

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 December 27, 2013, issue of the *Texas Register* (38 TexReg 9444).

### **Background and Summary of the Factual Basis for the Adopted Rule**

This rulemaking is necessary to adopt by reference the new United States Environmental Protection Agency (EPA) airport de-icing effluent limitation guidelines, which were adopted in 40 Code of Federal Regulations (CFR) Part 449 and became effective on June 15, 2012. The requirements generally apply to discharges associated with the de-icing of airfield pavement at airports that have at least 1,000 annual jet departures (non-propeller aircraft) and discharges associated with aircraft de-icing at new airports in cold climate zones that have more than 10,000 total annual departures (jets and all other types of aircraft).

Existing and new airports with at least 1,000 annual jet departures that generate discharges associated with airfield pavement de-icing are to use de-icing agents that do not contain urea or meet the following numeric effluent limitation for ammonia: Daily Maximum of 14.7 milligrams per liter (mg/L).

New airports with more than 10,000 total annual departures (jets and all other types of aircraft) that are located in areas with an annual heating degree day value of more than

3,000 are required to collect 60% of aircraft de-icing fluid after de-icing. Airports that discharge the collected aircraft de-icing fluid directly to waters of the United States must also meet the following numeric effluent limits for chemical oxygen demand: Daily Maximum of 271 mg/L and Weekly Average of 154 mg/L. The rule does not establish requirements for aircraft de-icing discharges at existing airports.

This rulemaking will amend §305.541 to adopt 40 CFR Part 449 by reference. These effluent limitation guidelines and new source performance standards will be incorporated into the Multi-Sector General Permit (MSGP) TXR050000 upon its renewal in 2016 and any applicable individual permits for airports during their next permit action. Airports will not be required to comply with the new requirements until the requirements are incorporated into the MSGP or their individual permit.

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 will add 40 CFR Part 449 to the list of parts adopted after delegation.

### **Section Discussion**

The commission adopts the amendment to §305.541 that adds the adoption by reference of 40 CFR Part 449, as amended, which contains regulations related to controlling discharges of pollutants from airport de-icing operations.

### **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 new airport de-icing regulations found at 40 CFR Part 449, which require certain airports to comply with chemical oxygen demand or ammonia effluent limitations as they apply to aircraft or airfield pavement de-icing, respectively. 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 449 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 adopted 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 new 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 new airport de-icing regulations found at 40 CFR Part 449. The adopted rule would substantially advance this stated purpose by adding a reference to 40 CFR Part 449 to 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 airport de-icing 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 action 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 Comment**

A public hearing was offered on January 23, 2014, and there was no public participation. The comment period closed on January 27, 2014. The commission received no comments on this rulemaking action.

**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 40 Code of Federal Regulations Part 449.

**§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 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 74, December 1, 2009), as amended, are adopted by reference.