

The Texas Natural Resource Conservation Commission (commission) proposes new §331.120, Compliance History; Denial of Permit, and an amendment to §331.121, Class I Wells.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules are to implement certain requirements of Senate Bill (SB) 324, 77th Legislature, 2001. Senate Bill 324 became effective on May 26, 2001.

In accordance with SECTION 18.05(f) and (g) of House Bill (HB) 2912 (“Sunset”), 77th Legislature, 2001, former law relating to compliance history is continued in effect for underground injection control (UIC) applications for permit issuance, amendment, or renewal submitted before September 1, 2002. Because SB 324 became effective on May 26, 2001, it is former law and applies to any UIC applications for permit issuance, amendment, or renewal pending on or submitted on or after May 26, 2001, and before September 1, 2002. For those UIC permit applications submitted on or after September 1, 2002, the compliance history requirements of House Bill (HB) 2912 will apply.

The purpose of the proposed rule is to implement certain requirements of SB 324. Senate Bill 324 adds Texas Water Code (TWC), §27.012(b), Application for Permit; and amends §27.014, Applicable Fee, and §27.051(d) and (e), Issuance of Permit. Texas Water Code, §27.051(a)(1), specifies that the commission may issue a permit for an injection well if it finds that the use or installation of the injection well is in the public interest. Prior to SB 324, TWC, §27.051(d), required the commission, in determining if the use or installation of an injection well for the disposal of hazardous waste is in the public interest, to consider a number of factors including the compliance history of the applicant.

Senate Bill 324 amends TWC, §27.051(d), and broadens its applicability. Whereas before the commission was required to consider these factors for hazardous waste disposal applications, SB 324 now requires the commission to consider the factors set out in TWC, §27.051(d), prior to the issuance of all injection well applications, not just those relating to the disposal of hazardous waste. Therefore, TWC, §27.051(d), now applies to all injection well applications, including those for the disposal of hazardous waste and nonhazardous waste and those for uranium mining. The proposed amendment to §331.121(b) deletes the specific reference to disposal of hazardous waste in order to implement this statutory requirement. In addition, SB 324 amends TWC, §27.051(d), by requiring the commission to consider the compliance history not only of the applicant but of entities “related” to the applicant. The proposed new §331.120, Compliance History; Denial of Permit, would implement the changes to TWC, §27.051(d), relating to the commission’s consideration of the compliance history of the applicant and related entities prior to the issuance of an injection well permit. Proposed new §331.120(a) specifies that this section applies to applications for UIC permits submitted or pending on or after May 26, 2001, and before September 1, 2002.

Senate Bill 324 also amends TWC, §27.051(e), by requiring the commission to establish a procedure for the preparation of comprehensive summaries of an applicant’s compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant.

The commission currently has procedures for preparation of compliance summaries for UIC permit applications, and these procedures are specified in existing §281.21(d). These current procedures

specify that a compliance summary shall cover at least the two-year period preceding the date on which the technical review is completed and shall include: the date(s) and descriptions of any citizen complaints received; the date(s) of all agency inspections, and for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact; the date(s) of any agency enforcement action and the applicant's response to such action; the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility contingency plan, if applicable; and the name and telephone number of a person to contact for additional compliance history. In addition to these requirements listed in the rules, compliance summary procedures specified by the commission include a current assessment of compliance and a statement indicating if a current inspection with alleged noncompliances has been resolved, a statement of whether the company is current with facility and generator fees, the date(s) and description of any pending or prior enforcement actions against the facility and the facility's response, as well as any pending or prior enforcement actions against facilities that are owned or operated by the current applicant.

In the past, compliance summaries for injection well permits included only information relative to the site which is the subject of the current application, as well as other UIC and other solid waste facilities at other sites owned or operated by the applicant whether permitted or not. Compliance summaries for facilities with injection wells have traditionally included only inspections and reports of noncompliances related to solid waste or UIC. To implement the requirements of SB 324, a comprehensive compliance summary would include all compliance issues for all media regulated by the commission including, but not limited to, UIC, solid waste, water, and air. Proposed new §331.120(b) requires the commission to

prepare comprehensive compliance summaries for applications pertaining to UIC permits. This new subsection is proposed to implement the new requirements specified in TWC, §27.051(e), and would significantly broaden the required elements of a compliance summary for an injection well permit application to include all compliance issues relating to a regulated entity.

Senate Bill 324 amendments to TWC, §27.051(e), require the commission to prepare comprehensive summaries not only of the applicant's compliance history, but also the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. To implement this change, proposed new §331.120(c) requires UIC compliance histories for a regulated entity applying for an injection well permit be broadened to include any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%. Perhaps the most applicable accounting standard and business practice that can be applied to the statutory reference to "closely related" is how the accounting profession determines the accounting treatment for an investment. When an investor corporation owns more than 50% of another entity it possesses a controlling interest. An investor corporation may hold an interest of less than 50% and, therefore, not possess legal control; however, its investment in voting stock gives it the ability to exercise significant influence over operating and financial policies of an entity. Consequently, the accounting profession established a guide for accounting for investors when 50% or less of common voting stock is held. This guide, Accounting Principles Board (APB) Opinion No. 18, also provides an operational definition of significant influence. To achieve a reasonable degree of uniformity in the application of "significant

influence” criterion, APB 18 concludes that an investment (direct or indirect) of 20% or more of the voting stock of an entity should lead to a presumption that an investor has the ability to exercise significant influence over the entity. The commission proposes to use 20% ownership as the standard for determining whether an entity is closely related. Using 20% as the standard would establish a bright line for the commission and for an applicant in determining what entities will be included in a compliance summary. This change will result in a significant increase in the numbers and types of facilities that are reviewed during the preparation of a compliance summary for a UIC permit application. Proposed new §331.120(c) also requires that the applicant shall provide, as part of the UIC application, all required information relating to business entities.

Senate Bill 324 further amends TWC, §27.051(e), by directing the commission to deny the permit in cases where the commission finds that the compliance history is unacceptable. Proposed new §331.120(d) sets out criteria to be used in classifying UIC compliance history. Proposed new §331.120(d) would require the commission to deny the permit application in cases where the commission concludes that the applicant’s compliance history is unacceptable. This determination will be made by the commission on a case-by-case basis after consideration of the nature, duration, repetition, and potential impact of violations, for all media. The commission will give special weight to violations involving the failure of the applicant to obtain a permit and other violations which indicate the applicant's tendency to engage in activities without seeking appropriate authorization from the commission. Authority for the commission to deny a permit in whole or in part is provided for in 30 TAC §50.17, relating to Commission Actions. Injection control permit applicants may appeal the

commission's decision to deny a permit based on an unacceptable compliance history in accordance with the provisions of §50.19, relating to Notice of Commission Action, Motion for Rehearing.

#### SECTION BY SECTION DISCUSSION

Proposed new §331.120, Compliance History; Denial of Permit, would implement the changes to TWC, §27.051(d) relating to the commission's consideration of the compliance history of the applicant and related entities prior to the issuance of an injection well permit and would also implement changes to TWC, §27.051(e) relating to preparation of comprehensive summaries of an applicant's compliance history.

Proposed new §331.120(a) specifies that this section applies to applications for UIC permits submitted or pending on or after May 26, 2001, and before September 1, 2002.

Proposed new §331.120(b) requires the commission to prepare comprehensive compliance summaries for applications pertaining to UIC permits. This new subsection is proposed to implement the new requirements specified in TWC, §27.051(e).

Proposed new §331.120(c) requires UIC compliance histories for applications for permit issuance, amendment, or renewal pending on or submitted on or after May 26, 2001, and before September 1, 2002, to include any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant

has an ownership interest of at least 20%. Proposed new §331.120(c) also requires that the applicant shall provide, as part of the UIC application, all required information relating to business entities.

Proposed new §331.120(d) would require the commission, for applications for permit issuance, amendment, or renewal pending on or submitted on or after May 26, 2001, and before September 1, 2002, to deny the permit application in cases where the commission concludes that the applicant's compliance history is unacceptable. Whether a compliance history is unacceptable will be determined by the commission on a case-by-case basis. In making this determination, the commission will consider the nature, duration, repetition, and potential impact of violations, for all media. The commission will give special weight to violations involving the failure of the applicant to obtain a permit and other violations which indicate the applicant's tendency to engage in activities without seeking appropriate authorization from the commission.

Section 331.121(b) is proposed to be amended by deleting the specific reference to disposal of hazardous waste. Senate Bill 324 now requires the commission to consider the factors set out in TWC, §27.051(d), prior to the issuance of all injection well applications, not just those relating to the disposal of hazardous waste.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the period the proposed rules are in effect, there will be no fiscal implications to units of state or local government as a result of implementation of the proposed rules. This rulemaking applies to

applications for UIC permits submitted or pending on or after May 26, 2001, and before September 1, 2002.

The proposed rules are intended to implement certain provisions of SB 324. Specifically, the commission has been directed to establish a procedure for the preparation of comprehensive summaries of an applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. In the past, compliance summaries for injection well permits included only information relative to the site which is the subject of the current application, as well as other UIC and other solid waste facilities at other sites owned or operated by the applicant whether permitted or not. The proposed rules will broaden the required elements of a compliance summary to include all compliance issues relating to the regulated entity, which may include issues from other media not related to the current permit application (such as UIC, solid waste, water, and air). The commission would be required to deny permits to applicants with unacceptable compliance histories.

The proposed rulemaking is procedural in nature and does not propose additional regulatory requirements to affected entities; therefore, the commission anticipates no fiscal implications to units of state and local government due to implementation of the proposed rules. Currently, no injection wells are permitted to units of state and local government.

**PUBLIC BENEFIT AND COSTS**

Mr. Davis also determined that for each year the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules would be potentially increased protection to human health and the environment due to the expanded compliance review prior to approving a UIC permit.

The proposed rules are intended to implement certain provisions of SB 324, which directed the commission to establish a procedure for the preparation of comprehensive summaries of an applicant's compliance history. The review will include the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. In the past, compliance summaries for injection well permits included only information relative to the site which is the subject of the current application, as well as other UIC and other solid waste facilities at other sites owned or operated by the applicant whether permitted or not. The proposed amendments will broaden the required elements of a compliance summary to include all compliance issues relating to the regulated entity, which may include issues from other media not related to the current permit application (such as UIC, solid waste, water, and air). The commission would be required to deny permits to applicants with unacceptable compliance histories.

The proposed rules affect all injection well applications submitted or pending on or after May 26, 2001, and before September 1, 2002. The proposed rulemaking is procedural in nature and does not propose additional regulatory requirements to affected entities; therefore, the commission anticipates no additional fiscal implications to individuals and businesses due to implementation of the proposed rules.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small and micro-businesses as a result of implementation and enforcement of the proposed rules. The proposed rules are intended to adopt certain provisions of SB 324, which requires the commission to establish a procedure for the preparation of comprehensive summaries of an applicant's compliance history.

The proposed rules affect approximately five injection wells which are owned and operated by small or micro-businesses. The proposed rulemaking is procedural in nature and does not propose additional regulatory requirements to affected entities; therefore, the commission anticipates no additional fiscal implications to small or micro-businesses due to implementation of the proposed rules.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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.

Although the intent of the rule is to protect the environment or reduce risks to human health from environmental exposure, it is not a major environmental rule because it does 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 rule 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 because the rules merely require the commission to prepare a more comprehensive compliance history for UIC applications, and require the commission to deny permits to applicants with unacceptable compliance histories. Certain provisions of TWC, Chapter 27, were amended by SB 324 during the 77th Legislature, 2001. These amendments became effective on May 26, 2001. The proposed rule is intended to implement certain provisions of SB 324. Senate Bill 324 amends TWC, §27.051(d), and broadens its applicability. Senate Bill 324 further amends TWC, §27.051(e), by directing the commission to deny the permit in cases where the commission finds that the compliance history is unacceptable. The rule is proposed to implement these statutory changes. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). The proposed rule does not exceed a standard set by federal law, because there is no comparable federal law. The proposed rule does not exceed an express requirement of state law, because it is consistent with the express requirements of SB 324. The proposed rule does not exceed a requirement of a delegation agreement, because there is no applicable delegation agreement. The proposed rule is not to be adopted solely under the general powers of the agency, but will be adopted under the express requirements of SB 324. The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to these proposed rules since they are reasonably taken to fulfill an obligation mandated by state law. The specific purpose of

these proposed rules is to incorporate the new requirements relating to the preparation of compliance summaries by the executive director and the consideration of applications by the commission, which are contained in TWC, §27.051(d) and (e). Promulgation and enforcement of these proposed rules would not affect private real property which is the subject of the rules because the proposed rule language merely incorporates the new requirements relating to the preparation of compliance summaries by the executive director and the consideration of applications by the commission, which are contained in TWC, §27.051(d) and (e). There is no burden on private real property because the proposed standards are not considered to be more stringent than existing standards. The subject proposed regulations do not affect a landowner's rights in private real property.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any Coastal Natural Resource Areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 13, 2001, at 2:00 p.m. at the TNRCC Complex in Building F, Room 2210, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the

hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., September 24, 2001, and should reference Rule Log Number 2001-049-305-WT. For further information, please contact Michael Bame, Policy and Regulations Division at (512) 239-5658.

#### STATUTORY AUTHORITY

The new and amended sections are proposed under TWC, §5.103, which provides the commission 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; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed new and amended sections implement SB 324 changes to the TWC, §27.051.

**SUBCHAPTER G: CONSIDERATION PRIOR TO PERMIT ISSUANCE**

**§331.120, §331.121**

**§331.120. Compliance History; Denial of Permit.**

(a) This section applies to applications for underground injection control (UIC) permits submitted or pending on or after May 26, 2001, and before September 1, 2002.

(b) The commission shall prepare a comprehensive compliance summary for applications for UIC permits in accordance with Texas Water Code, §27.051(e).

(c) The summary shall include the applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%. The applicant shall provide, as part of the UIC application, all required information relating to business entities.

(d) The commission shall deny the permit application in cases where the commission concludes that the applicant's compliance history is unacceptable. Whether a compliance history is unacceptable will be determined by the commission on a case-by-case basis. In making this determination, the commission will consider the nature, duration, repetition, and potential impact of violations for all

media. The commission will give special weight to violations involving the failure of the applicant to obtain a permit and other violations which indicate the applicant's tendency to engage in activities without seeking appropriate authorization from the commission.

**§331.121. Class I Wells.**

(a) (No change.)

(b) In determining whether the use or installation of an injection well [for the disposal of hazardous waste] is in the public interest under Texas Water Code, §27.051(a)(1), the commission shall also consider:

(1) - (4) (No change.)

(c) - (g) (No Change.)