

The Texas Commission on Environmental Quality (commission) adopts new §§37.9245, 37.9250, 37.9255, 37.9260, and 37.9265 *without changes* to the text as proposed in the June 6, 2008 issue of the *Texas Register* (33 TexReg 4484) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 1037, 80th Legislature, 2007, amended Subchapter D, Chapter 26 of the Texas Water Code (TWC), by adding §26.132. SB 1037 requires the commission to develop standards to prevent the contamination of ground and surface water resources from brine evaporation pit operations. SB 1037 requires an owner or operator to provide financial assurance to ensure satisfactory facility closure and obtain pollution liability insurance covering bodily injury and property damage to third parties.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes the addition of adopted new 30 TAC Chapter 218, Brine Evaporation Pits.

SECTION BY SECTION DISCUSSION

The commission adopts new Chapter 37, Subchapter X, Financial Assurance Requirements for Brine Evaporation Pits, to describe the financial assurance requirements for brine evaporation pits required by §218.35, Financial Assurance. Adopted new §37.9245, Applicability, indicates who is subject to the financial assurance requirements of the new subchapter.

Adopted new §37.9250, Definitions, references Subchapter A of Chapter 37 as well as Chapter 218. Since mechanism wordings all refer to the term "facility" rather than "brine evaporation pits" as used in

Chapter 218, this section clarifies that the two terms shall be synonymous for financial assurance purposes. This is not meant to affect or change usage of the term "brine evaporation pits" in Chapter 218.

Adopted new §37.9255, Submission of Documents, requires that financial assurance mechanisms be submitted prior to permit issuance for new facilities or within 180 days of the effective date of the rules for existing facilities. For either case, the executive director may provide written permission for an alternate deadline at his discretion.

Adopted new §37.9260, Financial Assurance Requirements for Closure and Post Closure of Brine Evaporation Pits, subsection (a) specifies the requirements and associated framework for the financial assurance mechanisms for closure and post closure. Since these requirements are common to many of the financial assurance programs, cross reference is made to existing Subchapters A - D. The section also specifies that §37.31 does not apply to brine evaporation pit owners and operators since some brine evaporation pits are already in existence and could not comply with a requirement to provide a mechanism 60 days prior to receipt of waste. Section 37.9255 provides the submittal timing requirements for brine evaporation pits. Adopted new §37.9255(b) establishes the financial assurance mechanisms that will be allowed by cross referencing to existing Subchapter C. Pay in trusts are not deemed an acceptable financial assurance mechanism since payment into a trust over time would not assure that financial assurance is adequate to ensure satisfactory closure of the brine evaporation pit as required by SB 1037. Only after the trust was fully funded could closure be assured by adequate funding.

Adopted new §37.9265, Third Party Pollution Liability Requirements for Brine Evaporation Pits, addresses the requirements for third party pollution liability insurance coverage. Subsection (a) describes

the minimum required amount of insurance coverage, the minimum standards for an insurance company providing the coverage and establishes what constitutes proof of coverage. Subsection (b) requires that if an endorsement rather than a certificate of insurance is chosen to provide the proof, then the insurance policy must be amended by the Endorsement of Liability. Finally, subsection (c) makes certain definitions in §37.402 regarding the terms of liability insurance applicable to brine evaporation pit owners providing third party pollution liability insurance. Section 37.411 provides that the executive director may amend the amount of third party pollution liability insurance based on the risk associated with each individual brine evaporation pit.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

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

A "major environmental rule" is 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 adopted rules are part of a larger proposal to implement rules for the regulation of brine evaporation pits. The corresponding rulemaking is published in this issue of the *Texas Register*, adopted Chapter 218, Brine Evaporation Pits. The specific intent of the adopted rules in Chapter 37 is to prescribe the manner in which an owner or operator of a brine evaporation pit may meet the third party liability pollution insurance and financial assurance requirements

under adopted Chapter 218. Furthermore, the adopted rules are administrative in nature and will not 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 commission concludes that the adopted rulemaking does not meet the definition of a major environmental rule.

In addition to the fact that the adopted rulemaking does not meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Subsection (a) applies only to a state agency's adoption of a major environmental rule that: (1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds 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) was adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards governing the operation of commercial brine evaporation pits. Second, the adopted rulemaking is required by SB 1037 and does not exceed its requirements. Third, the adopted rulemaking 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 a state and federal program. Finally, the adopted rulemaking will be adopted under the express authority of SB 1037, that expressly requires the commission to adopt any rules required to implement the act. Therefore, the rules are not adopted solely under the commission's general powers. The commission invited public comment regarding the draft

regulatory impact analysis determination during the public comment period. No public comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The commission determined that the adopted rulemaking does not constitute a taking. The specific purpose of the adopted new rules is to prescribe the manner in which an owner or operator of a brine evaporation pit may meet the third party liability pollution insurance and financial assurance requirements under adopted Chapter 218. The adopted new rules substantially advance this stated purpose by delineating the insurance company rating, amount of coverage, and documentation required for acceptable third party pollution liability insurance and setting forth various options for obtaining adequate financial assurance.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). SB 1037 mandates that the commission adopt rules implementing the act.

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted amendments is to prescribe the manner in which an owner or operator of a brine evaporation pit may meet the third party liability pollution insurance and financial assurance requirements under adopted Chapter 218. The adopted rules substantially advance this stated purpose by

delineating the insurance company rating, amount of coverage, and documentation required for acceptable third party pollution liability insurance and setting forth various options for obtaining adequate financial assurance.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden, nor restrict or limit the owner's right to real property in addition to reducing its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted rules are administrative in nature, and will not affect private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

PUBLIC COMMENT

The commission offered a public hearing on June 24, 2008. The comment period closed on July 7, 2008.

The commission received no oral or written comments.

**SUBCHAPTER X: FINANCIAL ASSURANCE REQUIREMENTS
FOR BRINE EVAPORATION PITS**

§§37.9245, 37.9250, 37.9255, 37.9260, 37.9265

STATUTORY AUTHORITY

The new rules are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of this state; TWC, §5.105, which authorizes the commission to adopt rules as necessary to carry out its powers and duties under the TWC; TWC, §26.011, which authorizes the commission to adopt any rules necessary to protect the quality of water in the state; and TWC, §26.132 as amended by the 80th Legislature, which grants the commission the rulemaking authority to adopt rules requiring the owner or operator of a brine evaporation pit to provide the commission with proof of adequate financial assurance to ensure satisfactory closure of the facility and obtain pollution liability insurance covering bodily injury and property damage to third parties.

The new rules implement TWC, §§5.013, 5.102, 5.103, 5.105, 26.011, and 26.132.

§37.9245. Applicability.

This subchapter applies to owners and operators of brine evaporation pits required to provide evidence of financial assurance under Chapter 218 of this title (relating to Brine Evaporation Pits). This

subchapter does not apply to state or federal governmental entities whose debts and liabilities are the debts and liabilities of a state or the United States. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure and third party pollution liability.

§37.9250. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements) and Chapter 218 of this title (relating to Brine Evaporation Pits), except the term "brine evaporation pit" shall mean the same as "facility" for purposes of this subchapter.

§37.9255. Submission of Documents.

An owner or operator required by this subchapter to provide financial assurance must submit an originally signed financial assurance mechanism for closure, post closure and third party pollution liability coverage.

(1) For new facilities, owners or operators shall submit the originally signed financial assurance mechanism:

(A) prior to permit issuance; or

(B) as otherwise approved in writing by the executive director.

(2) For facilities in existence upon the effective date of this section, owners or operators shall submit the originally signed financial assurance mechanism:

(A) within 180 days of the effective date of this section; or

(B) as otherwise approved in writing by the executive director.

§37.9260. Financial Assurance Requirements for Closure and Post Closure of Brine Evaporation Pits.

(a) An owner or operator of a brine evaporation pit subject to this subchapter shall establish financial assurance for the closure and post closure of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A - D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action) except §37.31 of this title (relating to Submission of Documents) is not applicable.

(b) An owner or operator subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter C of this chapter to demonstrate financial assurance for closure except a pay-in trust fund may not be used.

§37.9265. Third Party Pollution Liability Requirements for Brine Evaporation Pits.

(a) An owner or operator subject to this subchapter shall establish and maintain financial assurance for third party pollution liability insurance covering bodily injury and property damage to third parties caused by accidental sudden or nonsudden occurrences arising from facility operations that:

(1) is issued by an insurance company authorized to do business in the state of Texas that has a rating by the A.M. Best Company of "A-" or better;

(2) is in an amount not less than \$3 million; and

(3) is evidenced by either an originally signed certificate of insurance worded identically to the wording specified in §37.631 of this title (relating to Certificate of Insurance for Liability) or an endorsement worded identically to the wording specified in §37.641 of this title (relating to Endorsement for Liability).

(b) If an endorsement as described within this section is used, the insurance policy shall be amended by the Endorsement for Liability.

(c) Owners and operators must also comply with §37.402 of this title (relating to Definitions), §37.404 of this title (relating to Liability Requirements for Sudden and Nonsudden Accidental Occurrences) and §37.411 (relating to Adjustments to the Level of Liability Coverage).