

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §39.551, Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This proposed rulemaking would amend Chapter 39 notice requirements for applicants seeking to discharge storm water and certain non-storm water from municipal separate storm sewer systems (MS4s) under an individual Texas Pollutant Discharge Elimination System (TPDES) permit. For new permits or major amendments to individual TPDES MS4 permits, this amendment would add two public posting requirements. The first posting requirement would be to post a copy of the Notice of Receipt of Application and Intent to Obtain a Permit within 30 days of the application being declared administratively complete. The second posting requirement would be to post the Notice of Application and Preliminary Decision on or before the first day of published newspaper notice. Both notices must remain posted until the commission has taken final action on the application; both notices must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located. These two public posting requirements would replace the direct mail requirement to provide notice to adjacent or downstream landowners of the Notice of Receipt of Application and Intent to Obtain a Permit and the Notice of Application and Preliminary Decision. This proposal would not amend nor otherwise affect other public notification requirements which are still in effect for other types of TPDES permits.

Applicants for new permits or major amendments to individual TPDES MS4 permits must continue to

publish in a newspaper regularly published or circulated within each county where the proposed MS4 or discharge is located, and in each county affected by the discharge. Also, notice must still be mailed to a set group of local and state governmental entities by the commission's chief clerk. This group includes the mayor and health authorities of the city or town served by the MS4, the county judge and health authorities in the county served by the MS4, the Texas Department of Health (TDH), the Texas Parks and Wildlife Department (TPWD), and the Railroad Commission of Texas (RRC). The proposed notices posted in a public place combined with the current newspaper notice and mailed notices to local and state governmental entities will provide effective notice to interested persons.

An MS4 is a conveyance or system of conveyances owned or operated by a state, city, town, borough, county, district, association, or other public body (created by or pursuant to state law). The MS4s are designed to collect and convey storm water to designated run-off areas via roads with drainage systems, municipal streets, catch basins, curb gutters, ditches, man-made channels, or storm drains. Because MS4s may include dozens or often hundreds of storm water outfalls, a large segment of the population will be adjacent to or downstream of an MS4 outfall. It could be extremely burdensome, difficult, and expensive for the public entity to identify every person adjacent or downstream to an MS4 outfall and to pay for mailed notice to all of these persons. The costs and burden usually to cities and counties, but ultimately borne by taxpayers, could be excessive without this modification.

On September 14, 1998, the commission received authority from the United States Environmental Protection Agency (EPA) to implement the National Pollutant Discharge Elimination System (NPDES) program for Texas and commenced the TPDES. The TPDES is comprised of many programs to

control discharges of pollutants to surface water in Texas. One program of the TPDES regulates storm water discharges from MS4s to water in Texas through individual TPDES permits.

According to the Memorandum of Agreement between the commission and EPA, the NPDES permits issued by the EPA to authorize storm water discharges from large and medium MS4s must be reissued by the commission as TPDES permits as each permit expires. Phase I MS4s are large systems (serving a population greater than 250,000 people) to medium systems (serving a population less than 250,000, but greater than or equal to 100,000), while Phase II MS4s are small systems (serving a population less than 100,000 people). In accordance with Phase II regulations, by December 2002, the commission must also develop and issue TPDES permits for storm water discharges from Phase II small MS4s.

Authorized discharges from MS4s include storm water, certain non-storm water discharges, and previously TPDES permitted wastewater discharges from outfalls contributing to the MS4 system. Non-storm water discharges are described in the *Federal Register* of December 8, 1999 (64 FR 68756) to be the following: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined in 40 Code of Federal Regulations §35.2005(20)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air-conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, street wash water and discharges, or flows from fire fighting activities.

SECTION BY SECTION DISCUSSION

New §39.551(b)(2)(C) is proposed to add language that replaces the direct mail requirement for the Notice of Receipt of Application and Intent to Obtain a Permit to adjacent or downstream landowners for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4. This amendment is proposed in order to make public notice less expensive and burdensome for the MS4 owner/operator; the costs and burden usually to cities and counties, but ultimately borne by taxpayers, could be excessive without this modification. (A public posting requirement in subsection (b)(3) of this section of the Notice of Receipt of Application and Intent to Obtain a Permit would replace the direct mail requirement.)

New §39.551(b)(3) is proposed to require the applicant for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4 to post a copy of the Notice of Receipt of Application and Intent to Obtain a Permit. The notice must be posted within 30 days of the application being declared administratively complete and remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located. This notice will be provided by applicants for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4 to replace the direct mail notice to adjacent or downstream landowners. The purpose of this change is to establish an alternative notice requirement that will continue to provide adequate public notice while reducing the burden on cities and other public entities.

Section 39.551(c) is proposed to be amended to remove an obsolete cross-reference. New §39.551(c)(5)(A) and (B) are proposed to replace the direct mail requirement for the Notice of Application and Preliminary Decision to adjacent or downstream landowners for a new individual TPDES permit for a discharge authorized by an existing state permit issued before September 14, 1998, for which the application does not propose a major amendment. New §39.551(c)(5)(A) and (B) would mirror the existing language in §39.551(b)(2)(A) and (B), which has been the intent and practice of the commission. This amendment is proposed in order to make public notice less expensive and burdensome for the MS4 owner/operator; the costs and burden usually to cities and counties, but ultimately borne by taxpayers, could be excessive without this modification. (A public posting requirement in subsection (c)(6) of this section for the Notice of Application and Preliminary Decision would replace the direct mail requirement.)

New §39.551(c)(5)(C) is proposed to add language that replaces the direct mail requirement for the Notice of Application and Preliminary Decision to adjacent or downstream landowners for a new permit or major amendment to an individual TPDES permit that authorizes discharges from an MS4. This amendment is proposed in order to make public notice less expensive and burdensome for the MS4 owner/operator; the costs and burden usually to cities and counties, but ultimately borne by taxpayers, could be excessive without this modification. (A public posting requirement in subsection (c)(6) of this section for the Notice of Application and Preliminary Decision would replace the direct mail requirement.)

New §39.551(c)(6) is proposed to require the applicant for a new permit or major amendment to an

individual TPDES permit that authorizes discharges from an MS4 to post a copy of the Notice of Application and Preliminary Decision. The notice must be posted on or before the first day of published newspaper notice and must remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located. This notice will be provided by applicants for a new permit or a major amendment to an individual TPDES permit that authorizes discharges from an MS4 to replace the direct mail notice to adjacent or downstream landowners. The purpose of this change is to establish an alternative notice requirement that will continue to provide adequate public notice while reducing the burden on cities and other public entities.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined for the first five-year period the proposed amendment is in effect, there may be positive fiscal impacts which are not anticipated to be significant to certain state agencies, universities, and units of local government due to less burdensome public notice requirements for the Phase I and Phase II MS4s that amend or apply for an individual TPDES permit.

The commission received authority from the EPA to issue TPDES permits on September 14, 1998.

The TPDES program is comprised of many components to control discharges of pollutants to surface water in Texas. One component of the TPDES program regulates storm water discharges from MS4s to water in Texas through TPDES permits.

There are 22 Phase I MS4 systems that have been issued NPDES permits in the following cities and other public entities: Corpus Christi, San Antonio, Fort Worth, Garland, Dallas, Pasadena, Dallas-Texas Department of Transportation (TxDOT), El Paso, Laredo, Amarillo, Beaumont-TxDOT, Beaumont, Arlington, Houston-Harris County, Abilene, Austin-TxDOT, Austin, Irving, Lubbock, Mesquite, Plano, and Waco. These permits will be reissued as TPDES permits as they each expire. The first of these permits expired on May 31, 2000, and the last of these permits will expire in 2003. Additionally, there are approximately 285 smaller Phase II MS4s that serve populations of less than 100,000 people that the commission must authorize by December 2002 in accordance with federal rules.

Phase I MS4 systems are large systems (serving a population greater than 250,000 people) to medium systems (serving a population less than 250,000, but greater than or equal to 100,000), while Phase II MS4 systems are small systems (serving a population less than 100,000 people). The MS4s are a conveyance or system of conveyances owned or operated by a state, city, town, borough, county, district, association, or other public body (created by or pursuant to state law). The MS4s are designed to collect and convey storm water to designated run-off areas via roads with drainage systems, municipal streets, catch basins, curb gutters, ditches, man-made channels, or storm drains.

The proposed amendment would not affect the current notice requirements to publish notices in local newspapers nor affect the current notice requirements to send notices to local and state governmental entities via the commission's chief clerk, including the mayor and health authorities of the city or town served by the MS4 systems, the county judge and health authorities in the county served by the MS4

system, the TDH, the TPWD, and the RRC. The proposed amendment is intended to implement less burdensome public notification requirements for applicants seeking authorization to amend or apply for an individual TPDES MS4 permit while also providing an alternative method of adequate public notice.

The proposed amendment would add two public posting requirements. The first posting requirement would require the applicant to post a copy of the Notice of Receipt of Application and Intent to Obtain a Permit within 30 days of the application being declared administratively complete. The second posting requirement would require the applicant to post a copy of the Notice of Application and Preliminary Decision on or before the first day of published newspaper notice. Both notices must remain posted until the commission has taken final action on the application; both notices must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located. The commission does not anticipate significant fiscal implications for units of state and local government due to the posting requirements. There may be potential fiscal benefits from the proposed amended public mailing requirements. The commission estimates it would cost a medium to large Phase I MS4 system approximately \$27,000 to more than \$67,500, depending on the number of notices required to be mailed (minimum of 100,000 for a medium Phase I MS4 system and at least 250,000 for a large Phase I MS4 system). The commission also estimates it would cost a small Phase II MS4 system (serving 50,000 people) approximately \$13,500 to mail required notices. The proposed amendment would decrease the required number of mailed notices, resulting in a cost savings for the owners/operators. Because notices will continue to be mailed to local authorities and published in local newspapers, the required information concerning the application status of MS4 systems serving particular areas would continue to be made available to the

public, and there will be new requirements for the Notice of Receipt of Application and Intent to Obtain a Permit and the Notice of Application and Preliminary Decision to be posted in a public place.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be reduced costs for units of state and local government.

By definition, Phase I and II MS4 systems are publicly owned and operated; therefore, the commission estimates there will be no fiscal implications for individuals and businesses as a result of implementing the proposed amendment.

Because notices will continue to be mailed to local authorities and published in local newspapers, the required information concerning the application status of MS4 systems serving particular areas would continue to be made available to the public, and there will be new requirements for the Notice of Receipt of Application and Intent to Obtain a Permit and the Notice of Application and Preliminary Decision to be posted in a public place.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

By definition, Phase I and II MS4 systems are publicly owned and operated; therefore, the commission estimates there will be no adverse fiscal implications for small or micro-businesses as a result of implementing the proposed amendment.

Because notices will continue to be mailed to local authorities and published in local newspapers, the required information concerning the application status of MS4 systems serving particular areas would continue to be made available to the public, and there will be new requirements for the Notice of Receipt of Application and Intent to Obtain a Permit and the Notice of Application and Preliminary Decision to be posted in a public place.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule.” “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 is intended to implement less burdensome public notification requirements for applicants seeking authorization to amend or apply for an individual TPDES MS4 permit while also providing an alternative method of adequate public notice. Therefore, the rulemaking does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact assessment for this rule under Texas Government Code, §2007.043. This rulemaking is procedural in nature and does not provide the commission with any additional authority or jurisdictional responsibility related to MS4s. This rulemaking is intended to implement less burdensome public notification requirements for applicants seeking authorization to amend or apply for an individual TPDES MS4 permit while also providing an alternative method of adequate public notice. Therefore, the rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act (CCA) Implementation Rules, 31 Texas Administrative Code (TAC) §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program (CMP) or will affect an action/authorization identified in the CCA Implementation Rules, 31 TAC §505.11(a)(6), and will, therefore, require that applicable goals and policies of the CMP be considered during the rulemaking process.

The commission prepared a preliminary consistency determination for the proposed rulemaking pursuant to 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP

goals and policies. The goals of the CMP, in 31 TAC §501.12, applicable to the rulemaking are to: protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests. The policy of the CMP applicable to the proposed rulemaking is §501.14(f)(1)(A), which requires the commission rules to comply with the Clean Water Act.

Promulgation and enforcement of the proposed rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because the change proposed by the rulemaking is procedural in nature and will not have direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on June 25, 2001 at 10:00 a.m., in Building F, Room 3202A, at the commission's central office located at 12100 Park 35 Circle. 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 be permitted

during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-040-039-AD. Comments must be received by 5:00 p.m., July 9, 2001. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.012, which states that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §5.551, which establishes that the commission shall by rule provide for notice to the extent necessary to satisfy the EPA requirements; §26.011, which states the commission has the powers and duties prescribed in Chapter 26 and all other powers necessary or convenient to

carry out its responsibilities to adopt reasonable rules or orders adopted or issued by the commission to regulate discharges under Chapter 26; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

The proposed amendment implements TWC, §5.551 and Texas Government Code, §2001.004.

**SUBCHAPTER J: PUBLIC NOTICE OF WATER QUALITY APPLICATIONS AND
WATER QUALITY MANAGEMENT PLANS**

§39.551

§39.551. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.

(a) (No change.)

(b) Notice of receipt of application and intent to obtain permit.

(1) (No change.)

(2) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit; [or]

(B) 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) ; or [.]

(C) an application for a new permit or major amendment to a TPDES permit that authorizes the discharges from a municipal separate storm sewer system.

(3) For permits listed in subsection (b)(2)(C) of this section, the executive director will require the applicant to post a copy of the notice of receipt of application and intent to obtain a permit. The notice must be posted within 30 days of the application being declared administratively complete and remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located.

(c) Notice of application and preliminary decision. Notice under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text [as] required by §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6). In addition to §39.419 of this title, for all applications except applications to renew permits [and those in subsection (c)(1) of this section], the following provisions apply.

(1) - (4) (No change.)

(5) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit;

(B) an application for a new 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); or

(C) an application for a new permit or major amendment to a TPDES permit that authorizes the discharges from a municipal separate storm sewer system.

(6) For permits listed in subsection (c)(5)(C) of this section, the executive director will require the applicant to post a copy of the notice of application and preliminary decision. The notice must be posted on or before the first day of published newspaper notice and must remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located.

(d) - (g) (No change.)