

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** April 8, 2016

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Brent Wade, Deputy Director
Office of Waste

Docket No.: 2015-0870-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 39, Public Notice
Chapter 295, Water Rights, Procedural
Chapter 297, Water Rights, Substantive
Chapter 331, Underground Injection Control
HB 655: Aquifer Storage and Recovery
Rule Project No. 2015-022-331-WS

Background and reason(s) for the rulemaking:

The rulemaking is needed to implement House Bill (HB) 655, which was passed during the 84th Texas Legislature, 2015. HB 655 amended the Texas Water Code (TWC), Chapters 11, 27, and 36 to address requirements for authorization to inject and recover water as part of an aquifer storage and recovery (ASR) project. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator.

The rulemaking also implements a portion of HB 2031, 84th Texas Legislature, 2015. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. Because the definition section of 30 TAC Chapter 297 will require amendment to implement both HB 655 and HB 2031, this rulemaking is including the definition of "marine seawater" in §297.1 to avoid an open section conflict under *Texas Register* publication requirements. The rest of the implementation of HB 2031 is planned as a separate rulemaking.

Scope of the rulemaking:

The rulemaking will amend existing requirements for authorization of an ASR project. Under the revised rules the requirements for a pilot project, followed by a final authorization, is changed to a single authorization for an ASR project.

A.) Summary of what the rulemaking will do:

The rulemaking will amend the following: 30 TAC Chapter 39 to include public notice requirements for applications for Class V Underground Injection Control Wells; 30 TAC Chapter 295 to remove requirements for a two-phase ASR project approval process; 30 TAC Chapter 297 to add definitions for "native groundwater" and "marine seawater"

Commissioners

Page 2

April 8, 2016

Re: Docket No. 2015-0870-RUL

(required to implement portions of HB 2031); and 30 TAC Chapter 331 to include new definitions provided in HB 655, remove the requirement that injected water must meet 30 TAC Chapter 290 requirements for a public drinking water supply, include construction, operation, and reporting requirements, and Texas Commission on Environmental Quality (TCEQ or commission) considerations prior to approval of an ASR project.

B.) Scope required by federal regulations or state statutes:

None.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

TWC, §5.103, Rules

TWC, §5.105, General Policy

TWC, §5.120, Conservation and Quality of Environment

TWC, §27.019, Rules, etc.

HB 655

Effect on the:

HB 655 does not create a group of affected persons who were not affected prior to passage of this legislation. Regulatory requirements for testing of injected water are reduced from monthly to annually, which will result in lower costs for ASR project managers.

A.) Regulated community:

Operators of ASR projects will have to comply with the requirements of this legislation. Adoption of specific requirements for ASR, including injection and recovery of appropriated water, will provide regulatory certainty to ASR operators.

B.) Public:

The public will benefit for ASR projects, which provide an alternative water source for public water systems.

C.) Agency programs:

The Underground Injection Program will administer injection of water for ASR; the Water Rights Permitting and Availability Section will be responsible for regulations pertaining to the recovery of appropriated water.

Stakeholder meetings:

No stakeholder meetings were held; however, a public hearing was held for this rulemaking during the public comment period.

Commissioners

Page 3

April 8, 2016

Re: Docket No. 2015-0870-RUL

Public comment:

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from Benbrook Water Authority; Brazos Valley Groundwater Conservation District; Clearwater Underground Water Conservation District; Hemphill Underground Water Conservation District; High Plains Underground Water Conservation District; the Honorable Lyle Larson, Texas State Representative, District 122, who authored HB 655; Llano Estacado Underground Water Conservation District; Lone Star Groundwater Conservation District; Mesa Underground Water Conservation District; Permian Basin Underground Water Conservation District; Prairielands Groundwater Conservation District; Sandy Land Underground Water Conservation District; South Plains Underground Water Conservation District; Texas Alliance of Groundwater Districts; Texas Farm Bureau; the Upper Trinity Groundwater Conservation District; and Sledge Law and Public Strategies. All commenters generally were in support of the proposed rules, although there were numerous comments that certain rules were not consistent with HB 655. A major concern expressed by commenters was that under the proposed rules, injected water would have to be treated to remove pathogens or other organisms not present in the groundwater within the zone. Another concern expressed by commenters was that the proposed ASR notice requirements were more extensive than HB 655.

Significant changes from proposal:

The changes from proposal were made to ensure consistency with HB 655 while complying with requirements to maintain an authorized Underground Injection Control (UIC) program under the federal Safe Drinking Water Act. Changes from proposal in Chapter 39 include requiring only one notice of an application for an individual UIC permit for an ASR project, which must be mailed by the chief clerk and published by the applicant after technical review is complete. In addition, changes from proposal were made so that notice of the individual permit application is only required to be mailed to the groundwater conservation district in which the injection wells will be located, as required by HB 655, and local, state and federal governmental entities for which notice is required under 40 Code of Federal Regulations (CFR) §124.10(c); persons who have requested to be on a mailing list developed and maintained in accordance with 40 CFR §124.10(c)(1)(ix); and the applicant, as required for an authorized UIC program under the federal Safe Drinking Water Act. These changes from proposal mean that notice of the individual permit application is not required to be mailed to any other persons, including adjacent landowners and mineral rights owners, because such notice is not required by HB 655 nor by applicable federal requirements. Changes were also made so that notice of the individual permit application is required to be published in a newspaper of general circulation in the county in which the injection wells will be located, consistent with HB 655, rather than the largest newspaper of general circulation in the county. Lastly, in response to comments, changes from proposal were made in Chapter 331 so that the executive director will be required to inform a groundwater conservation district in which the injection wells will be located when UIC authorization for an ASR project is proposed to be authorized by rule.

Commissioners

Page 4

April 8, 2016

Re: Docket No. 2015-0870-RUL

Potential controversial concerns and legislative interest:

Relaxation of current state standard for quality of injected water. HB 655 amended the TWC, by adding TWC, §27.154(d), under which the TCEQ may not adopt or enforce groundwater quality protection standards for the quality of water injected into an ASR injection well, if those standards are more stringent than applicable federal standards. Under current §331.184(e) that has been in place since the mid-1990s, water that is injected for aquifer storage must meet the commission's drinking water standards as provided in Chapter 290, concerning primary drinking water standards. Under the current federal rule at 40 Code of Federal Regulations (CFR) §144.12(a), no well operator shall inject any fluids containing any contaminant into an underground source of drinking water if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR Part 142 or may otherwise adversely affect the health of persons. Because the federal rules do not specify that injected water in aquifer storage projects must meet primary drinking water standards, current §331.184(e), may be more stringent than the federal standards and was revised to be consistent with HB 655. This revision applies only to the injected water and does not affect the requirements in Chapter 290.

Does this rulemaking affect any current policies or require development of new policies?

No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

Under HB 655, Section 6, the TCEQ is directed to adopt rules by May 1, 2016, to implement the sections of TWC amended by HB 655. Adoption of rules in Chapters 39, 295, 297, and 331 are necessary to implement these changes to the TWC.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** December 25, 2015

Anticipated *Texas Register* adoption publication date: May 13, 2016

Anticipated effective date: May 19, 2016

Six-month *Texas Register* filing deadline: June 25, 2016

Agency contacts:

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Attachments

HB 655

cc: Chief Clerk, 2 copies
Executive Director's Office

Commissioners

Page 5

April 8, 2016

Re: Docket No. 2015-0870-RUL

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