

Legal Q&A

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What federal and state agencies monitor water quality in Texas?

Water quality in Texas is monitored and regulated by four agencies: (1) the federal Environmental Protection Agency (EPA); (2) the Texas Commission on Environmental Quality (TCEQ); (3) the Texas Railroad Commission; and (4) the Texas Parks and Wildlife Department (TPWD).

The EPA governs water quality at the federal level pursuant to the federal Clean Water Act. 33 U.S.C. §§ 1251-1387. Specifically, the EPA enforces the National Pollutant Discharge Elimination System (NPDES) to control the discharge of pollutants into surface waters of the United States. *Id.* § 1342.

In Texas, the EPA has entered into an agreement with the TCEQ to administer the system. The state program is aptly named the Texas Pollutant Discharge Elimination System (TPDES). The TCEQ's Water Quality Division is responsible for protecting the quality of water in Texas. The division, among other duties: (1) issues wastewater permits under the TPDES; (2) develops the Texas Surface Water Quality Standards; and (3) updates the state's Water Quality Management Plan. 33 U.S.C. § 1313(c); TEX. WATER CODE §§ 26.023, 26.012, 26.1036; 30 TEX. ADMIN. CODE §§ 307.1-.10 (1991, Texas Surface Water Quality Standards) (TCEQ). Other sections of the TCEQ that are involved with water quality include the enforcement division (which enforces water quality rules) and the Small Business and Local Government Assistance program (which helps small cities and businesses come into and stay in compliance with water quality and other TCEQ rules).

The Texas Parks and Wildlife Department investigates fish kills caused by pollution and may seek damages or other restorative measures through other agencies or the courts. TEX. PARKS & WILD. CODE § 12.0011(b)(1).

All protection of water quality in relation to pollution from oil, gas, and geothermal resources is under the jurisdiction of the Texas Railroad Commission. TEX. WATER CODE § 26.141(a)(1).

What is the key plan that regulates water quality in Texas?

The state's Water Quality Management Plan (WQMP), which is created at the state level in compliance with federal standards, is the overarching plan for groundwater and surface water protection. 33 U.S.C. § 1288(d); TEX. WATER CODE § 26.012. The WQMP currently identifies, in addition to other water quality information: (1) effluent (discharge) limits for wastewater treatment plants; (2) the total allowable amount (total maximum daily load) of specific pollutants for specific waterbodies; (3) methods for managing runoff and other forms of nonpoint source pollution not collected by a storm water sewer system or treatment facility; and (4) the agencies designated to manage water issues. The TPDES is created under and in compliance with the WQMP, and governs all discharges into the waters of Texas.

What water quality standards are applied to waters in the state?

Under the TPDES, the TCEQ creates water quality standards (WQs) for surface water that are based on federal standards set out in the Clean Water Act. TEX. WATER CODE § 26.023, 30 TEX. ADMIN. CODE Ch. 307. Specific stream segments and other waterbodies are assigned a designated use, which determines the

level of pollutants that may be present in the water without threatening human health or the environment. 30 TEX. ADMIN. CODE § 307.7. The most common designated use classification for waters in Texas is “contact recreation (i.e., swimming).” The TCEQ uses various tests to determine water quality, including whole effluent toxicity testing (WET testing), tests for nutrients, and tests for bacteria, among others. *Id.* § 307.4.

Discussions are currently underway between TCEQ staff and various stakeholders involved in the Surface Water Quality Standards Advisory Work Group to possibly add subsets (such as wading or boating) to the contact recreation designation beyond mere “contact”. TML recently signed a resolution jointly with the Texas Water Conservation Association, the Water Environment Association of Texas, and the Texas Association of Clean Water Agencies outlining recommendations for the proposed changes.

What if a waterbody fails to meet designated standards?

Waterbody segments that fail to meet the requirements set out by the designated use are placed on a list that is submitted to the EPA. 33 U.S.C. § 1313(d). The list is known as the “303d” list because waterbody segments placed on it are in violation of section 303(d) of the Clean Water Act. *Id.* When a stream segment or reservoir is placed on the 303d list, the process of developing total maximum daily loads for the specific pollutants that are present in the water begins. 33 U.S.C.A. 1313(d)(1). In order to ensure that these maximums are not exceeded, the TCEQ will determine the maximum allowable amount of a pollutant for a specific reservoir or stream segment and divide that maximum among all of the permitted entities and nonpoint pollution sources that discharge into that waterbody segment, creating a total maximum daily load (TMDL) requirement for each discharger. TMDLs also require an implementation plan, which is a flexible plan that includes a detailed description of mandatory and voluntary management measures that are intended to reduce pollutant loads to the required level, and a schedule under which the TCEQ anticipates how the TMDL implementation will proceed.

Are storm water discharges required to be permitted under the TPDES?

Storm water discharges from municipal separate stormwater systems (MS4s) require TPDES permitting. 33 U.S.C. § 1342(p), 30 TEX. ADMIN. CODE § 305.1. MS4s are divided into three groups by population: large, medium, and small. 33 U.S.C. § 1342(p)(2). Large MS4s are those that serve a population of more than 250,000. *Id.* They are grouped with medium MS4s, which serve 100,000-250,000 people. Both large and medium MS4s require an individual stormwater permit to discharge, commonly referred to as “Phase I” permits. *Id.* Small MS4s serve fewer than 100,000 people. *Id.* If a small MS4 is located in an EPA-designated Urbanized Area or is otherwise specifically designated by the TCEQ, it must apply for a “general permit” from the TCEQ, known as a Phase II permit. As opposed to an individual, tailored permit, a general permit applies the same standards to all of the entities that are subject to it. TEX. WATER CODE § 26.040(a).

What programs are available for cities to regulate water pollution within their city limits?

Cities have some power to investigate and regulate water quality. TEX. WATER CODE Ch. 26, Subch. E. Under the Texas Water Quality Act, a city may inspect the public water in its area in order to determine: (1) if the water meets the TCEQ’s water quality standards; (2) if the dischargers into the public water

have permits to discharge; and (3) if discharge permit holders in the city are discharging in compliance with those permits. TEX. WATER CODE § 26.171.

Cooperative agreements between cities and other local governments or the TCEQ are authorized in order to assist with the effectiveness of water quality management, inspection, and enforcement functions. *Id.* § 26.175. A city may also make written recommendations to the TCEQ regarding what the city believes the TCEQ-determined water quality standards within city limits should be. *Id.* § 26.172. In addition, any city that owns or operates a sanitary sewer system and/or treatment plant shall, in compliance with state law, enact and enforce rules controlling and regulating the waste entering the system. *Id.* §§ 26.001(17), 26.176(a). This can include requiring pretreatment of certain types of waste before it enters into the city's system. *Id.* § 26.176(a).

In order to better protect water quality within city limits, a city may establish a water pollution control and abatement program. TEX. WATER CODE § 26.177. However, a relatively small number of cities have utilized the authority to do so. In those that have, the measures have often been controversial. In fact, municipal authority in this area routinely comes under attack in the Texas Legislature.

How can city officials get involved in the state water quality process?

The TCEQ holds open-participation meetings for the Surface Water Quality Standards Advisory Work Group and Water Quality Advisory Work Group that are open to anyone who has an interest in the water quality process. There are also several stakeholder groups that are open to the public and address more specific issues, such as pretreatment and storm water permitting.

More information may be found on the Water Quality Advisory Groups webpage at the TCEQ website: http://www.tceq.state.tx.us/nav/advise/water_surface.html.