

The Texas Commission on Environmental Quality (commission or TCEQ) adopts the amendment to §305.541 *without changes* to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5744) and will not be republished.

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

The rulemaking adopts by reference the new United States Environmental Protection Agency (EPA) construction storm water rules, which were adopted in Title 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. 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), TXR150000, reissued on March 5, 2008.

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 United States Court of Appeals for the Seventh Circuit (Petition Number 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 re-consider 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 commission 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. The commission adopts 40 CFR Part 450 as it currently exists and does not intend to prospectively adopt any future amendments to the federal regulations at this time.

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.

The CGP is due for renewal in 2013. The non-numeric effluent limitations will be incorporated into the renewal of the CGP. A revised turbidity limit will be incorporated only if the EPA has adopted a revised turbidity limit by the time the CGP renewal is drafted. Construction site operators operating under authorization of the CGP will not be required to comply with the new requirements until the CGP is reissued.

Any individual construction storm water permit issued after the adoption of this rule will include the federal non-numeric limits and a numeric limit for turbidity only if EPA has adopted a revised turbidity limit. The federal non-numeric limits will also be included in the mining sectors (Sectors G, H, and J) of the renewal of the TPDES Multi-Sector General Permit, (MSGP) TXR05000, which is expiring August 13, 2011. However, due to EPA's identification of flaws in their method of calculating the turbidity limit currently included in the rules, a revised turbidity limit will be incorporated into the 2011 revision of the MSGP only if EPA has adopted a revised turbidity limit prior to the issuance of the 2011 MSGP.

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 (NPDES) 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

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

#### FINAL 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 adopted 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 intent of the adopted rule 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. 40 CFR Part 450 has new requirements that took effect on February 1, 2010. These rules are adopted by reference in §305.541. Since these rules are 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 invited public comment regarding the draft regulatory impact analysis determination during the comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

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

Promulgation and enforcement of this rule is 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 one acre 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. 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 does not constitute a taking under the Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption 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 adopted rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted 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.

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

#### PUBLIC COMMENT

The commission held a public hearing on July 29, 2010. The comment period closed on August 2, 2010. The commission received written comments from the Lower Colorado River Authority (LCRA) and the Texas Department of Transportation (TxDOT). Representatives from Bullock, Bennett, and Associates; Harris County Flood Control District; LCRA; M & S Engineering; and TxDOT attended the public meeting but did not comment.

#### RESPONSE TO COMMENTS

LCRA stated that it did not have specific comments but wanted to express its ongoing interest in the revisions to the CGP. LCRA noted the unique nature of its linear transmission line construction projects. LCRA said it looks forward to participating in the development of revisions to the CGP and any related guidance documents.

**The commission appreciates the LCRA's interest. No changes were made to the rule.**

TxDOT's comments related to the preamble and not to the rule. TxDOT disagreed with the statements regarding the ability of well-managed construction sites being able to meet the turbidity limit with standard best management practices and the cost being insignificant. TxDOT stated that on many of its projects, flocculants would be required to meet the turbidity limit. TxDOT also stated that the cost of compliance with the turbidity limit will be expensive for TxDOT.

**The preamble was revised to reflect EPA's decision to re-examine the turbidity limit due to identified flaws in their method of calculating the limit established in 40 CFR Part 450. However, EPA may promulgate a revised turbidity limit that will be incorporated into the applicable TPDES permits. No change was made to the rule language.**

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

**§305.541**

STATUTORY AUTHORITY

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