

The Texas Commission on Environmental Quality (commission) adopts the amendment to §305.72.

Section 305.72 is adopted *without change* to the proposed text as published in the April 9, 2004 issue of the *Texas Register* (29 TexReg 3586), and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking amends §305.72 in order to implement House Bill (HB) 2567, 78th Legislature, 2003, and its amendments to Texas Water Code (TWC), §27.021. The intent of HB 2567 was to exempt permits for Class I injection wells that dispose of brine produced by a desalination operation from the hearing required by TWC, §27.018 under the provisions of Texas Government Code, Chapter 2001. HB 2567 does not exempt Class I injection well permits for the disposal of any other waste streams from these hearing requirements. The purpose of this amendment is to provide that when a Class I injection well permit for the disposal of desalination brine is issued without a hearing under HB 2567, and then the permit holder seeks to dispose of other types of wastes in the well, the permit amendment process will provide the opportunity for a hearing as required by TWC, §27.018 under the provisions of Texas Government Code, Chapter 2001.

The amendment specifies that a permit for a Class I injection well used only for the disposal of desalination brine may not be administratively modified, under §305.72(b)(4), in order to change the waste streams injected into the Class I injection well to a waste stream other than desalination brine. The effect of this amendment is that a permit change of this kind requires a major amendment under §305.62(c)(1)(A), which provides an opportunity for a contested case hearing. This amendment ensures that the hearing requirements of TWC, §27.018 for general purpose Class I injection well permits are

retained for the disposal of wastes other than desalination brine after a permit is issued under the provisions of HB 2567.

Amendments to 30 TAC Chapters 50, 55, and 331 are also adopted in this issue of the *Texas Register* to implement HB 2567.

SECTION DISCUSSION

This rulemaking amends §305.72(b)(4) to specify that the kind of permit modification allowed by this paragraph shall not include modifying a Class I injection well permit used only for the disposal of desalination brine to a general purpose Class I injection well permit. This amendment effectively precludes a permit holder for this type of Class I injection well (used only for the disposal of desalination brine) from adding waste streams other than desalination brine without providing the opportunity for a contested case hearing.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that the rulemaking 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, 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 rulemaking does

not meet the definition of a “major environmental rule” because the specific intent of the rule is to preserve the hearing requirements of TWC, §27.018. The rule substantially advances this purpose by providing that §305.72 may not be used to add a waste stream, other than desalination brine, to the permit for a Class I injection well that was issued without a contested case hearing. The rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because it maintains current requirements of state law and thus does not change the status quo. The rulemaking 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 provision maintains existing requirements of state law.

In addition, the rulemaking does not exceed the four applicability requirements of Texas Government Code, §2001.0225(a), because the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or seek to adopt a rule solely under the general powers of the agency.

The rulemaking does not exceed a standard set by federal law because there are no corresponding federal standards requiring a contested case hearing for a permit for a Class I injection well.

Furthermore, the rulemaking does not exceed an express requirement of state law because the hearing requirement is mandated by state law. In addition, the rulemaking does not exceed the requirements of the delegation agreement concerning injection wells because the delegation agreement does not require contested case hearings for Class I injection well permits to dispose of brine produced by desalination

operations. Finally, this rulemaking is not adopted solely under the general powers of the agency but is adopted under the specific provisions of TWC, §27.019 and §27.021.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the amendment and performed an assessment of whether the amendment constitutes a taking under Texas Government Code, §2007.043.

The specific purpose of the amendment is to preserve the contested case hearing requirement of TWC, §27.018. TWC, §27.021 provides that an application for a Class I injection well for the disposal of brine produced by a desalination operation is not subject to the hearing requirements of TWC, §27.018 and Texas Government Code, Chapter 2001. Section 305.72 provides a procedure for permit modification at the request of the permittee without the opportunity for a contested case hearing. One of the permit modifications under this section is a change of waste stream. The rulemaking provides that this provision may not be used to add a waste stream, other than desalination brine, to the permit of a Class I injection well when that permit was obtained without the opportunity for a contested case hearing.

The amendment substantially advances the previously stated purpose by providing that §305.72 may not be used to add a waste stream other than desalination brine to the permit of a Class I injection well issued without the opportunity for a contested case hearing.

The adopted amendment does not impose any burden on private real property and does not result in any benefit to society from the use of private real property because the amendment does not directly apply to the ownership or use of a particular parcel of private real property.

Promulgation and enforcement of the amendment will not be a statutory or a constitutional taking of private real property because the amendment does not apply to the ownership or use of a particular parcel of private real property. The amendment does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond any reduction in value that would otherwise exist in the absence of the amendment.

The commission has no reasonable alternative actions that could accomplish the specified purpose of preserving the contested case hearing requirement of TWC, §27.018. The amendment ensures that the contested case hearing requirements for general purpose Class I injection well permits will be retained after a permit is issued under the provisions of HB 2567.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rulemaking is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendment is consistent with CMP goals and policies because the rulemaking is an administrative stipulation that specifies that §305.72(b)(4) shall not be used to change a permit from a Class I injection well permit used only for the disposal of desalination brine to a general purpose Class I injection well permit. This amendment will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

PUBLIC COMMENT

The comment period ended May 10, 2004. Two written comments were received: one from the United States Environmental Protection Agency (EPA), Region 6, and another from the commission's Office of Public Interest Counsel (OPIC). EPA suggested changes to the rulemaking but did not indicate support of or opposition to the rule. OPIC indicated support of the rule.

RESPONSE TO COMMENTS

The comments are not directly relevant to the amendments in Chapter 305. All comments are responded to in the preambles for the amendments to Chapters 50, 55, and 331. These preambles are also published in this issue of the *Texas Register*.

**SUBCHAPTER D: AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS,
REVOCATION, AND SUSPENSION OF PERMITS**

§305.72

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the 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; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.021, which provides that permits for disposal of brine produced by desalination operations are not subject to the hearing requirements of §27.018 and Texas Government Code, Chapter 2001.

§305.72. Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee.

- (a) This section applies only to Underground Injection Control permits.

- (b) With the permittee's consent, the executive director may modify administratively a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures and notice requirements of this chapter. Any change to the permit not

processed as a minor modification under this section must be made for cause and in compliance with appropriate public notice requirements. Minor modifications may only:

- (1) correct typographical errors;
- (2) require more frequent monitoring or reporting by the permittee;
- (3) change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement;
- (4) change quantities or types of fluids injected which are within the capacity of the facility as permitted and in the judgement of the executive director, would not interfere with the operation of the facility or its ability to meet conditions described in the permit and would not change its classification, provided however, that this provision shall not be used to add a waste stream other than desalination brine to the permit of a Class I injection well issued without the opportunity for a contested case hearing;
- (5) change construction requirements, provided that the alterations comply with the requirements of Chapter 331 of this title (relating to Underground Injection Control); or

(6) amend a plugging and abandonment plan which has been updated under §305.154(7) of this title (relating to Standards).