

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

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking is being proposed 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 would improve the overall organization of TCEQ rules related to the TPDES program.

This rulemaking proposes to adopt 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 will not be re-proposed in this rulemaking. Subchapter J relating to cooling water intakes will be re-proposed in the new rule §305.544. Additionally, this rulemaking proposes to adopt 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 proposing to repeal 30 TAC Chapters 308, 314, and 315.

Section by Section Discussion

§305.542. Pretreatment Standards.

Proposed new §305.542 would adopt by reference 40 CFR Part 403, as amended, with the following exceptions. The commission is not proposing to adopt 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 proposed 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 proposed rule would adopt 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.

Proposed new §305.543 would adopt 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.

Proposed new §305.544(1), (2), (4), and (8) would adopt 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.

Proposed new §305.544(3) would adopt 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 proposed rule would adopt by reference the most current version of 40 CFR Part 125, Subpart D adopted on May 15, 2000, as amended.

Proposed new §305.544(5) would adopt 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 proposed rule would adopt by reference the most current version of 40 CFR Part 125, Subpart H adopted on May 15, 2000, as amended.

Proposed new §305.544(6) would adopt 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 proposed rule would adopt by reference the most current version of

40 CFR Part 125, Subpart I adopted on August 15, 2014, as amended.

Proposed new §305.544(7) would adopt 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 proposed rule would adopt by reference the most current version of 40 CFR Part 125, Subpart J adopted on August 15, 2014, as amended.

Proposed new §305.544(9) would adopt 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 proposed rule would adopt by reference the current version of 40 CFR Part 125, Subpart N adopted on June 16, 2006, as amended.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, has determined that for the first five-year period that the proposed new rules would be 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 rules.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed new rules would be in effect, the public benefit anticipated would be improved readability with the removal of obsolete provisions, consolidation of the rules governing the TPDES program, and compliance with the Memorandum of Agreement between the agency and the EPA regarding the same program.

The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals. The proposed rulemaking contains a reference to 40 CFR Part 125, Subpart N, which should not create a new fiscal impact because regulated entities were required to submit to federal regulations prior to the EPA granting TPDES program authority for wastewater discharges from oil and gas facilities.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking would not adversely affect a local economy in a material way for the first five years that the proposed new rules would be in effect.

Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking would not adversely affect rural communities in a material way for the first five years that the proposed new rules would be in effect. The new rules 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 rulemaking for the first five-year period that the proposed new rules would be 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 rulemaking would not adversely affect a small or micro-business in a material way for the first five years that the proposed new rules would be in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program and would not require an increase or decrease in future

legislative appropriations to the agency. The proposed rulemaking would 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 would not create, expand, repeal or limit an existing regulation, nor would the proposed rulemaking increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed new rules should not impact positively or negatively the state's economy.

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 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 proposed for repeal would be re-proposed within Chapter 305, Subchapter P in proposed new §§305.542 - 305.544 to improve the overall organization of TCEQ rules related to the TPDES program. This rulemaking is also being proposed 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-proposed in this rulemaking. Subchapter J relating to cooling water intakes will be re-proposed in the new §305.544. In addition, the proposed rulemaking would adopt by reference 40 CFR Part 125, Subpart N that was not previously adopted in Chapter 308. Therefore, it is not anticipated that the proposed 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 proposed new rules do not meet the definition of a “Major environmental rule.”

Furthermore, even if the proposed new rules did meet the definition of a major environmental rule, the proposed 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 proposed 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 proposed new rules would not constitute a major environmental rule, a regulatory impact analysis is not required.

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 the proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed 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 would improve the overall organization of TCEQ rules related to the TPDES program. In addition, the proposed rulemaking would adopt by reference 40 CFR Part 125, Subpart N, that was not previously adopted in Chapter 308. The proposed rulemaking would substantially advance this stated purpose. Promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property because the proposed rulemaking would not affect real property.

In particular, there are no burdens imposed on private real property, and the proposed rulemaking would consolidate rules for the purpose of improving organization of TCEQ rules related to the TPDES program. Because the proposed rulemaking would 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 proposed new rules. Therefore, this proposed rulemaking would 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 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed new rules 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 rulemaking 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 rulemaking include

policies for discharges of wastewater.

The proposed rulemaking 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 new rules would not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules would be consistent with these CMP goals and policies and the rules 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.

Virtual Public Hearing

The commission will hold a virtual public hearing on this proposal on November 9, 2021, at 10:00 a.m. 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 virtual hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Registration

The hearing will be conducted remotely using an internet meeting service. Individuals who plan to attend the hearing and want to provide oral comments and/or want their attendance on record must register by November 8, 2021. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on November 8, 2021, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_YTRlMmM0YjEtMzcyNy00MjMyLTk0MGQtZDc0ODA1NDlmMWZl%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%2230ec010b-ff0b-4618-bbc4-622a14f9cb18%22%2c%22IsBroadcastMeeting%22%3a%22true%7d&btype=a&role=a

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 Cecilia Mena, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. 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 2021-020-305-OW. The comment period closes on November 9, 2021. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Ms. Laurie Fleet, Water Quality Division at (512) 239-5445.

**SUCHAPTER P: ADDITIONAL CONDITIONS [EFFLUENT GUIDELINES AND
STANDARDS] FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES)
PERMITS**
§§305.542 - 305.544

Statutory Authority

The rulemaking is proposed 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 proposed 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).