

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts the amendments to §319.302 and §319.303.

Section 319.302 is adopted *with changes* to the proposed text as published in the November 5, 2010, issue of the *Texas Register* (35 TexReg 9831). Section 319.303 is adopted *without changes* to the proposed text and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

Chapter 319, Subchapter C requires wastewater facilities owned by local governments to notify local governments and local media following certain wastewater spills and discharges. The rule establishes when notification is required and includes the form used to provide such notifications. The notification form provides recommended safety actions for the general public to take in the event of a wastewater spill or discharge. These rules were originally created in response to a specific wastewater spill into Brushy Creek in the Austin Metropolitan area that resulted in bacterial infection for several residents residing in the impacted area of the spill. The recommended safety precautions currently contained in the spill notice form at §319.303 were specifically worded for this spill event. However, the recommended safety precautions are not applicable to all wastewater spill events and have resulted in confusion amongst the general public for spill events in other areas.

Section by Section Discussion

The commission adopts the amendment to §319.302, Notification Requirements, providing clarification to the regulated community and general public on when and under what conditions notice must be provided. Specifically, §319.302(b)(1) was changed to remove the phrase "...recreational uses..." in response to comments received which indicated that use of this phrase added additional confusion and was contradictory to language in the statute at Texas Water Code (TWC), §26.039(e), which specifically refers to drinking water sources only.

The commission adopts the amendment to §319.303, Form of the Notice to Local Officials and Local Media, providing clarification to the regulated community concerning what information must be included in a notice of a wastewater spill and to clarify precautionary language that may be contained in a wastewater spill notice for the general public. Additionally, the adopted amendment will remove the form from the rule replacing it with minimum notification requirements.

Final Regulatory Impact Analysis Determination

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code, and it does not

meet any of the four applicability requirements listed in §2001.0225(a). The adopted rules do not adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. The adopted rules are designed to protect human health by reducing potential exposure to accidental discharges or spills from wastewater treatment and collection facilities.

The economy, a sector of the economy, productivity, competition, or jobs will not be adversely affected in a material way because the additional costs caused by the rules are minimal. There are no costs to businesses or the private sector. The adopted rules will potentially add costs for notice to local governments and local media. The additional costs added by the rules are not substantial; however, because the local governments are already required by TWC, §26.039(b) to notify the commission of all spills which cause, or may cause, pollution.

The adopted rules do not adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state, because the proposed rules are designed to protect human health by reducing potential exposure to accidental discharges or spills from wastewater treatment and collection facilities owned or operated by a local government.

This adoption does not exceed a standard set by federal law and is specifically required by state law. There is no standard set by federal law for notification of local governments and local media of spills from wastewater treatment or collection facilities owned or operated by local governments. The adopted rules are specifically required by TWC, §26.039(f), to specify the conditions under which a spill must be reported to appropriate local government officials and local media. This adoption does not exceed the requirements of a delegation agreement or contract between the state and federal government. There is no agreement or contract between the commission and the federal government concerning notification of local governments and local media of spills from wastewater treatment or collection facilities owned or operated by local governments.

The adopted rules are not adopted solely under the general powers of the commission; instead, they are adopted under a specific state law. The specific state law is TWC, §26.039(f), which requires the commission by rule to specify the conditions under which a spill must be reported to appropriate local government officials and local media.

The commission determined that no regulatory impact analysis was required by Texas Government Code, §2001.0225, for this adopted rulemaking. The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments concerning the regulatory impact analysis determination were received.

Takings Impact Assessment

The commission has prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment.

The specific purpose of the adopted rules is to implement the requirements of House Bill 1074, 76th Legislature, 1999, which amends TWC, §26.039, to require notice to local governmental officials and local media of spills or accidental discharges from wastewater treatment or collection facilities owned or operated by local governments.

The adopted rules substantially advance this specific purpose by identifying which entities must report and the conditions under which these reports must be made. This adopted rulemaking improves the usefulness of the form of the notice to local government officials and local media. Promulgation and enforcement of these adopted rules will not burden private real property. The adopted rules only affect wastewater treatment or collection facilities owned or operated by local governments.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

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

Public Comment

The commission held a public hearing on December 9, 2010. The comment period closed on December 13, 2010. The commission received comments from Baker Botts L.L.P. and The Water Environment Association (WEAT) of Texas who, generally, supported the proposed amendments, but recommend changes based on statutory requirements.

Response to Comments

Both commenters stated that the addition of language concerning "commonly used for recreational purposes" proposed at 319.302(b)(1) was contradictory to statutory requirements stated in the TWC, §26.039(e), which directs the TCEQ to develop rules to require notification of spills that "may adversely affect a public or private source of drinking water."

The commission agrees with the comment received from Baker Botts L.L.P. and WEAT concerning §319.302(b)(1) and has removed all references to recreational uses.

Baker Botts L.L.P. also commented that the proposed notice revisions under §319.303(c) require new notices for certain spills potentially not connected to drinking water sources which, again, is contradictory to the statute requirement TWC, §26.039(e). The commenter recommended changing the language at §319.302(b)(3) to clarify that the notice is only required for 100,000 gallons or more if the "facility owner knows, or has reason to know, may adversely affect a public or private source of drinking water."

The rule, as currently written, requires notice for all spills of 100,000 gallons or more, irrespective of a facility owner's knowledge of the potential of the spill to adversely affect public or private sources of drinking water. As evidenced by the rule as written, the commission previously determined that, given the significant potential for any spill of 100,000 gallons or more of untreated wastewater to contaminate sources of drinking water, all such spills should be subject to notification under TWC, §26.039(e). The rule, as written, does not conflict with statute. Accordingly, no change to §319.302(b)(3) of the rule will be proposed at this time.

**SUBCHAPTER C: PUBLIC NOTICE OF SPILLS OR ACCIDENTAL
DISCHARGES
FROM WASTEWATER FACILITIES OWNED OR OPERATED BY
LOCAL GOVERNMENTS**

§319.302 and §319.303

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §26.039(f), which requires the commission by rule to specify the conditions under which a spill from a wastewater treatment or collection facility owned or operated by a local government must be reported to appropriate local government officials and local media, including the content of the notice; and TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state.

The adopted amendments implement TWC, §§5.103, 5.105, and 26.039.

§319.302. Notification Requirements.

(a) The owner of a facility must designate a responsible individual to comply with this subchapter.

(b) In addition to the noncompliance notification to the commission required by §305.125(9) of this title (relating to Standard Permit Conditions) and any notification required under Chapter 327 of this title (relating to Spill Prevention and Control), the owner of a facility, through its responsible individual, must notify appropriate local government officials and the local media (see §319.301 of this title (relating to Definitions)) whenever one of the following types of spills occurs from the facility:

(1) a spill, regardless of volume, that the facility owner knows or has reason to know, will adversely affect a public or private source of drinking water;

(2) a spill with a volume of 50,000 gallons or more where one or more of the following conditions also exists:

(A) the spill occurs within 1/2-mile of a public or private source of drinking water;

(B) the spill occurs within 1/2-mile of a private drinking water well which is located within 1/2-mile of a public water supply well;

(C) the spill occurs within 1/2-mile up-gradient of a surface water intake of a public or private source of drinking water;

(D) the spill occurs in an active groundwater recharge area;

(E) the spill occurs up-gradient and within 1/2-mile of a karst terrain or shallow alluvial well that is a source of drinking water;

(3) a spill of 100,000 gallons or more.

(c) The responsible individual must issue the notice as quickly as possible, but not later than 24 hours after the facility becomes aware of the spill. The notice may be hand-delivered, sent by facsimile, e-mail, or by phone with follow-up written notice. The contents of the notice must comply with §319.303 of this title (relating to Notice to Local Officials and Local Media.)

(d) Within 48 hours of providing notice to appropriate local government officials and local media, the responsible individual must provide to the commission regional office in whose region the spill occurred a copy of the notice, the date notice was provided to local officials and local media, and a list of notice recipients.

§319.303. Notice to Local Officials and Local Media.

(a) Persons responsible for a wastewater spill must ensure notice complies with subsections (b) and (c) of this section. Responsible persons may contact the commission to obtain a template which may be used in the event of a wastewater spill.

(b) For all wastewater spills as referenced in §319.302(b) of this title (relating to Notification Requirements) the notice must contain the following:

(1) one of the following statements:

(A) a spill from a wastewater treatment facility has occurred; or

(B) a spill from a collection facility has occurred;

(2) the facility name;

(3) person to contact for further information;

(4) the location of the spill;

(5) the estimated date and time of the spill;

(6) the estimated volume of the spill (number of gallons);

(7) the type of the spill (domestic, industrial, etc.);

(8) a description of the area potentially affected, including a down-gradient and lateral distance from the spill site;

(9) the suspected cause of the spill; and

(10) a list of actions that have been taken including, but not limited to:

(A) notification of:

(i) appropriate local government officials; and

(ii) the TCEQ regional office;

(B) containment of the spill;

(C) increased monitoring of water supply systems; and

(D) initiation or completion of clean up activities.

(c) If the wastewater spill meets the conditions of §319.302(b)(2) and/or (b)(3) of this title then the notice must also contain the following precautionary statements:

(1) Persons using private drinking water supply wells located within 1/2-mile of the spill site or within the potentially affected area should use only water that has been distilled or boiled at a rolling boil for at least one minute for all personal uses including drinking, cooking, bathing, and tooth brushing. Individuals with private water wells should have their well water tested and disinfected, if necessary, prior to discontinuing distillation or boiling.

(2) Persons who purchase water from a public water supply may contact their water supply distributor to determine if the water is safe for personal use.

(3) The public should avoid contact with waste material, soil, or water in the area potentially affected by the spill.

(4) If the public comes into contact with waste material, soil, or water potentially affected by the spill, they should bathe and wash clothes thoroughly as soon as possible.