

EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENT ON TCEQ's CONSTRUCTION GENERAL PERMIT NO. TXR150000

The Executive Director of the Texas Commission on Environmental Quality (commission or TCEQ) files this Response to Public Comment (Response) on an amendment without renewal of Texas Pollutant Discharge Elimination System (TPDES) General Permit No. TXR150000, the Construction General Permit for Stormwater Discharges (CGP). As required by Texas Water Code (TWC), (Section) § 26.040(d) and Title 30 Texas Administrative Code (TAC), § 205.3(e), before a general permit is issued, the Executive Director must prepare a response to all timely, relevant and material, or significant comments. The response must be made available to the public and filed with the Office of the Chief Clerk at least ten days before the commission considers the approval of the general permit. This response addresses all timely received public comments, whether or not withdrawn.

Timely public comments were received from Tom Schneider on behalf of Stormcon.

PERMIT BACKGROUND

The CGP authorizes the discharge of stormwater runoff associated with regulated large and small construction sites and certain non-stormwater discharges into surface water in the state. Regulated large construction activities are those disturbing five acres or more. Regulated small construction activities are those disturbing at least one acre up to five acres. Construction activities are also grouped, and their total land area disturbance used if they are part of a common plan of development.

The existing version of the general permit was issued on March 5, 2018, and expires on March 5, 2023. The proposed amendment without renewal to the existing general permit is in response to the transfer of state and federal regulatory authority to TCEQ for discharges associated with oil and gas exploration, production, processing, or treatment operations, or transmission facilities. Transfer of state and federal regulatory authority for these discharges into surface water in the state occurred on January 15, 2021, following implementation of House Bill (HB) 2771, 86th Legislative Session, 2019.

This amended CGP expands the applicability of the general permit to include non-exempt stormwater discharges into surface water in the state from construction activities associated with oil and gas exploration, production, processing, or treatment operations, or transmission facilities, and to replace the EPA-issued 2017 National Pollutant Discharge Elimination System (NPDES) CGP TXR10F000, modified June 27, 2019. Existing permittees, authorized under the 2017 EPA-issued NPDES CGP, needing permit coverage after the effective date of this amended CGP must submit a Notice of Intent (NOI) to obtain authorization under TCEQ's amended CGP within 90 days of the effective date of the amended general permit. Permittees currently authorized under TCEQ's 2018 TPDES CGP will not be required to submit an NOI to continue authorization under the amended general permit during this permit term.

The CGP is issued under the statutory authority of the TWC: 1) TWC § 26.121, which makes it unlawful to discharge pollutants into or adjacent to water in the state except as authorized by a rule, permit, or order issued by the commission, 2) TWC § 26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state, 3) TWC § 26.040, which provides the commission may authorize waste discharges by general permit, and 4) TWC § 26.131, which transfers the Railroad Commission of Texas' (RRC) responsibilities to TCEQ relating to regulation of discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the exploration, production and development of oil, natural gas, or geothermal resources.

The federal stormwater regulations, Phase I, for discharges from large construction activities are located in the federal rules at Part 40 Code of Federal Regulations (CFR) § 122.26, which were adopted by reference by TCEQ in 30 TAC § 281.25(a). The Phase II small construction site regulations are located in the federal rules at 40 CFR § 122.26(a)(9)(i)(B) and (c), which were adopted by reference by TCEQ at 30 TAC § 281.25(a)(4). Subsequently, effluent guidelines for construction activities were adopted in 40 CFR Part 450 and adopted by TCEQ by reference in 30 TAC § 305.541 and were incorporated starting with the 2013 CGP.

PROCEDURAL BACKGROUND

TCEQ published notice of the draft general permit to solicit public comment in *Houston Chronicle*, and the *Texas Register* on September 24, 2021. The public comment period ended on October 25, 2021.

COMMENTS AND RESPONSES

Comment: Stormcon commented “The definition of produced water in TAC 30 Part 1 §7.117 seems to encompass all wastewater associated with oil and gas exploration, development, and production, excluding hydrostatic test water and gas plant effluent while the traditional meaning of produced water is much narrower and is in line with the definition in SB 601. “Produced water” means naturally occurring water that emerges from the ground during the production of oil or gas. While this new definition greatly expands the reach of HB 2771 the three qualifiers of being associated with “exploration, development and production” limit the authority that the TCEQ is given in HB 2771 to only the wastewaters that are associated with exploration, development, and production. Any wastewater that is not associated with the exploration, development, and production have been excluded from this definition and therefore are not covered under HB 2771. Wastewaters associated with exploration, development, and production are exempt oil and gas activities with the non-exempt activities being the activities that are down stream from exploration, development, and production. The June 2021 stakeholders meeting the TCEQ response to question #3 made clear there is an existing standard that defines which oil and gas activities are associated with exploration, development and production and which activities are not. The activities that are downstream are the non-exempt activities. These activities are required to seek permit coverage for the stormwater discharges from the construction activities.”

Stormcon also noted “When applying the definition in TAC 30 Part 1 §7.117 to HB 2771 the result would give the TCEQ the authority to permit any activity that resulted in the discharge of any wastewater into the waters of the state that are associated oil and gas exploration, development, and exploration. Which would include any stormwater runoff from construction from oil and gas activities that disturb over one acre or is part of a larger plan of development. Applying the definition in TAC 30 Part 1 §7.117 with HB 2771 authorization of authority to the TCEQ over any activity that would result and discharge of produced water it would then limit the TCEQ authority to those construction sites that are associate with oil and gas exploration, development, and production based on the definition that is being used to implement HB 2771 “as all wastewater associated with oil and gas exploration, development, and production activities, except hydrostatic test water and gas plant effluent, that is discharged into water in the state, including waste streams regulated by 40 CFR Part 435.” The proposed amendment to the CGP 9. “The CWA § 402(l)(2) provides that stormwater discharges from construction

activities related to oil and gas exploration, production, processing, or treatment, or transmission facilities are exempt from regulation under this permit.

Finally, Stormcon stated ““HB 2771 gives the TCEQ the authority to regulate any activity that would result in the discharge produced water, hydrostatic test water and gas effluent into waters of the state. A question was asked in the July meeting and how does construction storm water runoff fit into any of the three specifically listed wastewaters in HB 2771. The answer was the TCEQ interpretation of the definition of wastewater would include construction stormwater runoff. In TAC 30 Part 1 §7.117 (b).1.(B)(i) includes this sentence “For the purposes of TCEQ’s implementation of Texas Water Code, §26.131, “produced water” is defined as all wastewater associated with oil and gas exploration, development, and production activities, except hydrostatic test water and gas plant effluent, that is discharged into water in the state, including waste streams regulated by 40 CFR Part 435.”

Response: TCEQ will issue authorizations under the amended CGP to entities within its jurisdiction, including operators with non-exempt stormwater discharges into surface water in the state from construction activities associated with oil and gas exploration, production, processing, or treatment operations, or transmission facilities.

HB 2771 (86th Legislature) amended TWC § 26.131. The amendment to TWC §2 6.131 provides that the commission (TCEQ) “may issue permits for the discharge into water in this state of produced water, hydrostatic test water, and gas plant effluent resulting from the activities described by Subsection (a) on delegation to the commission of (NPDES) authority for those discharges.” The intent of HB 2771 was to reduce the regulatory burden to applicants of obtaining two separate permits; a State only permit from the RRC and an NPDES permit from EPA. TCEQ sent a complete application requesting delegation of regulatory authority from EPA to the Texas Attorney General’s Office in August 2020. The Attorney General’s Office provided a statement of legal authority indicating that TCEQ **has the necessary jurisdiction to regulate all oil and gas point source discharges to water in the state** (*emphasis added*). The Governor’s office submitted the application for TCEQ to obtain regulatory authority to the EPA on October 12, 2020, and EPA approved TCEQ’s application on January 15, 2021. Additionally, the *Federal Register* notice of EPA’s approval of Texas’ delegation application provided “Authority: This action is taken under the authority of section 402(b) of the Clean Water Act as amended, 33 U.S.C. 1342(b). Pursuant to 40 CFR § 123.61(c), I hereby provide public notice of the EPA’s final action approving the State of Texas’ request for NPDES program authorization for discharges of produced water, hydrostatic test water, and gas plant effluent, **otherwise known as oil and gas discharges, within the State.**” (*emphasis added*) (*Approval of the Application by the State of Texas for Partial National Pollutant Discharge Elimination System (NPDES) Program Authorization for Oil and Gas Discharges, 80 Fed. Reg. 9,332 (Feb. 12, 2021)*).

To implement HB 2771, TCEQ amended 30 TAC § 305.541(b) which provides that “For the purposes of the commission’s implementation of Texas Water Code, § 26.131, “produced water” is defined as all wastewater associated with oil and gas exploration, development, and production activities, except hydrostatic test water and gas plant effluent, that is discharged into water in the state, including waste streams regulated by 40 CFR Part 435.” To memorialize the change in regulatory authority, the TCEQ and the RRC amended their existing Memorandum of Understanding (30 TAC § 7.117 and 16 TAC § 3.30) effective July 15, 2020. The Memorandum of Understanding incorporates the 30 TAC § 305.541 (b) definition of produced water and defines the role of each agency in regulating stormwater discharges.

TCEQ issues general permit authorizations under the statewide stormwater CGP (TXR150000) for construction projects that disturb greater than five acres of soil. In order to obtain an authorization under the general permit, applicants are required to develop and implement a stormwater pollution prevention plan that is intended to be kept on site and submit an NOI to

TCEQ using the online ePermits system. Stormwater authorizations under the general permit may be obtained instantaneously from the online system.

Additionally, Stormcon asked the following specific questions:

Question 1: Will EPA still be issuing permits to entities that are not in TCEQ's jurisdiction?

Response 1: No. TCEQ will only issue permits to entities in the TCEQ's jurisdiction.

Question 2: Who will the TCEQ issue permit authorizations to under the amended CGP?

Response 2: The TCEQ will issue CGP authorizations to entities that discharge non-exempt stormwater into surface water in the state from construction activities associated with oil and gas exploration, production, processing, or treatment operations, or transmission facilities required to obtain TPDES permit coverage. In addition, coverage under the amended CGP extends to those facilities that have lost their exemption due to discharges described in 40 CFR § 122.26(c)(1)(iii).

Question 3: Where will the operators of construction sites that are not associated with oil and gas exploration, development, and production get permit coverage?

Response 3: This amendment to the CGP does not change the universe of operators currently eligible for coverage under the TPDES CGP. The amendment implements the requirements from HB 2771 (86th Legislature) which amended TWC § 26.131 by providing that construction activities associated with oil and gas exploration, production, processing, or treatment operations, or transmission facilities are eligible for coverage under TCEQ's CGP.

Question 4: Is the definition of "produced" water in 30 TAC § 7.117(b)(1)(B)(i) used to include stormwater runoff from oil and gas construction activities under TCEQ's jurisdiction?

Response 4: Yes. As discussed above, the intent of HB 2771 was to reduce the regulatory burden to applicants of obtaining two separate permits; a State only permit from the RRC and an NPDES permit from EPA. TCEQ sent a complete application requesting delegation of regulatory authority from EPA to the Texas Attorney General's Office in August 2020. The Attorney General's Office provided a statement of legal authority indicating that TCEQ **has the necessary jurisdiction to regulate all oil and gas point source discharges to water in the state** (*emphasis added*).