

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §327.1 and new §327.32.

Section 327.1 is adopted *without change* to the proposed text as published in the February 5, 2016, issue of the *Texas Register* (41 TexReg 933) and, therefore, will not be republished. Section 327.32 is adopted *with change* to the proposed text and, therefore, will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

Senate Bill (SB) 912, passed by the 84th Texas Legislature, 2015, amends Texas Water Code (TWC), §26.039 to allow individuals to report certain accidental discharges or spills of treated or untreated wastewater on a monthly basis from wastewater treatment facilities or collection systems owned or operated by a local government. SB 912 also requires the commission to establish standard methods for calculating the volume of accidental discharges or spills of treated or untreated wastewater related to this section; to consider compliance history of the individual; and to establish procedures for formatting and submitting a monthly summary. Additionally, SB 912 requires TCEQ to adopt rules necessary to implement TWC, §26.039 no later than June 1, 2016. This rulemaking adopts amended §327.1 and new §327.32 in order to implement the requirements of SB 912 for unpermitted wastewater treatment facilities and collection systems.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts amended 30 TAC Chapter 305, Consolidated Permits.

Section by Section Discussion

§327.1, Applicability

The commission adopts amended §327.1(b)(7) to replace the phrase, "discharges not so authorized" with "unauthorized discharges" in order to improve readability and clarity.

The commission also adopts §327.1(a)(10), which states that Chapter 327 is not applicable to accidental discharges or spills of treated or untreated wastewater that are reported in accordance with §305.132.

§327.32, Reporting Requirements for Certain Accidental Discharges or Spills of Treated or Untreated Wastewater at Wastewater Treatment Facilities or Collection Systems

The commission adopts new §327.32(a) to define terms used in the section.

The commission adopts new §327.32(a)(1) to provide a definition of a collection system to mean pipes, conduits, lift stations, force mains, and all other constructions, devices, and appurtenant appliances used to transport domestic wastewater to a wastewater

treatment facility. This definition is consistent with the definition in 30 TAC Chapter 217, Design Criteria for Domestic Wastewater Systems.

The commission adopts new §327.32(a)(2) to provide a definition of history of noncompliance to mean the history of non-reporting or reoccurrences of accidental discharges or spills of treated or untreated wastewater. Section 327.32(a)(2) was changed in response to comment about broadening the definition of history of noncompliance to account for a high number of accidental discharges or spills.

The commission adopts new §327.32(a)(3) to provide a definition of local government to mean an incorporated city, a county, a river authority, or a water district or authority acting under Article III, Section 52 or Article XVI, Section 59 of the Texas Constitution. This definition is consistent with the definition in TWC, Chapter 26.

The commission adopts new §327.32(a)(4) to provide a definition of wastewater treatment facility to mean all contiguous land and fixtures, structures, and appurtenances used for storing, processing, and treating wastewater. A wastewater treatment facility does not include the collection system located outside of the fenced area around a wastewater treatment facility. This definition is consistent with the definition in Chapter 217. The phrase "around a wastewater treatment facility" was added in response to comments to remain consistent with Chapter 217.

The commission adopts new §327.32(b) that states that unless the conditions in §327.32(c) exists, all accidental discharges or spills of treated or untreated wastewater shall be reported within 24 hours from the time of occurrence. A written submission shall be provided to the executive director within five days of occurrence. The written submission shall contain a description of the accidental discharge or spill and its cause; the potential danger to human health or safety, or the environment; the duration of the accidental discharge or spill, including exact dates and times; the length of time that the accidental discharge or spill is expected to continue if it has not been corrected; and steps taken or planned to reduce, eliminate, and prevent recurrence of the accidental discharge or spill, as well as efforts made to mitigate its adverse effects.

The commission adopts new §327.32(c) to allow an accidental discharge or spill of treated or untreated wastewater that occurs at wastewater treatment facilities or collection systems owned or operated by a local government, and that does not endanger human health or safety or the environment, to be reported to the executive director as a monthly summary.

The commission adopts new §327.32(c)(1) which specifies that the accidental discharge or spill must be 1,000 gallons or less.

The commission adopts new §327.32(c)(2) which specifies that the accidental discharge or spill must not be associated with another simultaneous accidental discharge or spill of treated or untreated wastewater.

The commission adopts new §327.32(c)(3) which specifies that the accidental discharge or spill must be controlled or removed before it enters water in the state or adversely affects a public or private source of drinking water.

The commission adopts new §327.32(c)(4) which specifies that the accidental discharge or spill must not be subject to local regulatory control and reporting requirements.

The commission adopts new §327.32(d) which specifies that the summary must be reported to the executive director by the 20th day of the month for spills of treated or untreated wastewater that have occurred during the previous month. This date is consistent with the reporting requirements for permitted facilities. This clause also specifies that the summary must include the location; volume; content; description of the accidental discharge or spill and its cause, including dates and times; and steps taken to reduce, eliminate, and prevent recurrence of the accidental discharge or spill.

The term "exact" was removed in subsection (d)(4) in response to comments.

The commission adopts new §327.32(e) to provide four standard methods for

determining spill volumes.

The commission adopts new §327.32(e)(1). This paragraph describes visual estimates as the first of four standard methods. If the accidental discharge or spill is less than 55 gallons, using a standard five-gallon bucket for reference, estimate the number of buckets that the discharge or spill would fill then multiply by five to obtain the number of gallons discharged or spilled. If the accidental discharge or spill is larger than 55 gallons, using a standard 55-gallon barrel for reference, estimate the number of barrels that the discharge or spill would fill then multiply by 55 to obtain the number of gallons discharged or spilled. The number 50 was changed to 55 in response to comments to remain consistent with industry standards.

The commission adopts new §327.32(e)(2). This paragraph describes volume as the second of four standard methods. Identify the length, width, and depth of the contained accidental discharge or spill in feet and calculate the volume by multiplying length by width by depth by 7.5 (the conversion factor from cubic feet to gallons).

The commission adopts new §327.32(e)(3). This paragraph describes duration and flow rate as the third standard method. Identify separate estimates for the duration and the flow rate of the accidental discharge or spill. The estimated volume is calculated by multiplying the duration (hours or days) by the flow rate (gallons/hour or gallons/day).

The commission adopts new §327.32(e)(4) to include an alternative method in which the responsible person may use other volumetric calculation methodologies rather than those listed in subsection (e)(1 - (3)), so long as such methodologies include procedures to identify a duration, flow rate, depth, affected area, and total quantity of each spill (including, as appropriate, reference to estimation tools such as barrels, for example), and such methodology is consistent with standard and accepted industry practices. Such alternative methodology must be identified in the responsible person's monthly report. New §305.132(d)(4) was added in response to comment to allow flexibility and in recognition of other existing standardized methods.

The commission adopts new §327.32(f) which specifies that the responsible person must keep records of all accidental discharges or spills of treated or untreated wastewater reported under §327.32. The records must remain on-site for three years and be made immediately available to commission staff upon request. This three-year period is consistent with recordkeeping requirements for permitted facilities.

The commission adopts new §327.32(g) which specifies that the executive director may require more frequent reporting based on the responsible person's history of noncompliance.

Final Regulatory Impact Analysis

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, it revises procedural rules regarding when and how specific accidental discharges or spills of treated or untreated wastewater are to be reported. The primary purpose of the adopted rulemaking is to implement changes made to the TWC in SB 912.

The adopted rulemaking is procedural in nature and does 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 or a sector of the state.

This rulemaking does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major

environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the adopted rulemaking revises procedural rules regarding when and how to report certain accidental discharges and spills of treated or untreated wastewater and is procedural in nature. The primary purpose of the adopted rulemaking is to implement changes made to the TWC in SB 912. This adopted rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the law described in the Statutory Authority section of this preamble.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of

whether Texas Government Code, Chapter 2007, is applicable. The adopted rulemaking revises procedural rules regarding when and how to report certain accidental discharges and spills of treated and untreated wastewater. Promulgation and enforcement of the adopted rulemaking will not burden private real property. The adopted rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

The commission reviewed this rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee 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. Therefore, the adopted rules are not subject to the CMP.

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

Public Comment

The commission held a public hearing on March 1, 2016. The comment period closed on

March 7, 2016. The commission received comments from Harris County Pollution Control Services Department (HCPCSD), Lloyd Gosselink Attorneys at Law (Lloyd Gosselink), San Jacinto River Authority - Woodlands Division (SJRA), Texas Association of Clean Water Agencies (TACWA) and Water Environment Association of Texas (WEAT), and an individual. The comments received were neither in support of nor against the rulemaking, but each commenter suggested changes to the proposed rule language.

Response to Comments

Comment

HCPCSD commented that it has a concern with using the term "collection system" as it is defined in 30 TAC Chapter 217 in this rule rather than using the term "collection facility" used in SB 912. HCPCSD would like the definition to exclude lift stations, mains and manholes from the definition because of their proximity to ditches and storm drains in Harris County. HCPCSD is concerned that discharges to waters of the state will not be reported timely under the new rule. HCPCSD suggested narrowing the definition by adding language to §327.32(c)(3) to state that an accidental discharge or spill "is controlled or removed before it enters water in the state, specifically including, but not limited to ditches and storm drains."

Response

The commission respectfully disagrees with the comment. The commission understands the term "facility" used in SB 912 is synonymous with the term "collection system" that is defined in Chapter 217. The rule requires 24-hour reporting for discharges or spills which reach waters of the state. No change was made in response to the comment.

Comment

HPCSD commented that the definition of history of noncompliance in §327.32(a)(2) should be broadened to include the number of accidental discharges or spills not just the reporting of them.

Response

The commission agrees with the comment and has made a change in the proposed rule language to broaden the definition by accounting for reoccurrences.

Comment

HPCSD commented that the definition of wastewater treatment facility in §327.32(a)(4) should include "around a wastewater treatment facility" to be consistent with Chapter 217.

Response

The commission agrees with the comment and has made the change to be consistent with Chapter 217.

Comment

HCPCSD recommended that language is added to §327.32(g) to allow for local pollution control authorities to require more frequent reporting of accidental discharges or spills.

Response

The commission respectfully disagrees with this comment. The noncompliance forms are reported to the TCEQ regional office and Enforcement Division. It is the responsibility of TCEQ to determine the history of noncompliance. No change was made in response to this comment.

Comment

Lloyd Gosselink, SJRA, WEAT and TACWA recommended removing the word "exact" in §327.32(d)(4). They commented that this revision would maintain the requirement for reporting date and time without placing an undue burden on the permittees to identify the exact time.

Response

The commission agrees with the comment and has removed the term "exact" from the rule language.

Comment

Lloyd Gosselink, SJRA, WEAT and TACWA commented that §327.32(d)(5) should be removed. They noted that it is unnecessary to identify steps taken to reduce, eliminate, and prevent recurrence of the accidental discharge or spill for small volume accidental discharge or spills. They also commented that the proposed language requires diagnosis and planning that is suitable for larger spills but places an undue burden on the permittees to submit with a monthly summary.

Response

The commission respectfully disagrees with the comment. This information is already captured under the 24-hour reporting requirements and ensures that the responsible person has attempted to prevent future accidental discharges or spills. No change was made in response to this comment.

Comment

Lloyd Gosselink, SJRA, WEAT and TACWA commented that while the three methods for calculating spill volume in §327.32(e)(1) - (3) capture the most commonly used

calculations, they believe there are other methods that are appropriate in certain circumstances. They commented that an "other methods" option is necessary so that permittees are not forced to report small accidental discharges or spills on the same basis as accidental discharges or spills greater than 1,000 gallons only because the volumetric calculation method differs from the three methods TCEQ currently proposes. They propose adding §327.32(e)(4) "Other Methods. The responsible person may use other volumetric calculation methodologies rather than those listed above, so long as such methodologies, include procedures to identify a duration, flow rate, depth, affected area, and total quantity of each spill (including, as appropriate, reference to estimation tools such as barrels, for example), and such methodology is consistent with standard and accepted industry practices. Such alternative methodologies must be identified in the responsible person's monthly report."

Response

The commission agrees with the suggested change. The language submitted allows for an additional documented methodology that includes elements of the other three standards already in the proposed rule language. Adding the additional language allows application of other acceptable industry standards for calculating spills while not diminishing the documentation of important parameters that characterize each spill. Section 305.132(d)(4) was added in response to comment.

Comment

An individual commented that the industry standard for metal and plastic barrels and drums is 55 gallons. Therefore, he commented that the references to a 50-gallon drum be revised to 55-gallon in §327.32(e)(1).

Response

The commission agrees with the comment and has changed "50" in §327.32(e)(1) to "55" to remain consistent with the industry standard.

CHAPTER 327: SPILL PREVENTION AND CONTROL

§327.1, §327.32

Statutory Authority

The amendment and new section are adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, §26.039, concerning Accidental Discharges and Spills and TWC, §26.121, concerning Unauthorized Discharges Prohibited, which prohibit unauthorized discharges into or adjacent to water in the state.

The adopted amendment and new section implement TWC, §26.039, and Senate Bill 912 (84th Texas Legislature, 2015).

§327.1. Applicability.

(a) This chapter applies to discharges or spills that result in a release to the environment within the territorial limits of the State of Texas, including the coastal waters of this state.

(b) This chapter does not apply to:

(1) discharges or spills of oil that enter or threaten to enter coastal waters of the State. Except for spills of oil of 240 barrels or less for which the Railroad Commission of Texas is the on-scene coordinator, such discharges or spills are regulated by the Texas General Land Office under the Oil Spill Prevention and Response Act of 1991, the Texas Natural Resources Code, Chapter 40, Subchapters C, D, E, F, and G;

(2) spills or discharges from activities subject to the jurisdiction of the Railroad Commission of Texas under the Texas Water Code, §26.131;

(3) releases only to air;

(4) the lawful placement of waste or accidental discharge of material into a solid waste management unit registered or permitted under Chapter 335, Subchapter A of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste in General);

(5) units and activities regulated under the authority of the Texas Water Code, Chapter 26, Subchapter I (Underground and Aboveground Storage Tanks);

(6) the lawful application of materials, including but not limited to fertilizers and pesticides, to land or water;

(7) discharges that are authorized by a permit, order, or rule issued under federal law or any other law of the State of Texas; provided, however, that unauthorized discharges shall be reported under this chapter unless the permit, order, or another commission rule provides an applicable reporting requirement;

(8) discharges or spills that are continuous and stable in nature, and are reported to the United States Environmental Protection Agency under 40 Code of Federal Regulations §302.8;

(9) discharges or spills occurring during the normal course of rail transportation; or

(10) accidental discharges or spills of treated or untreated wastewater that are reported in accordance with §305.132 of this title (relating to Special Conditions for Certain Wastewater Discharges).

§327.32. Reporting Requirements for Certain Accidental Discharges or Spills of Treated or Untreated Wastewater at Wastewater Treatment Facilities or Collection Systems.

(a) The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Collection system--Pipes, conduits, lift stations, force mains, and all other constructions, devices, and appurtenant appliances used to transport domestic wastewater to a wastewater treatment facility.

(2) History of noncompliance--History of non-reporting or reoccurrences of accidental discharges or spills of treated or untreated wastewater.

(3) Local government--An incorporated city, a county, a river authority, or a water district or authority acting under Article III, Section 52, or Article XVI, Section 59 of the Texas Constitution.

(4) Wastewater treatment facility--All contiguous land and fixtures, structures, and appurtenances used for storing, processing, and treating wastewater. A wastewater treatment facility does not include the collection system located outside of the fenced area around a wastewater treatment facility.

(b) Except as provided by subsection (c) of this section, all accidental discharges or spills of treated or untreated wastewater shall be reported within 24 hours of the occurrence. A written submission shall be provided to the executive director within five days of the occurrence. The written submission shall contain a description of the accidental discharge or spill and its cause; the potential danger to human health or safety, or the environment; the duration of the accidental discharge or spill, including exact dates and times; if the cause of the accidental discharge or spill has not been corrected, the time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence, and to mitigate its adverse effects.

(c) The responsible person of a wastewater treatment facility or collection system that is owned or operated by a local government may report accidental discharges or spills of treated or untreated wastewater that do not endanger human health or safety or the environment to the executive director as a monthly summary if each individual accidental discharge or spill:

(1) has a volume of 1,000 gallons or less;

(2) is not associated with another simultaneous accidental discharge or spill of treated or untreated wastewater;

(3) is controlled or removed before the accidental discharge or spill enters water in the state or adversely affects a public or private source of drinking water; and

(4) is not otherwise subject to local regulatory control and reporting requirements.

(d) The responsible person shall submit a monthly summary by the 20th day of the month for each accidental discharge or spill that occurred during the previous month. The summary must include, at a minimum, the:

(1) location, volume and content of the accidental discharge or spill;

(2) description of the accidental discharge or spill;

(3) cause of the accidental discharge or spill;

(4) dates and times of the accidental discharge or spill; and

(5) steps taken to reduce, eliminate, and prevent recurrence of the accidental discharge or spill.

(e) The responsible person must use one of the following methods for determining the volume of the discharge or spill.

(1) Visual estimate. If the accidental discharge or spill is less than 55 gallons, using a standard five-gallon bucket for reference, estimate the number of buckets that the discharge or spill would fill then multiply by five to obtain the number of gallons discharged or spilled. If the accidental discharge or spill is larger than 55 gallons, using a standard 55 gallon barrel for reference, estimate the number of barrels that the discharge or spill would fill and then multiply by 55 to obtain the number of gallons discharged or spilled.

(2) Measured volume. Identify the length, width, and depth of the contained accidental discharge or spill in feet and calculate the volume by multiplying length by width by depth by 7.5 (the conversion factor from cubic feet to gallons).

(3) Duration and flow rate. Identify separate estimates for the duration and the flow rate of the accidental discharge or spill. The estimated volume is calculated by multiplying the duration (hours or days) by the flow rate (gallons/hour or gallons/day).

(4) Other methods. The responsible person may use other volumetric calculation methodologies rather than those listed in paragraphs (1) - (3) of this subsection, so long as such methodologies include procedures to identify a duration, flow rate, depth, affected area, and total quantity of each spill (including, as appropriate, reference to estimation tools such as barrels, for example), and such methodology is consistent with standard and accepted industry practices. Such alternative methodologies must be identified in the responsible person's monthly report.

(f) The responsible person must keep records of all accidental discharges or spills of treated or untreated wastewater reported under this section. The records must remain on-site for three years and be made immediately available to commission staff upon request.

(g) The executive director may require more frequent reporting based on the responsible person's history of noncompliance.