

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §305.541.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The rulemaking is necessary to adopt by reference the new United States Environmental Protection Agency (EPA) construction storm water rules, which were adopted in 40 Code of Federal Regulations (CFR) Part 450 and became effective on February 1, 2010. The rule applies to construction activities that are already required to be authorized under the Texas Pollutant Discharge Elimination System (TPDES) program, meaning that it applies to sites that are one or more acres in size, as well as smaller sites that are part of a larger common plan of development or sale that will disturb one or more acre. This rule requires all regulated construction activities to meet a series of non-numeric effluent limitations established to provide minimum national requirements. Besides the non-numeric effluent limits that all regulated sites are required to meet, construction sites that disturb ten or more acres will also be required to collect and analyze storm water discharges from the site and comply with a numeric effluent limitation for turbidity.

Non-numeric effluent limits are narrative requirements for best management practices to address erosion, sediment control, soil stabilization, and pollution prevention that prevent or minimize the amount of construction site pollutants, such as sediment, in storm water runoff. The requirements in the rule are similar to the existing requirements in the TPDES Construction General Permit (CGP), TXR15000 reissued on March 5, 2008.

The federal numeric effluent limitation is for turbidity and is set at 280 nephelometric turbidity units. This new requirement is achievable at a well-managed construction site without specialized treatment through the use of routine best management practices. Turbidity does not require laboratory analysis to determine the level present in the discharge. Analysis can be performed at the construction site with a hand-held turbidity meter.

The CGP is due for renewal in 2013. The non-numeric effluent limitations and turbidity effluent limitation will be incorporated into the renewal of the CGP. Construction site operators will not be required to comply with the new requirements until the CGP is reissued.

Currently, §305.541 adopts by reference certain parts of 40 CFR that were in effect at the time Texas was awarded delegation of the National Pollutant Discharge Elimination System program, and specific parts that were adopted after delegation. This rulemaking will add 40 CFR Part 450 to the list of parts adopted after delegation.

## SECTION DISCUSSION

Proposed amended §305.541 adds the adoption by reference of 40 CFR Part 450 as amended, which contains regulations related to controlling storm water from regulated construction sites.

## COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, fiscal implications, although not significant, are anticipated for the agency. The agency will be required to purchase new equipment, increase public outreach, modify forms,

update educational materials, modify inspection protocols, and modify the requirements of the CGP when it is renewed in 2013. The agency will use currently available resources to implement the proposed rule.

Units of state or local governments that engage in regulated construction activities or that operate regulated Municipal Separate Storm Sewer Systems (MS4s) will also experience fiscal implications as a result of implementation or enforcement of the proposed rule. However, any fiscal implications are not expected to be significant.

Many types of construction activities are affected by the proposed rule. Some examples are: residential construction, highway construction, commercial building construction, public building construction, and power line construction. The federal rules require all regulated construction activities to comply with non-numeric effluent limitations, which are essentially required best management practices. For large sites (ten acres or more), construction activities must also monitor (i.e., sample and analyze) discharges from construction sites and comply with a numeric effluent limitation for turbidity. The CGP will incorporate the non-numeric limitations and numeric limitations upon its renewal in 2013. No costs will be incurred by any regulated entity until the CGP is reissued in 2013, the third year after the proposed adoption of this rulemaking.

Small construction sites (at least one but less than ten acres or part of a larger plan of development) will be required to utilize best management practices that address erosion and sediment control, soil stabilization, and pollution prevention methods that are similar to the requirements in the requirements of the existing CGP. These prescribed methods (berms, barriers, etc.) are already used at many construction sites to comply with non-numeric effluent limitations, and any cost increase under the proposed rule is expected to be negligible. The proposed rule is not expected to have a significant fiscal impact on small

construction sites that disturb less than ten acres.

Large construction sites, which for the purpose of this rule are those disturbing ten or more acres, including smaller sites that are part of a larger common plan of development that will disturb ten or more acres, will be required to comply with the non-numeric effluent limitations described above, monitor discharges from the site, and comply with a numeric effluent limitation for turbidity. The proposed rule is not expected to have a significant fiscal impact on entities that engage in construction activities.

Prescribed methods to comply with non-numeric effluent limitations are already used at many construction sites, and any cost increase to use prescribed methods is not expected to be significant. In order to monitor discharges and comply with the numeric effluent limit, operators of large construction sites will need to have a turbidity meter and trained staff available to sample and analyze storm water when there is a rainfall event sufficient to cause a discharge. The cost to purchase a turbidity meter and associated equipment could range from \$900 to \$1,325. This purchase is expected to be a one-time purchase of equipment that can be used at multiple construction sites. The annual purchase of verification standards used to calibrate the meter is estimated to cost \$15 per year. Training and sampling costs are not expected to be significant since the meters come with instructions and current construction site staff can be trained while on the job to sample and monitor storm water. In addition, sampling and monitoring will only be required when there is a rainfall event sufficient to cause a discharge. The TCEQ will determine the frequency of sampling in the renewal of the CGP in 2013.

State agencies and local governments that engage in regulated construction activities will be affected by the proposed rule, but any cost increases are not expected to be significant. MS4 operators (e.g., cities or counties) that regulate construction storm water may need to adjust their oversight programs and

investigation protocols to include the new requirements. They may need to purchase turbidity meters to verify permittees' sample results. One-time costs for turbidity meters and associated equipment could range from \$900 to \$1,325. The annual purchase of verification standards used to calibrate the meter is estimated to cost \$15 per year. MS4 operators could increase permit fees to cover these costs, if they choose to do so.

#### PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be greater control over storm water discharges from regulated construction sites resulting in less sediment, turbidity, and other pollutants in construction storm water discharges from reaching waters in the state.

The proposed rule is not expected to result in significant fiscal implications for individuals or businesses.

Businesses that engage in regulated construction activities will be affected by the proposed rule, but not until the construction general permit is renewed in 2013. Costs to comply with the proposed non-numeric effluent limitations for small construction sites are not expected to be significant since many of the prescribed methods are used in current construction activities. Businesses may incur one-time equipment costs for a turbidity meter and related equipment, which is estimated to range from \$900 to \$1,325, if they have large construction sites. The annual purchase of verification standards used to calibrate the meter is estimated to cost \$15 per year. Training on equipment use is expected to occur on the job and is not expected to be significant since the meters come with instructions. Sampling and monitoring will occur only when there is a rainfall event that causes storm water runoff.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that engage in regulated construction activities. A small business is expected to incur the same costs as a large business to comply with the non-numeric effluent limitations and numeric effluent limitations of the proposed rule. For small construction sites, a small business will be required to use the prescribed methods, many of which are currently used, to comply with non-numeric effluent limitations. For large construction sites, a small business will be required to monitor runoff when there is a significant rainfall event and comply with the numeric effluent limitations. A small company may incur one-time costs for a turbidity meter and associated equipment, which is estimated to range between \$900 and \$1,325. The annual purchase of verification standards used to calibrate the meter is estimated to cost \$15 per year. Training, sampling, and monitoring costs are not expected to be significant since they can be done using current personnel and with on the job training.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with federal regulations, and any cost increases are not expected to affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a

material way for the first five years that the proposed rule is in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

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

A "major environmental rule" is defined in Texas Government Code, §2001.0225(a) as applying to rules adopted by a state agency that: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) 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 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the proposed rule change is to modify TCEQ's rules to implement new federal storm water regulations affecting construction activities that disturb one or more acres, and smaller sites that are part of larger common plans of development that will disturb one or more acres. Title 40 CFR Part 450 has new requirements that took effect on February 1, 2010. These rules would be adopted by reference in §305.531. Since these rules are being adopted by reference to conform to both federal rules and the NPDES delegation agreement; and this rule does not exceed any express requirement of state law or adopted solely under the general powers of TCEQ, the commission concludes that this rule does not meet the definition of "major environmental rule."

The commission invites public comment on the draft regulatory impact analysis determination.

#### DRAFT TAKINGS IMPACT ASSESSMENT

The commission evaluated this rule and performed an assessment of whether the proposed rule change constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule change is to incorporate new federal storm water regulations into state rules.

Promulgation and enforcement of this rule would be neither a statutory nor a constitutional taking of private real property because it involves only additional control of storm water runoff during construction activities on sites disturbing ten acres or more.

There are additional storm water control requirements imposed on private real property during construction activities that disturb one or more acres, but the benefits to society are increased by reducing discharges of pollutants from construction sites disturbing these particular construction sites. The rule change does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond what would otherwise exist in the absence of the regulation. Therefore, this rule change, if adopted, does not constitute a taking under the Texas Government Code, Chapter 2007.

The commission invites public comment on the draft takings impact assessment.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal 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 conducted a consistency determination for the proposed rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. This rulemaking fulfills the CMP goal to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

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

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on July 29, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas

Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512)

239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>.

File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-015-305-OW. The comment period closes August 2, 2010.

Copies of the proposed rulemaking can be obtained from the commission's Web site at

[http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Sherry Smith at (512) 239-0571.

**SUBCHAPTER P: EFFLUENT GUIDELINES AND STANDARDS FOR TEXAS POLLUTANT  
DISCHARGE ELIMINATION SYSTEM (TPDES) PERMITS**

**§305.541**

**STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

The proposed amendment implements 40 Code of Federal Regulations Part 450.

**§305.541. Effluent Guidelines and Standards for Texas Pollutant Discharge Elimination System Permits.**

Except to the extent that they are less stringent than the Texas Water Code or the rules of the commission, 40 Code of Federal Regulations (CFR), Subchapter N, Parts 400 - 471, except 40 CFR Part 403, which are in effect as of the date of the Texas Pollutant Discharge Elimination System program authorization, as amended, and Parts 437 (Federal Register, Volume 65, December 22, 2000), 442 (Federal Register, Volume 65, August 14, 2000), 444 (Federal Register, Volume 65, January 27, 2000),

[and] 445 (Federal Register, Volume 65, January 19, 2000), and 450 (Federal Register, Volume 74, December 1, 2009), as amended, are adopted by reference.