The Texas Commission on Environmental Quality (commission, agency, or TCEQ) adopts the amendment to §39.551 *without changes* as published in the July 24, 2009 issue of the *Texas Register* (34 TexReg 4827) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking amends §39.551(c)(2) and adds §39.551(c)(2)(A) and (B) to state that if the notice of receipt of application and intent to obtain a permit (NORI) is mailed more than two years before the date that the notice of application and preliminary decision (NAPD) is scheduled to be mailed, then the applicant must prepare an updated landowner list and map, and file them with the commission. The rule also allows the executive director to require an updated landowner's map and mailing addresses for the NAPD for any water quality matter in which the executive director determines that circumstances have changed to warrant this new information. The commission is adopting this change to ensure that when the NAPD is mailed, it is mailed to the most current list of potentially affected persons.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 281, Applications Processing, and Chapter 295, Water Rights, Procedural.

This rule will not apply to any applicant for a water quality permit if the NAPD has been mailed at the time that the rules become effective.

SECTION DISCUSSION

The commission adopts administrative changes throughout the rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating

agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors.

The adopted amendment to §39.551 requires applicants to supply an updated landowner map and mailing addresses to the chief clerk if it has been more than two years since the NORI was mailed to the landowner list. This requirement has been added to increase the accuracy of the mailing list for the NAPD if significant time has elapsed between the NORI and the NAPD. The updated list will allow new potentially affected landowners to participate in the permitting process who otherwise might not have been aware of the pending permit application. Section 39.551(c)(2) is divided into two subparagraphs. Subparagraph (A) contains the language in the original §39.551(c)(2). Subparagraph (B) contains the language of the new requirement.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the adopted amendment and performed an analysis of whether the adopted amendment requires a regulatory impact analysis under Texas Government Code, §2001.0225. The adopted amendment is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, and it does not 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. The purpose of this rulemaking is to require updated landowner lists and maps for a NAPD that is mailed more than two years after the NORI for water quality applications and to allow the executive director to require updated lists and maps for the NAPD for any water quality matter in which the executive director determines that circumstances have changed to warrant this new

information. The small costs associated with these updated lists and maps would not 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. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted amendment and performed an analysis of whether the adopted amendment constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted amendment is to provide for adequate notice to potentially affected persons for water quality permits. The adopted amendment would substantially advance this stated purpose by requiring applicants to update their landowner lists and maps if the NAPD is mailed more than two years after the NORI and allowing the executive director to require updated lists and maps for the NAPD for any water quality matter in which the executive director determines that circumstances have changed to warrant this new information. Promulgation and enforcement of the adopted amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rulemaking is procedural and does not impact real property. There are no other reasonable or practicable alternatives to this rulemaking.

The commission invited public comment regarding the takings impact assessment during the public comment period. No comments were received.

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 reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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

PUBLIC COMMENT

The commission held a public hearing in Austin on August 19, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on August 24, 2009. The commission received comments from Lloyd Gosselink, Attorneys at Law on behalf of a coalition of its clients, including cities, regional water districts, and river authorities (Coalition) and from Lowerre, Frederick, Perales, Allmon & Rockwell, Attorneys at Law on behalf of the Sierra Club, Environmental Defense Fund, and Lowerre Frederick, Perales, Allmon & Rockwell (Commenters). The Coalition was in support of this rule change. The Commenters oppose the rule unless additional notice

requirements are included.

RESPONSE TO COMMENTS

The Coalition and the Commenters express approval of the goal of the proposed rule changes to ensure better notice of applications to potentially affected persons.

The commission appreciates the comment.

The Coalition agrees with the TCEQ that two years is the appropriate time for requiring an updated mailing list for the NAPD. Review of water quality applications may be delayed for two years or more due to the complexity of the application.

The commission appreciates the comment.

The Commenters urge the TCEQ to reduce the time for the applicant to be required to update the mailing list for the NAPD from two years to one year. Delays of more than a year in processing applications should be rare and are usually the result of the applicant failing to provide the proper information, changing the project, or not needing to pursue the application quickly. A one-year time frame may encourage applicants to work more diligently with TCEQ staff.

The commission respectfully disagrees with the comment because a two-year time frame for the requirement of updating the landowner map is more reasonable than a one-year time frame. It is not unusual for a one-year delay in processing applications to occur for reasons beyond the control

of the applicant, such as those mentioned by the Coalition and other reasons, such as issues with the United States Environmental Protection Agency for water quality applications. Therefore, the commission respectfully declines to make the change.

The Commenters request that the commission implement additional safeguards by rule or policy requiring the executive director to post notice of an application for a new water right or amendment on the internet.

The commission appreciates the comment but respectfully declines to make this change because it is beyond the scope of this rulemaking. The commission may consider this comment for future rulemakings.

The Commenters also note that in the air and waste areas the commission posts signs at the site of the facility providing information. Such practices are effective and efficient ways to provide notice to affected landowners who can provide the TCEQ with information.

The commission appreciates the comment but respectfully declines to make this change because it is beyond the scope of this rulemaking. The commission may consider this comment for future rulemakings.

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

§39.551

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The amendment is also adopted under Texas Water Code, §5.553, which provides notice requirements for water quality permits; Texas Water Code, §26.028, which provides for commission action on a water quality permit application after notice; and Texas Water Code, §26.121, which provides that certain discharges of waste are prohibited unless authorized by the commission.

The adopted amendment implements Texas Water Code, §§5.102, 5.103, 5.105, 5.553, 26.028, and 26.121.

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

(a) Applicability. This section applies to applications for wastewater discharge permits, including disposal of sewage sludge or water treatment sludge applications that are declared administratively complete on or after September 1, 1999. This subchapter does not apply to registrations and notifications for sludge disposal under §312.13 of this title (relating to Actions and Notice).

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

(1) Notice under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) is required to be published no later than 30 days after the executive director deems an application administratively complete. This notice must contain the text as required by §39.411(b)(1) - (9) and (12) of this title (relating to Text of Public Notice). In addition to the requirements of §39.418 of this title, the chief clerk shall mail notice to the School Land Board if the application will affect lands dedicated to the permanent school fund. The notice shall be in the form required by Texas Water Code, §5.115(c).

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

(A) an application to renew a permit;

(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 Amendments); 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 paragraph (2)(C) of this subsection, 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 required by §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6) of this title. In addition to §39.419 of this title, for all applications except applications to renew permits, the following provisions apply.

(1) The applicant shall publish notice of application and preliminary decision 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.

(2) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(A) For any application involving an average daily discharge of five million gallons or more, in addition to the persons listed in §39.413 of this title, the chief clerk shall mail notice to each county judge in the county or counties located within 100 statute miles of the point of discharge who has requested in writing that the commission give notice, and through which water into or adjacent to which waste or pollutants are to be discharged under the permit, flows after the discharge.

(B) If the notice of the receipt of application and intent to obtain a permit was mailed more than two years prior to the time that notice of application and preliminary decision is scheduled by the executive director to be mailed, the applicant must submit an updated landowner map, landowner list, and any associated information for mailing the notice of application and preliminary decision. Notwithstanding this requirement, the Executive Director may require an updated landowner map, landowner list, and any associated information for mailing the notice of the application and preliminary decision if circumstances in the area have significantly changed that warrant updated lists.

(3) The notice must set a deadline to file public comment with the chief clerk that is not less than 30 days after newspaper publication. However, the notice may be mailed to the county judges under paragraph (2) of this subsection no later than 20 days before the deadline to file public comment.

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

(A) everything that is required by §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

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

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

(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; 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 paragraph (5)(C) of this subsection, 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) Notice of application and preliminary decision for certain 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 of the application and preliminary decision 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 preliminary decision, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing to those listed in §39.413 of this title.

(C) The notice must set a deadline to file public comment, or to request a public meeting, 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 §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6) 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.

(e) Notice for other types of applications. Except as required by subsections (a), (b), and (c) of this section, the following notice is required for certain applications.

(1) For an application for a minor amendment to a permit other than a TPDES permit, or for an application for a minor modification of a TPDES permit, under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the chief clerk shall mail notice, that the executive director has determined the application is technically complete and has prepared a draft permit, to the mayor and health authorities for the city or town, and to the county judge and health authorities for the county in which the waste will be discharged. The notice shall state the deadline to file public comment, which shall be no earlier than ten days after mailing notice.

(2) For an application for a renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which the applicant does not propose to discharge into or adjacent to water in the state and does not seek to change materially the pattern or place of disposal, no notice is required.

(3) For an application for a minor amendment to a TPDES permit under Chapter 305, Subchapter D of this title, the following requirements apply.

(A) The chief clerk shall mail notice of the application and preliminary decision, 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 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 §39.407 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 as designated by the United States Environmental Protection Agency on an annual basis, notice shall be published in the *Texas Register*.

(C) The text shall meet the requirements in §39.411(b)(1) - (4)(A), (6), (7), (9), and (12), and (c)(4) - (6) of this title.

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

(E) The executive director shall prepare a response to all relevant and material or significant public comments received by the commission under §55.152 of this title (relating to Public Comment Period).

(f) Notice of contested case hearing.

(1) This subsection applies if an application is referred to the State Office of Administrative Hearings 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 §39.413 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 §39.411(d)(1) and (2) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

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

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

(g) Notice for discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR Part 124, Subsection 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 agency's library located at the commission's central office located at 12100 Park 35 Circle, Building A, Austin.