

## The Lone Star Current

### TCEQ Approves Revisions to Texas Surface Water Quality Standards

by Lauren J. Kalisek

On June 30, the Texas Commission on Environmental Quality (“TCEQ”) took final action to approve revisions to the Texas Surface Water Quality Standards, 30 Texas Administrative Code, Chapter 307 (“TSWQS” or “Standards”) and the accompanying guidance document, “Procedures to Implement the Texas Surface Water Quality Standards” (“Implementation Procedures”). The Standards assign uses and set general and site-specific water quality criteria protective of such uses for all surface waterbodies in the State. The criteria are used to assess the quality of our State’s surface water and identify impairments, to establish limits in discharge permits issued pursuant to the Texas Pollution Discharge Elimination System Program (“TPDES”), and to support water quality certifications issued by the TCEQ for Section 401 certifications for Army Corps of Engineers’ dredge and fill permits under the Clean Water Act. The TSWQS serve as the foundation for the State’s surface water quality protection programs.

The TCEQ’s approval was the culmination of a four-year effort in developing the revisions, including work by TCEQ staff and stakeholder groups. The major revisions to the TSWQS include: (1) expanded classifications and criteria for contact recreation to address intermittent streams in the State that may not be suitable for full contact recreation; (2) revisions to toxic criteria to incorporate new data on toxicity effects and revisions to basic requirements for toxicity effluent testing; (3) the addition of new numerical nutrient criteria to protect numerous reservoirs from excessive

growth of aquatic vegetation related to nutrients; (4) clarification of the application of the standards in different stream flow conditions; and (5) revisions to various site-specific uses and criteria.

One of the more controversial revisions was the proposal to increase the criteria for waterbodies assigned a primary contact recreation use from 126 cfu/100 ml *E.coli* to 206 as a part of the restructuring of contact recreation categories. TCEQ staff had proposed this change based on recent guidance from EPA suggesting that 206 cfu/100 ml is adequate. This proposed change would have impacted most major waterbodies in the state that are listed as classified segments in the TSWQS, such as reservoirs, lakes and rivers, and the proposal generated a significant amount of public comment and concern. During its consideration of the revisions at its meeting on June 30, the Commissioners noted that 173 waterbodies in the State are heavily used for primary contact recreation and all but three of those meet or exceed the current 126 cfu/100 ml criteria. Therefore, the Commissioners determined to keep the current criteria of 126. In addition, the Commissioners asked to be informed about further scientific developments for nutrient criteria, asked staff to consider mechanisms to streamline the process of assigning the correct category of recreational use to waterbodies, and urged staff to continue to collect data and evaluate the proper protection levels.

However, two significant changes to the TWQS and Implementation Procedures that will have substantial impacts on

TPDES permitting were not discussed during the June 30 meeting: Whole Effluent Toxicity (“WET”) limits and nutrient screening for rivers and streams. Changes adopted in the Implementation Procedures provide new focus on WET testing for sublethal impacts. This new approach will cause the TCEQ to more closely review both lethal and sublethal WET testing results during permit renewals and amendments and will almost certainly lead to the imposition of more sublethal and lethal

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## MUNICIPAL CORNER

**Conflicting-loyalties incompatibility does not prohibit a city manager of a general law city from serving on the board of trustees of an independent school district whose boundaries contain the municipality.**

The Attorney General's opinion was requested regarding whether a city manager of a general law city with a council-city manager form of government may serve on the board of trustees of an independent school district within the boundaries of the municipality. Specifically, the requestor asked whether the conflicting-loyalties aspect of the common law doctrine of incompatibility prevented service in both positions. The A.G. stated that conflicting-loyalties incompatibility prohibits an individual from simultaneously holding two positions that would prevent him or her from exercising independent and disinterested judgment in either or both positions. However, this only applies if a person holds two positions that each constitute an "office." A member of the board of trustees of an independent school district is an "officer" for the purpose of this analysis. However, a city manager who serves at the will of a mayor and council does not qualify as an "officer." In general law municipalities with a city manager form of government, the city manager is appointed by and serves at the will of the governing body of the municipality. The A.G. concluded that because the city manager of a general law city does not hold an office, conflicting-loyalties incompatibility does not apply and does not prohibit the city manager from occupying both positions. Tex. Att'y Gen. Op. GA-0766 (2010).

**A municipality that has adopted Chapter 174 of the Texas Local Government Code is not subject to the limits of § 143.014 thereof unless its provisions are otherwise adopted in a collective bargaining agreement.**

The Attorney General was asked how certain provisions of the Texas Local Government Code ("Code") apply to municipalities who have adopted chapter 174 of the Code, the Fire and Police Employee Relations Act ("FPERA"). Section 143.014 of the Code provides requirements for the appointment and removal of a person classified immediately below the department head of a fire or police department of a city with a population of less than 1.5 million. Subsection (c) limits the number of persons who can be appointed to such positions. For fire departments, this limitation is based on the number of certified firefighters in the city. The A.G. referred to Opinion GA-0662, which stated that a city's adoption of FPERA does not change a department head's ability to appoint persons to a classification immediately below his own classification, but removes the numerical limits established by subsection (c) unless otherwise provided by a collective bargaining agreement adopted by the city. This statute expressly states that subsection (c) does not apply to a city that has adopted FPERA

unless the appointment procedure is specifically adopted by a municipality through a collective bargaining agreement. Tex. Att'y Gen. Op. GA-0771 (2010).

**The Texas Local Government Code does not prohibit the selection of a company as a construction manager-at-risk for a city project if a related company has been selected pursuant to a separate procurement process as the design engineer for the project.**

The Attorney General was asked whether a city was prohibited from selecting a company as a construction manager-at-risk for a city project if a related company had been chosen as the city's project manager and design engineer on the project. The Texas Local Government Code ("Code") requires that before or concurrently with selecting a construction manager-at-risk, a governmental entity must select or designate a design engineer who prepares the construction documents for the project, and who is responsible for complying with statutes that govern the practice of engineering, architecture, and related practices. Section 271.118(c) of the Code expressly permits the same entity to serve as the design engineer and as the construction manager-at-risk if hired through separate procurement processes. The A.G. reasoned that if Texas statutes allowed the same entity to serve in both capacities in separately procured contracts, it would logically follow that related entities would not be prohibited from serving as the design engineer and as the construction manager-at-risk. Thus, the Code does not prohibit selection of a company as a construction manager-at-risk for a city project if a related company was selected as the design engineer for that project, as long as the related company was selected pursuant to a separate procurement process for each position. Tex. Att'y Gen. Op. GA-0782 (2010).

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WET limits for TPDES permittees. In addition, the Implementation Procedures include new provisions for nutrient screening for discharges to rivers and streams that establish a new framework for determining when nutrient limits will be placed in discharge permits.

The revisions to the TSWQS and Implementation Procedures will be effective following final publication in the *Texas Register*, currently scheduled for July 16, 2010, and will impact the State's surface water quality programs for years to come.

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