

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §305.126, concerning Additional Standard Permit Conditions for Wastewater Discharge Permits. The amendments are adopted with changes to the proposed text published in the June 19, 1998, issue of the *Texas Register* (23 TexReg 6389).

EXPLANATION OF ADOPTED RULE

The amendments to §305.126 are being made to reflect changes to the policy and administration of the reporting requirements for wastewater discharge facilities. Minor amendments to the existing rule are being made regarding the calculation of flow limitations, and administration of waiver requests. These revisions are based on public comments received and the determination that the existing rule, with minor revisions, will promote advance planning more effectively than would occur under the proposed amended rule and, therefore, assist in pollution prevention. In addition, the existing rule contains provisions giving facilities the flexibility to determine when and how to expand their treatment facilities. Permittees can obtain a waiver from the rule requirements if they show it is not necessary to add more capacity to the treatment facility. The rule does not dictate when permittees have to increase capacity nor how much capacity must be provided. The rule is designed to set time frames for initiating planning and for obtaining permit authorizations to construct facilities if necessary.

The rule amendments being adopted will implement the commission's new permitting policy which specifies that any domestic wastewater discharge facility with one million gallons per day or greater permitted flow will receive an annual average flow limitation. Any domestic wastewater discharge facility with less than one million gallons per day of permitted flow will continue to receive a daily

average flow limitation. The rule has been revised so that it applies to facilities with either daily average flow limitations or annual average flow limitations. The rule is also being revised to specify that waiver requests will be signed by the enforcement division of the commission.

FINAL REGULATORY IMPACT ANALYSIS

The commission has determined that a regulatory impact analysis is not required because the rule does not meet the definition of a "major environmental rule" as defined in §2001.0225 of the Texas Government Code, and it will not have an adverse effect in a material way on the economy, environment, or public health and safety of any sector of the state.

The intent of the current rule is to promote advance planning and to assist community leaders by requiring them to plan ahead for future expansion and/or upgrading of treatment systems, or construction of new wastewater treatment facilities. The specific intent of the rule revision is to keep the rule consistent with and reflective of policy changes made in 1997 regarding how flows for large facilities are calculated. This policy change specified that domestic wastewater discharge facilities with a million gallon per day (MGD) or greater permitted flow will receive an annual average flow limitation. The annual average flow is calculated based on all the daily flow averages for 12 consecutive months. The 1997 change also added a new requirement that these facilities report maximum 2-hour peak flows for each calendar month.

Because the current rule is based on daily average flow limitations, it is being revised to cover the large facilities that now receive an annual average flow limit due to the permitting policy change. Under Section 26.042 of the Texas Water Code the commission has the ability to establish reasonable requirements for monitoring and reporting of disposal activities. The revisions to the 75/90 rule will more accurately reflect when large facilities have reached the 75 percent and 90 percent benchmarks because annual averages provide more data from which to determine capacity needs. Large facilities are subject to seasonal fluctuations or wastewater trends, and are therefore susceptible to triggering the 75 percent and 90 percent benchmarks for short-term anomalous flows. Under an annual average limitation, facilities will trigger the benchmarks more accurately because fluctuations will be averaged over a longer period of time. It will act as a better indicator, for both the permittee and the commission, for when large facilities will need to begin taking steps to expand or upgrade their treatment systems.

The rule revision will have a small positive effect on the economy because it will make it easier for facilities to comply with the requirements of the rule. The rule will not have an adverse effect on the environment or public health and safety because the quality of discharges from these larger facilities will continue to be regulated by the requirements of their wastewater discharge permits. The annual average flow average does not change how a facility's effluent loading is calculated. A facility that has received an annual average still reports the 30-day average flow which is used to calculate the loadings for a permittee's effluent limitations. This method is the same for all facilities.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rule is to change the rule so that it is consistent with administrative and policy changes adopted by the commission. The rulemaking will substantially advance this specific purpose by specifying the rule applies to facilities with either annual or daily average flow limitations, and that waiver requests will be signed by the enforcement division director of the commission. The current rule does not create a taking because it is intended to provide that a wastewater treatment facility make necessary assessments regarding population growth and the facility's capacity. It does not adversely affect the economy in a material way. Rather, the rule assists treatment facilities that are receiving an increased waste stream due to population growth or economic expansion, and is a tool for insuring that these facilities are able to adequately meet future needs. This rule is intended to aid the ability of facilities to stay compliant with regulatory and statutory requirements in addressing any future population needs by making assessments based on benchmarks which allow a facility to address their needs along manageable time lines. The inclusion of "annual average" will bring the rule in line with a policy change made in the water quality permitting program which utilizes the annual average, rather than the daily average referenced in the current rule, for facilities discharging over a million gallons a day. Promulgation and enforcement of this rule will not affect private real property that is the subject of this rule because facilities subject to annual average flow limitations will benefit under the 75/90 rule. Annual averages are based on a full year's worth of reporting, and will provide a better indication of actual expansion and planning needs for these facilities, further insuring that these facilities are not unnecessarily subject to the requirements of the rule. Therefore, there is no burden over and above that burden already present under the rule in effect currently.

COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that it is subject to the Coastal Management Program and must be consistent with all applicable goals and policies of the Coastal Management Program (CMP).

The commission has prepared a consistency determination for the rule pursuant to 31 TAC §505.22 and has found that the proposed rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to this rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the rule include the administrative policies and the policies for specific activities related to the discharge of municipal and industrial wastewater to coastal waters. Promulgation and enforcement of this rule is consistent with the applicable CMP goals and policies because the proposed rule amendments will not change the requirements for permittees to evaluate their treatment capacity needs. In addition, the rule does not violate any applicable provisions of the CMP's stated goals and policies.

HEARING AND COMMENTERS

The commission did not hold a public hearing on the proposed rule changes. The comment period for the proposed rules closed on July 20, 1998. Five commenters submitted written comments. The City of Dallas wrote in support of the rule. The law firm of Henry, Lowerre, Johnson, Hess & Frederick (Henry, Lowerre), the Lower Colorado River Authority (LCRA), the Texas Parks and Wildlife Department

(TPWD), and the Texas Center for Policy Studies (TCPS), on behalf of the center and the Wimberley Valley Watershed Association wrote in opposition to the rule.

ANALYSIS OF TESTIMONY

The City of Dallas commented that the proposed rule places the burden on permittees to meet treatment capacity needs and would give the city more flexibility in how it plans for future growth.

The commission agrees that the proposed rules were designed to give regulated entities more local control over treatment capacity decisions. However, the existing rules contain a provision designed to make the rules flexible for permittees by allowing requirements to be waived under certain circumstances. The commission has determined that further flexibility for permittees is not necessary, and the rule will not be revised.

TCPS commented that the proposed rule amendments would “eviscerate and render meaningless” the rule requirements to conduct advance planning regarding treatment capacity needs. The rule will no longer accomplish its original objective, which was to ensure treatment plants did not reach the stage of risking inadequate capacity. LCRA noted that the lower Colorado River suffered from discharges that resulted from municipal dischargers who did not build needed treatment capacity. The rule was intended to assist community leaders by requiring them to plan ahead for needed expansions and upgrades to their treatment plants, and these planning requirements, while perhaps unyielding, helped solve a real problem.

The commission agrees that the current rule has contributed to advance planning by wastewater treatment facilities, and will retain the rule as it currently exists.

TCPS, TPWD, and Henry, Lowerre commented that the existing rule already provides enough flexibility by allowing permittees to request a waiver from requirements to obtain authorization to commence construction of additional treatment and/or collective facilities. TCPS also stated that the current rule is a reasonable way to avoid over-capacity situations, and is not unduly burdensome to permittees.

The commission agrees that the waiver provision in the existing rule provides flexibility to permittees by allowing requirements to be waived under certain circumstances. The existing rule leaves the ultimate decision over when and how much to expand or upgrade a treatment facility to the permittee. The waiver provision will be retained in the rule.

Henry, Lowerre commented that the record for the rule should include historic documentation that shows a need for strong and enforceable requirements. The commission should take into consideration the historical problems that led to the promulgation of the rule in the 1980s. The TCPS, LCRA, and Henry, Lowerre also noted the state is currently experiencing rapid growth and development similar to the growth that occurred in the 1980s that led to the need for the rule in the first place. This current growth makes the rule important today, and is an inappropriate time for the rule to be scaled back.

The commission agrees that the rule was adopted in 1986 in response to concerns regarding adequate treatment time and capacity for domestic wastewater treatment plants across the state. The object

of the rule was to assist community leaders by requiring them to plan ahead for future expansion and/or upgrading of the treatment system, or construction of new wastewater treatment facilities. The commission agrees that current economic conditions in the state may make it a less than ideal time to reduce the reporting requirements of the 75/90 rule at this time, and the revisions will not be adopted.

TCPS commented that the revisions to the rule will threaten the environment and public health in Texas. TPWD expressed concern that the rule change may have adverse impacts on state fish and wildlife resources. Henry, Lowerre also noted that the rule revision will have negative impacts on the state's ability to ensure attainment of water quality standards, plan for future growth, and prevent significant degradation of the quality of state waters. This is particularly important since the commission is involved in efforts to perform and implement Total Daily Maximum Loads on polluted water bodies.

While the commission disagrees that the proposed rule amendments would have negative impacts on the environment, the commission agrees that the advance planning mechanism of the existing rule has been effective. As the reporting requirements are not being revised, these mechanisms will continue to be utilized.

Henry, Lowerre noted that the existing rule is valuable, particularly during periods of rapid development, when sewage treatment needs are often given low priority. The commenter further noted that the existing rule is clear and easily enforced, which helps the commission make use of its limited resources. TPWD noted that the enforcement of the existing rule has led to decreased incidents of overburdened treatment

facilities and infiltration by-passes. LCRA commented that history has demonstrated that unless discharges are required to plan for expansion in advance, some communities will not act. Instead of the rule amendments, the commission should require permittees to substantiate claims that expansion is not necessary, and “no action” strategies must be approved by the commission.

The commission agrees that the existing rule has been useful in promoting advance planning, particularly during periods of growth when such planning is especially important. This advance planning has helped keep facilities on track with capacity needs, and these provisions in the rule are being retained. The commission notes that under the waiver provisions of the existing rule, permittees must submit waiver requests to the executive director with an engineering report supporting the claim that the planned population to be served or the quantity of waste produced is not expected to exceed the design limitations of the treatment facility.

Henry, Lowerre commented that the proposed amendments are a major environmental regulation and therefore subject to §220.0225 of the Texas Government Code. The revisions will be a burden to the commission and have major negative impacts on the quality of Texas waters. The commenter further noted that the amendments would have fiscal impacts not noted by the commission, such as costs of negative impacts on water quality, and the cost of tracking and notification by commission staff. There will also be negative impacts on the commission’s efforts to assume the federal National Pollution Discharge Elimination System (NPDES) program, as the rule revisions would further burden commission staff and resources.

The commission believes proposed revisions in the 75/90 rule were not a major environmental rule and that the proposed changes would not have caused negative water quality impacts because the rule would have simply shifted the focus to requiring the permittee to advise the commission of its plans to ensure adequate treatment capacity. A facility would still have had to remain in compliance with all permit limitations. The TNRCC's strong enforcement philosophy has been, and will continue to be, a critical factor in ensuring permit compliance. In response to the comment regarding the negative impacts on the commission's ability to assume the federal NPDES program, this agency has received authorization and is currently administering that program. Because the reporting requirements of the rule are being retained, the concerns about negative fiscal impacts should no longer be an issue.

STATUTORY AUTHORITY

These amendments are adopted under the Texas Water Code §5.102, which provides the commission with general powers to carry out duties under the Texas Water Code, and §5.103 and §5.105 which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state and to establish and approve all general policies of the commission. Additionally, the amendments are adopted under Texas Water Code §26.042, which authorizes the commission to prescribe reasonable requirements for monitoring and reporting of waste collection, treatment and disposal activities.

SUBCHAPTER F : PERMIT CHARACTERISTICS AND CONDITIONS

§305.126

§305.126. Additional Standard Permit Conditions for Waste Discharge Permits.

(a) Whenever flow measurements for any sewage treatment plant facility in the state reaches 75 percent of the permitted average daily or annual average flow for three consecutive months, the permittee must initiate engineering and financial planning for expansion and/or upgrading of the wastewater treatment and/or collection facilities. Whenever the average daily or annual average flow reaches 90 percent of the permitted average daily flow for three consecutive months, the permittee shall obtain necessary authorization from the commission to commence construction of the necessary additional treatment and/or collection facilities. In the case of a wastewater treatment facility which reaches 75 percent of the permitted average flow for three consecutive months, and the planned population to be served or the quantity of waste produced is not expected to exceed the design limitations of the treatment facility, the permittee will submit an engineering report supporting this claim to the executive director. If in the judgment of the executive director the population to be served will not cause permit noncompliance, then the requirements of this section may be waived. To be effective, any waiver must be in writing and signed by the director of the enforcement division of the commission, and such waiver of these requirements will be reviewed upon expiration of the existing permit; however, any such waiver shall not be interpreted as condoning or excusing any violation of any permit parameter.

(b) The permittee shall give notice to the executive director as soon as possible of any planned physical alterations or additions to the permitted facility. In addition to the requirements of §305.125(7) of this title (relating to Standard Permit Conditions), notice shall also be required under this subsection when:

(1) the alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in §305.534 of this title (relating to New Sources and New Dischargers); or

(2) the alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under 40 Code of Federal Regulations (CFR) 122.42(a)(1) as adopted by §305.531 of this title (relating to Establishing and Calculating Additional Conditions and Limitations for TPDES Permits);

(3) the alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan.

(c) If the permittee is a new discharger, it must provide quantitative data described in 40 CFR §§122.21(h)(4)(I) and (ii) no later than two years after commencement of discharge; however, the permittee need not conduct tests which the permittee has already performed and reported under the discharge monitoring requirements of its TPDES permit.