

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

Background and Summary of the Factual Basis for the Proposed 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 proposed rulemaking will amend §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 and July 5, 2017.

Section Discussion

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

System Permits

The commission proposes an amendment to §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.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are expected for the agency or for other units of state or local government.

The proposed rule would adopt by reference new dental office pretreatment standards adopted by the EPA in 40 CFR Part 441 that became effective on July 14, 2017.

The new federal regulations create standards to reduce the discharge of mercury-containing dental amalgam to POTWs. The new federal regulations require dental offices to use amalgam recovery devices and two best management practices: one which prohibits the discharge of waste 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.

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 Control Authorities are required to identify, notify, and receive the One-Time Compliance Reports from the regulated dental offices. There are approximately 8,835 dental offices in Texas that will need to comply with this rule. The TCEQ is the Control Authority for approximately 2,800 regulated dental offices that discharge into POTWs without an approved pretreatment program. The POTWs with an approved pretreatment program are the Control Authorities for approximately 6,035 regulated dental offices. It is estimated that approximately 296 new dental offices will open for business and have to be in compliance with this rule each year.

Under the federal rule, dental dischargers are not significant industrial users or categorical industrial users and therefore most of the oversight and reporting requirements such as permitting and annual inspections that would apply to dischargers subject to categorical pretreatment standards do not apply to dental dischargers unless required by the Control Authority. The federal regulation also reduced reporting for dental offices in comparison to reporting requirements for other

industrial users that are subject to categorical pretreatment standards. It is expected that all of the Control Authorities, including the TCEQ and other units of state or local government, would use existing staff and resources to administer the collection of the One-Time Compliance Report. Therefore, no significant fiscal implications are anticipated.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with federal law and the protection of public health and safety from the discharge of mercury-containing dental amalgam to 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.

Costs are anticipated for businesses or individuals as a result of the implementation or administration of the proposed rule. The estimated cost of compliance depends on a number of variables, such as the number of dental offices that place or remove dental amalgam, the number of chairs in the dental office, and the size of the amalgam separator(s) that are connected to one or more chairs. For the estimated 41% of dental offices statewide that will have to install amalgam separators, costs for each office are

not expected to be significant. Costs, if any, that are passed on to patients are also not expected to be significant.

There are approximately 10,344 dental offices in Texas based on 2015 data from the United States Census Bureau. EPA estimates that approximately 85%, or 8,835 dental offices in Texas place or remove dental amalgam and, therefore, are subject to regulation by this rule. EPA also estimates that approximately 41%, or 4,241, dental offices in Texas are placing or removing dental amalgam, but do not have separators installed. These dental offices would have until 2020 to install a separator. TCEQ staff assume that approximately 25% of dental offices would install a separator in the first year the proposed rule is in effect (2018) and 25% would install a separator in the second year (2019) the proposed rule is in effect. The remaining 50% would install a separator in the third year the rule would be in effect (2020).

EPA estimates that approximately 9.7% of dental offices have one to two chairs, 68.9% have three to five chairs; 5.8% have six chairs; and 15.6% have seven chairs or more.

EPA estimates that the amalgam separator and installation cost would be between \$672 for one to two chairs up to \$3,336 for seven chairs or more. Reporting costs and the annual operation, maintenance, and amortized repair cost for affected dental offices would range from \$424 for one to two chairs to \$881 for seven chairs or more and that annual recordkeeping costs would be \$62 for all dental offices, independent of the number of chairs. Total initial costs per dental office are estimated to be

between \$672 and \$3,366 depending upon the size of the dental office. Subsequent to amalgam separator installation costs, annual costs are estimated to be between \$486 and \$943 each year per office, depending upon the size of the dental office.

Agency staff estimate that the total statewide costs for installation of an amalgam separator by an estimated 50% of the estimated 4,241 dental offices that have to install amalgam separators for the first two years the rule would be in effect, would be \$1.9 million in the first year (2018) and \$2.5 million in the second year (2019). In the third year (2020 the deadline for compliance), the remaining 50% of dental offices that have to install amalgam separators would come into compliance with costs estimated to be \$4.3 million. These costs include approximately 296 new dental offices coming online each year as well as the estimated cost of operation, maintenance, and repairs for the amalgam separators as well as reporting and recordkeeping. Estimated costs of \$1.7 million are anticipated in the fourth year the proposed rule is in effect and \$3.4 million are expected in year five. These estimated costs include installation costs of an amalgam separator by approximately 296 new dental offices each year and the estimated cost of operation, maintenance, repairs, reporting, and recordkeeping.

Small Business and Micro-Business Assessment

No significant adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. Almost all of the estimated 8,835 affected

dental offices in Texas are small or micro-businesses. Costs of compliance for affected dental offices depends on a number of variables, such as the number of dental offices that place or remove dental amalgam, the number of chairs in the dental office, and the size of the amalgam separator(s) that are connected to one or more chairs. Dental offices that do not have dental amalgam separators installed are expected to have costs of between \$672 for one to two chairs up to \$3,336 for seven chairs or more for the installation of the separators. Amortized costs for repair as well as maintenance and operation costs would be \$424 each year for offices with one to two chairs up to \$881 each year for offices with seven chairs or more and \$62 for all offices for recordkeeping costs. It is assumed that additional compliance costs for dental offices will be passed on to patients who use their services. Separate compliance or reporting requirements for small or micro-businesses cannot be established because the agency is required under a federal agreement to incorporate federal rules into the commission's rules.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required for the first five-year period the proposed rule is in effect because the proposed rule is required by federal law and is necessary in order for the state to maintain delegation of the NPDES program by the federal government.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Communities Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rule does not adversely affect any rural community in a material way for the first five years that the proposed rule is in effect. The amendment would apply statewide and have the same effect for dental offices in rural communities as dental offices in urban communities. The proposed rule is necessary because under the Memorandum of Agreement (MOA) between EPA and the commission regarding the NPDES, the agency is required to incorporate federal rules into the commission's rules.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement Assessment for this proposed rulemaking. The proposed rule does not create or eliminate a government program but it does broaden the oversight of an approved pretreatment program to dental offices. The proposed rule does not require: the creation of new employee positions or the elimination of existing employee positions; an increase or decrease in future legislative appropriations to the agency; or an increase or decrease

in fees paid to the agency. The proposed rule does not create a new regulation but it does adopt a federal rule by reference. The federal rule broadens the oversight of an approved pretreatment program to dental offices and increases the number of individuals (dental offices) subject to the federal rule.

During the first five years that the proposed rule would be in effect, it is not anticipated that there will be an adverse impact on the state's economy. The proposed rule is expected to enhance the protection of public health and safety from the discharge of mercury-containing dental amalgam to POTWs, thus protecting the water resources of the state. The cost of compliance for each affected dental office is not expected to be significant.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed 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 proposed 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 proposed rulemaking is procedural in nature; therefore, the proposed rule does not meet the definition of a "major environmental rule."

Even if the proposed 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 proposed 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 proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The commission invites public comment regarding this Draft Regulatory Impact Analysis Determination. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed 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 proposed 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 proposed 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 proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal 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 proposed rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the proposed 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 proposed 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on March 8, 2018, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located

at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2017-009-305-OW. The comment period closes on March 12, 2018. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Laurie Fleet, Wastewater Permitting Section, at (512) 239-5445.

**SUBCHAPTER P: EFFLUENT GUIDELINES AND STANDARDS FOR TEXAS
POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMITS**

§305.541

Statutory Authority

This amendment is proposed 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 proposed 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)[, 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 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.