's Statement (Chapter 8)

An Attorney General's Statement is required and described in regulations found at 40 CFR 123.23. The State Attorney General must certify that the State has lawfully adopted statutes and regulations which provide the State agency with the legal authority to administer a permitting program in compliance with 40 CFR part 123. The Texas Attorney General's Statement describes and cites State legal authority it believes adequate to administer the TPDES program; and certifies that the State has the legal authority to administer the TPDES program in accordance with the regulations in 40 CFR part 123. Chapter 8 entitled ''Authority for the Texas National Pollutant Discharge Elimination System Program,'' which was submitted by the

State of Texas on February 5, 1998, and the supplemental March 16, 1998, letter from Texas Attorney General Dan Morales to Acting EPA Region 6 Regional Administrator Jerry Clifford, taken together, constitute the Attorney General's Statement required by section 402(b) of the CWA and 40 CFR 123.23 for purposes of the State's TPDES application. All references to the ''Attorney General's Statement'' or ''statement of legal authority'' made in this document refer to the combination of these two documents.

Public Comment on the Described Program

The program submitted by the State of Texas has been determined by EPA to be complete in accordance with the regulations found at 40 CFR part 123. EPA and TNRCC want the citizens of Texas to understand the proposed TPDES program and encourage public participation in the decision making process. Therefore, EPA requests that the public review the program that TNRCC has submitted and provide any comments they feel are appropriate. EPA will consider all comments on the TPDES program and/or its approval in its decision.

EPA is specifically seeking public input on the following aspects of the proposed TPDES program:

Public Participation

In discussions with the State of Texas over the last couple of years concerning the possibility of federal approval of a Texas NPDES program, EPA expressed various concerns regarding the opportunity for public participation in the State permitting and enforcement processes. For example, EPA raised concerns that notice and opportunity for comment should be provided on proposed settlements of administrative enforcement actions; that Texas notices should notify the public that it may request a hearing on permit applications and that a hearing would be granted if there was a significant degree of public interest; that Texas should provide for permissive intervention in administrative penalty actions; and over restrictions placed by the State on the participation of citizens in formal evidentiary contested case hearings and the implications of those restrictions on the ability of citizens to establish standing to obtain judicial review of permits. In response to these discussions, the State of Texas has implemented various regulatory and statutory changes to enhance the opportunity for public participation under the State program, and the Texas Attorney General has stated that the law governing individual standing in Texas judicial proceedings is substantially equivalent to current requirements for standing under federal law. Through these statutory and regulatory changes and the Texas Attorney General's statement, Texas has worked to address EPA's concerns in this area. The results of the various discussions between EPA and TNRCC regarding public participation issues are reflected in an exchange of letters between TNRCC Commissioner Barry McBee and Acting Region 6 Regional Administrator Jerry Clifford dated June 16, 1997 (McBee to Clifford), June 19, 1997 (Jerry Clifford to Barry McBee) and November 25, 1997 (Barry McBee to Jerry Clifford). These three letters are included as part of the official record for this matter.[2]

Texas' Regulatory Flexibility Under Texas Water Code 5.123

The Texas Legislature added section 5.123 to the Texas Water Code in 1997 (implementing Senate Bill 1591). This section gives the TNRCC flexibility to exempt from State statutory or regulatory requirements an applicant proposing an alternative method or alternative standard to control or abate pollution. EPA raised questions concerning the effect of the statute on TNRCC's obligations under the TPDES program. In response, the Texas Attorney General stated that Texas Water Code 5.123 does not subtract from the TNRCC's authority required as a condition of program approval under the CWA or EPA regulations since the statute does not authorize the TNRCC to grant an exemption that is inconsistent with the environmental requirements of any federally approved program. In a letter from TNRCC Commissioner Ralph Marquez to Acting Region 6 Regional Administrator Jerry Clifford dated March 16, 1998, Commissioner Marquez clarified TNRCC's position that section 5.123 does not authorize TNRCC to grant permits that vary from applicable federal requirements. To further clarify this position, Commissioner Marquez committed to include the following language in the proposed MOA between EPA and the TNRCC:

> The regulatory flexibility authority in Senate Bill 1591 will not be used by TNRCC to approve an application to vary a federal requirement or a State requirement which implements a federal program requirement under § 402(b) of the Clean Water Act, EPA regulations implementing that Section, or this MOA, including but not limited to inspection, monitoring or information collection requirements that are required under § 402(b) of the Clean Water Act, EPA regulations implementing that Section or this MOA to carry out implementation of the approved federal program.

This language is included on page 8 of the proposed MOA.

Texas' Defense to Liability for Acts of God, War, Strike, Riot, or Other Catastrophe

Section 7.251 of the Texas Water Code provides that if an event that would otherwise be a violation of a statute, rule, order or permit was caused solely by an act of God, war, strike, riot, or other catastrophe, the event is not a violation of that statute, rule, order, or permit. This statute and its effect on the TPDES program are discussed in detail in the Attorney General's Statement provided by the State of Texas as part of its application. However, EPA wishes to also clarify its understanding of this statute and its role in the federally authorized program.

It is important to first note that section 7.251 of the Texas Water Code creates a defense to liability not provided for under the federal CWA. Should EPA authorize the TPDES program, EPA would still retain its authority to bring enforcement actions for violations of the Act, and this authority would not be affected by section 7.251. Both EPA and the courts have consistently interpreted the CWA as a strict liability statute. The only defense to liability recognized under federal law is the federal upset defense found at 40 CFR 122.41(n), which is a very narrow affirmative defense for violations of technology-based effluent limitations. Although both Texas Water Code section 7.251 and 40 CFR 122.41(n) provide for affirmative defenses that must be pled and proven by the asserting party, the defenses are not analogous.

The Attorney General's Statement provided by the State of Texas acknowledges that the defenses are not analogous. However, in his effort to clarify the scope of the State statute, the Attorney General compares section 7.251 to ''a federal defense that CWA § 301(a) only applies to any person causing an unauthorized discharge.'' It is EPA's belief that no such federal defense exists. EPA has consistently taken the position, which it believes is supported by available case law, that any unauthorized discharge of pollutants is unlawful regardless of the cause, and that a facility owner or operator is responsible for any unlawful

[2] Also included in the record and of interest on this issue is an exchange of letters between Mr. Richard Lowerre of Henry, Lowerre, Johnson, Hess, & Frederick and the TNRCC dated November 19, 1997 (Lowerre to TNRCC Chairman Barry McBee) and January 6, 1998 (Jim Phillips, Deputy Director of the Office of Legal Services, TNRCC to Lowerre).

discharge occurring at his facility. Therefore, although Texas Water Code section 7.251 creates an affirmative defense to liability for actions brought by Texas under State law, section 7.251 is not a defense to enforcement actions brought by EPA pursuant to the federal CWA.

As interpreted by the Texas Attorney General, section 7.251 provides an affirmative defense to unauthorized discharges under State law only if the event causing the discharge is completely outside the control of the person otherwise responsible for the discharge and only if the discharge could not have been avoided by the exercise of due care, foresight, or proper planning, maintenance or operation. Section 7.251 does not shield a party from liability if that party's action or inaction contributed to the violation. Based on this interpretation, it is EPA's understanding that if a facility owner or operator could have reasonably anticipated a discharge, and could have taken steps to prevent it by care and foresight, proper planning, or maintenance, then the affirmative defense is unavailable. For example, if a heavy rainfall, a strike, or a riot is reasonably foreseeable, or the facility is not designed, operated, or maintained properly, then any discharge resulting from such an event would not be solely caused by the event, and the facility owner or operator would be unable to claim the defense for such a discharge.

The Attorney General also states that section 7.251 would not preclude the imposition of penalties for a violation that persists after the original force majeure event ceases to be the sole cause of a discharge, whether the persisting violation was a continuing discharge or a failure to comply with a rule, order, or permit requirements. EPA understands this to mean that even if a discharge at a facility were initially caused by an act of God, and the facility owner or operator in no way contributed to the discharge, either through his action or inaction, if the facility owner or operator could have taken steps to stop the discharge from continuing, but failed to do so, the facility operator would be liable for the continuing discharge.

As discussed in the Attorney General's Statement, the main impact of section 7.251 is to insulate a party from penalties; the statute's effect on the TNRCC's injunctive authority is minimal in that it does not affect a court's authority to issue an injunction to enforce any Code requirement or prohibition, including the requirement that a party comply with any permit, rule or order issued by the TNRCC. EPA understands the Texas Attorney General's statement to conclude that the TNRCC can enjoin by suit in State court any violation or threat of violation of a statute, rule or permit under the TPDES program. Based on this understanding, TNRCC appears to have injunctive authority equivalent to EPA's authority under federal law despite the existence of section 7.251.

In regard to the insulation of parties from penalties under section 7.251, EPA would rarely seek penalties for violations of the Act that were completely beyond the control of a party, and in regard to which that party had exercised due care, foresight, proper planning and maintenance.

Therefore, based on the Texas Attorney General's Statement and EPA's understanding of TNRCC's broad injunctive authority, the statute does not appear to prevent TNRCC from demonstrating adequate authority to meet its obligations under section 402(b) of the CWA.

Inspections

The federal regulations (40 CFR 123.26(e)(5)) require State NPDES compliance evaluation programs to have the procedures and ability for inspecting the facilities of all major dischargers and all Class I sludge facilities where applicable at least annually. In the proposed MOA between EPA and the TNRCC, the TNRCC states that it has the procedures and ability for inspecting the facilities of all major dischargers and all Class I sludge facilities where applicable at least annually, and that it will inspect 100% of the majors and Class I sludge facilities on an annual basis, or a universe of majors/minors agreed upon annually by EPA and the TNRCC. The agreement to allow TNRCC to substitute the inspection of a mutually agreed-upon universe of majors/minors for inspection of 100% of the majors and Class I sludge facilities is based on EPA's and TNRCC's commitment to a process for targeting inspections according to the priorities established by TNRCC to protect the waters of Texas. Under the terms of the proposed MOA, the TNRCC will develop an annual inspection plan that establishes priorities, lists the major and minor dischargers to be inspected, and demonstrates that the plan is substantially equivalent to the annual inspection of all major dischargers and Class I sludge management facilities where applicable. The TNRCC will have to inspect majors at some regular interval while expending resources on minors equivalent to 100% of the majors annually. The TNRCC will also have to demonstrate water quality improvement as a result of the trade-off. Under the proposed MOA, if EPA and the TNRCC are unable to reach agreement on the universe of majors/minors to be inspected under the annual inspection plan by the beginning of the following fiscal year, TNRCC agrees to inspect 100% of the majors and all Class I sludge management facilities where applicable.

Timely and Appropriate Enforcement

Section 402(b) of the Act requires that a State have adequate authority to abate violations of the permit or the permit program. Because the ability to take timely and appropriate enforcement action is fundamental to an adequate enforcement program, EPA's Oversight Guidance states that by the time a facility appears on the second Quarterly Noncompliance Report, a formal enforcement action should have been taken. Chapter 6 of Texas' application (Enforcement Program Description) outlines the time frames for TNRCC issuance of enforcement actions. The average time for TNRCC enforcement action issuance is 255 days. As a result, in implementing the TPDES program, TNRCC would not in all cases be able to meet the timely and appropriate criteria contained in EPA's Oversight Guidance. In cases where TNRCC cannot meet this criteria, TNRCC has agreed in the proposed MOA to notify EPA 45 days prior to a facility appearing on the Exception List. EPA will then initiate formal enforcement action in order to ensure that the violations are addressed in a timely and appropriate manner.

Penalty Policy

The TNRCC proposes to use its own Penalty Policy in administering the TPDES program, and the TNRCC policy differs in some respects from the EPA penalty policy. It is EPA policy that penalties generally should, *at a minimum*, collect the economic benefit accruing to the violator as a result of violating the law. EPA's policy also states that every effort should be made to calculate and recover an additional amount, over and above economic benefit, to ensure that the violator does not gain economically by violating the law. (EPA's February 1984 ''Policy on Civil Penalties'' (#GM–21) as implemented in EPA's March 1, 1995 ''Interim CWA Settlement Penalty Policy''). TNRCC's policy will not ensure that economic benefit will be collected, at a minimum, in all cases, and TNRCC's policy allows for mitigation of penalties to zero in some instances. Neither the CWA nor 40 CFR part 123 require a State seeking NPDES

authority to adopt EPA's penalty policy verbatim. However, 402(b) of the Act and 40 CFR 123.27 require that States have enforcement authority, including civil and criminal penalties, adequate to abate violations of a permit or the permit program. If the TPDES program were approved, EPA would be required to over-file in certain instances in order to ensure consistency with the Federal penalty policy that no party be allowed to garner an unfair economic advantage through avoiding the cost of compliance with environmental protection requirements. Any penalties collected by EPA go to the federal, not the State, treasury.

Applicability of Water-Quality Based Limits in the Absence of Technology-Based Effluent Guidelines

In a brief filed February 12, 1998, in the U.S. Court of Appeals for the Fifth Circuit on behalf of the State of Texas and the Texas Railroad Commission in *Texas Mid-Continental Oil & Gas Association v. EPA* (No. 97–60042 and Consolidated Cases), the Texas Attorney General took the position that EPA did not have the authority to include water quality-based effluent limitations in an NPDES permit unless technology-based effluent guidelines had been developed. EPA vigorously disagrees with this position and continues to maintain that under the CWA, technology-based and water quality-based effluent limitations are independently applicable in determining appropriate effluent limitations for an NPDES permit.

While confident that the Texas Attorney General's position on EPA's authority to independently require compliance with water quality standards will not be upheld by the courts, EPA also believes it is not necessary to wait for a final ruling by the courts before acting on the TPDES program proposed by TNRCC. The Texas Attorney General's statement confirms that TNRCC has full authority under state law to impose effluent limitations for any discharge as necessary to insure compliance with approved water quality standards. In addition, in a March 16, 1998, letter to EPA Region 6 Acting Regional Administrator Jerry Clifford from TNRCC Commissioner Ralph Marquez, Commissioner Marquez committed to add additional language to the MOA to clarify that in implementing the TPDES program, TNRCC would use water quality-based effluent limits in permits wherever necessary to insure compliance with water quality standards. As a result of Commissioner Marquez' commitment, the following language is now included on page 24 of the proposed MOA:

> Water quality based effluent limitations will be included in TPDES permits for all discharges to ensure compliance with approved water quality standards. Water quality based effluent limitations are part of the federally approved program and the State will impose such limitations in TPDES permits unless technology-based effluent limitations are more stringent.

Therefore, the proposed TPDES program would appear to function in a manner consistent with EPA's interpretation of the requirements of the CWA and its implementing regulations.

TPDES Resource Needs

The CWA and EPA regulations require States seeking approval of State NPDES programs to demonstrate adequate resources, including qualified personnel and sufficient funding, to operate the proposed program if approved. Section 304(I)(2) of the CWA requires EPA to promulgate guidelines establishing the minimum procedural and other elements of State programs, including among other things, funding, personnel qualifications, and manpower requirements. 40 CFR 123.22 requires a state seeking NPDES approval to provide as part of its program submission a description of the staff who will carry out the proposed State program and an itemization of the estimated costs of establishing and administering the proposed program for the first two years after approval. As required by 40 CFR 123.22, the State included a description of the cost of establishing and administering the proposed TPDES program for the first two years after program approval in Chapter 7 of its application. However, information provided to EPA by two public interest groups, the Texas Center for Policy Studies (letter to Samuel Coleman and Steven A. Herman dated May 7, 1998) and People Organized in Defense of Earth and her Resources (letter to Carol Browner and Jerry Clifford dated April 29, 1998), has raised questions concerning whether the available information indicates that the State, if authorized, will have sufficient funding to adequately implement the program. The answers to these questions will be important to EPA's final decision on TPDES program approval. To that end, EPA intends to seek clarification from the TNRCC regarding certain aspects of the information provided. Any additional comments by the public will also be considered by the Regional Administrator in making his final decision.

It is also important to note that under the proposed TPDES program, authority over storm water general permits (approximately 20,000 permittees) and municipal separate storm sewer permits (approximately 30 permits) already issued by EPA would not be transferred to TNRCC until the federal permits expire or are replaced by a TPDES permit. Therefore, permitting authority and primary enforcement responsibility over a significant portion of the NPDES universe would not transfer to TNRCC until after the period covered by the financial capability information included in the program approval request. In addition, the State would be required to begin administering Phase II of the NPDES storm water program (expected to require permitting of numerous smaller municipalities and construction sites) starting around 2001. As a result of these anticipated increases in TNRCC responsibility in the years following program approval, resources needed to run the program would also increase. If the TPDES program were approved, TNRCC would be expected to increase its resources commensurate with program growth, and if it were unable to do so, the program would be subject to withdrawal by EPA under 40 CFR 123.64(b).

Funding Sources Available for the TPDES Program

Under 40 CFR 123.22(b)(3), the program description must include an itemization of the sources and amounts of funding, including Federal grant money, expected to be available to TNRCC for the first two years after approval to meet the costs of establishing and administering the proposed TPDES program. However, since EPA cannot guarantee the level of Federal funding Congress will make available in future years, a State seeking program approval must be able to run its program with or without the assistance of Federal funding.

Chapter 7 of the TPDES application contains both the expected program costs and the required breakdown on funding sources. The funding sources TNRCC would rely on for the first two years of the proposed TPDES program includes federal grants totaling $7,224,305 per year. Approximately 49% of the proposed TPDES budget would therefore be dependent on the continued availability of Federal grants. The Texas Legislature has already authorized TNRCC to increase the maximum annual permit fee to $25,000 and to collect additional fees to recover the costs of an authorized program.[3] If

[3] Under Texas' proposed funding plan, the TNRCC will charge fees for storm water permittees. As a result, many industrial facilities, construction

current levels of available Federal grant funds decline, TNRCC would need to further increase fee revenue or seek additional funds from the Texas Legislature to fund the TPDES program.

Environmental Justice

EPA encourages States to include environmental justice provisions in their environmental programs in furtherance of environmental justice policies, and to help ensure compliance with non-discrimination provisions of Title 6 of the Civil Rights Act. EPA wrote to TNRCC in December of 1997, recommending that the State include an environmental justice program as part of its proposed TPDES program. Under the current regulations for State program approval, Texas is not required to submit a description of program procedures to ensure environmental justice issues are taken into consideration in TNRCC's permitting and enforcement decisions. In a letter dated February 6, 1998, TNRCC indicated it does have an environmental justice program. However, the State did not make that program a part of the TPDES application.

Other Federal Statutes

A. National Historic Preservation Act

Section 106 of the National Historic Preservation Act requires that all federal agencies must consult with the State Historic Preservation Officer and the Advisory Council on Historic Preservation on all federal undertakings which may affect historic properties or sites listed or eligible for listing in the National Register of Historic Places. Regulations outlining the requirements of a section 106 consultation on a federal undertaking are found at 36 CFR part 800. EPA has initiated section 106 consultation on the State's request for approval of the TPDES program.

B. Endangered Species Act

Section 7 of the Endangered Species Act (ESA) requires that all federal agencies consult on federal actions which may affect federally listed species to insure they are unlikely to jeopardize the continued existence of those species or adversely modify their critical habitat. Regulations controlling consultation under ESA section 7 are codified at 50 CFR part 402. The approval of the State permitting program under section 402 of the Clean Water Act is a federal action subject to this requirement, but the State's subsequent TPDES permit actions are not. EPA Region 6 initiated formal consultation with the U.S. Fish and Wildlife Service on January 29, 1998.

C. Coastal Zone Management Act

Pursuant to section 307(c)(1)(C) of the Coastal Zone Management Act, Federal agencies carrying out an activity which affects any land or water use or natural resource within the Coastal Zone of a state with an approved Coastal Zone Management Plan must determine whether that activity is, to the maximum extent practicable, consistent with the enforceable requirements of the Plan and provide its determination to the State agency responsible for implementation of the Plan for review. Texas' approved Coastal Zone Management Plan is administered by the General Land Office and, more particularly, by its Coastal Coordination Council. TNRCC permit actions are themselves subject to consistency review under 31 TAC § 505(11)(a)(6); thus approval of TNRCC's TPDES program would not affect Texas' coastal zone and would be consistent with the enforceable requirements of Texas' Coastal Zone Management Plan.

D. Regulatory Flexibility Act

Based on General Counsel Opinion 78–7 (April 18, 1978), EPA has long considered a determination to approve or deny a State NPDES program submission to constitute an adjudication because an ''approval'', within the meaning of the APA, constitutes a ''license,'' which, in turn, is the product of an ''adjudication''. For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* Under the RFA, whenever a Federal agency proposes or promulgates a rule under section 553 of the Administrative Procedure Act (APA), after being required by that section or any other law to publish a general notice of proposed rulemaking, the Agency must prepare a regulatory flexibility analysis for the rule, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the Agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule.

Even if the NPDES program approval were a rule subject to the RFA, the Agency would certify that approval of the State's proposed TPDES program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve an NPDES program merely recognizes that the necessary elements of an NPDES program have already been enacted as a matter of State law; it would, therefore, impose no additional obligations upon those subject to the State's program. Accordingly, the Regional Administrator would certify that this program, even if a rule, would not have a significant economic impact on a substantial number of small entities.

I hereby provide public notice of the application by the State of Texas for approval to administer, in accordance with 40 CFR part 123, the TPDES program.

Dated: June 11, 1998.

Gregg A. Cooke,

Regional Administrator.

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development projects and municipal separate storm sewer systems not currently regulated by the TNRCC will become subject to the TPDES fee system as storm water permitting authority transfers from EPA to the TNRCC.

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1218–DR]

South Dakota; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of South Dakota (FEMA–1218–DR), dated June 1, 1998, and related determinations.

EFFECTIVE DATE: June 1, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated June 1, 1998, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), as follows:

I have determined that the damage in certain areas of the State of South Dakota, resulting from flooding, severe storms, and tornadoes on April 25, 1998, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 93–288, as amended (''the Stafford Act''). I, therefore, declare that such a major disaster exists in the State of South Dakota.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as