

# Texas Commission on Environmental Quality

## INTEROFFICE MEMORANDUM

**To:** Commissioners **Date:** October 15, 2010

**Thru:** LaDonna Castañuela, Chief Clerk  
Mark R. Vickery, P.G., Executive Director

**From:** L'Oreal W. Stepney, P.E., Deputy Director  
Office of Water

**Docket No.:** 2010-0316-RUL

**Subject:** Commission Approval for Rulemaking Adoption  
Chapter 305, Consolidated Permits  
Amendment of §305.541 to Implement New Federal Construction Storm Water  
Rules by Reference  
Rule Project No. 2010-015-305-OW

**Background and reason(s) for the rulemaking:**

The rulemaking adopts 40 Code of Federal Regulations (CFR) Part 450, a new chapter that sets new requirements for regulated construction sites. These rules require operators of any regulated construction activity (disturbing at least one acre or part of a larger plan of development or sale) to meet a series of non-numeric effluent limitations.

The rule also requires a numeric effluent limit for turbidity. On September 20, 2010, as a result of a court challenge to these new rules, the US Court of Appeals for the Seventh Circuit (Petition No. 09-4113), at the request of EPA, remanded the administrative record and is holding the case in abeyance. The remand is to allow EPA time to reconsider the rule and to fully respond to comments received during its rulemaking that related to the turbidity limit of 280 nephelometric turbidity units. EPA also asked the court to vacate the turbidity limit of 280 nephelometric turbidity units due to identified flaws in their method of calculation, but the court declined to do so.

The executive director has taken a position that until revised federal rules are promulgated numeric turbidity limitations will not be implemented in TCEQ issued construction storm water permits. Since this state rulemaking is an adoption by reference as amended, further TCEQ rulemaking will not be required.

In its motion before the court, EPA stated that it intended to reexamine the turbidity effluent limit through a narrowly tailored notice and comment (public participation) rulemaking and, if necessary, revise that portion of the limit before proceeding with its defense of the rule. The court will not be involved in the rulemaking. Following conclusion of the federal rulemaking, the fate of the court challenge will be determined.

**Scope of the proposed rulemaking:**

The rulemaking is not required by state or federal statute, but is necessary to keep commission rules synchronized with the EPA's rules as required by the Memorandum of Agreement (MOA) with EPA.

**Statutory authority:**

Texas Water Code, (TWC), §5.102, General Powers  
TWC, §5.103, Rules  
TWC, §5.105, General Policy  
TWC, §5.120, Conservation and Quality of Environment

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**Effect on the:**

**A) Regulated community:** Any entity engaging in regulated construction activities will be affected. The non-numeric limits are similar to the requirements in the current Texas Pollutant Discharge Elimination (TPDES) Construction General Permit (CGP), TXR150000. These non-numeric limits will be included in:

- Any individual construction storm water permit issued after the adoption of this rule;
- Sectors G, H, and J (related to mining) of the TPDES Multi-Sector General Permit (TXR050000) renewal due to be issued by August 2011; and
- The CGP renewal due to be issued by August 2013.

Numeric limits will also be included in these permits provided EPA adopts a revised turbidity limit through rulemaking.

**B) Public:** No effect on the public is anticipated.

**C) Agency programs:** The agency will be required to modify inspection protocols, (Field Operations Division), increase public outreach, modify forms, update educational materials (Small Business and Local Government Assistance Division), and modify the requirements of storm water permits (Water Quality Division).

**Stakeholder meetings:**

No stakeholder meetings were held since the requirements were set by the federal regulations.

**Public comment:**

A public hearing was held July 29, 2010. No comments were made at the hearing. The Lower Colorado River Authority (LCRA) and the Texas Department of Transportation (TXDOT) submitted comments. LCRA indicated that they would work through their issues with the new regulations during the renewal of the CGP rather than through this rulemaking. TXDOT is concerned with the ability of construction projects to meet the turbidity limit and the cost of compliance.

**Significant changes from proposal:**

Changes were made to the preamble in light of EPA's decision to re-examine the turbidity limit due to identified flaws in their method of calculating the limits established in 40 CFR Part 450. This addresses the comments regarding the turbidity numeric effluent limitation. No change was made to rule language since it is an adoption by reference as amended.

**Potential controversial concerns and legislative interest:**

None.

**Will this rulemaking affect any current policies or require development of new policies?**

No.

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**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

The alternative is to leave §305.541 as it is. Consequences for not amending the rule are that the commission will have to rely on the federal rules to implement the new storm water requirements in 40 CFR Part 450. Without the amendment of §305.541, TCEQ could be considered out of compliance with the MOA requirement that states in Section A.17., *TNRCC Responsibilities*, "Ensure new federal NPDES regulations are incorporated into state regulations within one year of federal promulgation or within two (2) years if a state statute must first be enacted."

**Key dates in the proposed rulemaking schedule:**

**Key points in adoption rulemaking schedule:**

<i>Texas Register</i> proposal publication date:	July 2, 2010
Anticipated <i>Texas Register</i> publication date:	November 19, 2010
Anticipated effective date:	November 25, 2010
Six-month <i>Texas Register</i> filing deadline:	January 3, 2011

**Agency contacts:**

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Robert Brush, Rule Project Attorney, 239-5600  
George Ortiz, Rule Team Member, 239-1457, Field Operations Support Division  
Natalia Henricksen, Texas Register Coordinator, 239-0177

**Attachments:**

40 CFR Part 450  
7<sup>th</sup> US Court of Appeals Petition

cc: Chief Clerk, 2 copies  
Executive Director's Office  
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