

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

Background and Summary of the Factual Basis for the Proposed Rule

This rulemaking is necessary to adopt by reference revisions to the United States Environmental Protection Agency (EPA) construction stormwater regulations, which were adopted in 40 Code of Federal Regulations (CFR) Part 450 and became effective on May 5, 2014.

The revisions to the federal regulations do not include any new regulatory requirements, but instead provides clarification to existing requirements and removes requirements related to the numeric turbidity effluent limitation. Specifically, the revisions include: defining "infeasible"; clarifying the applicability of requirements to control erosion caused by discharges; providing additional details on areas where buffers are required; clarifying requirements for soil stabilization, preservation of topsoil and pollution prevention measures; and withdrawing the numeric turbidity effluent limitation and monitoring requirements.

This rulemaking will amend §305.541 to adopt by reference revisions to 40 CFR Part 450, as published in the *Federal Register* on March 6, 2014 (79 FR 44). The clarifications added to the federal regulations will be incorporated into the Construction

General Permit (CGP) at the time it is renewed in 2018. However, withdrawing the numeric turbidity effluent limitation in the federal regulations will not require a revision to the CGP, since this limitation was not incorporated into the 2013 CGP. In 2011, EPA stayed the numeric turbidity effluent limitation.

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 revise the reference to 40 CFR Part 450 to cite the *Federal Register* volume and date of publication related to the 2014 revisions to the construction stormwater regulations.

Section Discussion

The proposed amendment to §305.541 revises the *Federal Register* volume and date for 40 CFR Part 450 to reflect those associated to the 2014 revisions to the construction stormwater regulations.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, has determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of

administration or enforcement of the proposed rule.

The EPA promulgated effluent limitation guidelines and standards for the stormwater construction and development point source permit category in December 2009. In February 2014, EPA adopted revisions to those guidelines and standards which embodied agreements with parties who had filed petitions for review of that final rule. This proposed rule would incorporate by reference those 2014 revisions to 40 CFR Part 450.

The proposed amendment would do the following: 1) define "infeasible"; 2) clarify the applicability of requirements to control erosion caused by discharges; 3) provide additional details on areas where buffers are required; 4) clarify requirements for soil stabilization, preservation of topsoil and pollution prevention measures; and 5) withdraw numeric turbidity effluent limitation and monitoring requirements.

The proposed rule does not provide any new regulatory requirements for regulated entities nor does it reduce any regulatory requirements. The amendment merely provides clarification of current stormwater regulatory requirements. The rulemaking is necessary to keep commission rule synchronized with EPA's rules as required by the NPDES Memorandum of Agreement (MOA) the agency has with EPA.

The proposed rule will provide clarification of existing requirements and remove the numeric turbidity effluent limitation. When adopted, this rule will be added to the stormwater CGP when it is renewed in 2018. However, when the CGP is renewed, no changes are needed to reflect the removal of the numeric turbidity effluent limit because this limitation and associated monitoring were never incorporated into the CGP when it was renewed in 2013. At that time, the numeric turbidity effluent limit had been stayed by the EPA and therefore was never incorporated into the CGP.

The proposed rule is not anticipated to result in any significant fiscal implications to the agency as it does not provide new regulatory requirements and merely clarifies existing requirements. No fiscal implications are anticipated for other units of state or local government for the same reasons.

Public Benefits and Costs

Mr. Horvath has 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 consistency with federal rules, clarity for the regulated community, and consistent enforcement of the construction stormwater regulations.

The proposed rule is not anticipated to result in fiscal implications for businesses or individuals. The proposed rule does not provide any new regulatory requirements for

regulated entities nor does it reduce any regulatory requirements, it merely provides clarification of current stormwater regulatory requirements. The proposed rule will remove the numeric turbidity effluent limitation. When the current CGP is renewed, no changes will be needed to reflect the removal of the numeric turbidity effluent limit because this limitation and associated monitoring were not incorporated into the CGP when it was renewed in 2013. At that time, the numeric turbidity effluent limit had been stayed by the EPA and therefore was never incorporated into the CGP.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect for small or micro-businesses. The proposed rule will provide clarification of existing requirements and remove the numeric turbidity effluent limitation. The proposed rule is not expected to have fiscal implications for small or micro-businesses as the proposed revisions do not add or reduce regulatory requirements.

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 does not adversely affect a small or micro-business in a material way and is necessary to maintain consistency with federal rules in order to protect the public health, safety,

environmental and economic welfare of the state.

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 proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. 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 intent of the rulemaking is to adopt by reference EPA's revised construction stormwater regulations found at 40 CFR Part 450. The specific intent of the proposed rulemaking is to amend the commission's rules to incorporate recent federal regulatory changes that do protect the environment and reduce risks to

human health from environmental exposure, but that 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.

Therefore, the proposed rule does not meet the definition of a "major environmental rule."

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 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. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed the requirements of 40 CFR Part 450 or any other federal law; 2) does not exceed an express requirement of state law; 3) does not 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; and 4) is not proposed solely under the general powers of the agency, but rather specifically under the MOA between EPA and the commission, which requires the

commission to incorporate federal NPDES rules into the commission's rules. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to adopt by reference EPA's revised construction stormwater regulations found at 40 CFR Part 450. The proposed rule would substantially advance this stated purpose by revising the Federal Register volume and date for 40 CFR Part 450 to reflect those associated to EPA's 2014 revisions to the construction stormwater regulations in the commission's rules.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code,

§2007.003(b)(4). The commission is the regulatory agency that administers the state NPDES program and, therefore, is responsible for incorporating federal NPDES regulation changes into its permit program under 40 CFR §123.62(e) and the MOA between EPA and the commission.

Nevertheless, the commission further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule requires compliance with federal effluent limitations related to construction stormwater without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

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 - 33.210 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.

The CMP goal applicable to the proposed rule includes ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

Promulgation and enforcement of this rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies, and because this rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking 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 October 23,

2014, 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 Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2014-020-305-OW. The comment period closes October 27, 2014. Copies of the proposed rulemaking can be obtained from the commission's web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Laurie Fleet, Wastewater Permitting Section, at (512) 239-5445.

**SUBCHAPTER P: EFFLUENT GUIDELINES AND STANDARDS FOR TEXAS
POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMITS
§305.541**

Statutory Authority

This amendment is proposed under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §5.120, which requires the commission to administer the law so as to promote the conservation and protection of the quality of the state's environment and natural resources; TWC, §26.027, which authorizes the commission to issue permits; TWC, §26.040, which authorizes the commission to issue general permits; and TWC, §26.121, which authorizes the commission to prohibit unauthorized discharges.

The proposed amendment implements the 2014 revisions to 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 40 CFR 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), 449 (*Federal Register*, Volume 77, May 16, 2012), and 450 (*Federal Register*, Volume 79 [74], March 6, 2014 [December 1, 2009]), as amended, are adopted by reference.