

The Texas Natural Resource Conservation Commission (commission) adopts the amendment to §39.551, Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge *without changes* to the proposed text as published in the June 8, 2001 issue of the *Texas Register* (26 TexReg 4022) and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking amends Chapter 39 notice requirements for applicants seeking to discharge storm water and certain non-storm water from municipal separate storm sewer systems (MS4s) under an individual Texas Pollutant Discharge Elimination System (TPDES) permit. For new permits or major amendments to individual TPDES MS4 permits, this amendment adds two public posting requirements. The first posting requirement is to post a copy of the Notice of Receipt of Application and Intent to Obtain a Permit within 30 days of the application being declared administratively complete. The second posting requirement is to post the Notice of Application and Preliminary Decision on or before the first day of published newspaper notice. Both notices must remain posted until the commission has taken final action on the application; both notices must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located. These two public posting requirements replace the direct mail requirement to provide notice to adjacent or downstream landowners of the Notice of Receipt of Application and Intent to Obtain a Permit and the Notice of Application and Preliminary Decision. This rulemaking does not amend nor otherwise affect other public notification requirements which are still in effect for other types of TPDES permits.

Applicants for new permits or major amendments to individual TPDES MS4 permits must continue to publish notice in a newspaper regularly published or circulated within each county where the proposed MS4 or discharge is located, and in each county affected by the discharge. Also, notice must still be mailed to a set group of local and state governmental entities by the commission's chief clerk. This group includes the mayor and health authorities of the city or town served by the MS4, the county judge and health authorities in the county served by the MS4, the Texas Department of Health (TDH), the Texas Parks and Wildlife Department (TPWD), and the Railroad Commission of Texas (RRC). The notices posted in a public place combined with the current newspaper notice and mailed notices to local and state governmental entities will provide effective notice to interested persons.

An MS4 is a conveyance or system of conveyances owned or operated by a state, city, town, borough, county, district, association, or other public body (created by or pursuant to state law). The MS4s are designed to collect and convey storm water to designated run-off areas via roads with drainage systems, municipal streets, catch basins, curb gutters, ditches, man-made channels, or storm drains. Because MS4s may include dozens or often hundreds of storm water outfalls, a large segment of the population will be adjacent to or downstream of an MS4 outfall. It could be extremely burdensome, difficult, and expensive for the public entity to identify every person adjacent or downstream to an MS4 outfall and to pay for mailed notice to all of these persons. The costs and burden usually to cities and counties, but ultimately borne by taxpayers, could be excessive without this modification.

On September 14, 1998, the commission received authority from the United States Environmental Protection Agency (EPA) to implement the National Pollutant Discharge Elimination System (NPDES)

program for Texas and commenced the TPDES. The TPDES is comprised of many programs to control discharges of pollutants to surface water in Texas. One program of the TPDES regulates storm water discharges from MS4s to water in Texas through individual TPDES permits.

According to the Memorandum of Agreement between the commission and EPA, the NPDES permits issued by the EPA to authorize storm water discharges from large and medium MS4s must be reissued by the commission as TPDES permits as each permit expires. Phase I MS4s are large systems (serving a population greater than 250,000 people) to medium systems (serving a population less than 250,000, but greater than or equal to 100,000), while Phase II MS4s are small systems (serving a population less than 100,000 people). In accordance with Phase II regulations, by December 2002, the commission must also develop and issue TPDES permits for storm water discharges from Phase II small MS4s.

Authorized discharges from MS4s include storm water, certain non-storm water discharges, and previously TPDES permitted wastewater discharges from outfalls contributing to the MS4 system. Non-storm water discharges are described in the *Federal Register* of December 8, 1999 (64 FR 68756) to be the following: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined in 40 Code of Federal Regulations §35.2005(20)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air-conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, street wash water and discharges, or flows from fire fighting activities.

#### SECTION BY SECTION DISCUSSION

New §39.551(b)(2)(C) is adopted to add language that replaces the direct mail requirement for the Notice of Receipt of Application and Intent to Obtain a Permit to adjacent or downstream landowners for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4. This amendment is adopted in order to make public notice less expensive and burdensome for the MS4 owner/operator; the costs and burden usually to cities and counties, but ultimately borne by taxpayers, could be excessive without this modification. (A public posting requirement in subsection (b)(3) of this section of the Notice of Receipt of Application and Intent to Obtain a Permit replaces the direct mail requirement.)

New §39.551(b)(3) is adopted to require the applicant for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4 to post a copy of the Notice of Receipt of Application and Intent to Obtain a Permit. The notice must be posted within 30 days of the application being declared administratively complete and remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located. This notice will be provided by applicants for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4 to replace the direct mail notice to adjacent or downstream landowners. The purpose of this change is to establish an alternative notice requirement that will continue to provide adequate public notice while reducing the burden on cities and other public entities.

Section 39.551(c) is adopted to be amended to remove an obsolete cross-reference.

New §39.551(c)(5)(A) and (B) are adopted to replace the direct mail requirement for the Notice of Application and Preliminary Decision to adjacent or downstream landowners for a new individual TPDES permit for a discharge authorized by an existing state permit issued before September 14, 1998, for which the application does not propose a major amendment. New §39.551(c)(5)(A) and (B) would mirror the existing language in §39.551(b)(2)(A) and (B), which has been the intent and practice of the commission. This amendment is adopted in order to make public notice less expensive and burdensome for the MS4 owner/operator; the costs and burden usually to cities and counties, but ultimately borne by taxpayers, could be excessive without this modification. (A public posting requirement in subsection (c)(6) of this section for the Notice of Application and Preliminary Decision replaces the direct mail requirement.)

New §39.551(c)(5)(C) is adopted to add language that replaces the direct mail requirement for the Notice of Application and Preliminary Decision to adjacent or downstream landowners for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4. This amendment is adopted in order to make public notice less expensive and burdensome for the MS4 owner/operator; the costs and burden usually to cities and counties, but ultimately borne by taxpayers, could be excessive without this modification. (A public posting requirement in subsection (c)(6) of this section for the Notice of Application and Preliminary Decision replaces the direct mail requirement.)

New §39.551(c)(6) is adopted to require the applicant for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4 to post a copy of the Notice of Application and Preliminary Decision. The notice must be posted on or before the first day of published newspaper notice and must remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located. This notice will be provided by applicants for a new permit or a major amendment to an individual TPDES permit that authorizes discharges from an MS4 to replace the direct mail notice to adjacent or downstream landowners. The purpose of this change is to establish an alternative notice requirement that will continue to provide adequate public notice while reducing the burden on cities and other public entities.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule.” “Major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking is intended to implement less burdensome public notification requirements for applicants seeking authorization to amend or apply for an individual TPDES MS4 permit while also providing an alternative method of adequate public notice. Therefore,

the rulemaking does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The commission solicited comments on the draft regulatory impact analysis determination. No comments were received.

#### TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact assessment for this rule under Texas Government Code, §2007.043. This rulemaking is procedural in nature and does not provide the commission with any additional authority or jurisdictional responsibility related to MS4s. This rulemaking is intended to implement less burdensome public notification requirements for applicants seeking authorization to amend or apply for an individual TPDES MS4 permit while also providing an alternative method of adequate public notice. Therefore, the rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found the rulemaking is identified in the Coastal Coordination Act (CCA) Implementation Rules, 31 Texas Administrative Code (TAC) §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program (CMP) or will affect an action/authorization identified in the CCA Implementation Rules, 31 TAC §505.11(a)(6), and will,

therefore, require that applicable goals and policies of the CMP be considered during the rulemaking process.

The commission conducted a consistency determination for the adopted rulemaking pursuant to 31 TAC §505.22, and found the adopted rulemaking is consistent with the applicable CMP goals and policies. The goals of the CMP, in 31 TAC §501.12, applicable to the rulemaking, are to: protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests. The policy of the CMP applicable to the adopted rulemaking is §501.14(f)(1)(A), which requires the commission rules to comply with the Clean Water Act.

Promulgation and enforcement of the adopted rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because the change adopted by the rulemaking is procedural in nature and will not have direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

The commission solicited comments on the consistency determination. The commission received a letter from the Texas Department of Transportation (TxDOT); the letter stated that TxDOT did not have any comments or suggestions on the consistency determination.

#### HEARING AND COMMENTERS

A public hearing was held on June 25, 2001, in Room 3202A, Building F, at the commission's central office located at 12100 Park 35 Circle. No one attended the hearing. The comment period closed on July 9, 2001. The commission received a letter from the Texas Department of Transportation (TxDOT); the letter stated that TxDOT did not have any comments or suggestions.

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which states that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §5.551, which establishes that the commission shall by rule provide for notice to the extent necessary to satisfy the EPA requirements; §26.011, which states the commission has the powers and duties prescribed in Chapter 26 and all other powers necessary or convenient to carry out its responsibilities to adopt reasonable rules or orders adopted or issued by the commission to regulate discharges under Chapter 26; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

**SUBCHAPTER J: PUBLIC NOTICE OF WATER QUALITY APPLICATIONS AND  
WATER QUALITY MANAGEMENT PLANS**

**§39.551**

**§39.551. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.**

(a) Applicability. This section applies to applications for wastewater discharge permits, including disposal of sewage sludge or water treatment sludge applications, that are declared administratively complete on or after September 1, 1999. This subchapter does not apply to registrations and notifications for sludge disposal under §312.13 of this title (relating to Actions and Notice).

(b) Notice of receipt of application and intent to obtain permit.

(1) Notice under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) is required to be published no later than 30 days after the executive director deems an application administratively complete. This notice must contain the text as required by §39.411(b)(1) - (9) and (12) of this title (relating to Text of Public Notice). In addition to the requirements of §39.418 of this title, the chief clerk shall mail notice to the School Land Board if the application will affect lands dedicated to the permanent school fund. The notice shall be in the form required by Texas Water Code, §5.115(c).

(2) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit;

(B) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment); or

(C) an application for a new permit or major amendment to a TPDES permit that authorizes the discharges from a municipal separate storm sewer system.

(3) For permits listed in subsection (b)(2)(C) of this section, the executive director will require the applicant to post a copy of the notice of receipt of application and intent to obtain a permit. The notice must be posted within 30 days of the application being declared administratively complete and remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located.

(c) Notice of application and preliminary decision. Notice under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the

applicant. This notice must contain the text required by §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6). In addition to §39.419 of this title, for all applications except applications to renew permits, the following provisions apply.

(1) The applicant shall publish notice of application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(2) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice). For any application involving an average daily discharge of five million gallons or more, in addition to the persons listed in §39.413 of this title, the chief clerk shall mail notice to each county judge in the county or counties located within 100 statute miles of the point of discharge who has requested in writing that the commission give notice, and through which water into or adjacent to which waste or pollutants are to be discharged under the permit, flows after the discharge.

(3) The notice must set a deadline to file public comment with the chief clerk that is not less than 30 days after newspaper publication. However, the notice may be mailed to the county judges under paragraph (2) of this subsection no later than 20 days before the deadline to file public comment.

(4) For TPDES permits, the text of the notice shall include:

(A) everything that is required by §39.411(b)(1) - (3), (5) - (7), (9), and (12),  
and (c)(2) - (6) of this title;

(B) a general description of the location of each existing or proposed discharge  
point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage  
sludge; and

(iii) the use and disposal sites known at the time of permit application.

(5) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit;

(B) an application for a new TPDES permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment); or

(C) an application for a new permit or major amendment to a TPDES permit that authorizes the discharges from a municipal separate storm sewer system.

(6) For permits listed in subsection (c)(5)(C) of this section, the executive director will require the applicant to post a copy of the notice of application and preliminary decision. The notice must be posted on or before the first day of published newspaper notice and must remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located.

(d) Notice of application and preliminary decision for certain TPDES permits. For a new TPDES permit for which the discharge is authorized by an existing state permit issued before September 14, 1998, the following shall apply:

(1) If the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment), the following mailed and published notice is required.

(A) The applicant shall publish notice of the application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(B) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing to those listed in §39.413 of this title.

(C) The notice must set a deadline to file public comment, or to request a public meeting, with the chief clerk that is at least 30 days after newspaper publication.

(D) The text of the notice shall include:

(i) everything that is required by §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6) of this title;

(ii) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(iii) for applications concerning the disposal of sludge:

(I) the use and disposal practices;

(II) the location of the sludge treatment works treating  
domestic sewage sludge; and

(III) the use and disposal sites known at the time of permit  
application.

(2) If the application proposes any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the applicant must follow the notice requirements of subsection (b) of this section.

(e) Notice for other types of applications. Except as required by subsections (a), (b), and (c) of this section, the following notice is required for certain applications.

(1) For an application for a minor amendment to a permit other than a TPDES permit, or for an application for a minor modification of a TPDES permit, under Chapter 305, Subchapter D of this title (relating to Amendments, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the chief clerk shall mail notice, that the executive director has determined the application is technically complete and has prepared a draft permit, to the mayor and health authorities for the city or town, and to the county judge and health authorities for the county in which the waste

will be discharged. The notice shall state the deadline to file public comment, which shall be no earlier than ten days after mailing notice.

(2) For an application for a renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which the applicant does not propose to discharge into or adjacent to water in the state and does not seek to change materially the pattern or place of disposal, no notice is required.

(3) For an application for a minor amendment to a TPDES permit under Chapter 305, Subchapter D of this title, the following requirements apply.

(A) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments and to request a public meeting to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutants are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR) §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

(vi) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists); and

(vii) any other person the executive director or chief clerk may elect to include.

(B) For TPDES major facility permits as designated by EPA on an annual basis, notice shall be published in the *Texas Register*.

(C) The text shall meet the requirements in §39.411(b)(1) - (4)(A), (6) - (7), (9), and (12), and (c)(4) - (6).

(D) The notice shall provide at least a 30-day public comment period.

(E) The executive director shall prepare a response to all relevant and material or significant public comments received by the commission under §55.152 of this title (relating to Public Comment Processing).

(f) Notice of contested case hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Not less than 30 days before the hearing, the applicant shall publish notice at least once in a newspaper regularly published or circulated in each county where, by virtue of the county's geographical relation to the subject matter of the hearing, a person may reasonably believe persons reside who may be affected by the action that may be taken as a result of the hearing. The executive director shall provide to the chief clerk a list of the appropriate counties.

(3) Not less than 30 days before the hearing, the chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice), except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit.

(4) For TPDES permits, the text of notice shall include:

(A) everything that is required by §39.411(d)(1) and (2) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage  
sludge; and

(iii) the use and disposal sites known at the time of permit application.

(g) Notice for discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR Part 124, Subsection D, §124.57(a), public notice, which is in effect as of the date of TPDES program authorization, as amended, is adopted by reference. A copy of 40 CFR Part 124 is available for inspection at the library of the agency, Park 35, 12015 North Interstate 35, Austin.