

The Texas Commission on Environmental Quality (commission) proposes to amend §50.113.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rulemaking implements House Bill (HB) 2654, 80th Legislature, 2007. HB 2654 amended Texas Water Code (TWC), §27.021 and added new TWC, §27.023 to allow the commission to issue a general permit authorizing the use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. These legislative changes are intended to promote desalination technology and address the need for public water supply systems to dispose of drinking water treatment residuals. To implement HB 2654, this rulemaking amends §50.113(d).

The amended rule adds two new types of applications and actions to a listing of applications that the commission may act on without holding a contested case hearing. This listing is in §50.113(d). There are two paragraphs under §50.113(d) that are affected by the proposed amendment.

First, the proposed amendment to §50.113(d)(5) will update the list of applications that are not subject to a contested case hearing by adding an application for a Class I injection well used only for the disposal of nonhazardous drinking water treatment residuals. This exception is in addition to the exception for applications for disposal of desalination brine which was added by a previous rulemaking in the September 10, 2004 issue of the *Texas Register* (29 TexReg 8814). Amendment of §50.113(d)(5) also includes updates to reflect use of the term "nonhazardous brine from a desalination operation" instead of "desalination brine," and inserts the word "injection" into the phrase "Class I injection wells," to achieve consistency with the title of TWC, §27.021 as amended by HB 2654.

Second, a new paragraph has been inserted as §50.113(d)(6) with renumbering of subsequent paragraphs.

The new paragraph implements part of TWC, §27.023 in HB 2654 that allows the commission to issue a general permit authorizing a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals, without providing the opportunity for a contested case hearing, as long as all requirements for a Class I injection well permit are met. Public notice of, and the opportunity to comment on, a permit application will not be affected by this rulemaking. Removing the opportunity for a contested case hearing may expedite the approval of Class I injection well permits for the disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals. The commission's ability to hold a discretionary hearing under the provisions of TWC, §5.102(b) was not amended by HB 2654.

Changes to 30 TAC Chapters 55, 305 and 331 are also proposed in this issue of the *Texas Register* to implement HB 2654 and to incorporate other changes to facilitate disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals.

SECTION DISCUSSION

§50.113. Applicability and Action on Application.

The proposal would amend §50.113(d)(5) by adding a permit application for a Class I injection well used only for the disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals to the list of applications upon which the commission may act without holding a contested case hearing. The proposal would add §50.113(d)(6) to include the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit, or the authorization for the use of an injection

well under a general permit in the list of items upon which the commission may act without holding a contested case hearing. Section 50.113(d)(6) - (8) will be renumbered as (d)(7) - (9), respectively.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed amendment is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule. The agency will utilize existing resources to develop rules and guidelines for a general permit to authorize the use of Class I injection wells for disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals.

HB 2654, 80th Legislature, Regular Session allows the commission to issue a general permit to authorize the use of a Class I injection well for disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals and allows the Railroad Commission of Texas to authorize the use of these wastes as appropriate injection fluids for enhanced recovery purposes without the necessity of obtaining a permit from the commission. HB 2654 requires agency rules governing the issuance of the general permit including the requirement for the submission of a notice of intent by the prospective permittee. In addition, HB 2654 specifies that the general permit is not subject to the requirements of a contested case hearing. The proposed rulemaking is part of the agency's effort to establish a general permit program authorizing the use of Class I injection wells as specified by the legislation. In addition to this rulemaking, amendments are also proposed for appropriate sections of Chapters 55, 305, and 331. This fiscal note addresses only the fiscal implication of proposed changes to Chapter 50. The fiscal implications for needed amendments to other chapters are addressed in separate fiscal notes.

The proposed rule would comply with the contested case hearing requirements of HB 2654. These administrative changes allow the agency to authorize disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals under a general permit without holding a contested case hearing if all permit requirements are met.

Local governments and state agencies that are suppliers of public drinking water are not expected to experience significant fiscal implications because of the proposed rule. Governmental entities supplying public drinking water are expected to choose the most economical method of disposal of nonhazardous desalination and drinking water residual wastes, and disposal of these wastes in these injection wells is one option among various options available to suppliers of public drinking water regarding waste disposal.

If a local government or state agency chooses to own or operate a Class I injection well qualifying for authorization under the proposed general permit, the proposed rule could streamline the process for the governmental entity by deleting the requirement for contested case hearings, public notice, and public meetings. Savings generated by not holding contested case hearings could be as much as \$500,000 although a contested case hearing would likely cost less. Not being required to publish public notices required by individual permits could save as much as \$1,000 to \$3,000 depending on the circulation size of the newspapers used. Savings generated by not being required to hold a public meeting, if an application had generated sufficient public interest for the agency to require one for an individual permit, could range from \$1,700 to \$4,700 depending on the cost of notices and the price for renting a meeting place.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from the changes seen in the proposed rule will be to allow desalination projects to come on line in a shorter time frame thus providing an increased supply of public drinking water while continuing to safeguard public health and the environment.

Individuals and business entities that are suppliers of public drinking water are not expected to experience significant fiscal implications because of the proposed rule. Suppliers of public drinking water are expected to choose the most economic method of disposal of nonhazardous desalination concentrate and drinking water treatment residuals, and disposal of these wastes in these injection wells is one option among various options available to suppliers of public drinking water regarding waste disposal.

Large businesses that own or operate these types of injection wells could possibly save both time and money since the proposed rule does not subject them to contested case hearings, requirements of public notice, and requirements for public meetings that would be required under an individual permit. Savings generated by not holding contested case hearings could be as much as \$500,000 although a contested case hearing would likely cost less. Public notices required for individual permits could cost as much as \$1,000 to \$3,000 depending on the circulation size of the newspapers used. If applying for authorization under a general permit, applicants could be expected to save this expense. Applicants for authorization under this general permit could also save on the public meeting costs incurred for individual notices if an application would have had a public meeting under the requirements for an individual permit. These

costs could range from \$1,700 to \$4,700 depending on the number of notices of public meeting that would have been required and the price of rentals for meeting places in the area.

Oil and gas businesses that might utilize enhanced recovery methods by injecting nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are expected to experience the same cost savings regarding contested case hearings, public notice and public meetings as those experienced by suppliers of public drinking water.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Staff knows of no small or micro-businesses that are owners of Class I wells. The proposed rule establishes that wells authorized under the general permit for Class I injection wells disposing of nonhazardous desalination and drinking water treatment residual wastes are not subject to the requirements of a contested case hearing, requirements of public notice, and requirements of public meetings as are those required by individual permits. If a small or micro-business decides to request authorization under a general permit to own or operate a Class I injection well for nonhazardous desalination concentrate or drinking water treatment residual waste disposal, it should experience the same cost savings associated with contested case hearings, public notices, and public meetings as those experienced by large businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is needed to comply with state law and does

not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 rulemaking does not meet the definition of a "major environmental rule" as defined by 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. This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not intended to reduce risks to human health from environmental exposure, nor does it 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 intent of the proposed rulemaking is to implement HB 2654, passed during the 80th Legislature, 2007, and to revise criteria for authorizing Class I nonhazardous wells injecting desalination concentrate and other water treatment residuals from public water systems so that the state's rules are no more

stringent than federal Class I nonhazardous injection well regulations. The specific intent of the proposed amendment to Chapter 50 is to address the authority of the commission to take actions regarding the proposed general permit and authorizations under the proposed general permit. The rule substantially advances this purpose by adding notices of intent submitted under §331.203 to the applicability of Chapter 50, Subchapter F. Further, applications for a Class I injection well permit used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well used only for the disposal of nonhazardous brine from desalination operations or drinking water treatment residuals are added to the list of items upon which the commission may act without holding a contested case hearing.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed amendment would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the proposed amendment will be significant with respect to the economy; therefore, the proposed amendment will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, 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. This rulemaking does not meet any of these four applicability requirements because this rulemaking does not exceed any standard set by federal law but rather amends the rules so that they are no more stringent or restrictive than the federal regulations. The proposed rule does not exceed the requirements of state law under the TWC, Chapter 27. Further, the proposed rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program. Finally, the rule is not proposed solely under the general powers of the agency, but rather specifically under TWC, §27.023(m), which allows the commission to adopt rules to implement the general permit authorizing use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals and TWC, §27.109, which authorizes the commission to adopt rules to implement TWC, Chapter 27 (regarding Injection Wells), as well as the other general powers of the agency.

The commission invites public comment regarding this draft regulatory impact analysis determination. 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.

TAKING IMPACT ASSESSMENT

The commission evaluated the proposed amendment to Chapter 50 and performed a preliminary assessment of whether the proposed amendment would constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the proposed amendment is to implement HB 2654, authorizing use of a general permit for Class I injection wells injecting only nonhazardous desalination

concentrate or nonhazardous drinking water treatment residuals. The proposed amendment would substantially advance this purpose by amending §50.113 to add to the list of actions upon which the commission may act without first holding a contested case hearing applications for a Class I injection well permit used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well permit used only for the disposal of nonhazardous brine from desalination operations or drinking water treatment residuals.

Promulgation and enforcement of the proposed amendment would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rule because the proposed amendments neither relate to, nor have any impact on the use or enjoyment of private real property, and there would be no reduction in property value as a result of this rule. Therefore, the proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

The commission has no reasonable alternative that could accomplish the specific purpose of addressing the commission's authority to act other than by amending Chapter 50.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on April 8, 2008 at 10:00 a.m. in Building E Room 201S, at the commission's central office located at 12100 Park 35 Circle. 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 hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Ms. Kristin Smith, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Ms. Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-030-331-PR. The comment period closes April 14, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Ms. Kathryn Hoffman, Waste Permits Division, (512) 239-6890.

SUBCHAPTER F: ACTION BY THE COMMISSION

§50.113

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (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 §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The proposed amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

§50.113. Applicability and Action on Application.

(a) **Applicability.** This subchapter applies to applications that are declared administratively complete on or after September 1, 1999. Applications that are declared administratively complete before September 1, 1999, are subject to Subchapter B of this chapter (relating to Action by the Commission).

(b) This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law.

(c) After the deadline for filing a request for reconsideration or contested case hearing under §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing), the commission may act on an application without holding a contested case hearing or acting on a request for reconsideration, if:

(1) no timely request for reconsideration or hearing has been received;

(2) all timely requests for reconsideration or hearing have been withdrawn, or have been denied by the commission;

(3) a judge has remanded the application because of settlement; or

(4) for applications under Texas Water Code, Chapters 26 and 27 and Texas Health and Safety Code, Chapters 361 and 382, the commission finds that there are no issues that:

(A) involve a disputed question of fact;

(B) were raised during the public comment period; and

(C) are relevant and material to the decision on the application.

(d) Without holding a contested case hearing, the commission may act on:

(1) an application for any air permit amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted;

(2) an application for any initial issuance of an air permit for a voluntary emission reduction or electric generating facility;

(3) an application for a hazardous waste permit renewal under §305.631(a)(8) of this title (relating to Renewal);

(4) an application for a wastewater discharge permit renewal or amendment under Texas Water Code, §26.028(d), unless the commission determines that an applicant's compliance history as determined under Chapter 60 of this title (relating to Compliance History) raises issues regarding the applicant's ability to comply with a material term of its permit;

(5) an application for a Class I injection well permit used only for the disposal of nonhazardous [desalination] brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(6) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(7)[(6)] an application for pre-injection unit registration under §331.17 of this title (relating to Pre-Injection Units Registration);

(8)[(7)] an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018; and

(9)[(8)] other types of applications where a contested case hearing request has been filed but no opportunity for hearing is provided by law.