

The Texas Commission on Environmental Quality (TCEQ or commission) adopts an amendment to §305.539 *without changes* to the proposed text as published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2821) and, therefore will not be republished

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 1998, the commission entered into a Memorandum of Understanding (MOU) with the United States Environmental Protection Agency (EPA) related to the Texas Pollutant Discharge Elimination System (TPDES) program. The MOU states that the TCEQ will not authorize TPDES discharges into waters of the United States under certain subchapters of 30 TAC Chapter 321, and that these subchapters may be repealed and replaced by general permits. This rulemaking removes references to Chapter 321 that are obsolete and no longer applicable.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 50, Action on Applications and Other Authorizations and 30 TAC Chapter 321, Control of Certain Activities by Rule.

#### SECTION BY SECTION DISCUSSION

The commission adopted amendment to §305.539(a)(1) and (a)(2) remove the obsolete references to 30 TAC §321.271 that are no longer applicable. The commission adopted amendment to §305.539(a)(4)(B) and (D) and §305.539(a)(5) and (6) update the agency's name.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the amendments are not subject to §2001.0225 because they do not meet the criteria for a "major environmental rule" as defined in that

statute. A "major environmental rule" means 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 adopted amendments remove obsolete references to Chapter 321. Chapter 321, Subchapters G, H, J, K, M, and O are specified for repeal because they are inactive, obsolete, and have been replaced by TPDES general permits. Therefore, it is not anticipated that the adopted amendments will 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 commission concludes that these adopted amendments do not meet the definition of a "major environmental rule."

Furthermore, even if the adopted amendments did meet the definition of a major environmental rule, the adopted amendments are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, 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. The adopted amendment to §305.539(a)(1) and (2) or §305.539(a)(4)(B) and (D) or §305.539(a)(5) and (6) will not cause any of the results listed in Texas Government Code, §2001.0225(a).

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory

impact analysis. Because the adopted amendments do not constitute a major environmental rule, a regulatory impact analysis is not required.

The commission solicited public comment regarding this draft regulatory impact analysis determination.

No comments were received on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted amendments and performed an assessment of whether the rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rulemaking is to remove references to inactive and obsolete sections that have been replaced by general permits. The adopted amendments would substantially advance this stated purpose. Promulgation and enforcement of these adopted amendments would be neither a statutory nor a constitutional taking of private real property because the adopted amendments do not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted amendments would eliminate an unnecessary reference to an obsolete rule. Because the amendments do not affect real property, they do not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of amendments. Therefore, these adopted amendments will not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission determined that the adopted amendments, which are procedural mechanisms for removing references to subchapters no longer applicable, are consistent with CMP goals and policies and will not have a direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation of the amendments will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission invited public comment regarding the consistency of the rules with the CMP. No comments were received regarding the consistency of the rules with the CMP.

#### PUBLIC COMMENT

The proposal was published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2821). The comment period closed on June 25, 2007. The commission received no comments on the proposed rulemaking.

**SUBCHAPTER O: ADDITIONAL CONDITIONS AND PROCEDURES FOR WASTEWATER  
DISCHARGE PERMITS AND SEWAGE SLUDGE PERMITS**

**§305.539**

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.102, which establishes the commission's general authority to carry out its jurisdiction; §5.103(a) and §5.105, which provide the commission with the authority to adopt rules and policies necessary to carry out its powers and duties under the TWC and other laws of the state; §5.120, which states the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; and §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state.

The adopted amendment implements TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, and 26.011.

**§305.539. Additional Requirements for Shrimp Aquaculture Facilities Within the Coastal Zone.**

(a) A commercial aquaculture facility, located within the coastal zone as delineated under rules of the Coastal Coordination Council, 31 TAC §503.1, and engaged in the production of shrimp that will discharge into water in the state shall comply with the following requirements.

(1) The applicant shall apply to the executive director for an individual Texas pollutant discharge elimination system (TPDES) permit. The application, in addition to the information required by the application form, shall include:

(A) a copy of the site-assessment environmental report submitted to the Texas Department of Agriculture (TDA) as part of the application for an aquaculture license; and

(B) a copy of an emergency plan, approved by the Texas Parks and Wildlife Department (TPWD), for incorporation into the TPDES permit.

(2) The applicant shall obtain an individual TPDES wastewater discharge permit in accordance with the requirements of this chapter before discharging into water in the state.

(3) The applicant shall obtain an amendment to an individual TPDES permit prior to an increase in the amount of discharge above the levels allowed in the existing permit or a change in the nature of the discharge, except as otherwise provided by Chapter 35, Subchapter F of this title (relating to Water Quality Emergency and Temporary Orders).

(4) The facility shall comply with the terms and conditions of its individual TPDES permit, and any quarantine conditions imposed by TPWD, except in cases where the facility is in imminent danger of overflow, flooding, or similar conditions that could result in either the release of exotic species that are regulated by the TPWD or that would result in the violation of a quarantine condition imposed by the TPWD. In such cases, the facility may discharge effluent in excess of the permitted flow rates, but only to the extent necessary to comply with an emergency plan that is approved by the TPWD, and the following provisions shall also apply.

(A) The facility is not subject to effluent limitations, discharge flow limitations, and other effluent monitoring requirements in the permit for discharges that comply with an emergency plan approved by the TPWD.

(B) A facility shall notify the appropriate TCEQ regional office at least 48 hours, or as soon as practicable, prior to initiating any action under an emergency plan in response to an emergency event, such as landfall of a hurricane, and shall notify the regional office as soon as practicable following initiation of the emergency plan.

(C) The facility shall control discharges made under an emergency plan in the most environmentally sound manner that is practicable.

(D) Within 30 days following initiation of the emergency plan, the facility shall submit a written report to the appropriate TCEQ regional office that includes the following information:

(i) the reason for initiation of the plan;

(ii) actions taken to prevent or mitigate impacts of the discharge to the receiving stream;

(iii) volumes of wastewater discharged;

(iv) the dates that discharges occurred; and

(v) a general summary of receiving stream conditions at the time of the discharges.

(E) The facility is responsible for demonstrating that the discharges were necessary and that conditions required initiation of the emergency plan.

(5) A facility engaged in the propagation or rearing of shrimp which exhibit one or more manifestations of disease as defined by TPWD in 31 TAC §57.111 and §69.75 shall immediately report the apparent disease to the TCEQ regional office and Wastewater Permitting Section, and to TPWD, and shall comply with 31 TAC §57.114 and §69.77. The executive director shall be immediately notified of the results of any analyses by a shellfish disease specialist. Any actions which are deemed necessary by the discharger to prevent transmission of the disease to aquatic life endemic to waters in the state shall be implemented as soon as possible. The executive director may require suspension or termination of the discharge of effluent from infected portions of the facility as is necessary to protect aquatic life in the receiving stream from potential adverse effects.

(6) A facility required to hold a permit from TPWD regulating the possession and sale of exotic fish and shellfish shall immediately notify the TCEQ regional office and Wastewater Permitting Section if the TPWD places the facility under quarantine condition. There shall be no discharge during the quarantine period, except upon approval by the executive director and TPWD. The executive director and TPWD may suspend or terminate the prohibition on discharge to allow for implementation of the facility's emergency plan approved by TPWD, following the lifting of the quarantine condition by TPWD, or based on other relevant factors.

(7) Except as provided in paragraph (4) of this subsection, a facility shall comply with the terms and conditions in its individual TPDES permit, which shall include conditions related to suspended solids based on levels and measures adequate to prevent:

(A) a potential significant adverse response in aquatic organisms, changes in flow patterns of receiving waters, or excessive sedimentation of bays; and

(B) a potential significant adverse response in aquatic plants caused by reduction of light due to suspended solids in discharges.

(b) All new, amendment, or renewal applications for an individual TPDES permits to which the requirements of this section apply are subject to review by a three-member application review committee comprised of one representative each from the executive director, TPWD, and TDA.

(c) In considering whether to approve an application for a new, amended, or renewed individual TPDES permit for a commercial aquaculture facility located within the coastal zone and engaged in the production of shrimp, the commission shall consider all relevant factors, including:

(1) the site-assessment environmental report provided by the applicant under subsection (a)(1)(A) of this section;

(2) any sensitive aquatic habitat guidelines established by TPWD; and

(3) any comments on the application provided by the three-member application review committee referred to in subsection (b) of this section.