

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** August 19, 2022

Thru: Laurie Gharis, Chief Clerk
Toby Baker, Executive Director

From: Josalyn McMillon, Acting Director
Office of Water

Docket No.: 2021-0310-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 307, Texas Surface Water Quality Standards
Triennial Revision of the Texas Surface Water Quality Standards
Rule Project No. 2020-014-307-OW

Background and reason(s) for the rulemaking:

Amendments will be adopted to the Texas Surface Water Quality Standards (TSWQS), 30 Texas Administrative Code (TAC) §§307.2, 307.3, 307.6, 307.7, and 307.10. The adopted revisions are a result of a review of the TSWQS as required on a triennial basis by federal Clean Water Act (CWA), §303(c). The TSWQS were last revised in February 2018, and portions of the 2018 TSWQS were approved by the United States Environmental Protection Agency (EPA) in November 2018, May 2019, January 2020, July 2020, and March 2021.

The revisions to the TSWQS will be adopted to include clarifications, incorporate new information and the results from studies on the appropriate uses and criteria of individual water bodies, incorporate new scientific data on the effects of specific pollutants, and address new provisions in federal regulations and EPA guidance.

Specific adopted changes to the rules include:

- revisions to statewide toxic criteria to incorporate new data on toxicity effects and address revised EPA procedures;
- revisions and additions to site-specific toxic criteria to incorporate local water quality data into criteria for select water bodies;
- revisions and additions to the uses, criteria, and descriptions of individual water bodies based on new data and results of recent use-attainability analyses (UAAs); and
- additions of site-specific recreational uses for select water bodies based on the results of recent recreational UAAs.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The revisions to the TSWQS include numerous substantive changes and clarifications in all sections of the standards except for 30 TAC §§307.1, 307.4, 307.5, 307.8, and 307.9. The revisions to the TSWQS incorporate new information and studies on the appropriate uses and criteria of individual water bodies, incorporate new scientific data on the effects of specific pollutants, and address new provisions of federal regulations and EPA guidance.

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The revisions in 30 TAC §§307.2, 307.3, 307.6, and 307.7 are changes in the basic numerical and narrative requirements of the TSWQS that apply to all surface water in the state. The numerous revisions and additions to site-specific uses and criteria in the appendices of §307.10 are tailored to individual water bodies. These site-specific revisions are based on studies and evaluations of each water body, and UAAs have been conducted as needed to revise uses or associated numerical criteria.

B.) Scope required by federal regulations or state statutes:

The CWA and associated EPA rules require states to review and, if appropriate, revise their water quality standards at least once every three years. The Texas Water Code (TWC) states that the Texas Commission on Environmental Quality (TCEQ, agency, or commission) may amend the standards from time to time.

These amendments will be adopted under TWC, §26.023, which provides TCEQ with the authority to make rules setting TSWQS for all water in the state. These amendments will also be adopted under TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of this state. The adopted amendments will satisfy the provision in CWA, §303(c) that requires states to adopt water quality standards and to review and revise those standards from time to time, but at least once each three-year period.

C.) Additional staff recommendations that are not required by federal rule or state statute:

- Revisions to the temporary standards provisions in §307.2 will be adopted to improve consistency with federal water quality standards regulations. The adopted revisions will increase flexibility when a temporary standard is adopted for permittees or water bodies, clarify the applicability of temporary standards, and specify requirements for adoption and reevaluation.
- In §307.3, language will be adopted to include a new definition and abbreviations and an amendment to an existing definition.
- In Table 1 of §307.6, revisions to numerical toxic criteria to protect aquatic life are recommended to incorporate updated EPA criteria documents that utilize new EPA data on toxic effects.
- In Table 2 of §307.6, revisions to numerical toxic criteria to protect human health are recommended to incorporate updated EPA guidance procedures for calculating human health criteria and additional EPA data on toxic effects.
- Revisions to §307.7 will be adopted to include the addition of a geometric mean criterion for Enterococci for high saline inland waters with primary contact recreation 2.
- In Appendices A, D, E, and G in §307.10, numerous additions and revisions will be adopted to site-specific uses and numerical criteria. These changes are based on new data and evaluations for individual water bodies. A UAA is required by EPA to support changes that are less stringent than current water quality standards or presumed uses.
- In Appendix B in §307.10, changes will be adopted to add and remove sole-source drinking water supplies.

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- Changes in Appendices A and C in §307.10 will be adopted to include the deletion of a footnote in Appendix A for Mid Cibolo Creek (1913) and revert the segment descriptions in Appendix C for Lower Cibolo Creek (1902), Upper Cibolo Creek (1908), and Mid Cibolo Creek (1913) back to the most recent EPA-approved descriptions located in the 2014 TSWQS due to further data evaluation being necessary.
- A footnote added to Appendix A for Upper North Bosque River (1255) will be adopted to clarify that the portion of the segment from the confluence with Dry Branch upstream to the confluence with the North/South Forks North Bosque River in Erath County is intermittent with perennial pools based on a 1991 UAA. The UAA resulted in the creation of classified Segment 1255, which was adopted as part of the 1992 revisions to the TSWQS and approved by EPA in an action letter dated June 16, 1993.
- Numerous other minor revisions will be adopted throughout Chapter 307 to improve clarity and provide additional specificity.

Statutory authority:

TWC, §5.103 and §26.023 and CWA, §303(c).

Effect on the:

A.) Regulated community:

The TSWQS directly affect permitted wastewater and stormwater dischargers in Texas, including cities, counties, state agencies, water districts, municipal utility districts, investor-owned utilities, river authorities, mobile home parks, recreational vehicle parks, hotels, motels, industries, campgrounds, or any other business or governmental entity with a permit to discharge stormwater or industrial or domestic wastewater.

Revisions to site-specific standards may affect requirements in TCEQ-issued wastewater and stormwater discharge permits and lead to changes at the permitted facilities. Some facilities may need to make changes that may involve alterations or new treatment methods or techniques that can range from best management practices to renovating, expanding, or building new treatment facilities. Upon permit expiration, some permit holders may need to seek permit amendments to adjust treatment criteria to newly adopted standards. Small businesses that discharge wastewater and/or stormwater will also be required to comply with the adopted requirements.

The rulemaking adoption does not create a group of affected entities in the regulated community who were not affected previously. Numerous water quality uses and criteria are revised, but the scope and applicability of the rules or affected permitting actions are not expanded with this adoption.

There will be a fiscal impact to some permitted facilities. Other facilities could benefit from this rulemaking because of cost savings. The adopted amendments have potential cost implications associated with revised criteria for toxic substances to protect human

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health and aquatic life, revised criteria for recreational uses, and revised dissolved oxygen criteria and aquatic life uses for classified and unclassified water bodies. These cost implications are generally associated with chemical screening and monitoring or the additional treatment of wastewater that may be needed to meet the standards for water quality. Dischargers may have to change or employ new wastewater treatment methods or techniques to meet the adopted standards. These changes may range from developing new wastewater processes to building new wastewater treatment facilities.

The adopted changes in dissolved oxygen criteria are anticipated to affect some local governments that operate domestic wastewater facilities. None of the adopted revisions to dissolved oxygen criteria for unclassified water bodies are anticipated to require more stringent treatment by domestic wastewater facilities. However, adopted changes to the dissolved oxygen criteria for three water bodies are less stringent and could facilitate future facility expansion for governmental entities. Including non-governmental dischargers, there are approximately two domestic and one industrial permitted wastewater dischargers on water bodies that could be aided by the adopted revisions.

B.) Public:

For each year of the first five years the adopted rules are in effect, the public benefit anticipated from the changes in the adopted rules will be continued protection of public drinking water supplies and aquatic life resources, an improved regulatory process for permitted wastewater discharges, and improved quality of the surface water resources of the state.

The rulemaking adoption does not create a group of affected parties from the general public who were not affected previously.

These adopted revised criteria are protective of human health and provide a public benefit. The adopted revisions more accurately assess water quality in the state and revise requirements to protect human health and water quality. The adopted rules will substantially advance this stated purpose by adopting revised water quality criteria and requirements that are supported by site-specific studies, federal and state research, and statewide monitoring and sampling data. Promulgation and enforcement of these rules will not burden private real property that is the subject of the rules because the amendments revising the TSWQS do not limit or restrict a person's rights in private real property.

C.) Agency programs:

Several of the adopted revisions to the site-specific criteria for individual water bodies in §307.10 are intended to address water bodies where recent data shows the current water quality standard is inappropriate. In these cases, the adopted water quality standards can help streamline the water quality management programs of TCEQ by curtailing unnecessary restorative activities, such as establishing total maximum daily loads (TMDLs), and redirecting funds to water bodies where restoration activities are needed. Adopted changes could also result in the removal of water bodies that may appear on the current Texas §303(d) list of impaired water bodies. One of the adopted revisions to

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Appendix G in §307.10 is anticipated to result in the removal of one impairment, which will eliminate the need for one TMDL study. As a result of the adopted change, the agency expects it will reallocate its resources for other water quality management activities and initiatives.

The rulemaking does not create a group of affected agency programs which were not affected previously.

No additional costs are anticipated for TCEQ to implement the revisions to the TSWQS. The revised water quality standards are primarily operational and procedural. The statewide monitoring and assessment of surface water quality data and review of wastewater permit applications may need to incorporate numerous changes and additions.

Stakeholder meetings:

One stakeholder meeting was held at the TCEQ complex in Austin on March 9, 2020, and a second stakeholder meeting was held via webinar on June 29, 2020. A third stakeholder meeting was held on June 30, 2020.

Other outreach efforts have included presentations at:

- The TCEQ Environmental Trade Fair and Conference,
- TCEQ Autumn Environmental Conference and Expo, and
- Numerous meetings of specific stakeholder groups.

Approximately 60 people attended the in-person meeting in March, and approximately 100 people attended the webinars in June. Electronic notices of the stakeholder meetings were sent to the Surface Water Quality Standards Advisory Work Group, which is a balanced group of regulated entities, environmental groups, consumers, and professional organization representatives, as well as to individuals interested in local water quality issues. Notices of the meetings were posted on TCEQ's Surface Water Quality Standards Advisory Work Group home page, with completed meeting minutes and follow-up information posted upon completion of each meeting.

Other interested parties or individuals who requested notification of stakeholder meetings were provided an open invitation to the meetings in a written notice provided via an electronic listserv. The adopted revisions were developed with extensive input and involvement from stakeholders through participation in the surface water quality standards work group.

Public comment:

The commission held a hybrid virtual and in-person public hearing held at TCEQ complex in Austin on May 2, 2022, and the comment period also closed on May 2, 2022. The commission received 525 comment letters, which represented comments from 555 different organizations, affiliations, and individuals. Two form letters are included in this count: 504 individuals sent one form letter (form letter A), and four individuals sent a second form letter (form letter B). Three attendees provided oral comments at the public

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hearing. Major interests expressed in the comment letters and during oral testimony included:

- support from 41 commenters, which included both form letters A and B in addition to the three oral commenters during the hearing, for the prohibition on the discharge of visible pre-production plastic, with some suggestions to either expand or otherwise improve the definition for pre-production plastic in §307.3(a)(50) and/or the prohibition language in §307.4(b)(8);
- opposition from five commenters regarding the visible pre-production plastic prohibition language in §307.4(b)(8);
- disagreement from 518 commenters, which included form letter A, concerning the recently denied petition for rulemaking regarding the protection of Texas's pristine streams and the agency's slow progress with the development of numeric nutrient criteria, along with a recommendation that the commission take action on numeric nutrient criteria during this triennial review and adopt a new designated use focused on pristine streams and prohibiting wastewater discharges into waters with that designated use;
- a request from 518 commenters, which included form letter A, to consolidate contact recreation categories using more stringent bacteria criteria;
- a suggestion from EPA that the proposed geometric mean Enterococci criterion for primary contact recreation 2 in inland high saline waters, located in §307.7(b)(1)(A)(vi), be revised from 54 colonies per 100 milliliters to 30 or 35 colonies per 100 milliliters; and
- suggestions from EPA and the Texas Parks and Wildlife Department (TPWD) on revisions to improve the proposed language regarding temporary standards in §307.2(g).

Significant changes from proposal:

Changes to language in §307.2(g), regarding temporary standards, were proposed to improve consistency with federal rules listed in 40 Code of Federal Regulations (CFR) §131.14. EPA and TPWD expressed general support for the proposed language; however, both commenters also suggested edits for further clarification. EPA commented that the commission should specify that the options listed in §307.2(g)(1) are the only options for a temporary standard and suggested the addition of language to clarify that the interim effluent condition that reflects the greatest pollutant reduction achievable with pollutant control technologies is applicable if no additional feasible pollutant control technology can be identified. Both EPA and TPWD recommended the addition of language to specify that a temporary standard may also be expressed as "the highest attainable interim criterion." These suggested edits were incorporated into §307.2(g)(1), as well as other changes suggested by EPA to further improve consistency with 40 CFR §131.14.

The commission removed both the proposed "pre-production plastic" definition in §307.3 and proposed §307.4(b)(8) that explicitly prohibited the discharge of visible pre-production plastic and provided a compliance mechanism.

EPA recommended a typographical error correction regarding §307.6(c)(1), Table 1, for the chronic criterion for cadmium and a scaling factor correction for chrysene and 1,2-

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dichloropropane in §307.6(d)(1), Table 2. These corrections were incorporated into §307.6(c)(1), Table 1 and §307.6(d)(1), Table 2.

EPA questioned the deletion of Granger Lake (Segment 1247) based on information from TCEQ's Drinking Water Watch database and also recommended the addition of Caldwell and Guadalupe counties to the new entry for San Marcos River (Segment 1808). These suggested edits were incorporated into §307.10(2), Appendix B.

Potential controversial concerns and legislative interest:

- Proposed Pre-production Plastic Discharge Prohibition Clarification –
 - Five commenters, all of whom represented industry, were in opposition to the visible pre-production plastic discharge prohibition provision as proposed in §307.4(b)(8). These comments covered the following topics:
 - the commission lacks the legal authority to impose such a prohibition;
 - improper notice under the Texas Administrative Procedure Act (§2001.024 of the Texas Government Code (TGC));
 - the prohibition constitutes a major environmental rule in accordance with TGC, §2001.0225;
 - the first sentence of the newly proposed §307.4(b)(8) is unqualified;
 - the provision is more than a clarification and is a zero-discharge standard akin to numeric toxics criteria, which conflicts with the existing narrative criteria in §307.4(b)(2);
 - the scientific basis behind the prohibition is not justified and the requirements in TWC, §26.023 were not followed regarding the use of quality assured data to develop standards;
 - requests for a more robust stakeholder process;
 - implementation and enforcement issues;
 - allowable length of compliance periods;
 - concern that the prohibition would impose significant costs on stakeholders and the fiscal note in the proposal preamble underestimates the costs to facilities; and
 - concerns that the prohibition is being promulgated in response to a specific court ruling and settlement agreement.
 - Forty-one commenters were in support of the visible pre-production plastic discharge prohibition provision as proposed in §307.4(b)(8). These comments covered the following topics:
 - implementation and enforcement issues;
 - the demonstrated need for the prohibition due to the presence of pollution from pre-production plastics and impacts to marine life, human health, and aesthetics;
 - requests for inclusion of certain requirements derived from House Bill 3814, which was filed in the 87th Legislative Session by Representative Hunter; and
 - requests that the prohibition be expanded to include all sizes of plastic pollution, not just visible.

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- Pristine Streams – Five hundred eighteen commenters noted the recently denied petition for rulemaking regarding pristine streams, recommended the commission take action on numeric nutrient criteria during this triennial review, noted the importance of monitoring nutrient pollution, and commented that monitoring alone is insufficient to protect pristine streams from harmful algal blooms and losses of economic development due to decreases in tourism. Fourteen of these commenters asserted that the TSWQS do not adequately protect the state’s waters from nutrient pollution and that the existing Nutrient Criteria Development Advisory Work Group has not been successful in implementing numeric criteria for nutrient pollution. These 14 commenters also recommended the adoption of a new designated use focused on pristine streams and prohibiting wastewater discharges into waters with that designated use.

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

The TSWQS establish state goals and targets for water quality. For individual water bodies, the standards assign water quality-related uses and specify associated numerical criteria to protect the assigned uses. In addition, some narrative and numerical criteria are applied statewide, and the TSWQS include procedures on how water quality standards are applied and assessed. This rulemaking will not require the development of new policies.

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

The TSWQS establish the instream water quality conditions for surface waters in the state. The TSWQS are the basis for establishing effluent limits in wastewater and stormwater discharge permits, setting instream water quality goals for TMDLs, and providing water quality targets to assess water quality and identify impaired water bodies.

If this rulemaking is not approved, these different TCEQ water programs would be addressing some water quality standards that have been shown to be inappropriate for water in the state and would not represent the most recent scientific basis for setting criteria. This would result in the inappropriate allocation of resources externally and internally.

Key points in the rulemaking adoption schedule:

***Texas Register* proposal publication date:** March 25, 2022

Anticipated *Texas Register* adoption publication date: September 23, 2022

Anticipated effective date: September 29, 2022

Six-month *Texas Register* filing deadline: September 25, 2022

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Attachments:

None.

cc: Chief Clerk, 2 copies
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