

The Texas Natural Resource Conservation Commission (commission or TNRCC) proposes amendments to §§39.5, 39.15, 39.17, and 39.151, concerning public notice.

EXPLANATION OF PROPOSED RULES

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

Currently, the commission's rules relating to minor amendments to TPDES permits are not entirely harmonious with the federal major/minor modification scheme. To integrate the state and federal systems, the commission proposes rule amendments to add a third class of permit changes. The current 30 TAC §305.62(c)(2)(C) defines as minor amendments those items the United States Environmental Protection Agency (EPA) processes as minor modifications under 40 Code of Federal Regulations (CFR) §122.63. This is a smaller universe than what is considered a minor amendment under state law (Texas Water Code, §26.028(b) (Vernon 1988)). To fully implement state law while also meeting the EPA requirements, the proposed rule would add to the traditional category of amendments (major amendments and minor amendments) a third class based on the federal system, the minor modification. The changes to Chapter 39 would conform notice requirements to applicable changes that are concurrently being proposed to Chapter 305 and make the rules consistent with the Texas Water Code, §26.028(b) and 40 CFR §124.10(c).

The commission is also proposing a transitional notice rule for new applications for initial TPDES authorization for discharges already authorized by existing state permits issued before September 14, 1998. Under the Memorandum of Agreement between EPA and the TNRCC, a facility that has a current state permit, but whose application for an National Pollutant Discharge Elimination System (NPDES) permit, amendment, or renewal was not processed by EPA prior to Texas' assumption of NPDES, may not simply continue to operate under its state permit. There are approximately 1,800 facilities that must be issued a TPDES permit. These amendments are intended to assist the TNRCC in efficiently replacing those permits with TPDES permits while providing all the required federal and state public notice.

Currently, §39.5(f) misspells the word "affidavit." Proposed §39.5(f) corrects this typographical error.

The commission is proposing to delete §39.15(a)(3), which states that public notice is not required for TPDES minor amendments, because the Texas Water Code requires public notice for all minor amendments.

Proposed §39.17(b)(1) adds the words "or minor modification" to conform to the changes the commission is proposing for §39.151, relating to minor amendments and minor modifications.

The commission is also proposing to make several changes to §39.151. First, as part of its effort to write its rules and guidance in plain English, the commission is proposing to make changes that will make the section easier to read and understand.

Second, the commission is proposing to amend §39.151(c), to describe the notice required for a new TPDES permit for which the discharge is currently authorized by an existing state permit issued before September 14, 1998. This will assist the commission in efficiently replacing the existing state permits with TPDES permits, while providing all public participation opportunities required under both state and federal law. The proposed rule will require the chief clerk to 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). The 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 TPDES permits, including a general description of the location of the discharge point and the name of the receiving water. While some of this notice will be repetitive of notice already given by the applicant for the identical discharge parameters and requirements, 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” In this proposed rule, individuals who have already been given individual mailed notice of an existing permit are not likely to be any differently affected by a proposed TPDES permit for the identical discharge parameters authorized by the existing state permit. 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 will be

required. This provision would be automatically self-limiting; once this finite group of state permits is replaced by TPDES permits, it would no longer be effective.

Third, the proposed rule will amend the notice requirements for minor amendments and will add notice requirements for minor modifications. To meet the requirements of 40 CFR §124.10(c) and still have the flexibility afforded by Texas Water Code, §26.028, the commission is proposing that there be three, rather than the current two, types of amendments to TPDES permits - major amendments, minor amendments, and minor modifications. Each would require a different kind of notice.

Under proposed §39.151(c)(1), for applications for minor amendments to permits other than TPDES permits or for applications for minor modifications to TPDES permits, mailed notice that the executive director has prepared a draft permit will be sent 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. Under proposed §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 to all significant public comments received by the commission under §55.25(b).

FISCAL NOTE

Bob Orozco, Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments to Chapter 39 are in effect, there will be no significant fiscal implications for state government or units of local government as a result of administration or enforcement of the proposed amendments. The proposed amendments to Chapter 39 amend public notice rules with regard to the new TPDES permits where the discharge is authorized by an existing state permit issued before September 14, 1998. The proposed amendments also amend the notice requirements for minor changes to TPDES permits.

In the proposed amendments to the rules, notice of new TPDES permits, where the discharge is authorized by an existing state permit issued before September 14, 1998, will be same for other new TPDES permits, except mailed notice will not be required for adjacent and downstream landowners. The proposed amendment will also add another class of notice to accompany minor changes to TPDES permits. Each type of TPDES permit amendment requires a different type of public notice. Notice for major amendments would remain unchanged. For minor amendments to TPDES permits, the chief clerk would provide notice as specified in the Texas Water Code Chapter 26 and federal environmental protection regulations. Minor modifications to TPDES permits will include notice as required by Texas Water Code Chapter 26.

Fiscal implications are not anticipated to be significant as the proposed amendments only outline and clarify the required notice for processing certain TPDES permit applications and do not create any new notice requirements not currently required by state or federal law.

PUBLIC BENEFIT

Mr. Orozco has also determined that for each year of the first five years the proposed amendments to Chapter 39 are in effect, the public benefit anticipated from enforcement of and compliance with these rules will be greater regulatory flexibility while maintaining all required federal and state public notice requirements. Minor amendment requirements will provide enhanced public notice and public participation to harmonize state and federal law. The fiscal implications to small business are in the Small Business Analysis Section of this fiscal note.

SMALL BUSINESS ANALYSIS

The proposed changes to Chapter 39 will amend the public notice rules with regard to minor changes to TPDES permits and with regard to new TPDES permits where the discharge is authorized by an existing state permit issued before September 14, 1998.

No significant additional costs are anticipated to any person or small business associated with the proposed amendments because the amendments do not create any new notice requirements above what is already required by Chapter 26 of the Texas Water Code or federal environmental protection regulations. The proposed amendments also clarify what notice is required for certain new TPDES permits. Therefore, no adverse economic effects are anticipated to any person or small business as a result of implementing the provisions of the proposed amendments to the rules. In addition, although no adverse economic effects are anticipated, state and federal law do not allow small businesses to be treated differently than large businesses with respect to what is required in an application or what subsequent public notice is required.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to 2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the 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. Because the specific intent of the proposed rulemaking is procedural in nature and outlines the notice required for new 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, the rulemaking does not meet the definition of a “major environmental rule.” In addition, the proposed amendment is not a major environmental rule because the proposed changes will not impose any additional notice requirements not already required by state or federal law and the proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant to the Code, §2007.043. The following is a summary of that assessment. Promulgation and enforcement of these rules will not affect private real property because the proposed rulemaking consists of public notice requirements for implementation of the TPDES permitting program recently delegated to the TNRCC

by the federal EPA and certain additional, ancillary technical corrections. In addition, this rulemaking does not restrict or limit an owner's right to property that would otherwise exist in the absence of the proposed changes. 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. Furthermore, the following exception to the application of Chapter 2007 of the Code applies to the majority of the proposed rulemaking: "[this] action . . . is reasonably taken to fulfill an obligation mandated by federal law." (the 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

The commission has reviewed the proposed rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the proposed rules are subject to the CMP and must be consistent with applicable CMP goals and policies. The commission has determined that the proposed rulemaking is consistent with each applicable CMP goal and policy, which are found in 31 TAC §501.12 and §501.14. The rulemaking outlines and clarifies the commission's rules concerning public participation in the area of new, amended, and renewal TPDES permits. Specifically, the proposed rules clarify which documents must be submitted with certain TPDES applications; what TPDES permit changes qualify as major amendments, minor amendments, and minor modifications; and allow the commission the flexibility to issue a permit for less than two years. The proposed rules harmonize the notice requirements of the federal Clean Water Act (CWA), the Code of Federal Regulations that implements

the CWA, and the Texas Water Code with regard to minor TPDES permit changes. The rulemaking will also clarify notice procedures for certain new TPDES permits consistent with the same state and federal rules and regulations.

The commission has also determined that the proposed rule will not have a direct and significant adverse effect on Coastal Natural Resource Areas identified in the applicable CMP policies. The proposed rules are procedural and will not have a direct and significant impact that is causally linked to the activity authorized by the permit. Notice requirements applicable to wastewater discharge matters are preliminary to receiving a wastewater discharge permit. The notice is not the causal link to the discharge activity; it is an initial step that must be taken to obtain a permit. The permit authorizing the discharge is the direct link to the activity.

The commission invites public comment on the applicability of the CMP and on the consistency determination of the proposed rule.

PUBLIC HEARING

A public hearing on this proposal will be held May 6, 1999, at 10:00 a.m. in Room 5108 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by May 10, 1999, and should reference Rule Log Number 99003-039-WT. Comments received by 5:00 p.m. on that date will be considered by the commission before any final action on the proposal. For further information, please contact Emily W. Rogers at (512) 239-0649.

STATUTORY AUTHORITY

The amendments are proposed 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 amendments are also proposed 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.

No other codes, statutes, or rules will be affected by this proposal.

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 [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) Texas pollutant discharge elimination system minor amendments under Texas
Water Code, Chapter 26;]

(3) [(4)] 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 amendments are proposed 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 amendments are also proposed 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.

No other codes, statutes, or rules will be affected by this proposal.

§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 [administratively complete application]. The chief clerk shall mail notice to the School Land Board if the requirements of Texas Water Code, §5.115(c) apply to [concerning] 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: [an application to renew a permit.]

(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 [application and] 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 [Texas pollutant discharge elimination system (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) in addition to the requirements in §39.11 of this title (relating to Text of Public Notice),] a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) [(B)] for applications concerning the disposal of sludge; [, use and disposal practice(s) and the location of the sludge treatment works treating domestic sewage and use or disposal sites known at the time of permit application.]

(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) [(c)] Notice for other types of applications [Limited notice for certain applications]. Except
as required by subsections (a), (b), and (c) of this section, the following notice is required for certain
applications. [Subsections (a) and (b) of this section do not apply if an application is described in one
of the following paragraphs and the described notice requirements, if any, are completed:]

(1) For an [the] application for [is] 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)[. In such instances], 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 [end] no earlier than ten days after mailing notice.

(2) For an [the] application for a [proposes the] renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which [and] 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) [(d)] 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)] [in addition to the requirements in §39.11 of this title,] a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) [(B) for applications concerning the disposal of sludge;], the sludge use and disposal practice(s) and the location of the sludge treatment works treating domestic sewage and use or disposal sites known at the time of permit application.]

(1) the use and disposal practices;

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

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

(f) [(e)] Notice for [concerning] discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR [Code of Federal Regulations (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.