

The Texas Commission on Environmental Quality (commission) adopts the amendment to §50.113.

Section 50.113 is adopted *without change* to the proposed text as published in the April 9, 2004 issue of the *Texas Register* (29 TexReg 3586), and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking adds two new types of applications 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 separate reasons for the adopted amendment.

First, the adopted amendment to §50.113(d)(5) implements House Bill (HB) 2567, 78th Legislature, 2003, which amended the Texas Water Code (TWC) by adding new §27.021. HB 2567 allows the commission to issue a permit to dispose of brine produced by a desalination operation in a Class I injection well without providing a contested case hearing under TWC, §27.018, as long as all requirements for a Class I injection well permit are met. This rulemaking does not affect public notice of a permit application, opportunity to comment on a permit application, or the opportunity for a public meeting on a permit application under 30 TAC §55.154. The public meeting provisions of §55.154 satisfy the public hearing provisions of 40 Code of Federal Regulations (CFR) §124.12.

HB 2567 may expedite the approval of Class I injection well permits for the disposal of desalination brine by removing the potential for a contested case hearing under the provisions of TWC, §27.018. TWC, §27.021(b) establishes a notice and comment process for applications for the disposal of brine in

Class I injection wells. It further sets forth that notwithstanding TWC, §27.018, this type of application is not subject to the hearing requirements of Texas Government Code, Chapter 2001. However, HB 2567 did not address the commission's discretionary authority to hold a hearing under its general powers.

If desalination brine is hazardous, and the applicant wishes to dispose of the hazardous waste in a Class I well, then the well (and in most cases the surface facility) must be permitted by the commission. In addition, the applicant is subject to the United States Environmental Protection Agency's (EPA's) regulations regarding a no-migration demonstration.

This rulemaking does not affect hearings on applicants that seek authorization to dispose of desalination brine through methods other than Class I injection wells. Other options for disposal of nonhazardous desalination brine include Class V injection wells, evaporation ponds, and surface discharge under a Texas Pollutant Discharge Elimination System permit. 30 TAC §331.11(a) limits Class V wells to disposal of nonhazardous wastes. Disposal of nonhazardous waste through the use of a Class V injection well can be authorized by rule or by a site-specific permit, subject to certain water quality limitations. Authorizations by rule are not subject to hearings, while site-specific permits for Class V wells are subject to the hearing request process provided under Chapter 55.

Second, the adopted amendment that adds §50.113(d)(6) updates the list of applications that are not subject to a contested case hearing by adding applications for pre-injection unit registrations. Pre-injection unit registrations were created by a previous rulemaking in the January 3, 2003 issue of the

*Texas Register* (28 TexReg 340). The rules for pre-injection unit registrations, which can be found in 30 TAC §331.17 and §331.18, do not provide for contested case hearings. This amendment updates the list of applications that the commission may act on without holding a contested case hearing.

Changes to 30 TAC Chapters 55, 305, and 331 are also adopted in this issue of the *Texas Register* to implement HB 2567.

#### SECTION DISCUSSION

The adopted amendment to §50.113(d) adds two new types of applications to the current list of applications that the commission may act on without holding a contested case hearing. The first addition, applications for Class I injection well permits used only for the disposal of desalination brine, is added to existing paragraph (5). This first item implements TWC, §27.021. The second addition, applications for pre-injection unit registrations, is inserted in new paragraph (6). This second change aligns the list with provisions of a previous rulemaking. In addition, the language in existing paragraph (5) relating to other types of applications is moved to new paragraph (7).

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that this amendment 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. This adopted amendment does not meet the definition of a “major environmental rule” because the specific intent of the rule is to add language to the procedural rules to provide that an application for a Class I injection well for the disposal of brine produced by a desalination operation and an application for a pre-injection unit registration are not subject to a contested case hearing. This amendment substantially advances this purpose by providing under §50.113(d) that the application for a Class I injection well for the disposal of desalination brine is not subject to a contested case hearing, and by adding applications for pre-injection unit registrations to the list of applications not subject to a contested case hearing. This amendment does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because the amendment simply conforms the procedural rule for applications not subject to a contested case hearing to the statute. This amendment 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 permit for a Class I injection well for the disposal of desalination brine must meet all the statutory and regulatory requirements for issuance of a permit for a Class I injection well and because the provision relating to applications for pre-injection units reflects existing rules and does not adversely affect these interests.

In addition, the adopted rulemaking does not exceed the four applicability requirements of Texas Government Code, §2001.0225(a) because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or seek to adopt a rule solely under the general powers of the agency.

The adopted amendment does not exceed a standard set by federal law because there are no corresponding federal standards requiring a contested case hearing on an application for a Class I injection well permit or a pre-injection unit registration. Furthermore, the amendment does not exceed an express requirement of state law because the exemption for Class I wells that dispose of brine produced by a desalination operation is mandated by state law, and because no state law expressly requires a contested case hearing on pre-injection unit registrations. In addition, the amendment does not exceed any requirement of the delegation agreement concerning injection wells because the delegation agreement does not establish express requirements for a contested case hearing for the issuance of a Class I injection well permit for the disposal of brine from a desalination operation and because the delegation agreement does not address pre-injection unit registrations. Finally, the amendment is not adopted solely under the general powers of the agency but is adopted under the specific provisions of TWC, §27.019 and §27.021.

#### TAKINGS IMPACT ASSESSMENT

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

The specific purpose of the adopted amendment is to revise the list in §50.113(d) so it reflects recent amendments to the TWC and conforms to current rules. The amendment adds two applications to the list of applications that are not subject to contested case hearings: first, applications for permits to dispose of brine produced by desalination operations in Class I injection wells, and second, applications for pre-injection unit registrations.

The adopted amendment substantially advances the previously stated purpose by providing that the permit procedures for Class I injection wells for the disposal of brine produced by desalination operations and the procedures for pre-injection unit registrations do not provide for a contested case hearing.

The adopted amendment does not impose any burden on private real property and does not result in any benefit to society from the use of private real property because the amendment does not directly apply to the ownership or use of private real property.

Promulgation and enforcement of the amendment will not be a statutory or constitutional taking of private real property because the amendment does not apply to the ownership or use 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 adopted amendment.

The commission has no reasonable alternative actions that could accomplish the specified purpose of revising the list in §50.113(d) so it reflects recent amendments to the TWC and conforms to current rules. Without the adopted amendment, the list of applications that are not subject to opportunities for contested case hearings would remain outdated.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council. This rulemaking is a procedural change that allows the commission to issue a permit to dispose of brine produced by a desalination operation in a Class I injection well without providing a contested case hearing under TWC, §27.018. The commission determined that the amendment is consistent with CMP goals and policies because the rulemaking is a procedural change that does not modify any of the requirements for the permitting of this kind of disposal, and the amendment therefore does not have a direct or significant adverse effect on any coastal natural resource areas, nor does it have a substantive effect on commission actions subject to the CMP. Promulgation and enforcement of the amendment does not violate or exceed any standards identified in the applicable CMP goals and policies.

#### PUBLIC COMMENT

The comment period ended May 10, 2004. Two written comments were received: one from the EPA, Region 6, and another from the commission's Office of Public Interest Counsel (OPIC). EPA suggested changes to the rulemaking but did not indicate support of or opposition to the rule. OPIC indicated support of the rule.

#### RESPONSE TO COMMENTS

EPA recommends modifying the preamble to include language that clarifies that the opportunity to comment and request a public meeting, as described in §55.154 and 40 CFR §124.12, is not affected by the rulemaking.

**The preamble has been modified to address this concern by stating that this rulemaking does not affect the opportunity to comment on a permit application or the opportunity to request a public meeting under §55.154. The preamble also states that the public meeting provisions of §55.154 satisfy the public hearing provisions of 40 CFR §124.12.**

EPA recommends that the rulemaking explicitly state that permit applications for Class V wells for the disposal of waste from desalination operations are still subject to the opportunity for a contested case hearing. EPA also recommends identifying the state rules that prohibit the use of Class V wells for the injection of hazardous waste.

**The preamble has been modified to clarify that disposal of nonhazardous waste through the use of a Class V injection well can be authorized by rule or by a site-specific permit. The preamble also adds that this rulemaking does not affect hearings for a site-specific permit application that seeks authorization to dispose of desalination brine in a Class V injection well. This rulemaking does not impact authorizations by rule for Class V injection wells for disposal of desalination brine because authorizations by rule are not subject to the public hearing request process. The preamble also states that §331.11(a) limits Class V wells to disposal of nonhazardous wastes.**

EPA recommends that the rulemaking clarify that applicants applying for a permit to dispose of hazardous waste from desalination operations in a Class I well must file a Land Ban no-migration petition with EPA.

**The preamble has been modified to address this concern by stating that if desalination brine is hazardous, and the applicant wishes to dispose of it in a Class I well, then the well (and in most cases the surface facility) must be permitted by the commission, and the applicant is also subject to EPA's regulations regarding a no-migration demonstration.**

EPA also recommends that the rulemaking clarify that, in cases involving hazardous waste from desalination operations, no exception to the opportunity for contested case hearings will be granted.

**The legislature did not differentiate between hazardous and nonhazardous waste when it enacted TWC, §27.021. Under TWC, §27.021, all Class I underground injection control permit applications for the disposal of desalination brine, whether hazardous or nonhazardous, are subject to public notice and comment procedures but are not subject to a contested case hearing under TWC, §27.018.**

**The EPA is recommending that the commission continue to make some permits issued under TWC, §27.021 subject to a contested case hearing. This recommendation exceeds the requirements of the EPA's federal rules for underground injection control. The federal rules require a public hearing under 40 CFR §124.12 but do not require a contested case hearing.**

**The commission's public meeting requirements in §55.154 satisfy the federal public hearing requirements (40 CFR §124.12). Public meetings provide an opportunity for public input and**

**anyone can participate in a public meeting, but only affected parties may participate in a contested case hearing.**

**No change has been made in response to this comment.**

OPIC supports adoption of the rule and supports the recognition in the preamble that the rule changes do not affect the commission's discretionary authority to hold a hearing if the commission determines that a hearing is in the public interest. OPIC also agrees that the language added by HB 2567 does not remove the power of the commission to hold a hearing under TWC, §5.102(b). OPIC stated that the language added by HB 2567 does not remove the power of the commission to hold a hearing under TWC, §27.018. Moreover, OPIC stated that TWC, §27.021 does not exempt desalination injection well permit applications from the power of the commission to grant a hearing in the public interest under TWC, §27.018(a).

**The commission appreciates the support for this rulemaking.**

**Under TWC, §27.021(b), permit applications authorized by TWC, §27.021 are not subject to the hearing provisions in TWC, §27.018. The first sentence of TWC, §27.021(b) provides for public notice and comment. The second sentence of TWC, §27.021(b) states that an application authorized by §27.021 is not subject to the hearing requirements of Texas Government Code, Chapter 2001, notwithstanding §27.018. The language contained in TWC, §27.021(b) means that**

**permits issued under §27.021 are subject to public notice and comment procedures and are not subject to the hearing provisions under §27.018.**

**HB 2567 did not address the commission's discretionary authority to hold a hearing under its general powers. No change has been made in response to this comment.**

## **SUBCHAPTER F: ACTION BY THE COMMISSION**

### **§50.113**

#### **STATUTORY AUTHORITY**

The amendment is adopted under 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 §27.021, 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 pre-injection unit registration amendment is also adopted under Texas Health and Safety Code, §361.017 and §361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act; and under Texas Health and Safety Code, §401.051, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Radiation Control Act.

#### **§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 desalination brine under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations in Class I Wells;

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

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

