

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** September 24, 2010

Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: John Sadlier, Deputy Director
Office of Compliance and Enforcement

Docket No.: 2009-1574-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 321, Control of Certain Activities by Rule
SB 2445: Boat Sewage Disposal

Background and reason(s) for the rulemaking:

Senate Bill (SB) 2445, authored by Senator Carlos Uresti and sponsored by Representative Tracy King, 81st Legislature, 2009, Regular Session, amended Texas Water Code, §26.044 and §26.045, relating to the disposal of sewage by certain boats. Rulemaking is necessary to implement these changes. This rulemaking is also necessary to ensure consistency with federal regulations.

Scope of the rulemaking:

A) Summary of what the rulemaking will do:

The rulemaking repeals existing 30 Texas Administrative Code Chapter 321, Subchapter A and adopts new Chapter 321, Subchapter A to: implement the provisions required by SB 2445; ensure consistency with the Clean Water Act, §312 and 40 Code of Federal Regulations (CFR) Part 140; and ensure consistency with United States (U.S.) Coast Guard regulations regarding the design, installation, and operation of marine sanitation devices (MSDs).

B) Scope required by federal regulations or state statutes:

Changes required by SB 2445 include redefining the term "boat;" adding definitions for "boat pump-out station," "shoreside, mobile, or floating installation," and "surface water in the state;" and changing the frequency for renewal of certifications for pump-out stations from annual to biennial.

To ensure consistency with the Clean Water Act, §312 and 40 CFR Part 140, the new rules prohibit the discharge of treated and untreated boat sewage into all inland fresh waterbodies in the state, rivers that do not support interstate vessel traffic, and other waterbodies such as coastal waters and estuaries that are recognized as no discharge zones (NDZs). An NDZ is an area of a waterbody or an entire waterbody into which the discharge of treated and untreated sewage from all boats is completely prohibited. Currently the rules designate 24 freshwater lakes and one tidally-influenced lake as NDZs. The new rules would expand the regulated community by requiring boat owners that operate their boats on waterbodies not currently listed in the existing rules to comply with the NDZ requirements. As a result, the universe of regulated boat owners is expected to increase by approximately 30,000.

To ensure consistency with U.S. Coast Guard regulations, the new rules incorporate by reference regulations pertaining to the design, installation, and operation of MSDs. Boats regulated under the current rules are

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required to install a Type III MSD, which is a holding tank designed to prevent overboard discharge of treated or untreated sewage. The new rules would allow for the use of Type I, Type II, or Type III MSDs on boats, in accordance with U.S. Coast Guard regulations. Type I and II MSDs (those MSDs that are flow-through devices providing for maceration and disinfection of sewage) will be required to install a padlock or wire-tie to prevent automatic discharge of treated sewage while operating in NDZs.

C) Additional staff recommendations that are not required by federal rule or state statute:

- Applying the MSD certification requirement to boats located on all surface water in the state. The existing rules restrict the MSD certification requirement to only the 24 inland freshwater lakes designated as NDZs. Because the NDZ requirements need to be changed for consistency with federal regulations, it is reasonable to expand the MSD certification requirement in conjunction with the NDZ requirement. In addition, it is also reasonable to include other waterbodies, such as coastal waters and estuaries, as defined by "surface water in the state," in order to promote state-wide consistency and better education of the rule requirements to improve water quality.
- Adding or updating definitions of "houseboat," "marine sanitation device," "sewage," and "toilet" to enhance clarity and understanding of the rule language.
- Adding clarity to the process by which local governmental entities can request and obtain delegation of the certification program.
- Requiring the use of an electronic system (when it becomes available) to apply for and purchase the certifications unless the use of an electronic system creates a hardship.
- Requiring the use of the TCEQ's on-line ePay system to purchase certifications until the electronic system becomes available unless the use of the ePay system creates a hardship.
- Reorganizing the rule to improve the organizational flow of the requirements.
- Other non-substantive changes to improve clarity and to update references for statutes.

Statutory authority:

Texas Water Code, §5.013, General Jurisdiction of the Commission; §5.102, General Powers; §5.1035, Rules Regarding Drinking Water Standards; §5.701, Fees; §5.704, Notice of Change in Payment Procedures; §26.044, Disposal of Boat Sewage; and §26.045, Pump-Out Facilities for Boat Sewage.

Effect on the:

A) Regulated community:

- Owners of boat pump-out stations:
 - Will be issued certification biennially rather than annually.
 - May experience a slight increase in revenue due to increased usage of pump-out stations by boat owners as a result of the NDZ requirements; however, this increase may be offset due to an increased cost associated with emptying the pump-out stations more frequently.
- Owners of boats:
 - Boat owners that operate or are located on inland waters that are not currently listed in §321.2 will be impacted by being required to pay for service to have the contents of their Type III MSDs pumped at a boat pump-out station.

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- Boat owners that currently operate a Type I or Type II MSD will have a one-time cost impact to ensure the MSD is not discharging while operating on an NDZ. This cost includes the purchase of a wire-tie or padlock to lock the main valve or boat facilities.
 - Approximately 30,000 boat owners that operate or are located on any surface water in the state not currently listed in §321.2 will be impacted by being required to pay the certification fee for their MSD.
 - Boat owners with houseboats located on waters not currently listed in §321.2 may be impacted by being required to install a Type III MSD on their houseboat.
- Some private operations, such as marine plumbing specialists, may experience a slight increase in revenue due to the requirement for houseboats to have a Type III MSD installed.
 - Certain boat owners will be excluded from the certification requirements and are not expected to be impacted by having to pay the certification fees:
 - Owners of boats that meet the definition of a vessel subject to inspection under 46 USC §3301;
 - Boats that are registered in another state or country and will remain on surface water in the state for less than 30 consecutive days in a 12-month period; and
 - Boats that are owned by a federal, state, or local governmental agency.

B) Public: The public will benefit from improvements in the management of the discharge of human wastes as well as the chemicals used to treat the waste prior to discharge. Increased protection of water quality is anticipated to benefit aquatic and wildlife resources of the state and protect public health and safety.

C) Agency programs:

- Field Operations Support Division (FOSD) changed the frequency for issuance of boat pump-out station renewal certifications from annual to biennial during December 2009.
- FOSD will have to modify procedures and applications related to the certification program.
- Currently, FOSD uses a manual system to process certification applications. In addition, the Financial Administration Division could potentially be required to manually process an additional 30,000 payments for the estimated increase in regulated boat owners. As a result, the agency is developing an electronic system to automate certification.
- FOSD is working in cooperation with other governmental entities, such as state agencies, river authorities, or counties to implement programs to educate the public, which would help enforce the rule requirements.

Stakeholder meetings: A stakeholder meeting was held in Austin on November 16, 2009. The meeting was open to the public and approximately ten people representing marina associations, marine plumbing businesses, educational and outreach organizations, and state agencies attended. The stakeholders generally supported the changes to the rules and discussed options for additional enforcement of the rules.

Public comment:

The commission held a public hearing in Austin on June 8, 2010. The commission received comments from Galveston Bay Foundation (GBF), Saltmasters Texas LLC (Saltmasters), and Texas A&M University - Texas Sea Grant College Program (TSG). The comments were generally supportive of the rules.

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GBF supports the current proposal for extended coverage beyond current regulation and improved consistency with U.S. Coast Guard MSD policies and views the proposed rules as a positive step towards the protection of the state waterways and Galveston Bay. GBF and TSG commented that education and more active enforcement is a key to the success of the new rules. Saltmasters requested that commercial boats be required to have a certification sticker, so as to allow a marine safety enforcement officer reasonable cause to board the boat for inspection; suggested that SB 2445 be amended to require any dock that accommodates boats over 26 feet and that sells fuel to be required to have either a pump-out facility and/or a sewage receiving facility for commercial boats with pumping systems already on board; and to require county, city, and navigation districts to have rules or ordinances to reflect the suggested changes for dock requirements.

Significant changes from proposal:

No changes were made to the proposed rules in response to the comments.

Potential controversial concerns and legislative interest remaining after proposal and public comment:

During proposal of the rules, the following items were considered to be potential controversial concerns:

- Some boat owners may not be in favor of expanding the certification program and NDZ requirement, since it would require additional fees.
- Some groups may want to include all coastal waterbodies in the state as NDZs. Currently, Clear Lake is the only coastal waterbody that is designated as a NDZ.

There were no comments received regarding either of these issues during the comment period.

Does this rulemaking affect any current policies or require development of new policies? No new policies are anticipated.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking? The Agency could choose to not update the rules. However, there is a legislative mandate to address key definitions and the frequency of certification renewals. In addition, TCEQ's current rules are in conflict with federal regulations prohibiting the discharge of treated sewage from a boat into all inland fresh waterbodies in the state and with the design and installation requirements for MSDs.

Key points in adoption rulemaking schedule:

***Texas Register* proposal publication date:** May 14, 2010

***Anticipated Texas Register* publication date:** November 5, 2010

Anticipated effective date: November 11, 2010

***Six-month Texas Register* filing deadline:** November 14, 2010

Agency contacts:

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Michael Parr, Staff Attorney, 239-0611, Environmental Law Division

Devon Ryan, Texas Register Coordinator, 239-6090, General Law Division

Attachments

35 TexReg 3786

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33 USC §1322(f) - *Marine Sanitation Devices*

46 USC §2101 - *General Definitions*

46 USC §3301 - *Vessels Subject to Inspection*

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33 CFR §159.3 - *Definitions*
33 CFR §159.7 - *Requirements for Vessel Operators*
40 CFR §140.3 - *Standard*
40 CFR §140.4 - *Complete Prohibition*

cc: Chief Clerk, 2 copies
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