

The Texas Commission on Environmental Quality (commission) proposes an amendment to §305.72.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rule package amends §305.72 in order to implement House Bill (HB) 2567, 78th Legislature, 2003, and its amendments to Texas Water Code, §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 Texas Water Code, §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 Texas Water Code, §27.018 under the provisions of Texas Government Code, Chapter 2001.

The proposed 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 will be that a permit change of this kind will require a major amendment under §305.62(c)(1)(A), which provides an opportunity for a contested case hearing. This amendment will ensure that the hearing requirements of Texas Water Code, §27.018 for general purpose Class I injection well permits will be retained after a permit is issued under the provisions of HB 2567.

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

SECTION DISCUSSION

This rule package 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jan Washburn, Program Specialist in the Federal Grants and Strategic Planning Section, determined that for the first five-year period the proposed amendment is in effect, there will be no adverse fiscal implications for the agency or any other state agency. The amendment implements HB 2567, 78th Legislature, 2003, which may expedite the approval of Class I injection well permits for the disposal of desalination brine by removing the possibility of a contested case hearing. Public notice of, and the opportunity to comment on, a permit application will not be affected by this rulemaking. Ms. Washburn also determined that there will be no adverse fiscal impact to units of local government as a result of the proposed amendment. The amendment to Chapter 305 precludes an entity that has obtained a permit to dispose of brine from adding waste streams, unless the permit holder has gone

through the commission's normal permitting process, which includes the opportunity for a contested case hearing.

PUBLIC BENEFITS AND COSTS

Ms. Washburn determined that for the first five years the proposed amendment is in effect, the anticipated public benefit will be to allow desalination projects to come on line in a shorter time frame if disposal of brine will be via injection wells. State and local governments, small and micro-businesses, and other entities could possibly save both time and money by avoiding contested case hearings. Desalination projects could also help increase the potable water supply. Ms. Washburn also determined that there will be no adverse fiscal impacts to the public or individuals as a result of the proposed amendment.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Ms. Washburn also determined that there will be no adverse fiscal implications to small or micro-businesses as a result of implementation of the proposed amendment for the first five years it is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking 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 reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposal 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 proposal does not meet the definition of a “major environmental rule” because the specific intent of the rule is to preserve the hearing requirements of Texas Water Code, §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 proposal 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 proposal 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 and thus does not change the status quo.

In addition, the proposal does not exceed the four applicability requirements of Texas Government Code, §2001.0225(a) because the proposal 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) seek to adopt a rule solely under the general powers of the agency.

The proposal 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 proposal does not exceed an express requirement of state law because the hearing requirement is mandated by state law. In addition, the proposal 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 proposal is not adopted solely under the general powers of the agency, but is adopted under the specific provisions of Texas Water Code, §27.019 and §27.021.

The commission invites public comment on the draft regulatory impact analysis determination. All comments will be addressed in the publication of the final regulatory analysis.

TAKINGS IMPACT ASSESSMENT

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

The specific purpose of the proposed amendment is to preserve the contested case hearing requirement of Texas Water Code, §27.018. Texas Water Code, §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 Texas Water Code, §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 proposal 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 proposed amendment would substantially advance 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 proposed amendment does not impose any burden on private real property and it does not result in any benefit to society from the proposed use of private real property because the proposed amendment does not directly apply to the ownership or use of a particular parcel of private real property. In addition, 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 proposed amendment.

Therefore, promulgation and enforcement of this proposed amendment would not be a statutory or a constitutional taking of private real property.

The commission has no reasonable alternative actions that could accomplish the specified purpose of preserving the contested case hearing requirement of Texas Water Code, §27.018. The proposed 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, 78th Legislature, 2003.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking 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 proposed 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.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-

3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2003-062-331-WS. Comments must be received by 5:00 p.m., May 10, 2004. For further information, please contact Fred Duffy of the Waste Permits Division at (512) 239-6891 or Emily Barrett of the Policy and Regulations Division at (512) 239-3546.

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

§305.72

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §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; §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.

The amendment implements Texas Water Code, §27.018 and §27.021.

§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 [Correct] typographical errors;

(2) require [Require] more frequent monitoring or reporting by the permittee;

(3) change [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 [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 [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 [Amend] a plugging and abandonment plan which has been updated under §305.154(7) of this title (relating to Standards).