

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §305.541 *without change* to the proposed text as published in the September 26, 2014, issue of the *Texas Register* (39 TexReg 7726).

### **Background and Summary of the Factual Basis for the Adopted 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 FedReg 12661 - 12667).

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 revises 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 commission adopts the amendment to §305.541 that 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.

### **Final Regulatory Impact Analysis Determination**

The commission reviewed the adopted 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 adopted 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 adopted rule does not meet the definition of a "major environmental rule."

Even if the adopted 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 memorandum of agreement (MOA) between EPA and the commission, which requires the commission to incorporate federal NPDES rules into the commission's rules. Therefore, this adopted rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

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 this adopted 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 adopted 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 adopted 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 adopted rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted 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 adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

### **Consistency with the Coastal Management Program**

The commission reviewed the adopted 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 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.

The CMP goal applicable to the adopted 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 adopted 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.

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

### **Public Comments**

A public hearing was held on October 23, 2014. Mr. Ned Munoz, representing the Texas Association of Builders, provided comments in support of this rulemaking, specifically as they relate to withdrawing the numeric turbidity effluent limitation. The comment period closed on October 27, 2014.

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

**§305.541**

**Statutory Authority**

This amendment is adopted 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 adopted 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.