

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§305.542 - 305.544.

New §§305.542 - 305.544 are adopted without changes to the text as published in the October 8, 2021, issue of the *Texas Register* (46 TexReg 6884), and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking is being adopted in response to a quadrennial rule review wherein the commission determined that 30 TAC Chapter 308 Subchapters C and J, were obsolete (Non-Rule Project Number 2019-034-308-OW; December 13, 2019, issue of the *Texas Register* (44 TexReg 7718)). Additionally, the executive director identified several rules related to the Texas Pollutant Discharge Elimination System (TPDES) program that would be more appropriately consolidated into Chapter 305, Subchapter P. These rules include 30 TAC Chapters 308, 314, and 315, which contain adoption by reference of federal regulations similar to Chapter 305, Subchapter P. Consolidating these rules will improve the overall organization of TCEQ rules related to the TPDES program.

This rulemaking adopts by reference federal regulations that were previously adopted by reference in Chapters 308, 314, and 315, except for Chapter 308, Subchapters C and J, which were identified as obsolete. Subchapter C in its entirety and Subchapter J as relating to compliance dates were not re-proposed in this rulemaking. Subchapter J

relating to cooling water intakes will be adopted in the new rule §305.544.

Additionally, this rulemaking adopts by reference federal regulations related to cooling water intake structures at oil and gas facilities (40 Code of Federal Regulations (CFR) Part 125, Subpart N) that were not previously adopted in Chapter 308 because TCEQ didn't have authority to regulate oil and gas facilities until the United States Environmental Protection Agency (EPA) granted TPDES program authority for wastewater discharges from oil and gas facilities in January 2021. Concurrently with this rulemaking, the commission is repealing 30 TAC Chapters 308, 314, and 315.

Section by Section Discussion

§305.542. Pretreatment Standards.

Adopted new §305.542 adopts by reference 40 CFR Part 403, as amended, with the following exceptions. The commission is not adopting 40 CFR §§403.16 or 40 CFR §403.19 because 40 CFR §403.16 is less stringent than 30 TAC §305.535 and 40 CFR §403.19 expired in 2005. Additionally, the adopted rule states that where 40 CFR §403.11 provides procedures for requesting and holding a public hearing, the commission shall instead require notice of and hold a public meeting. Public meetings conducted by the executive director provide an opportunity for public comment and follow the procedures described in 40 CFR §403.11.

The federal regulations in 40 CFR Part 403 establish responsibilities of Federal, State, and local government, industry, and the public to implement National Pretreatment

Standards to control pollutants which pass through or interfere with treatment processes in Publicly Owned Treatment Works or which may contaminate sewage sludge.

The federal regulations in 40 CFR Part 403, which were in effect on the date of TPDES program authorization (i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 315. EPA amended 40 CFR Part 403 several times after 1998. The adopted rule adopts by reference the most current version of 40 CFR Part 403 adopted on November 2, 2020, as amended.

§305.543. Toxic Pollutant Effluent Standards and Prohibitions.

Adopted new §305.543 adopts by reference 40 CFR Part 129, Subpart A, as in effect on the date of TPDES program authorization, as amended. No changes to these federal regulations have been adopted by EPA since the date of TPDES program authorization in September 1998. The federal regulations in 40 CFR Part 129 establish effluent standards or prohibitions for the discharge of toxic pollutants.

§305.544. Criteria and Standards for Texas Pollutant Discharge Elimination System Permits.

Adopted new §305.544(1), (2), (4), and (8) adopts by reference 40 CFR Part 125, Subparts A, B, G, and M, respectively, as each of these subparts were in effect on the date of TPDES program authorization, as amended. No changes to these federal

regulations have been adopted by EPA since the date of TPDES program authorization in September 1998.

The federal regulations in 40 CFR Part 125, Subpart A establish criteria and standards for the imposition of technology-based treatment requirements in permits under Clean Water Act (CWA) §301(b), including the application of EPA promulgated effluent limitations and case-by-case determinations of effluent limitations under CWA §402(a)(1). 40 CFR Part 125, Subpart B establishes guidelines under CWA §318 and §402 for approval of any discharge of pollutants associated with an aquaculture project. 40 CFR Part 125, Subpart G establishes the criteria to be applied by EPA in acting on CWA §301(h) requests for modifications to the secondary treatment requirements. It also establishes special permit conditions which must be included in any permit incorporating a CWA §301(h) modification of the secondary treatment requirements. 40 CFR Part 125, Subpart M establishes guidelines for issuance of permits for the discharge of pollutants from a point source into the territorial seas, the contiguous zone, and the oceans.

Adopted new §305.544(3) adopts by reference 40 CFR Part 125, Subpart D, as amended. The federal regulations in 40 CFR Part 125, Subpart D establish the criteria and standards to be used in determining whether effluent limitations alternative to those required by promulgated EPA effluent limitations guidelines under CWA §301 and §304 (referred to as “national limits”) should be imposed on a discharger because

factors relating to the discharger's facilities, equipment, processes or other factors related to the discharger are fundamentally different from the factors considered by EPA in development of the national limits.

The federal regulations in 40 CFR Part 125, Subpart D, which were in effect on the date of TPDES program authorization (i.e. September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 308. EPA amended 40 CFR Part 125, Subpart D after 1998. The adopted rule adopts by reference the most current version of 40 CFR Part 125, Subpart D adopted on May 15, 2000, as amended.

Adopted new §305.544(5) adopts by reference 40 CFR Part 125, Subpart H, as amended. The federal regulations in 40 CFR Part 125, Subpart H describes the factors, criteria and standards for the establishment of alternative thermal effluent limitations under CWA §316(a) in permits issued under CWA §402(a).

The federal regulations in 40 CFR Part 125, Subpart H, which were in effect on the date of TPDES program authorization (i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 308. EPA amended 40 CFR Part 125, Subpart H after 1998. The adopted rule adopts by reference the most current version of 40 CFR Part 125, Subpart H adopted on May 15, 2000, as amended.

Adopted new §305.544(6) adopts by reference 40 CFR Part 125, Subpart I, as amended.

The federal regulations in 40 CFR Part 125, Subpart I establish requirements that apply to the location, design, construction, and capacity of cooling water intake structures at new facilities. The term “new facility” is defined in 40 CFR §125.83.

The federal regulations in 40 CFR Part 125, Subpart I, which were in effect on the date of TPDES program authorization (i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 308. EPA amended 40 CFR Part 125, Subpart I after 1998. The adopted rule adopts by reference the most current version of 40 CFR Part 125, Subpart I adopted on August 15, 2014, as amended.

Adopted new §305.544(7) adopts by reference 40 CFR Part 125, Subpart J, as amended. The federal regulations in 40 CFR Part 125, Subpart J establish the requirements that apply to cooling water intake structures at existing facilities. The term “existing facility” is defined in 40 CFR §125.92.

The federal regulations in 40 CFR Part 125, Subpart J, which were in effect on the date of TPDES program authorization (i.e., September 1998), were previously adopted by reference, as amended, in 30 TAC Chapter 308. EPA repealed 40 CFR Part 125, Subpart J after 1998 and subsequently adopted new regulations in 40 CFR Part 125, Subpart J. The adopted rule adopts by reference the most current version of 40 CFR Part 125, Subpart J adopted on August 15, 2014, as amended.

Adopted new §305.544(9) adopts by reference 40 CFR Part 125, Subpart N, as amended. The federal regulations in 40 CFR Part 125, Subpart N establish requirements that apply to the location, design, construction, and capacity of cooling water intake structures at new offshore oil and gas extraction facilities. The term “new offshore oil and gas extraction facility” is defined in 40 CFR §125.92. The adopted rule adopts by reference the current version of 40 CFR Part 125, Subpart N adopted on June 16, 2006, as amended.

Final Regulatory Impact 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 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.

Chapter 308, Subchapters A, B, D, G, H, I, and M that are adopted for repeal will be re-adopted within Chapter 305, Subchapter P in adopted new §§305.542 - 305.544 to improve the overall organization of TCEQ rules related to the TPDES program. This

rulemaking is also being adopted in response to a quadrennial rule review wherein the commission determined that Chapter 308, Subchapters C and J were obsolete.

Subchapter C in its entirety and Subchapter J as relating to compliance dates will not be re-adopted in this rulemaking. Subchapter J relating to cooling water intakes will be re-adopted in the new §305.544. In addition, the adopted rulemaking adopts by reference 40 CFR Part 125, Subpart N that was not previously adopted in Chapter 308. Therefore, it is not anticipated that the adopted new rules would 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 the adopted new rules do not meet the definition of a “Major environmental rule.”

Furthermore, even if the adopted new rules did meet the definition of a major environmental rule, the adopted new rules would not be subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in Texas Government Code, §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 new rules of §§305.542-305.544 would 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 new rules would not constitute a major environmental rule, a regulatory impact analysis is not required.

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 the rulemaking adoption and performed an assessment of whether the rulemaking adoption constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted action is to consolidate rules from Chapters 308 (with the exception of Subchapters C and J), 314, and 315 into Chapter 305, Subchapter P. Consolidating these rules will improve the overall organization of TCEQ rules related to the TPDES program. In addition, the rulemaking adoption will adopt by reference 40 CFR Part 125, Subpart N, that was not previously adopted in Chapter 308. The rulemaking adoption will substantially advance this stated purpose. Promulgation and enforcement of this rulemaking adoption will be neither a statutory

nor a constitutional taking of private real property because the rulemaking adoption will not affect real property.

In particular, there are no burdens imposed on private real property, and the rulemaking adoption will consolidate rules for the purpose of improving organization of TCEQ rules related to the TPDES program. Because the rulemaking adoption will not affect real property, it would 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 the adopted new rules. Therefore, this rulemaking adoption will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption 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 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the rulemaking adoption in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the rulemaking adoption is consistent with the applicable CMP goals and policies.

CMP goals applicable to the rulemaking adoption 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 rulemaking adoption includes policies for discharges of wastewater.

The rulemaking adoption is consistent with the above goals and policies by requiring wastewater discharges to comply with federal regulations established to protect water resources.

Promulgation and enforcement of the rulemaking will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules will be consistent with these CMP goals and policies and the rulemaking will not create or have a direct or significant adverse effect on any CNRAs.

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 November 9, 2021. The comment period closed on November 9, 2021. No public comments were received.

**SUBCHAPTER P: ADDITIONAL CONDITIONS FOR TEXAS POLLUTANT DISCHARGE
ELIMINATION SYSTEM (TPDES) PERMITS**

§§305.542 - 305.544

Statutory Authority

The rulemaking 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; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §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; TWC, §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 TWC, §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 new rules implement TWC, §§5.013, 5.102, 5.103(a), 5.105, 5.120, and 26.011.

§305.542. Pretreatment Standards.

40 Code of Federal Regulations (CFR) Part 403 (*Federal Register*, Volume 85, November 2, 2020), as amended, is adopted by reference, except 40 CFR §403.16 and §403.19, and except where 40 CFR §403.11 provides procedures for requesting and holding a public hearing, the commission shall instead require notice of and hold a public meeting. Such a public meeting shall be conducted by the executive director, shall be an opportunity for public comment, and shall otherwise follow the procedures described in 40 CFR §403.11.

§305.543. Toxic Pollutant Effluent Standards and Prohibitions.

Except to the extent that it is less stringent than the Texas Water Code or the rules of the commission, 40 Code of Federal Regulations Part 129, Subpart A, as in effect on the date of TPDES program authorization, as amended, is adopted by reference.

§305.544. Criteria 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, the following federal regulations are adopted by reference, as amended:

(1) 40 Code of Federal Regulations (CFR) Part 125, Subpart A, relating to imposing technology-based treatment requirements, as in effect on the date of Texas Pollutant Discharge Elimination System (TPDES) program authorization;

(2) 40 CFR Part 125, Subpart B, relating to issuance of permits to aquaculture projects, as in effect on the date of TPDES program authorization;

(3) 40 CFR Part 125, Subpart D, relating to determining fundamentally different factors (*Federal Register*, Volume 65, May 15, 2000);

(4) 40 CFR Part 125, Subpart G, relating to modifying the secondary treatment requirements, as in effect on the date of TPDES program authorization;

(5) 40 CFR Part 125, Subpart H, relating to determining alternative effluent limitations (*Federal Register*, Volume 65, May 15, 2000);

(6) 40 CFR Part 125, Subpart I, relating to cooling water intake structures for new facilities (*Federal Register*, Volume 79, August 15, 2014);

(7) 40 CFR Part 125, Subpart J, relating to relating to cooling water intake structures for existing facilities (*Federal Register*, Volume 79, August 15, 2014);

(8) 40 CFR Part 125, Subpart M, relating to ocean discharges, as in effect on the date of TPDES program authorization; and

(9) 40 CFR Part 125, Subpart N, relating to cooling water intake structures for new offshore oil and gas extraction facilities (*Federal Register*, Volume 71, June 16, 2006).