

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts an amendment to §305.541.

The amendment to §305.541 is adopted *without change* to the proposed text as published in the February 9, 2018, issue of the *Texas Register* (43 TexReg 715) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking is necessary to adopt by reference new dental office pretreatment standards, which were adopted by the United States Environmental Protection Agency (EPA) in 40 Code of Federal Regulations (CFR) Part 441 and became effective on July 14, 2017.

The new federal regulations create technology-based pretreatment standards to reduce the discharge of mercury-containing dental amalgam to publicly owned treatment works (POTWs). Dental offices, which discharge mercury present in amalgam used for fillings, are a source of mercury discharges to POTWs. Mercury entering POTWs frequently partitions into the sludge and enters the environment through the incineration, landfilling, or land application of sludge or through surface water discharge. The new federal regulations require dental offices to use amalgam recovery devices and two best management practices: one which prohibits the discharge of waste ("or scrap") amalgam, and the other which prohibits the use of line cleaners that

may lead to the dissolution of solid mercury when cleaning chair-side traps and vacuum lines. Additionally, the federal regulation requires dental offices to submit a One-Time Compliance Report to the Control Authority.

The federal regulations established that dental dischargers are not significant industrial users or categorical industrial users, unless designated as such by the Control Authority. This reduces most of the oversight and reporting requirements in 40 CFR Part 403, such as permitting and annual inspections that would be required if they were designated as significant industrial users or categorical industrial users. Lastly, the federal regulation reduced reporting for dental offices in comparison to reporting requirements for other industrial users that are subject to categorical pretreatment standards.

Existing dental offices that are subject to the rule must comply with the standards by July 14, 2020 and submit the One-Time Compliance Report by October 12, 2020. New dental offices that are subject to the rule must comply immediately with the standards and submit the One-Time Compliance Report within 90 days of discharge to a POTW. The One-Time Compliance Report must be submitted within 90 days after a transfer of ownership.

The adopted rulemaking amends §305.541 to adopt by reference 40 CFR Part 441 as published in the *Federal Register* on June 14, 2017, and minor corrections to the rule

that were published in the *Federal Register* on June 26, 2017 and July 5, 2017 (82 FedReg 28777; 82 FedReg 30997).

Section Discussion

§305.541, Effluent Guidelines and Standards for Texas Pollutant Discharge Elimination System Permits

The commission adopts amended §305.541 to add 40 CFR Part 441 and the *Federal Register* volume and date to the list of federal effluent guidelines and standards that were adopted by reference at the time Texas was awarded delegation of the National Pollutant Discharge Elimination System (NPDES) program and those that were adopted after delegation.

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 Texas 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 new dental office pretreatment standards, which were adopted by the EPA in 40 CFR Part 441. The specific intent of the adopted rulemaking is to amend the commission's rules to incorporate recent federal regulatory changes that 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. The adopted rulemaking is procedural in nature; 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 441 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 commission's rulemaking authority in Texas Water Code, §5.103. 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 Draft 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 dental office pretreatment standards found at 40 CFR Part 441. The adopted rule would substantially advance this stated purpose by amending §305.541 to reflect the EPA's new rules for dental office pretreatment standards into 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 Memorandum of Agreement 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 will be neither a statutory nor a constitutional taking of private real property. Specifically, the 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 regulations related to dental office pretreatment standards 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 adoption 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 CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The commission offered a public hearing on March 8, 2018. The comment period closed on March 12, 2018. The commission received one comment from the Texas Dental Association (TDA), which was in support of the rulemaking.

Response to Comment

Comment

TDA commented that they have been educating their members about eliminating amalgam discharge to POTWs since 2005. TDA also stated that they are developing pretreatment standard compliance resources for member dentists and answering any compliance questions members may have. Lastly, TDA looks forward to working with the TCEQ to help Texas dentists implement the new dental office pretreatment standards.

Response

The commission appreciates the comment and TDA's efforts to educate their members about the dental office pretreatment standards.

**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; and 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.

The adopted amendment implements the new regulation in 40 Code of Federal Regulations Part 441.

§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) 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 40 CFR Parts

437 (*Federal Register*, Volume 65, December 22, 2000), 441 (*Federal Register* Volume 82, June 14, 2017); 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 79, March 6, 2014), as amended, are adopted by reference.