

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §39.403, Applicability.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 applicant's 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 is intended to provide the option of including pre-injection units in a registration under the authority of Texas Water Code (TWC), Chapter 27, and to provide a consistent set of standards and guidance to permit applicants, commission 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 propose to change the terms "Pre-injection facilities" and "Surface facilities," which are considered to be terms of art, to "Pre-injection units." These changes are proposed 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 commissioners 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 permit 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 proposed to implement the new registration procedure. Part of that procedure will include 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 proposed amended and new sections to Chapter 331, specifically proposed new §331.17, Pre-injection Units Registration, and proposed 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 proposed for §39.403, Applicability, to except these notice provisions from Chapter 39. The procedures that apply may be found in proposed new §331.18.

SECTION BY SECTION DISCUSSION

Section 39.403, Applicability, is proposed to be 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 proposed new §331.18. Administrative changes have been made to conform to *Texas Register* requirements.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for units of state and local government due to administration and enforcement of the proposed rule. Units of state and local government that do not own or operate pre-injection units at Class I, nonhazardous, noncommercial injection wells would not be affected by the proposed rule.

The proposed rulemaking would exempt the registration of pre-injection units at Class I nonhazardous, noncommercial injection wells from public meeting and contested case hearing requirements. In a concurrent rulemaking in Chapter 331, the commission proposes to exempt from public meeting and contested case hearing requirements, those sites that opt to register their affected pre-injection units in lieu of permitting the units. Pre-injection units are the on-site above ground structures and equipment, including injection pumps, filters, tanks, surface impoundments, and piping for wastewater transmission

between any such facilities and the injection well, that are or will be used for storage or processing of waste to be injected into the disposal well. In order to implement the public notice exemption in the concurrent Chapter 331 rulemaking, the commission proposes to update existing regulations in this chapter.

Although this rulemaking intends to exempt applications for pre-injection units from public meeting and contested case hearings, the concurrent rulemaking requires the commission to provide mailed notices to adjacent land owners, allows for a 30-day comment period, and requires the commission to consider the public comments when making final decisions concerning the application.

Units of state and local government do not normally operate injection wells affected by the proposed rule. Additionally, there are no known active injection wells operated by units of government that would be affected by the proposed rule. However, if a unit of government did opt to register a pre-injection unit at a Class I injection well affected by the proposed rule, there would likely be cost savings due to the exemption of existing public meeting and contested case hearing requirements.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule will be potentially increased environmental protection by providing a financial incentive for owners and operators to register their pre-injection units with the commission. The registration of these units would

provide the commission with adequate technical data to determine whether the units posed a risk to the environment.

The proposed rulemaking would exempt the registration of pre-injection units at Class I nonhazardous, noncommercial injection wells from public meeting and contested case hearing requirements.

The commission currently receives approximately 20 applications per year for UIC permits that would be affected by the proposed rule. The majority of these applications are from large industrial businesses. For applicants that elect to register pre-injection units at Class I injection wells affected by the proposed rule, there would likely be cost savings, in an amount that cannot be determined at this time, due to the exemption of existing public meeting and contested case hearing requirements.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed rule, which is intended to exempt the registration of pre-injection units at Class I nonhazardous, noncommercial injection wells from public meeting and contested case hearing requirements.

The commission currently receives approximately 20 applications per year for UIC permits that would be affected by the proposed rule, some of which are submitted by small and micro-businesses. For applicants that elect to register pre-injection units at Class I injection wells affected by the proposed

rule, there would likely be cost savings, in an amount that cannot be determined at this time, due to the exemption of existing public meeting and contested case hearing requirements.

LOCAL EMPLOYMENT IMPACT

The commission has reviewed this proposed rule 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.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the proposed 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 proposed rule is to amend Chapter 39 to exempt the registration of pre-injection units at Class I, nonhazardous, noncommercial injection wells from the notice provisions of Chapter 39. The proposed rule does so by amending §39.403 to state that registrations for pre-injection units for Class I nonhazardous, noncommercial injection wells are excluded from the application of Chapter 39. The proposed rule substantially advances its purpose by excluding registrations for pre-injection units for Class I nonhazardous, noncommercial injection wells.

The proposed rule meets one criteria 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 proposed 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. And the proposed rule does not 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 proposal is made as part of a rule package which contains specific technical standards for pre-injection units at Class I nonhazardous, noncommercial injection wells. For these reasons, the rule does not meet the definition of a major environmental rule.

In addition, the proposed rule does not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the proposed 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) propose to adopt a rule solely under the general powers of the agency.

The proposed 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 Class I nonhazardous, noncommercial injection wells. The proposed 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 Class I nonhazardous, noncommercial injection wells.

The proposed 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 Class I nonhazardous, noncommercial pre-injection units.

This proposed 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, Chapter 27, §§27.002, 27.003, 27.011, 27.019(a), and 27.051(3).

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposed rule in accordance with Texas Government Code, §2007.043. The commission's preliminary assessment indicates that the Texas Government Code, Chapter 2007 does not apply to this proposed rule because the proposed 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, Chapter 27, §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 proposed rules would minimize this threat by requiring that Class I 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 proposed 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 proposed rule does not impose a greater burden than is necessary to achieve the health and safety purpose because the proposed design standards for Class I nonhazardous, noncommercial pre-injection

units represent the engineering practice necessary to prevent the pollution of fresh water. Further, the proposal allows applicants to use, as an option, a registration process to comply with the proposed 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 Class I nonhazardous, noncommercial pre-injection units be included in the injection well permit.

The proposed 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 proposed rule and performed a preliminary assessment of whether this proposed rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to clarify commission rules for pre-injection units at Class I nonhazardous, noncommercial injection wells so that pre-injection units will be regulated in a more consistent manner. The rule substantially advances this purpose by clarifying the definitions of injection well and pre-injection units; adding registration as an alternative to including pre-injection units in the injection well permit; and explicitly stating the design standards that will apply to all covered pre-injection units. In addition, the requirement to include pre-injection units in a permit or registration is synchronized with renewal of the injection well permit. The proposed rule 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. Since the proposed rule does not require more than would be required by current rules, it does not burden an owner of real property in a manner which would be a statutory or constitutional taking. Specifically, the subject proposed 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 proposed regulation.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed 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 proposed 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.).

Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-055-331-WS. Comments must be received by 5:00 p.m., October 7, 2002. For further information, please contact Ray Austin, Regulation Development Section, at (512) 239-6814.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§39.403

STATUTORY AUTHORITY

The amendment is proposed 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 proposed 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 proposed 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.

The proposed amendment implements TWC, Chapter 27.

§39.403. Applicability.

- (a) (No change.)

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

(1) - (13) (No change.)

(14) Water Quality Management Plan [(WQMP)] updates processed under TWC [Texas Water Code], 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) - (12) (No change.)

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

(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) (No change.)

(e) Applications for radioactive materials licenses [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); [39.418, 39.419, 39.420,] and certain portions of §39.413 of this title (relating to Mailed Notice).