

The Texas Natural Resource Conservation Commission (commission or TNRCC) proposes amendments to §305.48, concerning Additional Contents of Applications for Wastewater Discharge Permits, §305.62, concerning Amendments, and §305.71, concerning Basin Permitting.

EXPLANATION OF PROPOSED RULES

Under the Texas Pollutant Discharge Elimination System (TPDES) program, when a new TPDES permit is issued by the TNRCC, it replaces any National Pollutant Discharge Elimination System (NPDES) permit issued by the United States Environmental Protection Agency (EPA) and any state wastewater discharge permit issued by TNRCC before NPDES assumption. All covered discharges that did not have NPDES permits as of the date of assumption must be issued new TPDES permits, even if they have current state permits. These amendments are intended to assist the TNRCC in efficiently replacing those state permits with TPDES permits while providing all public participation required under state and federal law. The commission is also proposing concurrent changes to 30 TAC Chapters 39 and 281 to clarify the notice required for certain new TPDES permits, as well as conforming rule changes required to avoid conflicts within commission rules.

The primary purpose of the proposed amendments to Chapter 305 is to modify §§305.48, 305.62, and 305.71 to clarify which documents must be submitted with certain TPDES permit applications; to establish what TPDES permit changes qualify as major amendments, minor amendments, and minor modifications; and to allow the commission the flexibility to issue a permit for less than two years in those instances where necessary to effectuate an expeditious transition from a state to a TPDES permit.

Currently, the commission's rules in §305.48 require a wastewater discharge applicant to list on a map, or in a separate sheet attached to a map, the names and addresses of the owners of tracts of land that are adjacent to a treatment facility for which a wastewater discharge application has been filed. Section 305.48 is being amended to be consistent with the current requirements of §39.151 and to conform with amendments to that same section. Section 305.48(2)(a) is being amended to clarify that permittees seeking renewal of their permits need not submit an adjacent and downstream landowner list, because mailed notice to those persons is not required. Section 305.48(2)(b) is being amended to clarify that permittees seeking a new TPDES permit for the identical discharge as in an existing state permit issued before September 14, 1998, and for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62, would not be required to provide an adjacent and downstream landowner list.

Currently, §305.62 provides for two types of amendments to wastewater permits, the major amendment and the minor amendment. Under §305.62(c)(2)(C), minor amendments include those items EPA processes as minor modifications under 40 Code of Federal Regulations (CFR) §122.63. To meet Clean Water Act requirements while also retaining the flexibility of Texas Water Code, §26.028(b) to allow other types of amendments to be considered minor, the rule change in §305.62 proposes to create three types of amendments for TPDES permits - the major amendment, the minor amendment, and the minor modification. Section 305.62(c)(1)(C) would be deleted to eliminate the limiting language for TPDES permits as it relates to minor amendments.

Recently, the TNRCC has been asked to approve a reduction in monitoring frequency as part of a renewal of a wastewater discharge permit, or in the alternative, as a minor amendment to the permit.

The TNRCC believes that under the current rules and state law, a reduction in the monitoring frequency must be processed as a major amendment to the permit. The TNRCC is not proposing any amendments to the rule at this time that would allow a reduction in monitoring frequency to be processed as a minor amendment or as part of a renewal of a permit. However, the TNRCC is soliciting comments from the public about whether a reduction in monitoring could be processed as part of a renewal of a permit or as a minor amendment to a permit and whether that change should be incorporated into the current rulemaking.

Section 305.62(c)(3) would be added relating to minor modifications to TPDES permits. It will track the language in 40 CFR §122.63, relating to minor modifications to NPDES permits, and will include the same list of minor modifications provided in 40 CFR §122.63. Thus, all the changes classified as minor amendments under state law would continue to be made as minor amendments, with the exception of those listed changes that may be processed as minor modification to TPDES permits, which would use a third set of notice procedures.

Section 39.151(e) would be amended concurrently with the amendments to §305.62 to outline the notice required for each type of amendment. Notice for major amendments would not change. For minor amendments to TPDES permits, notice would be mailed to those people required to receive notice under Texas Water Code, §26.028(b) and 40 CFR §124.10(c), which includes the mayor and health authorities of the city in which the facility is located, the county judge and health authorities for

the county in which the facility is located, state and federal agencies required to receive notice for NPDES or TPDES permits, the applicant, and those people on the mailing list maintained by the chief clerk. For TPDES major facility permits, notice will be published in the *Texas Register*. The text of the notice will meet the requirements of §39.11 and §39.151(b)(4) and will provide at least a 30-day public comment period. The executive director will prepare a response to all significant public comments received by the commission under §55.25(b) of the TNRCC's procedural rules.

For minor modifications to TPDES permits, the chief clerk will provide notice as required by Texas Water Code, §26.028(b), which includes sending the notice to the mayor and health authorities of the city in which the facility is located and the county judge and health authorities for the county in which the facility is located. The notice will provide a ten-day public comment period.

Section 305.62(d) would also be amended to clarify that the executive director may initiate, and the commission may order, major amendments, minor amendments, modifications, or minor modifications to permits.

Section 305.62(a) will also be amended to make it easier to read and understand. The changes to this section are not substantive; they consist of grammatical changes and sentence structure.

Section 305.71(a) requires that a permit issued by the commission be for a term of at least two years. The commission is modifying subsection (a) to clarify that the transitional new TPDES permits replacing state permits may be issued for a term of less than two years.

FISCAL NOTE

Bob Orozco, Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments to Chapter 305, Consolidated Permits, are in effect, there will be no significant fiscal implications for state government or units of local government as a result of administration or enforcement of the proposed amendments. The proposed amendments to Chapter 305 clarify which TPDES permits changes will constitute a major amendment, a minor amendment, or a minor modification; will clarify what documents must be submitted with certain TPDES permit applications; and will provide the commission with the flexibility to issue certain TPDES permits for less than two years. The proposed amendments would also clarify that the executive director may initiate and the commission may order major amendments, minor amendments, modifications or minor modifications to permits.

Fiscal implications are not anticipated to be significant because the proposed changes conform to existing state and federal requirements, add clarification, and enhance flexibility that could be viewed as having potentially positive fiscal implications for units of local government.

PUBLIC BENEFIT

Mr. Orozco has also determined that for each year of the first five years the proposed amendments to Chapter 305 are in effect, the public benefit anticipated from enforcement of and compliance with these rules will be clarification of existing requirements; the addition of a new category of permit change which provides additional flexibility; conforming changes which make this rule consistent with

requirements in Chapter 39 and Chapter 281; and an improved regulatory process. The fiscal implications to small business are contained in the Small Business Analysis Section of this fiscal note.

SMALL BUSINESS ANALYSIS

The proposed amendments will establish which TPDES permits changes will constitute a major amendment, a minor amendment, or a minor modification; will clarify what documents must be submitted with certain TPDES permit applications; and will provide the commission with the flexibility to issue certain TPDES permits for less than two years. The proposed amendments would also clarify that the executive director may initiate and the commission may order major amendments, minor amendments, modifications or minor modifications to permits.

No significant additional costs are anticipated to any person or small business as a result of complying with the proposed amendments because the proposed amendments related to minor changes to TPDES permits will clarify and be consistent with existing state and federal requirements and do not add any additional regulatory burden to small business not already required by state or federal law. The proposed amendments also clarify that applicants for new TPDES permits for which the discharge is authorized by an existing state permit issued before September 14, 1998 will not be required to submit a list of adjacent and downstream landowners with their application. The proposed changes may be considered to have potentially positive economic effects for applicants who have applied for new TPDES permits for discharges authorized by an existing state permit issued before September 14, 1998 whose application does not propose any terms or conditions that would constitute a major amendment to the existing state permit. Therefore, no adverse economic effects are anticipated

to any person or small business as a result of complying with the provisions of the proposed amendments to the rules. In addition, although no adverse economic effects are anticipated, state and federal law do not allow small businesses to be treated differently than large businesses with respect to what is required in an application or what subsequent public notice is required.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code (the 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 Code. "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. Because the specific intent of the proposed rulemaking is procedural in nature and clarifies which documents must be submitted with certain TPDES permit applications; establishes which TPDES permit changes constitute a major amendment, a minor amendment, or a minor modification; and allows the commission the flexibility to issue a permit for less than two years, the rulemaking does not meet the definition of a "major environmental rule." In addition, the proposed amendment is not a major environmental rule because it will 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 because the rule is procedural and affects changes to the types of amendments available and notice required in TPDES permitting matters. In addition, the proposed amendments do not exceed a

standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant to the Code, §2007.043. The following is a summary of that assessment. Promulgation and enforcement of these rules will not affect private real property because the proposed rulemaking consists of rule changes which clarify the documents to be submitted with certain TPDES permit applications; establish what TPDES permit changes qualify as major amendments, minor amendments, and minor modifications; and allow the commission the flexibility to issue a permit for less than two years. In addition, this rulemaking does not restrict or limit an owner's right to property that would otherwise exist in the absence of the proposed changes. Any effect on property rights occasioned by the proposed changes would be a result of existing statutes contained in the Texas Water Code, Chapter 26, which mandates the development of a wastewater permitting program. Furthermore, the following exception to the application of Chapter 2007 of the Code applies to the majority of the proposed rulemaking: [this] action . . . is reasonably taken to fulfill an obligation mandated by federal law (the Code, §2007.003(b)(4)). See 40 CFR §§123.25, 122.21, and 124.10 (requiring a state with a federally delegated NPDES program to incorporate specific notice provisions in that program).

COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination

Council and found that the proposed rules are subject to the CMP and must be consistent with applicable CMP goals and policies. The commission has determined that the proposed rulemaking is consistent with each applicable CMP goal and policy, which are found in 31 TAC §501.12 and §501.14. The rulemaking outlines and clarifies the commission's rules concerning public participation in the area of new, amended, and renewal TPDES permits. Specifically, the proposed rules clarify which documents must be submitted with certain TPDES applications; what TPDES permit changes qualify as major amendments, minor amendments, and minor modifications; and allow the commission the flexibility to issue a permit for less than two years. The proposed rules harmonize the notice requirements of the federal Clean Water Act (CWA), the Code of Federal Regulations that implements the CWA, and the Texas Water Code with regard to minor TPDES permit changes. The rulemaking will also clarify notice procedures for certain new TPDES permits consistent with the same state and federal rules and regulations.

The commission has also determined that the proposed rule will not have a direct and significant adverse effect on Coastal Natural Resource Areas identified in the applicable CMP policies. The proposed rules are procedural and will not have a direct and significant impact that is causally linked to the activity authorized by the permit. Notice requirements applicable to wastewater discharge matters are preliminary to receiving a wastewater discharge permit. The notice is not the causal link to the discharge activity; it is an initial step that must be taken to obtain a permit. The permit authorizing the discharge is the direct link to the activity.

The commission invites public comment on the applicability of the CMP and on the consistency determination of the proposed rule.

PUBLIC HEARING

A public hearing on this proposal will be held May 6, 1999, at 10:00 a.m. in Room 5108 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by May 10, 1999, and should reference Rule Log Number 99003-039-WT. Comments received by 5:00 p.m. on that date will be considered by the commission before any final action on the proposal. For further information, please contact Emily W. Rogers at (512) 239-0649.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state. The amendments are also proposed

under the specific authority of Texas Water Code, §26.011, which provides the commission the authority to promulgate rules and issue orders relating to waste discharges and impending waste discharges covered by Texas Water Code, Chapter 26; Texas Water Code, §26.027, which allows the commission to issue permits and amend permits for the discharge of waste or pollutants into water of the state; Texas Water Code, §26.028, which describes what notice is required for wastewater applications; and Texas Water Code, §26.029, which describes the required conditions of permits.

No other codes, statutes, or rules will be affected by this proposal.

SUBCHAPTER C : APPLICATION FOR PERMIT

§305.48

§305.48. Additional Contents of Applications for Wastewater Discharge Permits.

(a) The following shall be included in an application for a wastewater discharge permit.

(1) (No change.)

(2) If the application is for the disposal of any waste into or adjacent to a watercourse, the application shall show the ownership of the tracts of land adjacent to the treatment facility and for a reasonable distance along the watercourse from the proposed point of discharge. The applicant shall list on a map, or in a separate sheet attached to a map, the names and addresses of the owners of such tracts of land as can be determined from the current county tax rolls or other reliable sources. The application shall state the source of the information. This subsection does not apply to:

(A) an application to renew a permit; and

(B) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by 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).

(3) (No change.)

(b) - (c) (No change.)

**SUBCHAPTER D : AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS,
REVOCATION, AND SUSPENSION OF PERMITS
§305.62, §305.71**

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state. The amendments are also proposed under the specific authority of Texas Water Code, §26.011, which provides the commission the authority to promulgate rules and issue orders relating to waste discharges and impending waste discharges covered by Texas Water Code, Chapter 26; Texas Water Code, §26.027, which allows the commission to issue permits and amend permits for the discharge of waste or pollutants into water of the state; Texas Water Code, §26.028, which describes what notice is required for wastewater applications; and Texas Water Code, §26.029, which describes the required conditions of permits.

No other codes, statutes, or rules will be affected by this proposal.

§305.62. Amendment.

(a) Amendments generally [Causes for amendment]. A change in a term, condition, or provision of a permit requires an amendment, except under [Except as provided in] §305.70 of this title (relating to Municipal Solid Waste Class I Modifications), under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee), under [and in] §305.66 of this title

(relating to Corrections of Permits), and under §305.64 of this title (relating to Transfer of Permits) [a change in a term, condition, or provision of a permit requires an amendment]. The permittee or an affected person may request an amendment. If the permittee requests an amendment, the application shall be processed under [in accordance with] Chapter 281 of this title (relating to Applications Processing). If the permittee requests a modification of a solid waste permit, the application shall be processed under [in accordance with] §305.69 of this title [(relating to Solid Waste Permit Modification at the Request of the Permittee)]. If the permittee requests a modification of a municipal solid waste permit, the application shall be processed in accordance with §305.70 of this title [(relating to Municipal Solid Waste Class I Modifications)]. If an affected person requests an amendment, the request shall be submitted to the executive director for review. If the executive director determines the request is not justified, the executive director will respond within 60 days of submittal of the request, stating the reasons for that determination. The person requesting an [such] amendment may petition the commission for a review of the request and the executive director's recommendation. If the executive director determines that an amendment [such a request] is justified, the amendment will be processed under [in accordance with] subsections (d) and (f) of this section.

(b) (No change.)

(c) Types of amendments.

(1) (No change.)

(2) A minor amendment is an amendment to improve or maintain the permitted quality or method of disposal of waste, or injection of fluid if there is neither a significant increase of the quantity of waste or fluid to be discharged or injected nor a material change in the pattern or place of discharge of injection. A minor amendment includes any other change to a permit issued under this chapter that will not cause, or [nor] relax a standard or criterion which may result in, a potential deterioration of quality of water in the state. A minor amendment may also include [includes], but is not limited to:

(A) except for Texas Pollutant Discharge Elimination System (TPDES) permits, changing an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date; and

(B) except for TPDES permits, requiring more frequent monitoring or reporting by the permittee; [; and]

[(C) for TPDES permits:]

[(i) correcting typographical errors;]

[(ii) changing the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge under 40 Code of Federal Regulations (CFR) §122.19;]

[(iii) deleting a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits;]

[(iv) when the permit becomes final and effective on or after March 9, 1982, conforming to changes respecting to 40 CFR §§122.41(e), (l), (m)(4)(i)(B) and 122.42(a) issued September 26, 1984; or]

[(v) incorporate conditions of a publicly owned treatment works (POTW) pretreatment program approved in accordance with the procedures in 40 CFR §403.11, as adopted by §315.1 of this title (relating to General Pretreatment Regulations for Existing and New Sources of Pollution) as enforceable conditions of the POTW's permit.]

(3) Minor modifications for TPDES permits. The executive director may modify a TPDES permit to make corrections or allowances for changes in the permitted activity listed in this subsection (see also §50.45 of this title (relating to Corrections to Permits)). Notice requirements for a minor modification are in §39.151 of this title (relating to Application for Wastewater Discharge

Permit, including Application for the Disposal of Sewage Sludge or Water Treatment Sludge). Minor modifications to TPDES permits may only:

(A) correct typographical errors;

(B) require more frequent monitoring or reporting by the permittee;

(C) change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date;

(D) change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation before discharge under §305.534 of this title (relating to New Sources and New Dischargers);

(E) delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except within permit limits;

(F) when the permit becomes final and effective on or after March 9, 1982, add or change provisions to conform with §§305.125, 305.126, 305.531(1), 305.535(c)(1)(B), and 305.537 of this title (relating to Standard Permit Conditions; Additional Standard Permit Conditions for

Waste Discharge Permits; Establishing and Calculating Additional Conditions and Limitations for TPDES Permits; Bypasses from TPDES Permitted Facilities; Minimum Requirements for TPDES Permitted Facilities; and Reporting Requirements for Planned Physical Changes to a Permitted Facility); or

(G) incorporate enforceable conditions of a publicly owned treatment works pretreatment program approved under the procedures in 40 CFR §403.11, as adopted by §315.1 of this title (relating to General Pretreatment Regulations for Existing and New Sources of Pollution).

(d) Good cause for amendments. If good cause exists, the executive director may initiate and the commission may order a major amendment, minor amendment, modification, or minor modification [an amendment] to a permit and the executive director may request an updated application if necessary.

Good cause includes, but is not limited to:

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

(5) for underground injection wells, a determination that the waste being injected is a hazardous waste as defined under §335.1 of this title (relating to Definitions) either because the definition has been revised, or because a previous determination has been changed; and

(6) for Underground Injection Control (UIC) area permits, any information that cumulative effects on the environment are unacceptable.

(e) - (i) (No change.)

§305.71. Basin Permitting.

(a) Upon receipt of wastewater discharge permit applications, excluding permits for confined animal feeding operations, the commission, to the greatest extent practicable, will evaluate all future applications within a single river basin within the same year. The future expiration dates for all permits issued after the effective date of this section shall be in accordance with the basin schedules in subsection (b) of this section. However, no permit shall be issued for a term of less than two years, except as specified in this subsection. If the schedule indicates a term of less than two years, then two terms between two and five years in length will be utilized in order to coincide with the schedule. There may be instances where two permit cycles are needed for some permits before they are on the basin cycle. The commission may issue new Texas Pollutant Discharge Elimination System (TPDES) permits for less than two years duration for discharges authorized by an existing state permit issued before September 14, 1998.

(b) - (e) (No change.)