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

**Background and Summary of the Factual Basis for the Proposed Rule**

House Bill (HB) 2771 (86th Texas Legislature, 2019) requires the TCEQ to submit a delegation request by September 1, 2021, to seek authority from the United States Environmental Protection Agency (EPA) to issue federal permits for discharges of produced water, hydrostatic test water, and gas plant effluent into water in the state resulting from certain oil and gas activities under the National Pollutant Discharge Elimination System (NPDES) program. Additionally, HB 2771 transfers permitting authority for these discharges from the Railroad Commission of Texas (RRC) to the TCEQ upon delegation of authority for these discharges from EPA to the TCEQ.

This rulemaking is one of several steps necessary to implement HB 2771. The proposed rulemaking would amend §305.541 to adopt by reference the EPA’s effluent limitations guidelines for the oil and gas extraction point source category and the centralized waste treatment category (40 Code of Federal Regulations (CFR) Parts 435 and 437).

**Section Discussion**

§305.541, Effluent Guidelines and Standards for Texas Pollutant Discharge Elimination System (TPDES) Permits
The commission proposes an amendment to §305.541(a) to improve readability and to adopt by reference the current federal regulations in 40 CFR Parts 435 and 437, but noting that the term "produced wastewater" will be used in place of the term "produced water" in the federal regulations, in order to distinguish between the federal definition of "produced water" and the commission jurisdiction under Texas Water Code, §26.131. The proposed rulemaking would ensure that these federal effluent limitation guidelines are adopted in state regulations, which is necessary prior to seeking NPDES delegation authority from the EPA to issue permits for discharges of produced water, hydrostatic test water, and gas plant effluent from oil and gas facilities.

EPA promulgated the Oil and Gas Extraction Effluent Guidelines and Standards (40 CFR Part 435) in 1979, and amended the regulations in 1993, 1996, 2001, and 2016. These regulations establish effluent limitation guidelines using best practicable control technology currently available (BPT), best available technology economically achievable (BAT), and best conventional pollutant control technology (BCT); performance standards for new sources; and pretreatment standards applicable to wastewater discharges from field exploration, drilling, production, well treatment, and well completion activities. These activities take place on land, in coastal areas, and offshore. The Oil and Gas regulations apply to conventional and unconventional oil and gas extraction, with the exception of coalbed methane.
EPA promulgated the Centralized Waste Treatment (CWT) Effluent Guidelines and Standards (40 CFR Part 437) in 2000 and amended the rule in 2003. These regulations establish effluent limitation guidelines using BPT, BAT, and BCT; performance standards for new sources; and pretreatment standards applicable to CWT facilities. CWT facilities treat or recover metal-bearing, oily, and organic wastes, wastewater, or used material received from off-site. The CWT industry handles wastewater treatment residuals and industrial process by-products that come from other industries, including the oil and gas exploration and production industry.

The commission proposes §305.541(b) to define "produced water" as that term is used in Texas Water Code, §26.131.

Fiscal Note: Costs to State and Local Government
Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

This proposed rulemaking addresses changes required to begin implementation of HB 2771. The proposed rule would adopt by reference certain effluent limitation guidelines in federal regulations. Regulated entities subject to these guidelines are not currently required to obtain discharge authorization from the commission because
they are permitted by the EPA and the RRC.

At a future date, if the EPA delegates authority to the commission, then fiscal implications will be anticipated for the agency and the state. On May 17, 2019, the Legislative Budget Board estimated the legislation’s impact in their fiscal note for HB 2771.

**Public Benefits and Costs**

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated will be compliance with state law.

**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 Assessment**

The commission reviewed this proposed rulemaking and determined that the proposed rule does not adversely affect rural communities 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 in rural communities as in urban communities.
Small Business and Micro-Business Assessment

No 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.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rule does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does the proposed rulemaking increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's
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 action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. "Major environmental rule" is defined as 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. This rulemaking does 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. This rulemaking would adopt by reference the EPA's effluent limitations guidelines for the oil and gas extraction point source category and the centralized waste treatment category (40 CFR Parts 435 and 437). The rulemaking does not meet the definition of "Major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Therefore, the commission finds that this rulemaking is not a "Major environmental rule."
Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the rulemaking does not exceed a standard set by federal law, rather it adopts by reference EPA’s effluent limitations guidelines for the oil and gas extraction point source category and the centralized waste treatment category (40 CFR Parts 435 and 437). Also, the rulemaking does not exceed an express requirement of state law nor exceed a requirement of a delegation agreement. Finally, the rulemaking was not developed solely under the general powers of the agency; but is required by HB 2771. Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the proposed rulemaking does not constitute a major environmental rule, a regulatory impact analysis is not required.

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 performed an assessment of this rule in accordance with Texas Government Code, §2007.043. This rulemaking would adopt by reference the EPA’s effluent limitations guidelines for the oil and gas extraction point source category and the centralized waste treatment category (40 CFR Parts 435 and 437). This rule would not constitute either a statutory nor a constitutional taking of private real property. This rulemaking would impose no burdens on private real property because the proposed rule neither relates to, nor has any impact on the use or enjoyment of private real property, and there is no reduction in value of the property as a result of this rulemaking.

**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 *et seq.*, 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.

CMP goals applicable to the proposed rule includes protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rule includes policies for discharges of wastewater from oil and gas exploration and production.

The proposed rulemaking is consistent with the above goals and policies by requiring wastewater discharges from oil and gas exploration and production facilities to comply with federal effluent limitation guidelines to protect water resources.

Promulgation and enforcement of the rule would 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 the rule would not create or have a direct or significant adverse effect on any CNRAs.

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 February 4, 2020, 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. Andreea Vasile, 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: https://www6.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 2019-118-305-OW. The comment period closes on February 11, 2020. Copies of the proposed rulemaking can be obtained from the commission’s
website at https://www.tceq.texas.gov/rules/propone_adopt.html. For further information, please contact Laurie Fleet, Water Quality Division, at (512) 239-5445.
SUBCHAPTER P: EFFLUENT GUIDELINES AND STANDARDS FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS

§305.541

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, which establishes the general authority of the commission necessary to carry out its jurisdiction; TWC, §5.103, which establishes that the commission, by rule, shall establish and approve all general policy of the commission; TWC, §5.105, which establishes the general authority of the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state; 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 House Bill 2771 (86th Texas Legislature, 2019).


(a) Except to the extent that they are less stringent than the Texas Water Code or the rules of the commission, the following federal regulations are adopted by reference, as amended:
(1) 40 Code of Federal Regulations (CFR) Parts 400 - 402, 404 - 434, 436, 438 - 440, 443, 446 - 448, and 451 - 471 [400 - 471, except 40 CFR Part 403], which are in effect as of the date of the Texas Pollutant Discharge Elimination System (TPDES) program authorization; [, as amended, and 40 CFR Parts]

(2) 40 CFR Part 435 (which is in effect as of the date of the TPDES program authorization for discharges subject to this part), except where 40 CFR Part 435 uses the term "produced water" the commission shall instead use the term "produced wastewater";

(3) 40 CFR Part 437 (Federal Register, Volume 68, December 22, 2003); [(Federal Register, Volume 65, December 22, 2000),]

(4) 40 CFR Part 441 (Federal Register, Volume 82, June 14, 2017);

(5) 40 CFR Part 442 (Federal Register, Volume 65, August 14, 2000); [,]

(6) 40 CFR Part 444 (Federal Register, Volume 65, January 27, 2000); [,]

(7) 40 CFR Part 445 (Federal Register, Volume 65, January 19, 2000); [,]

(8) 40 CFR Part 449 (Federal Register, Volume 77, May 16, 2012); [,] and
(9) 40 CFR Part 450 (Federal Register, Volume 79, March 6, 2014) [, as amended, are adopted by reference].

(b) For the purposes of the commission's implementation of Texas Water Code, §26.131, "produced water" is defined as all wastewater associated with oil and gas exploration, development, and production activities, except hydrostatic test water and gas plant effluent, that is discharged into water in the state, including waste streams regulated by 40 CFR Part 435.