

The Texas Commission on Environmental Quality (commission) adopts an amendment to §39.403, Applicability. Section 39.403 is adopted *without change* to the proposed text as published in the September 6, 2002 issue of the *Texas Register* (27 TexReg 8411) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The commission's practice of permitting pre-injection units and other surface units as part of nonhazardous underground injection control (UIC) permits has varied over time, due to the different scope of applications submitted by applicants, and due to different interpretations of statutes and the provisions of 30 TAC Chapter 331, Underground Injection Control. Generally, it has been the applicants' option whether to include pre-injection facility information in their UIC permit applications. About half of the UIC permits issued by the commission for on-site disposal of nonhazardous waste include specifications for pre-injection units. This rulemaking provides the option of including pre-injection units in a registration under the authority of Texas Water Code (TWC), Chapter 27, and provides a consistent set of standards and guidance to permit applicants, agency staff, and the general public on application requirements for pre-injection units, whether they are to be authorized by permit or registration. The conforming amendments to Chapter 331 also change the terms "Pre-injection facilities" and "Surface facilities," which are considered to be terms of art, to "Pre-injection units." These changes are adopted for consistency with other agency definitions wherein "facility" usually refers to a property along with structures and other appurtenances, and "unit" usually refers to the individual types of equipment used for the management of waste, such as tanks, pumps, or surface impoundments.

This issue was given preliminary consideration by the commissioners at a work session on October 20, 2000. Staff was directed to conduct additional research on the issue and develop recommendations. Staff returned to work session on January 17, 2001, and presented a list of options to the commission relating to the regulation of pre-injection units associated with on-site nonhazardous waste disposal by Class I injection wells and any permitted Class V injection wells. The commissioners directed staff to require applicants for UIC permits to include design information for pre-injection units with the permit application. The commissioners further directed staff to review the design information and ensure the design of the pre-injection units was adequate to protect groundwater. Applicants were to be informed that inclusion of pre-injection units as part of their UIC permits was optional. Applicants who choose not to include pre-injection units in their UIC permits would be subject to a registration process for those facilities. Applicants were also to be informed that sufficient design information must be included in their application so that staff could conduct a thorough technical review and determine whether the pre-injection units are protective of human health and the environment.

Amendments to Chapter 331 are adopted to implement the new registration procedure, and are also published in this issue of the *Texas Register*. Part of that procedure includes mailed public notice and an opportunity for public comment on the registration of pre-injection units. These mailed notice and public comment procedures for registration of UIC pre-injection units are given in the adopted amended and new sections to Chapter 331, including new §331.17, Pre-Injection Units Registration, and new §331.18, Registration Application, Processing, Notice, Comment, Motion to Overturn. It should be noted that an opportunity to file written comment with the commission will be available to interested parties; however, there will be no opportunity for a contested case hearing on the proposed

registrations. Conforming changes are hereby adopted for §39.403, Applicability, to except these notice provisions from Chapter 39. The procedures that apply may be found in adopted new §331.18.

SECTION DISCUSSION

Adopted §39.403, Applicability, is amended to except registrations of pre-injection units for nonhazardous noncommercial injection wells from the public notice requirements in Chapter 39. The requirements that apply may be found in adopted new §331.18. Administrative changes have been made to conform to *Texas Register* requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the adopted rule is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute.

“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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted rule is to amend Chapter 39 to exempt the registration of pre-injection units at nonhazardous, noncommercial injection wells from the notice provisions of Chapter 39. The rule does so by amending §39.403 to state that registrations for pre-injection units for nonhazardous, noncommercial injection wells are excluded from the application of Chapter 39. The adopted rule substantially advances its purpose by excluding registrations for pre-injection units for nonhazardous, noncommercial injection wells.

The adopted rule meets one criterion of the definition of a major environmental rule because the intent of this rule is to protect the environment or reduce risks to human health from environmental exposure. However, the rule does not meet the two other criteria of the definition of a major environmental rule. It does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because it does not require more from an applicant than is required by current rules which require that pre-injection units be included in the injection well permit. The adopted rule is not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because the adoption is part of a rule package which provides protection for health and the environment that is substantially similar to the protection provided by application of the previous rules.

In addition, the adopted rule does not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the rule does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) adopt a rule solely under the general powers of the agency.

The adopted rule does not exceed a standard set by federal law because there are no such corresponding federal standards for notice concerning registration of pre-injection units at nonhazardous, noncommercial injection wells. The rule does not exceed an express requirement of state law because TWC, Chapter 27 does not establish express requirements for notice concerning registration of pre-injection units at nonhazardous, noncommercial injection wells. The rule does not exceed the requirements of the delegation agreement because the delegation agreement does not establish express

requirements for notice concerning registration of pre-injection units at nonhazardous, noncommercial pre-injection units.

This rule is not adopted solely under the general powers of the agency, but is adopted under the specific provisions of the Texas Injection Well Act, TWC, §§27.002, 27.003, 27.011, 27.019(a), and 27.051(3).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that the Texas Government Code, Chapter 2007 does not apply to this adopted rule because the rule is an action that is taken in response to a real and substantial threat to public health and safety; it is designed to significantly advance the health and safety purpose; and it does not impose a greater burden than is necessary to achieve the health and safety purpose. Texas Government Code, §2007.003(b)(13), provides that an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose is exempt from Chapter 2007.

The real and substantial threat to public health and safety in this rulemaking involves activities that may pollute fresh water. The Texas Injection Well Act, TWC, §27.003 states that it is the policy of the state to "prevent underground injection that may pollute fresh water" and "to require the use of all

reasonable methods to implement this policy.” Section 27.051(3) requires that the commission make a finding, before it issues a permit, “that, with proper safeguards both ground and surface fresh water can be adequately protected from pollution.” Section 27.002(4) defines “pollution” as “the alteration of the physical, chemical, or biological quality of or the contamination of, water that makes it harmful, detrimental, or injurious to humans....”

Other adopted rules would minimize this threat by requiring that certain nonhazardous, noncommercial pre-injection units meet the design criteria for sewerage systems, while offering to applicants the option of using a registration process to authorize such pre-injection units. This rule exempts the registration process from the notice requirements of this chapter because Chapter 39 applies generally to permits and not to registrations.

The adopted rule significantly advances the health and safety purpose by setting a uniform design standard which is protective of human health and safety for certain pre-injection units. The design standards protect health and safety by requiring the management of waste fluids in such a manner as to prevent their excursion into fresh waters in the state.

The adopted rule does not impose a greater burden than is necessary to achieve the health and safety purpose because the adopted design standards for nonhazardous, noncommercial pre-injection units represent the engineering practice necessary to prevent the pollution of fresh water. Further, the adopted rule allows applicants to use, as an option, a registration process to comply with the rule. The option of using a registration process is expected to provide, in some instances, a less burdensome

method of administering the design standards than the present rules, which require that nonhazardous, noncommercial pre-injection units be included in the injection well permit.

The adopted rule is not subject to Texas Government Code, Chapter 2007 because it is exempt under the provisions of §2007.003(b)(13).

Nevertheless, the commission further evaluated this adopted rule and performed an assessment of whether this rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rule is to exempt the registration process from the notice requirements of Chapter 39, which applies generally to permits and not to registrations. The rule substantially advances this purpose by adding an exemption from the requirements of Chapter 39, Subchapters H - M for applications for registration of pre-injection units for nonhazardous, noncommercial, underground injection wells under §331.17 of this title (relating to Pre-Injection Units Registration).

The adopted rule does not require more from an applicant than was required by previously existing rules, which required that pre-injection units be included in the injection well permit. Since the adopted rule does not require more than would be required by previously existing rules, it does not burden an owner of real property in a manner which would be a statutory or constitutional taking. Specifically, the subject rule does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); 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.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the adopted rule does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*) and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning the CMP. The rulemaking action concerns only the procedural rules of the commission, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (31 TAC Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 *et seq.*).

HEARING AND COMMENTERS

There was no public hearing held on the proposed rulemaking, and no written comments were received during the comment period which closed at 5:00 p.m., October 7, 2002.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§39.403

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells. The amendment is also adopted under Texas Health and Safety Code (THSC), §361.017 and §361.024, which provide the commission with authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. The amendment is also adopted under THSC, §401.051, which provides the commission with authority to adopt rules necessary to carry out its powers and duties under the Texas Radiation Control Act.

§39.403. Applicability.

(a) Permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapters H - M of this chapter (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications and Water Quality Management Plans; Public Notice of Air Quality Applications; Public Notice of Injection Well and Other Specific Applications; and Public Notice for Radioactive Material Licenses). Permit

applications that are declared administratively complete before September 1, 1999 are subject to Subchapters A - E of this chapter (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications; Public Notice of Air Quality Applications; and Public Notice of Other Specific Applications). All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits). The effective date of the amendment of existing §39.403, specifically with respect to subsection (c)(9) and (10), is June 3, 2002. Applications for modifications filed before this amended section becomes effective will be subject to this section as it existed prior to June 3, 2002.

(1) Explanation of applicability. Subsection (b) of this section lists all the types of applications to which Subchapters H - M of this chapter apply. Subsection (c) of this section lists certain types of applications that would be included in the applications listed in subsection (b) of this section, but that are specifically excluded. Subsections (d) and (e) of this section specify that only certain sections apply to applications for radioactive materials licenses or voluntary emission reduction permits.

(2) Explanation of organization. Subchapter H of this chapter contains general provisions that may apply to all applications under Subchapters H - M of this chapter. Additionally, in Subchapters I - M of this chapter, there is a specific subchapter for each type of application. Those subchapters contain additional requirements for each type of application, as well as indicating which parts of Subchapter H of this chapter must be followed.

(3) Types of applications. Unless otherwise provided in Subchapters G - M of this chapter, public notice requirements apply to applications for new permits, concrete batch plant air quality exemptions from permitting or permits by rule, and applications to amend, modify, or renew permits.

(b) As specified in those subchapters, Subchapters H - M of this chapter apply to notices for:

(1) applications for municipal solid waste, industrial solid waste, or hazardous waste permits under Texas Health and Safety Code (THSC), Chapter 361;

(2) applications for wastewater discharge permits under Texas Water Code (TWC), Chapter 26, including:

(A) applications for the disposal of sewage sludge or water treatment sludge under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation); and

(B) applications for individual permits under Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(3) applications for underground injection well permits under TWC, Chapter 27, or under THSC, Chapter 361;

(4) applications for production area authorizations under Chapter 331 of this title (relating to Underground Injection Control);

(5) contested case hearings for permit applications or contested enforcement case hearings under Chapter 80 of this title (relating to Contested Case Hearings);

(6) applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), except as provided in subsection (e) of this section;

(7) applications for consolidated permit processing and consolidated permits processed under TWC, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing);

(8) applications for air quality permits under THSC, §382.0518 and §382.055. In addition, applications for permit amendments under §116.116(b) of this title (relating to Changes to Facilities), initial issuance of flexible permits under Chapter 116, Subchapter G of this title (relating to Flexible Permits), amendments to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) when an action involves:

(A) construction of any new facility as defined in §116.10(4) and (10) of this title (relating to General Definitions);

(B) modification of an existing facility as defined in §116.10(9) of this title which result in an increase in allowable emissions of any air contaminant emitted equal to or greater than the emission quantities defined in §106.4(a)(1) of this title (relating to Requirements for Exemptions from Permitting) and of sources defined in §106.4(a)(2) and (3) of this title; or

(C) other changes when the executive director determines that:

(i) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(ii) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(iii) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or

(iv) there is a reasonable likelihood of significant public interest in a proposed activity;

(9) applications subject to the requirements of Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major

Sources (FCAA, §112(g), 40 Code of Federal Regulations Part 63)), whether for construction or reconstruction;

(10) concrete batch plants registered under Chapter 106 of this title (relating to Exemptions from Permitting) unless the facility is to be temporarily located in or contiguous to the right-of-way of a public works project;

(11) applications for voluntary emission reduction permits under THSC, §382.0519;

(12) applications for permits for electric generating facilities under Texas Utilities Code, §39.264;

(13) applications for multiple plant permits (MPPs) under THSC, §382.05194; and

(14) Water Quality Management Plan updates processed under TWC, Chapter 26, Subchapter B.

(c) Notwithstanding subsection (b) of this section, Subchapters H - M of this chapter do not apply to the following actions and other applications where notice or opportunity for contested case hearings are otherwise not required by law:

(1) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), except for applications for individual permits under Subchapter B of that chapter;

(2) applications for registrations and notifications under Chapter 312 of this title;

(3) applications under Chapter 332 of this title (relating to Composting);

(4) applications under Chapter 122 of this title (relating to Federal Operating Permits);

(5) applications under Chapter 116, Subchapter F of this title (relating to Standard Permits);

(6) applications under Chapter 106 of this title, except for concrete batch plants specified in subsection (b)(10) of this section;

(7) applications under §39.15 of this title (relating to Public Notice Not Required for Certain Types of Applications) without regard to the date of administrative completeness;

(8) applications for minor amendments under §305.62(c)(2) of this title (relating to Amendment). Notice for minor amendments shall comply with the requirements of §39.17 of this title (relating to Notice of Minor Amendment) without regard to the date of administrative completeness;

(9) applications for Class 1 modifications of industrial or hazardous waste permits under §305.69(b) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice for Class 1 modifications shall comply with the requirements of §39.105 of this title (relating to Application for a Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title (relating to Text of Public Notice) and §305.69(b) of this title;

(10) applications for modifications of municipal solid waste permits and registrations under §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications). Notice for modifications shall comply with the requirements of §39.106 of this title (relating to Application for Modification of a Municipal Solid Waste Permit or Registration), without regard to the date of administrative completeness;

(11) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c) of this title. Notice for Class 2 modifications shall comply with the requirements of §39.107 of this title (relating to Application for a Class 2 Modification of an Industrial or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 and §305.69(c) of this title;

(12) applications for minor modifications of underground injection control permits under §305.72 of this title (relating to Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee);

(13) applications for minor modifications of Texas Pollutant Discharge Elimination System permits under §305.62(c)(3) of this title;

(14) applications for registration and notification of sludge disposal under §312.13 of this title (relating to Actions and Notice); or

(15) applications for registration of pre-injection units for nonhazardous, noncommercial, underground injection wells under §331.17 of this title (relating to Pre-Injection Units Registration).

(d) Applications for initial issuance of voluntary emission reduction permits under THSC, §382.0519 and initial issuance of electric generating facility permits under Texas Utilities Code, §39.264 are subject only to §39.405 of this title (relating to General Notice Provisions), §39.409 of this title (relating to Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing), §39.411 of this title, §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), §39.602 of this title (relating to Mailed Notice), §39.603 of this title (relating to Newspaper Notice), §39.604 of this title (relating to Sign-Posting), §39.605 of this title (relating to Notice to Affected Agencies), and §39.606 of this title (relating to Alternative Means of Notice for Grandfathered Facilities), except that any reference to requests for reconsideration or contested case hearings in §39.409 or §39.411 of this title shall not apply. For MPP applications filed before September 1, 2001, the initial issuance, amendment, or revocation of MPPs under THSC, §382.05194 is subject to the same public notice requirements that

apply to initial issuance of voluntary emission reduction permits and initial issuance of electric generating facility permits, except as otherwise provided in §116.1040 of this title (relating to Multiple Plant Permit Public Notice and Public Participation).

(e) Applications for radioactive materials licenses under Chapter 336 of this title are not subject to §39.405(c) and (e) of this title; §§39.418 - 39.420 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit; Notice of Application and Preliminary Decision; and Transmittal of the Executive Director's Response to Comments and Decision); and certain portions of §39.413 of this title (relating to Mailed Notice).