

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts amendments to §§39.5, 39.15, 39.17, and 39.151, concerning public notice. Section 39.151 is adopted with changes to the proposed text as published in the April 9, 1999 issue of the *Texas Register* (24 TexReg 2841). The remaining sections are adopted without changes and will not be republished.

#### EXPLANATION OF ADOPTION

The primary purpose of these rules is to provide public notice for minor changes to Texas Pollutant Discharge Elimination System (TPDES) permits and for TPDES permits for which the discharge is already authorized by an existing state permit issued before September 14, 1998.

Previously, the commission's rules relating to minor amendments to TPDES permits were not entirely consistent with the federal major/minor modification scheme. To integrate the state and federal systems, the commission now adds a third class of permit changes. Before this amendment, 30 TAC §305.62(c)(2) defined as minor amendments those items classed as minor modifications under 40 Code of Federal Regulations (CFR) §122.63. Minor modifications are a subset of the universe of minor amendments under Texas Water Code, §26.028(b). To fully implement state law while also meeting the NPDES requirements, the commission has added to the traditional categories of amendments (major amendments and minor amendments) a third class, the minor modification, based on the federal system. With this amendment, the Chapter 39 notice requirements now conform to changes that have been made to Chapter 305 and are consistent with Texas Water Code, §26.028(b) and 40 CFR §124.10(c).

The commission is also implementing a transitional notice rule for applications for initial TPDES authorization for discharges already authorized by existing state permits issued before September 14, 1998. Under the Memorandum of Agreement between the United States Environmental Protection Agency (EPA) and the TNRCC, a facility that has a current state permit, but whose application for a National Pollutant Discharge Elimination System (NPDES) permit, amendment, or renewal was not processed by EPA before Texas' assumption of NPDES, may not continue to operate under its state permit only. There are approximately 1,800 facilities that must be issued an up-to-date TPDES permit. The purpose of this part of the rule is to assist the Water Quality Division in efficiently and quickly processing a large number of the permit applications that were not processed by EPA. Specifically, these rules will allow the TNRCC to efficiently issue TPDES permits to those facilities whose NPDES permits have expired or whose NPDES permit applications for new permits were left pending at EPA when delegation occurred. These TPDES permits, which will replace existing state permits with identical discharge limits and parameters, will be processed in a manner similar to renewals, providing all the required public notice and opportunity for public participation included in both federal and state law.

The commission has deleted the provision previously contained in §39.15(a)(3), which stated that public notice is not required for TPDES minor amendments to conform to Texas Water Code requirements.

The commission has added the words "or minor modification" to §39.17(b)(1) to conform to §39.151, relating to minor amendments and minor modifications.

Several changes were made to §39.151. First, as part of its effort to write its rules and guidance in plain English, the commission made the section easier to read and understand. Upon adoption, the commission has made a formatting correction in subsection (e)(4)(C) to conform to *Texas Register* requirements.

Second, §39.151(c) has been amended to describe the notice required for a proposed TPDES permit for a discharge that is currently authorized by an identical existing state permit issued before September 14, 1998. This will assist the commission in efficiently replacing a certain group of existing state permits with TPDES permits, while still assuring that all public participation opportunities required under both state and federal law are met. For this limited set of draft permits the chief clerk will mail notice to the applicant, the mayor and health authorities of the city or town in which the facility is located, the county judge and health authorities in the county in which the facility is located, the people and entities on the mailing list developed by the chief clerk, and those entities named in 40 CFR §124.10(c) (i.e., federal and state agencies). This notice will also be published in a newspaper regularly published and circulated within each county where the proposed facility or discharge is located. The notice will provide for a 30-day public comment period and for an opportunity to request a contested case hearing or public meeting and will contain all the information required for notice of all TPDES permits, including a general description of the location of the discharge point and the name of the receiving water. Some of this information is repetitive of notice previously given by the applicant when it received its state permit for the identical discharge parameters and requirements. Individual, mailed notice to downstream and adjacent landowners will not be repeated. The Texas Water Code, §26.028(a) requires “notice be given to the persons who in the judgment of the commission may be

affected by the application ....” Individuals who have already received individual mailed notice of an existing permit are not likely to be affected differently by a proposed TPDES permit for the identical discharge parameters authorized by the existing state permit. This has traditionally been the commission’s judgment with regard to renewals, which these particular TPDES permits closely resemble. If the TPDES application proposes any term or condition that would constitute a major amendment to the existing state permit under §305.62, mailed notice to adjacent and downstream landowners is required, just as it always is for a major amendment. This provision is automatically self-limiting; once this finite group of state permits is replaced by TPDES permits, it will no longer be effective.

This notice scheme applies to a unique set of applications and has been tailored to fit their particular circumstances. This provision of the rule provides the same type of notice that is required under federal law for new NPDES permits and the same type of notice required for permit renewals. TNRCC’s notice requirements for new state permits and major amendments are more extensive than that required by federal law, and will continue to be so for all new discharges and major permit amendments. These particular permits targeted by this rule are not new discharges, nor will they constitute major amendments to existing permit requirements.

Third, these rules amend the notice requirements for minor amendments and add notice requirements for minor modifications. To meet 40 CFR §124.10(c) and still have the flexibility afforded by Texas Water Code, §26.028, the commission substitutes three, for the previous two types of amendments to

TPDES permits - major amendments, minor amendments, and minor modifications. Each incorporates a different kind of notice.

Under §39.151(d)(1), for applications for minor amendments to permits other than TPDES permits and for applications for minor modifications to TPDES permits, notice that the executive director has prepared a draft permit will be mailed to the mayor and health authorities of the city or town and to the county judge and health authorities for the county in which the waste will be discharged. The notice will provide a ten-day comment period. This is the same notice required by Texas Water Code, §26.028(b) and by the previous rule for minor amendments and it is more than what is required under 40 CFR §122.63. Under §39.151(e)(3), for applications for minor amendments to TPDES permits, notice of the application and draft permit will be mailed as required by Texas Water Code, §26.028(b) and 40 CFR §124.10(c). For TPDES major facility permits, the notice will also be published in the *Texas Register*. The text of the notice will meet the requirements of §39.11 and §39.151(b)(4) and will provide for at least a 30-day public comment period. The executive director will prepare a response as required by §55.25(b) to all significant public comments timely received by the commission. This, too, is more notice than required by federal regulations for NPDES permits.

#### REGULATORY IMPACT EVALUATION

The commission has reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that it is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” in the Government Code. “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 does not meet the definition because the specific intent of the rulemaking is procedural in nature and because it outlines the notice required for TPDES permits for which the discharge is authorized by an existing state permit issued before September 14, 1998 and describes the notice required for TPDES minor amendments and TPDES minor modifications to permits. In addition, this rule is not a major environmental rule because it does not impose any additional notice requirements not already required by state or federal law and does not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement and, thus, neither a Draft Regulatory Impact Assessment (RIA) nor a Final RIA is required.

#### TAKINGS IMPACT EVALUATION

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. Promulgation and enforcement of these rules will not affect private real property because they prescribe documents to be submitted with certain TPDES permit applications; establish what TPDES permit changes qualify as major amendments, minor amendments, and minor modifications; and provide the commission the flexibility to issue a permit for less than two years. They do not substantively change the requirements that must be incorporated in permits nor restrict or limit an owner's right to property that would otherwise exist. No additional burdens are placed on private property by this rulemaking. Any effect on property rights would be a result of Texas Water Code, Chapter 26, which requires a wastewater

permit. Furthermore, the following exception to the application of Chapter 2007 of Texas Government Code applies to these rules because this action is reasonably taken to fulfill an obligation mandated by federal law (Texas Government Code, §2007.003(b)(4)). See 40 CFR §§123.25, 122.21, and 124.10 (requiring a state with a federally delegated NPDES program to incorporate specific notice provisions in that program).

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

Section 505.22 requires, upon adoption of the rule or rule amendment, that an agency affirm that it has taken into account the goals and policies of the Coastal Management Program (CMP) by issuing a reasoned determination that the rule or rule amendment is consistent with CMP goals and policies. The commission has re-reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and affirms that these rules are subject to the CMP and must be consistent with applicable CMP goals and policies. The commission also affirms that this rulemaking is consistent with each applicable CMP goal and policy found in 31 TAC §501.12 and §501.14. All of the goals in §501.12 are applicable. Generally, the CMP goals are aimed at protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resources (CNRAs).

Specific CMP policies applicable to this rulemaking are found in 31 TAC §505.14(f), Discharge of Municipal and Industrial Wastewater to Coastal Waters. The only policy applicable to this rulemaking under §505.14(f) is the requirement that it be consistent with Clean Water Act (CWA) and federal regulations. This rulemaking complies with the requirements of the CWA and with the federal

regulations implementing the CWA. The public notice requirements of this rule require the same notice as the CWA or more notice than what is required under the CWA; therefore, this rule is consistent with all applicable policies of the CMP. The TNRCC has satisfied the requirement of the CMP by demonstrating that this action does not conflict, and is therefore consistent, with applicable CMP policies.

#### PUBLIC HEARING AND COMMENTERS

The commission held a public hearing on this proposal on May 6, 1999, at 10:00 a.m. in Room 5108 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. No oral comments were received at the public hearing. Written comments were received from the following in opposition to the changes that were proposed to this rule: Clean Water Action, Coalition for Protection of Copano Bay, Lower Laguna Madre Foundation, Public Citizen, San Jacinto River Association, Save Our Springs, Sierra Club, Texas Center for Policy Studies, Texas Committee on Natural Resources, Texas Shrimp Association, and Blackburn & Carter, all as submitted through the law firm of Henry, Lowerre, Johnson & Frederick (collectively referred to herein as Henry, Lowerre), and the National Wildlife Federation (NWF).

#### ANALYSIS OF TESTIMONY

Henry, Lowerre and NWF commented that the proposed rules eliminate or limit important provisions for public notice and opportunities for public participation in many TNRCC wastewater discharge permit decisions by eliminating mailed notice to adjacent and downstream landowners. Henry, Lowerre also commented that the rules do not enhance public participation and that they are contrary to state

law. NWF commented that the commission is not justified in concluding that downstream and adjacent landowners do not have the potential to be affected by permit renewals or by issuance of TPDES permits.

**These rules are intended to assist the Water Quality Division in processing efficiently and quickly the large number of unprocessed NPDES permit applications transferred from EPA to the TNRCC and to provide CWA authorization to those facilities that did not previously have it. As originally contemplated in its NPDES assumption application, the TNRCC intended to process EPA's backlog over a three- to five-year period. However, after assumption, in light of the number of permittees without CWA authorization, the TNRCC decided the better policy would be to bring these facilities into the TPDES fold as quickly as possible.**

**The adopted rules do not eliminate or reduce public notice or public participation for TPDES permits issued to replace existing state permits, nor do they conflict with Texas law. Rather, they establish notice requirements for TPDES permits issued to replace state discharge permits that have already been through a full notice process, expand the notice requirements for minor amendments, and create a new category of amendment, the minor modification. The minor modification receives the same notice as the same change would have previously, as a minor amendment. The notice for each kind of change reflects the substance of the change in the permit and is designed to balance the need for public notice to facilitate public participation, the time and resource burdens on the commission and the regulated community, and the potential impacts of the three kinds of amendments.**

Texas Water Code, §26.028(a), requires that the commission provide notice to the persons who, in the judgment of the commission, may be affected by the permit. For renewals of state permits, the commission concluded that those individuals who were originally given individual mailed notice of the permit when first proposed are not likely to be differently affected by the renewal of the same permit on the same terms. 30 TAC §39.151(a), promulgated in the December 27, 1996 issue of the *Texas Register* (21 TexReg 12550), states that mailed notice to adjacent and downstream landowners is not required for applications that are submitted to renew a permit. Similarly, in the rule adopted today the commission finds that individuals who received mailed notice of the terms of the existing state permit are not likely to be affected differently by the identical TPDES permit that replaces it. Thus, new TPDES permits that replace existing, identical state permits are in essence renewals of the same discharge. Because the same discharge point and parameters are being authorized, a second notice to downstream or adjacent landowners is not required under Texas law.

This new rule also provides enhanced notice for amendments that will be processed as minor amendments. State statutes require only that the TNRCC mail notice to city and county judges and health officials, and provide a ten-day comment period for all minor amendments. Under the new rules, the notice and comment period for minor amendments is increased to 30 days. Mailed notice is also provided to persons and entities entitled to receive notice under 40 CFR §124.10, which includes people who have requested to be on the TNRCC mailing list for that permit. Also, for major facilities, notice will be published in the *Texas Register*.

**For minor modifications under the new rule, the TNRCC will provide ten days' notice to the city and to the county judges and health officials, as required by Texas Water Code, §26.028. Under 40 CFR §122.63, by contrast, no notice is required for minor modifications. Notice for a minor modification as adopted today is more extensive than what it was while NPDES was administered by EPA under federal rules, and equals what has been required under state law for minor amendments.**

Henry, Lowerre commented that the TNRCC should require the applicant to mail notice for applications submitted under this rule.

**Although requiring the applicant to mail notice might reduce the cost to the TNRCC, the commission is concerned that it could not be sufficiently assured that mailed notice was completed by the applicant. To adequately establish this, staff time would be required to track notice, which could be difficult. In addition, more applications would probably give rise to defective notice challenges, resulting in delay and in unproductive use of staff and commission time for investigation.**

Henry, Lowerre commented that, because TNRCC is eliminating mailed notice, the TNRCC's current newspaper notice requirements are inadequate in that they allow an obscure public notice in the back of the smallest weekly newspaper in the county. The commenter suggested that the TNRCC establish its standard newspaper notice as that provided in §39.5.

**The rule does not eliminate mailed notice; it only avoids mailing repeated notice to the same people of the same permit terms. The newspaper notice provisions in §39.151(b)(1) are not part of this rulemaking. The commenter apparently harbors some confusion regarding what constitutes appropriate newspaper notice under that section. It tracks the language of Texas Water Code, §26.028(d); the applicant shall publish notice 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 applicant must publish in a regularly circulated newspaper available throughout the county or within the area affected by the discharge, not simply any newspaper within the county. For example, under §39.5(g) an applicant must publish in a newspaper of general circulation in the county in which the facility is located. Although this section is not specifically cross-referenced in §39.151, it represents TNRCC policy applicable to all newspaper notice and is reflective of what constitutes adequate notice. However, the TNRCC will consider revising §39.151(b)(1) in the future to address the commenter's concerns.**

Henry, Lowerre also suggested that the commission limit the proposed transition rule to publicly-owned sewage treatment facilities that have only minor discharges and do not have significant compliance problems.

**In fact, this rule will primarily apply to municipal minors because they comprise the vast majority of EPA's backlog. Permit applications for new and major amendments in-house at the TNRCC as of September 14, 1998 will not be processed under these new rules. Texas assumed most existing NPDES permits from EPA; they became TPDES permits under 30 TAC §305.533, and**

**applications to amend or renew them will be processed as renewals or amendments under the commission's preexisting rules.**

Henry, Lowerre commented that eliminating the requirement to submit adjacent and downstream landowner lists and maps is ill-advised, because these documents provide TNRCC a source of information about who may need to be contacted if there is a problem at the facility.

**The rule does not eliminate any current notice requirement. Based on §39.151(a), the commission's practice has been to not require that applicants for permit renewals to submit adjacent or downstream landowner lists with their applications. The amendments in §281.5 and §305.48 adopted today merely reflect the commission's practice that these lists are not required.**

**The TNRCC uses the lists to provide notice to downstream and adjacent landowners for new and amendment applications. If a serious problem occurred at the facility, the TNRCC or other state and local agencies would use other available and more reliable methods of contacting those people, like broadcast media and door-to-door notification. Additionally, because those lists do not necessarily provide physical addresses or phone numbers, but rather, they provide mailing addresses, they are unlikely to be useful in contacting people in an emergency.**

Henry, Lowerre commented that the proposed rules create a new class of "minor amendments" but do not require any newspaper notice or any mailed notice, thereby creating a lack of notice.

**The commission disagrees. Texas Water Code, §26.028(b), requires notice of minor amendments to be mailed to the mayor, county judge, and city and county health officials. The notice provides a ten-day comment period, but does not require newspaper notice. The new rule for minor amendments will require mailed notice to the mayor, county judge, city and county health officials, and state and federal agencies specified in 40 CFR §124.10(c), persons on the mailing list maintained by the Chief Clerk's Office either as required by 30 TAC §39.7 or 40 CFR §124.10(c)(1)(ix), and the applicant. Additionally, it expands the comment period to 30 days.**

**In addition, under the rules, publication in the *Texas Register* is required for minor amendments to major facilities. EPA regulations require published notice for amendments to permits of NPDES major discharges. The rules adopted today require *Texas Register* notice for minor amendments for major facilities instead of newspaper notice because in practice many minor amendments are staff-initiated to address water quality concerns. For example, under TPDES the TNRCC will be incorporating whole effluent toxicity (WET) limits into permits, generally as staff-initiated minor amendments. Publishing in the *Texas Register* will be a less expensive alternative to commercial papers.**

Henry, Lowerre also suggested that the TNRCC extend the comment period for minor amendments from the proposed ten days to 30 days.

**Although state statute requires only ten days' notice of minor amendments, the rule extends the comment period for these amendments to 30 days to match federal regulations for NPDES permits. For minor modifications, however, there will be a ten-day comment period. Federal regulations do not require any notice of minor modifications; state law requires at least ten days.**

Henry, Lowerre also commented that the TNRCC is proposing to reduce public notice and, thus, public participation to save money due to inadequate funding of the NPDES program. NWF commented that the cost associated with compiling a landowner list is not substantial and that the potential savings are outweighed by the potential loss associated with making permitting decisions without obtaining all reasonably available information.

**These rules will assist the Water Quality Division in processing efficiently and quickly the large number of unprocessed permit applications transferred from EPA to the TNRCC. The focus is policy, not finances. As stated in the FISCAL NOTE of the proposed preamble, the TNRCC does not anticipate significant positive or negative financial implications from implementing this rule.**

Henry, Lowerre questioned the number of facilities that are part of the backlog of applications assumed by the TNRCC from EPA. The commenter also appeared to be concerned about which applications will be processed under these rules and about whether an appropriate review will be conducted.

**There are approximately 800 facilities with no CWA authorization. About 1,100 facilities have pending renewal NPDES applications. These are the 1,800, or so, unprocessed permit applications assumed from EPA.**

**The adopted rule is intended to assist the TNRCC in processing those permit applications received from EPA. This rule will not apply to renewals and major amendments for discharges having both NPDES and state-only permits. Applications for renewals of state-only permits and NPDES permits will be processed under preexisting renewal rules. The same public notice that is required under Texas law for renewals will be required for new TPDES permits for discharges currently authorized by existing state permits.**

**Some of the discharges with in-house state renewal applications also had pending permit applications at EPA. Although the TNRCC will be processing these as “new” TPDES permits, these applications are for identical discharges and discharge parameters already authorized in the corresponding existing state permits. The TNRCC will conduct the same review of these applications as that conducted for renewals. New information from the application or new knowledge obtained since the last permit was issued (e.g., change in water quality standards, receiving water, etc.) will be considered and may result in more stringent requirements being added to the TPDES permit. As warranted, new requirements for toxic pollutants and sludge management will be added.**

Henry, Lowerre commented that there is no clear division for what is a "major amendment" in the context of what the TNRCC is proposing. Specifically, the commenter is concerned that the TNRCC has processed some changes to permits as minor amendments that could be considered major amendments.

**This rule does not change what is considered a major amendment. When deciding what constitutes a major amendment, the TNRCC follows state law and §305.62(c) of its rules. All minor amendments are screened by the Executive Review Committee of the Water Quality and Environmental Law Divisions to ensure that the rules and law are consistently interpreted. Generally, the staff determines whether the proposed change would result in a material change in the pattern or place of the discharge; if so, it is a major amendment under TNRCC regulations and notice to downstream and adjacent landowners is required.**

Henry, Lowerre and NWF commented that when TNRCC considers amendments to, or renewal of, an existing permit, the public, particularly downstream and adjacent landowners, is in the best position to raise issues regarding compliance and water quality problems.

**There is notice and an opportunity to participate in the renewal and TPDES-issuance process. The executive director or the commission will address all comments received relating to these facilities.**

**Additionally, the opportunity to make the agency aware of a compliance problem is available at any time, not simply during a renewal or issuance of a permit. Documented problems at the facility are an important source of information during the permitting process. The executive director considers a facility's compliance history and relevant self-reported data when evaluating a renewal application. The TNRCC will also consider compliance history when processing TPDES permit applications replacing existing state permits. If a member of the public is concerned about a particular facility or has information regarding problems at a facility, that person should report it to the appropriate regional office so that the complaint can be handled properly.**

NWF also commented that TNRCC should not attempt to create a new category of permit action.

Section 26.028 of the Water Code establishes three categories: permit issuance, permit renewals, and permit amendments. The commenter is concerned that the term "minor modification" is not consistent with the statutory scheme of Chapter 26 of the Water Code and believed it creates unnecessary ambiguity.

**A new classification called "minor modifications" is nothing more than a subset of minor amendments as contemplated by Texas Water Code, §26.028(b). The category of minor modification will not create unnecessary ambiguity because it is limited to seven enumerated items.**

NWF commented that the public benefit analyses supporting the proposed reduction in public notice are without substance and the rule does not provide regulatory flexibility other than that gained by §305.71.

NWF also commented that there is no basis for the contention that the rule will result in an improved regulatory process.

**The public benefit gained by this rule is greater than that associated with the amendment of §305.71. Bringing CWA coverage to permittees who do not have it is of utmost importance to the public because positive elements of the CWA such as WET limits, anti-backsliding, and mandatory development of Pretreatment Programs, will be incorporated into TPDES permits. To that end, this rulemaking will assist the TNRCC in efficiently processing permit applications assumed from EPA.**

NWF also commented that the TNRCC should not adopt the proposed changes to §39.17 to the extent the changes reference minor modifications of wastewater permits or create exceptions to the landowner notice requirements and §§281.5, 305.48, or 305.62 to the extent the changes create a category of permit “modifications.”

**The commission disagrees. The minor modification category is currently part of federal rules and is adopted to be consistent with the NPDES program. Nonetheless, the TNRCC is providing notice for minor modifications where none is required by NPDES.**

Henry, Lowerre also commented that the rules will affect private real property and that a proper Takings Impact Evaluation should be prepared. The commenter believed that eliminating opportunities for a landowner to know of a change in a permit that affects his or her property does affect private real

property, and that TNRCC's proposed change in public notice requirements could result in a negative effect on property because the landowner has no notice of the opportunity to provide TNRCC with information needed by the agency to adequately protect the landowner's property. Also, the commenter stated that the "mandated by federal law" excuse is clearly an improper justification because reducing public notice is clearly not required by federal law.

**Chapter 2007 of the Government Code requires a state agency engaged in rulemaking to prepare a written takings impact assessment on any governmental action (e.g., rulemaking) that may result in a taking. A "taking" is defined in §2007.002(5)(b) as a governmental action that affects an owner's private real property that is the subject of the governmental action. These new rules apply to permits to discharge wastewater into or adjacent to waters in the state. Adjacent and downstream landowners' property is not the subject of this rulemaking. Therefore, this rule does not affect the private real property of adjacent and downstream landowners. Nor does it affect the property of the applicant in a manner that constitutes a taking, as explained in the proposal preamble. The statement in the proposal preamble that "any effect on property rights occasioned by these proposed changes would be a result of existing Texas Water Code, Chapter 26, which mandates the development of the wastewater permitting program," was aimed at property owned by permittees, which is the subject of this rulemaking.**

**The rule adopted today does not eliminate opportunities or reduce public notice to adjacent and downstream landowners. Any person may request to be put on the mailing list maintained by the**

**chief clerk for a particular facility. In this case, the affected person will receive notice of action taken with regard to the permit at that facility.**

**40 CFR §§123.25, 122.21, and 124.10 require a state with a federally delegated NPDES program to incorporate specific notice provisions. The TNRCC has done so. The commenter is correct that federal regulation does not require the TNRCC to reduce notice. In fact, with regard to minor modifications, federal regulation does not require the TNRCC to provide any notice. Nevertheless, this rule requires notice to city and county officials and a ten-day comment period. Contrary to the assertion, the rule does not reduce notice to any person entitled to receive notice under the previous rules.**

Henry, Lowerre also commented that the TNRCC's conclusion that the rule is not a major environmental rule because the specific intent is procedural and the changes will not impose additional notice requirements is incorrect and that a proper RIA should be prepared. The commenter asserted that procedural rules can be major environmental rules, and that additional burdens on nearby property can make a rule a major environmental rule.

**This is not a major environmental rule, by definition. Section 2001.0225(g)(3) defines major environmental rule as 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. That is not the intent of this rule.**

**The specific intent of this rule is to set out the notice and public participation requirements associated with certain wastewater discharge applications. If a rule does not meet the definition of a major environmental rule, the agency is not required to perform an RIA under §2001.0225. Even if this rule met the definition of a major environmental rule, a full RIA would not be required, because the statute exempts actions taken pursuant to a state or federal law and those that do not exceed standards set by the state or federal law which mandates the action. Section 2001.0225 provides exemptions from the requirement to perform a full RIA as long as the rule being enacted does not impose any requirements not already required by state or federal law, exceed a standard set by federal law or state law, or exceed a requirement of a delegation agreement. These rules are required by Texas Water Code, §26.028, and by 40 CFR §§123.25, 122.21, and 124.10. Although the minor modification portions of the rule exceeds federal notice requirements, the level of notice provided in the rule is specifically required by state law. Additionally, the minor amendment portion of the rule exceeds state notice requirements, but the level of notice is specifically required by federal law. No other portions of the rule exceed any standards articulated by the state or federal law, nor do they exceed any requirement of TNRCC's NPDES authorization agreement with EPA.**

NWF asserted that the discussion of CMP consistency is without basis and indicated that the process for permit issuance is irrelevant to CMP compliance and to the contents of permits. 31 TAC §501.12(9) provides that a goal of the CMP is to make coastal management processes visible, coherent, accessible, and accountable to the people of Texas by providing for public participation in the ongoing development and implementation of the Texas CMP. This statement recognizes that public participation

opportunities are an integral component of CMP implementation. According to the commenter, it appeared that TNRCC is moving away from the position that public participation is an important component of informed decision-making.

**The TNRCC disagrees. Under 31 TAC §501.10, TNRCC rulemaking actions must comply with the goals and policies of the CMP. The goals are set out in §501.12 and the policies in §§501.13, 501.14, and 501.15. Chapter 505 of Title 31 sets out the procedures for ensuring that state actions (which include rulemaking) are consistent with the CMP goals and policies.**

**Section 505.11(b)(4) states that any rule governing an individual action, such as a wastewater discharge permit, is subject to the CMP. Section 505.22 sets out the requirements in a rulemaking that must be met to establish that the rulemaking complies with the CMP. Specifically, §505.22(a) requires the agency to state in the preamble that the proposed rule or rule amendment is subject to the CMP and therefore, must be consistent with all applicable CMP policies; to state a reasoned justification explaining the basis upon which the agency concluded the proposed rule is consistent with each applicable CMP policy; and to request public comment on the consistency of the proposed rule or rule amendment. Section 505.22 requires, upon adoption of the rule or rule amendment, that an agency affirm that it has taken into account the goals and policies of the CMP by issuing a reasoned determination that the rule or rule amendment is consistent with CMP goals and policies.**

**The CMP goals are found in §501.12 of Title 31 and are too numerous to list in the preamble.**

**Generally the goals, among other things, are to protect preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs. The CMP policies are found in §§501.13, 501.14, and 501.15. Section 505.13, entitled Administrative Policies, does not apply to this rulemaking because the policies in §505.13 are aimed at individual actions identified in §505.11, such as individual permitting actions. Section 505.15, Policy for Major Actions, does not apply because a major action is described as an activity for which a federal environmental impact statement under the National Environmental Policy Act is required.**

**Conversely, §505.14, Policies for Specific Activities and Coastal Natural Resource Areas, does apply to this rulemaking. Specifically, §505.14(f), Discharge of Municipal and Industrial Wastewater to Coastal Waters, applies because this rulemaking must comply with the requirements of the CWA and EPA's regulations. Therefore, it must be consistent with the policies articulated in §505.14(f). The public notice requirements of this rule require the same notice as the CWA or more notice than what is required under the CWA; therefore, this rule is consistent with applicable policies of the CMP.**

**The commenter highlights the goal of making the coastal management processes visible, coherent, accessible, and accountable to the people of Texas by providing for public participation in the ongoing development and implementation of the Texas CMP and asserts that this rulemaking is inconsistent with this goal. The CMP rules are not clear on how public participation in the ongoing development and implementation of the Texas CMP is to be accomplished, but even if it**

**means that the public participation envisioned by the CMP rules must be the same as the public participation provided for by Chapter 26 of the Texas Water Code in permitting matters, the TNRCC believes this rulemaking satisfies this goal because this rule provides either the same or enhanced public notice and participation as that required by state and federal law.**

**TNRCC affirms that this rulemaking is consistent with the CMP goals and has satisfied the requirement of the CMP by demonstrating that this action does not conflict, and is therefore, consistent with applicable CMP policies.**

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103 and §5.105, which provide the commission the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state. The amendments are adopted under the specific authority of Texas Water Code, §26.011, which provides the commission the authority to promulgate rules and issue orders relating to waste discharges and impending waste discharges covered by Texas Water Code, Chapter 26; Texas Water Code, §26.027, which allows the commission to issue permits and amend permits for the discharge of waste or pollutants into water of the state; Texas Water Code, §26.028, which describes the notice required for wastewater applications; and Texas Water Code, §26.029, which describes the required conditions of permits.

**SUBCHAPTER A : APPLICABILITY AND GENERAL PROVISIONS**

**§§39.5, 39.15, 39.17**

**§39.5. General Provisions.**

(a) - (e) (No change.)

(f) When this chapter requires an applicant to publish notice, the applicant must file an affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file the affidavit is the day of the public meeting for notice of public meeting, two days before a public hearing for notice of a public hearing, and 30 days after the last publication for other published notices. For notice of a public meeting, the applicant must also submit the affidavit to the executive director no later than the day of the public meeting. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. This subsection does not apply to applications for radioactive material licenses under Chapter 336 of this title.

(g) - (h) (No change.)

**§39.15. Public Notice Not Required for Certain Types of Applications.**

(a) Public notice is not required for the following:

(1) - (2) (No change.)

(3) applications for transportation route special permits under §330.32 of this title (relating to Collection and Transportation Requirements).

(b) (No change.)

**§39.17. Notice of Minor Amendment.**

(a) (No change.)

(b) Subsection (a) of this section does not apply to:

(1) applications seeking a minor amendment or minor modification of a wastewater discharge permit. For such applications, the notice requirements are in §39.151(c) of this title (relating to Application for Wastewater Discharge Permit, including Application for the Disposal of Sewage Sludge or Water Treatment Sludge).

(2) (No change.)

**SUBCHAPTER C : PUBLIC NOTICE OF WATER QUALITY APPLICATIONS**

**§39.151**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state. The amendment is also adopted under the specific authority of Texas Water Code, §26.011, which provides the commission the authority to promulgate rules and issue orders relating to waste discharges and impending waste discharges covered by Texas Water Code, Chapter 26; Texas Water Code, §26.027, which allows the commission to issue permits and amend permits for the discharge of waste or pollutants into water of the state; Texas Water Code, §26.028, which describes what notice is required for wastewater applications; and Texas Water Code, §26.029, which describes the required conditions of permits.

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

(a) Notice of receipt of application and administrative completeness. The chief clerk shall mail notice to the School Land Board if the requirements of Texas Water Code, §5.115(c) apply to an application that will affect lands dedicated to the permanent school fund. The notice shall be in the form required by that section. The chief clerk shall also mail notice to the persons listed in §39.13 of

this title (relating to Mailed Notice), except that mailed notice to adjacent or downstream landowners is not required for:

(1) an application to renew a permit; or

(2) 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).

(b) Notice of draft permit. For all draft permits except those in subsection (c) of this section, the following provisions apply.

(1) - (3) (No change.)

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

(A) everything that is required by §39.11 of this title (relating to Text of Public Notice); and

(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.

(c) Notice of certain draft 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, the following mailed and published notice is required.

(A) The applicant shall publish notice that the executive director has prepared a draft permit 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 draft permit, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing 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 pollutant 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 §39.7 of this title (relating to Mailing Lists);

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

(viii) if applicable, the secretary of the Coastal Coordination Council.

(C) The notice must set a deadline to file public comment, to request a public meeting, or to request a public hearing 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 §39.11 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.

(d) 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 (relating to Amendment, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the following requirements apply.

(A) The chief clerk shall mail notice of the application and draft permit, 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 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 §39.7 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, notice shall be published in the *Texas  
Register*.

(C) The text shall meet the requirements in §39.11 of this title and subsection  
(b)(4) of this section.

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

(E) The executive director shall prepare a response to all significant public  
comments received by the commission under §55.25 of this title (relating to Public Comment  
Processing).

(e) Notice of 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 §39.13 of this title, 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 §39.11 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.

(f) 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, Subpart 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.