

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§39.901 - 39.903.

Section 39.902 and §39.903 are adopted *with changes* to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3839). Section 39.901 is adopted *without change* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509, Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks and Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater. The commission must adopt rules designating diversion and discharge zones by September 1, 2020. Under

TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater or discharge waste resulting from the desalination process must consult with the TPWD and the GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC

Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In addition, TWC, §26.0272(b), indicates that TCEQ may issue a permit for the discharge of water treatment residuals from the desalination of seawater into the portion of the Gulf of Mexico inside the territorial limits of the state. TWC, §26.0272(c), specifies that prior to issuing a permit, TCEQ must evaluate the discharge of water treatment residuals from the desalination of seawater into the Gulf of Mexico for compliance with the state water quality standards, requirements of the Texas Pollutant Discharge Elimination System program, and applicable federal law. TWC, §26.0272(d), indicates that permits may be individual or general. TWC, §26.0272(d), also specifies that for individual permits, an application review procedure, at a minimum, must comply with the requirements of TWC, Chapter 5, Subchapter M; and the commission must comply with the requirements of TWC, §26.040, for a general permit.

TWC, §27.021, allows TCEQ to issue an individual Class I injection well permit authorizing the disposal of water treatment residuals produced by the desalination of seawater. TWC, §27.025, allows TCEQ to authorize a Class I injection well under a general permit for the disposal of concentrate produced by the desalination of seawater. TWC, §27.025, specifies that the general permit must include any requirements necessary to maintain delegation of the federal underground injection control program administered by TCEQ.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these adopted rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also adopts new sections in 30 TAC Chapter 295, Water Rights, Procedural; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

Section by Section Discussion

Subchapter O: Public Notice for Marine Seawater Desalination Projects

§39.901, Applicability

Adopted new §39.901, identifies the types of applications subject to Chapter 39, Subchapter O, which establishes the public notice process for treated marine seawater and off-shore discharge permits from marine seawater desalination projects under TWC, Chapter 18. This section clarifies that the terms "Treated marine seawater," "Off-shore discharges," and "Marine seawater desalination project" have the same meanings as the terms are defined in 30 TAC §318.2.

§39.902, Public Notice and Comment for Treated Marine Seawater Discharges

Adopted new §39.902, identifies the public notice and comment process. Adopted

§39.902(a) specifies that the executive director will file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk. Adopted §39.902(b) describes the contents of the notice. Adopted §39.902(c) specifies that the notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the technical summary will be posted on the TCEQ website for public review and comment. Concurrently with posting on the website, the notice of application and preliminary decision will be emailed to the state senator, state representative, and county judge who represent the area where the facility is or will be located. Adopted §39.902(c) also specifies that the notice of application and preliminary decision will also be emailed to the TPWD, the GLO, and persons on the mailing lists required by §39.407 that have provided a valid email address. Lastly, adopted §39.902(c) specifies that the emails will be sent to the email address on file with the Office of the Chief Clerk. Adopted §39.902(d) requires a new notice if major amendments or transfers are made after notice is posted on the TCEQ website. Adopted §39.902(e) specifies that the public comment period ends 15 calendar days after notice is posted on the TCEQ website unless the comment period is extended by the executive director for good cause. This section also specifies that the comment period is extended to the close of any public meeting. Adopted §39.902(f) describes the public meeting notice content. Adopted §39.902(g) specifies that, at least 14 calendar days prior to the public meeting, notice of a public meeting will be mailed or emailed to any person who submitted comments or requested a public meeting; emailed to the state senator, state representative, and county judge who represent the area where the facility is or will be located, emailed to

the TPWD and the GLO; and posted on the TCEQ website.

§39.903, Public Notice and Comment for Off-Shore Discharges

Adopted new §39.903, identifies the public notice and comment process for off-shore discharges. Adopted §39.903(a) specifies that the executive director will file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk. Adopted §39.903(b) describes the contents of the notice. Adopted §39.903(c) specifies that the notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and technical summary will be posted on the TCEQ website for public review and comment. Concurrently with posting on the website, the notice of application and preliminary decision will be emailed to the state senator, state representative, and county judge who represent the area where the facility is or will be located. Adopted §39.903(c) also specifies that the notice of application and preliminary decision will also be emailed to the TPWD, the GLO, and persons on the mailing lists required by §39.407 that have provided a valid email address. Lastly, adopted §39.903(c) specifies that the emails will be sent to the email address on file with the Office of the Chief Clerk. Adopted §39.903(d) requires new notice if major amendments or transfers are made after notice is posted on the TCEQ website. Adopted §39.903(e) specifies that the public comment period ends 15 calendar days after the notice is posted on the TCEQ website unless the comment period is extended by the executive director for good cause. Late comments will be added to the application file but will not be processed. Adopted §39.903(f) specifies that after the close of the comment period, the executive

director will evaluate timely and relevant public comments and develop a final technical summary. The final technical summary will include a summary of all timely and relevant public comments, a response to the issues raised in public comments, and the executive director's final decision on the application. This response to issues raised is not intended to be a detailed discussion and response to each comment, but rather a high level discussion and response to the issues raised in public comment. This high level discussion is to demonstrate that the executive director reviewed and considered the issues raised in public comment.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "major environmental rule" is 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 or the state.

The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. More specifically, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

Therefore, the specific intent of the adopted rulemaking is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The adopted rules in Chapter 39 are for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the processes for obtaining a permit to discharge treated marine seawater and waste resulting from the desalination of marine seawater under TWC, Chapter 18. The adopted new rules will protect the health and safety of aquatic and wildlife resources, as well as water quality, however, the adopted rules will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. Accordingly, the commission concludes that the adopted rulemaking does not meet the definition of a "major environmental rule."

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather creates an expedited process under state law to ensure efficient regulatory oversight, while comprehensively protecting the state's natural resources. Third, the adopted rulemaking does not come under a delegation agreement or contract with a federal program, and finally, it is not being adopted under the TCEQ's general rulemaking authority. This rulemaking is being adopted under specific state statutes enacted in HB 2031. Therefore, the commission does not adopt the rules solely under the commission's general powers.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific purpose of the adopted rulemaking is to modify the TAC to implement the changes to the TWC, from HB 2031, which creates procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process

for these permits. The adopted rulemaking will substantially advance this stated purpose by adopting rules in Chapter 39, that are intended to articulate and expedite the permitting process for marine seawater desalination discharges in accordance with HB 2031 and TWC, Chapter 18.

Promulgation and enforcement of the adopted rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these adopted rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." Specifically, the adopted rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. For marine seawater, there are no real property rights that have been granted for use of the water in the Gulf of Mexico. These actions will not affect or burden private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the

Coastal Coordination Act, Texas Natural Resources Code, §§33.201, *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the adopted rules include: discharges must comply with water quality-based effluent limits; discharges that increase pollutant loadings to coastal waters must not impair designated uses of coastal waters and must not significantly degrade coastal water quality, unless necessary for important economic or social development; and to the greatest extent practicable, new wastewater outfalls must be located where they will not adversely affect critical areas.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies. The adopted rules are consistent with these CMP goals and policies because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because the adopted rules do not allow a discharge from marine seawater desalination projects into or adjacent to water in the state, except in accordance with an individual permit issued by the commission.

Individual permits issued under these adopted rules will include effluent limitations to ensure compliance with water quality standards. Further, the expedited permitting process in these adopted rules cannot be used to authorize discharges of reject water into bays and estuaries. Reject water must be discharged into the Gulf of Mexico, and applicants must consult with the TPWD and the GLO regarding the outfall location(s).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on June 21, 2016, in Austin. The comment period closed on July 5, 2016. The commission received comments from AEM the Woodlands (AEM); Asociacion Amiga; Clean Water Action (CWA); Coastal Conservation Association Texas (CCA-Texas); EV Houston Newspaper (EVHN); Glenrose Engineering, Inc. (GEI); the Honorable A. R. Senac, Chambers County Commissioner, Precinct 4 (Commissioner Senac); San Marcos River Foundation (SMRF); Save Our Springs Alliance (SOS); TPWD; Viva! The Woodlands Magazine (Viva!); joint comments submitted by the Galveston Bay Foundation (GBF), National Wildlife Federation (NWF), and the Sierra Club Lone Star Chapter (Sierra Club); four individuals who submitted personalized comments through NWF; 32 individuals who submitted personalized comments through the Sierra Club; and 1,299 individuals who submitted identical comments through the Sierra Club. The comments submitted by Commissioner Senac do not in

any manner necessarily reflect the opinion of Chambers County Commissioners Court or Chambers County.

One individual supported the rules. Generally, AEM, Asociacion Amiga, CWA, CCA-Texas, EVHN, GEI, Commissioner Senac, SMRF, SOS, TPWD, Viva!, GBF, NWF, Sierra Club and 1,331 individuals supported the rules but were concerned that the rules did not provide sufficient public notice. Three individuals did not support the rules. TPWD, GBF, NWF, and Sierra Club suggested specific changes to the rules.

Response to Comments

General Comments

Comment

One individual commented in support of the rules.

Response

The commission acknowledges this comment.

Comment

One individual commented that he is opposed to discharges from desalination facilities along the Texas coast. One individual commented that TCEQ should not take any action to streamline the authorization process for discharges from desalination facilities. One individual commented that wastewater discharges should not be exempt from permit or hearing requirements.

Response

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

HB 2031, specifically TWC, §18.005(e), instructed the commission to develop rules to provide an expedited procedure for acting on an application for a permit. The bill also identified the procedural components of the permitting process for near-shore discharges, off-shore discharges, and treated marine seawater discharges. Near-shore discharges and treated marine seawater must include notice, public comment, and an opportunity for a public meeting and/or a contested case hearing. However, the process for off-shore discharges must include notice and public comment only. The adopted rulemaking complies with the requirements of HB 2031. No changes were made in response to these comments.

Comment

TPWD recommended revising "Texas Parks & Wildlife Department" to "Texas Parks and Wildlife Department."

Response

The commission agrees to make the recommended change throughout this adopted subchapter.

Comment

GBF, NWF, and Sierra Club recommended replacing the phrase "published on the TCEQ website" with "posted on the TCEQ website."

Response

The commission agrees to make the recommended change throughout this adopted subchapter.

§39.902, Public Notice and Comment for Treated Marine Seawater Discharges

Comment

GBF, NWF, and Sierra Club commented that the rule language should acknowledge the potential that the executive director may decide that a permit should not be issued and no draft permit will be available. The commenters recommended revising §39.902(a) to add the word "any" as follows: "...the executive director shall file the application, any draft permit, technical summary..."

Response

The public notice and comment procedures in §39.902 do not apply to applications that the executive director recommends not granting, therefore it is not necessary to revise §39.902(a) to acknowledge the potential that the executive director may decide that a permit should not be issued and no draft permit will be available. No change was made in response to this comment.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, TPWD, Viva!, GBF, NWF, Sierra Club, and 1,331 individuals recommended additional methods of issuing public notice in §39.902(c). Suggestions included maintaining an interested person email list for treated marine seawater discharges and emailing public notice to individuals or entities on the interested person email list; developing a sign-in sheet (i.e., membership sign-up) for interested persons who want to receive notice; emailing public notice to the county judge and county commissioners for each county in which part of the facility is proposed to be located; emailing public notice to media outlets, and having the notice available for public inspection at the county courthouse and at least one public library in each county where the discharge or discharges will be located.

GBF, NWF, and Sierra Club additionally recommended adding language to note that emailed notice will occur concurrently with posting the notice on the website.

Response

The commission agrees to expand the dissemination of the public notice to include county judges and persons on mailing lists maintained by the Office of the Chief Clerk. However, due to attachment size limitations on email servers, the commission revised the list of documents that will be emailed to only include the notice of application and preliminary decision while adding a requirement for the notice text in §39.902(b) to include the website address where the other documents are posted. In response to this comment, the commission added §39.902(b)(6) and renumbered subsequent paragraphs to require the notice text to include the website address where the application, draft permit, and technical summary are posted. The commission revised §39.902(c) to require emailed notice to occur concurrently with posting on the website; to require emailed notice to the county judge that represents the area where the facility is or will be located and persons on the mailing list required by §39.407 that have provided a valid email address; and to require only the notice of application and preliminary decision to be attached to emails. For consistency, the commission also revised §39.902(g) to require notice of a public meeting be sent to the county judge who represents the area where the facility is or will be located.

County commissioners were not included in the revised list of notice recipients because county judges preside over county commissioner's courts. Requiring the applicant to post the notice at the county courthouse and at least one public library in each county would extend the permit processing timeframe to an extent that

would not be consistent with the legislative directive to create an expedited process for review of these applications. Providing notice to media outlets doesn't necessarily result in media outlets publicizing the information and would extend the permit processing timeframe.

Comment

AEM, Asociacion Amiga, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, SOS, TPWD, Viva!, GBF, NWF and Sierra Club commented that the proposed comment period in §39.902(e) is too short to allow for meaningful comment, especially given that comments submitted during this period are the basis for any issues referred to a contested case hearing on an authorization to discharge treated marine seawater. Suggestions included increasing the public comment period from 10 calendar days to 15 business days or 21 calendar days.

Response

The commission recognizes that there must be a balance between allowing for an expedited permitting process while still allowing for meaningful public comment. In response to this comment, the commission revised §39.902(e) to increase the public notice period to 15 calendar days.

Comment

GBF, NWF, and Sierra Club commented that the rule language should acknowledge the potential that the executive director may decide that a permit should not be issued and

no draft permit will be available. The commenters recommended revising §39.903(a) to add the word "any" as follows: "...the executive director shall file the application, any draft permit, technical summary..."

Response

The public notice and comment procedures in §39.903 do not apply to applications that the executive director recommends not granting, therefore it is not necessary to revise §39.903(a) to acknowledge the potential that the executive director may decide that a permit should not be issued and no draft permit will be available. No change was made in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that §39.903(b) should be revised to include information about the specific quantity and quality of the water proposed to be discharged from each outfall in the public notice text.

Response

The commission partially agrees with this comment. The commission agrees the notice should contain the total quantity of water proposed to be discharged by the facility, but not the quantity from each outfall. The quantity from each outfall is more appropriately described in the application, the draft permit, and the technical summary. Additionally, the quality of water proposed to be discharged depends on many factors and is more appropriately described in the application, the draft

permit, and the technical summary. In response to this comment, the commission revised §39.903(b)(3) to include the total quantity of water proposed to be discharged by the facility. The commission also revised §39.902(b)(3) similarly for consistency.

§39.903, Public Notice and Comment for Off-Shore Discharges

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, Viva!, GBF, NWF, Sierra Club, and 1,331 individuals recommended additional methods of issuing public notice in §39.903(c). Suggestions included maintaining an interested person email list for off-shore discharges and emailing public notice to individuals or entities on the interested person email list; developing a sign-in sheet (i.e., membership sign-up) for interested persons who want to receive notice; emailing public notice to the county judge and county commissioners for each county in which part of the facility is proposed to be located, and emailing public notice to media outlets.

Response

The commission agrees to expand the dissemination of the public notice to include county judges and persons on mailing lists maintained by the Office of the Chief Clerk. However, due to attachment size limitations on email servers, the commission revised the list of documents that will be emailed to only include the notice of application and preliminary decision while adding a requirement for the notice text in §39.903(b) to include the website address where the other documents

are posted. In response to this comment, the commission added §39.903(b)(6) and renumbered subsequent paragraphs to require the notice text to include the website address where the application, draft permit, and technical summary are posted. The commission revised §39.903(c) to require emailed notice to occur concurrently with posting on the website; to require emailed notice to the county judge that represents the area where the facility is or will be located and persons on the mailing list required by §39.407 that have provided a valid email address; and to require only the notice of application and preliminary decision to be attached to emails.

County commissioners were not included in the revised list of notice recipients because county judges preside over county commissioner's courts. Requiring the applicant to post the notice at the county courthouse and at least one public library in each county would extend the permit processing timeframe to an extent that would not be consistent with the legislative directive to create an expedited process for review of these applications. Providing notice to media outlets doesn't necessarily result in media outlets publicizing the information and would extend the permit processing timeframe.

Comment

AEM, Asociacion Amiga, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, SOS, Viva!, GBF, NWF, and Sierra Club commented that the proposed comment period in §39.903(e) is too short to allow for meaningful comment. Some commenters suggested

increasing the public comment period from 10 calendar days to 15 business days.

Response

The commission recognizes that there must be a balance between allowing for an expedited permitting process while still allowing for meaningful public comment. In response to this comment, the commission revised §39.903(e) to increase the public notice period to 15 calendar days.

**SUBCHAPTER O: PUBLIC NOTICE FOR MARINE SEAWATER DESALINATION
PROJECTS**

§§39.901 - 39.903

Statutory Authority

The rules are adopted under Texas Water Code (TWC), §5.013 which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103 which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18.

The adopted rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

§39.901. Applicability.

The provisions of this subchapter establish the public notice process for treated marine seawater discharge permits and off-shore discharge permits from marine seawater desalination projects under Texas Water Code, Chapter 18. For the purposes of this subchapter, the terms "Treated marine seawater," "Off-shore discharges," and "Marine seawater desalination project" have the same meaning as the definitions of these terms found in §318.2 of this title (relating to Definitions).

§39.902. Public Notice and Comment for Treated Marine Seawater Discharges.

(a) Filing the administrative record. After the technical review is completed, the executive director shall file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk.

(b) Notice text. The notice of application and preliminary decision must contain the following information:

- (1) the permit number;

(2) the name, address, and telephone number of the applicant;

(3) a brief description of the location and nature of the proposed marine seawater desalination project, including the location of each outfall and the total quantity of water proposed to be discharged by the facility;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(5) if applicable, a statement that the application is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(6) the website address where the administratively and technically complete application, the draft permit, and the technical summary are posted for public review;

(7) a brief description of public comment procedures, including:

(A) a description of the manner in which comments regarding the executive director's preliminary decision may be submitted;

(B) the deadline to file comments; and

(C) the deadline to request a public meeting or a contested case hearing;

(8) a statement that the executive director will respond to comments raising issues that are timely received and are relevant, material, or otherwise significant;

(9) a brief description of procedures by which the public may request a public meeting and a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility will be located or there is substantial public interest in the proposed activity;

(10) a statement that there is an opportunity for a contested case hearing, the procedures by which the public may request a contested case hearing, and that only disputed issues of fact or mixed issues of fact and law that are relevant and material to the commission's decision that are raised during the comment period can be considered if a contested case hearing is granted;

(11) a statement that the executive director may issue final approval of the application unless a timely contested case hearing request is filed with the chief

clerk after transmittal of the executive director's decision and response to public comment;

(12) the name and telephone number of an agency contact that interested persons may contact for further information; and

(13) any additional information required by the executive director.

(c) Publication of the notice. The notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the technical summary, excluding oversized documents, will be posted on the TCEQ website for public review and comment. Concurrently with posting on the website, the notice of application and preliminary decision will be emailed to the email address on file with the Office of the Chief Clerk for the following individuals and agencies:

(1) the state senator and the state representative who represent the area where the facility is or will be located;

(2) the Texas Parks and Wildlife Department;

(3) the Texas General Land Office;

(4) the county judge who represents the area where the facility is or will be located; and

(5) persons on the mailing lists required by §39.407 of this title (relating to Mailing Lists) that have provided a valid email address.

(d) Amendment after notice. No amendments to an application which would constitute a major amendment under the terms of §318.6 of this title (relating to Amendment of a Permit) can be made by the applicant after the notice of application and preliminary decision has been posted on the TCEQ website, unless new notice is posted on the TCEQ website which includes a description of the proposed amendments to the application. For purposes of this subsection, an attempted transfer of an application shall constitute an amendment requiring additional notice.

(e) Public comment. Public comments must be filed with the chief clerk within the time period specified in the notice. The public notice period shall end 15 calendar days after the date of posting on the TCEQ website unless extended by the executive director for good cause. The public comment period shall be extended to the close of any public meeting.

(f) Public meeting notice. Notice of a public meeting must include the following information:

(1) the information required by subsection (b)(1) - (3) and (12) of this section;

(2) the date, time, and place of the meeting;

(3) a brief description of the nature and purpose of the meeting, including the applicable rules and procedures; and

(4) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(g) Recipients of public meeting notice. Notice of a public meeting will be mailed or emailed to any person who submitted comments or requested a public meeting; emailed to the state senator and the state representative who represent the area where the facility is or will be located, the Texas Parks and Wildlife Department, and the Texas General Land Office; emailed to the county judge who represents the area where the facility is or will be located; and posted on the TCEQ website at least 14 calendar days prior to the meeting date. The chief clerk need not mail or email notice of the public meeting to persons submitting public comment or public meeting requests who have not provided a return mailing address or email address.

§39.903. Public Notice and Comment for Off-Shore Discharges.

(a) Filing the administrative record. After the technical review is completed, the executive director shall file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk.

(b) Notice text. The notice of application and preliminary decision must contain the following information:

(1) the permit number;

(2) the name, address, and telephone number of the applicant;

(3) a brief description of the location and nature of the proposed marine seawater desalination project, including the location of each outfall and the total quantity of water proposed to be discharged by the facility;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(5) a statement that the application is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(6) the website address where the administratively and technically complete application, the draft permit, and the technical summary are posted for public review;

(7) a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and the deadline to file comments;

(8) a statement that the executive director will evaluate comments raising issues that are timely received and are relevant, material, or otherwise significant and develop a final technical summary;

(9) the name and telephone number of an agency contact that interested persons may contact for further information; and

(10) any additional information required by the executive director.

(c) Publication of the notice. The notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the

technical summary, excluding oversized documents, will be posted on the TCEQ website for public review and comment. Concurrently with posting on the website, the notice of application and preliminary decision will be emailed to the email address on file with the Office of the Chief Clerk for the following individuals and agencies:

(1) the state senator and the state representative who represent the area where the facility is or will be located;

(2) the Texas Parks and Wildlife Department;

(3) the Texas General Land Office;

(4) the county judge who represents the area where the facility is or will be located; and

(5) persons on the mailing lists required by §39.407 of this title (relating to Mailing Lists) that have provided a valid email address.

(d) Amendment after notice. No amendments to an application which would constitute a major amendment under the terms of §318.6 of this title (relating to Amendment of a Permit) can be made by the applicant after the notice of application and preliminary decision has been posted on the TCEQ website, unless new notice is posted on the TCEQ website which includes a description of the proposed

amendments to the application. For purposes of this subsection, an attempted transfer of an application shall constitute an amendment requiring additional notice.

(e) Public comment. Public comment must be filed with the chief clerk within the time period specified in the notice. The public notice period shall end 15 calendar days after the date of posting on the TCEQ website unless extended by the executive director for good cause. A public comment that is not filed with the chief clerk by the deadline provided in the notice shall be accepted by the chief clerk and placed in the application file but the chief clerk shall not process it.

(f) Response to comments and final decision. After the close of the comment period, the executive director shall:

(1) evaluate all timely received and relevant, material, or otherwise significant issues raised in public comments;

(2) develop a final technical summary which includes:

(A) a summary of all timely received and relevant, material, or otherwise significant issues raised in public comments;

(B) a response to the issues raised in public comments; and

(C) a summary of the executive director's final decision;

(3) revise the draft permit in response to comments, if necessary; and

(4) file the final technical summary and revised draft permit, if applicable, with the chief clerk within the shortest practical time after the comment period ends.