

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rule package 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 proposed amendment.

First, the proposed amendment to §50.113(d)(5) will implement House Bill (HB) 2567, 78th Legislature, 2003, which amended the Texas Water Code 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 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.

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 Texas Water Code, §27.018. The commission's ability to hold a discretionary hearing under the provisions of Texas Water Code, §5.102(b) was not amended by HB 2567. Other options for disposal of desalination brine are Class V injection wells, evaporation ponds, and surface discharge under a Texas Pollutant Discharge Elimination System permit.

Second, the proposed amendment that adds §50.113(d)(6) will update 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 will update 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 proposed in this issue of the *Texas Register* to implement HB 2567.

SECTION DISCUSSION

The proposed amendment to §50.113(d) will add 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, will be added to existing paragraph (5). This first item will implement Texas Water Code, §27.021. The second addition, applications for pre-injection unit registrations, will be inserted in new paragraph (6). This second change will bring the list in line with other provisions of a previous rulemaking. In addition, the language in existing paragraph (5) relating to other types of applications will be moved to new paragraph (7).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jan Washburn, Program Specialist in the Federal Grants and Strategic Planning Section, determined that for the first five-year period the proposed amendment is in effect, there will be no adverse fiscal implications for the agency or any other state agency. The amendment implements HB 2567, 78th Legislature, 2003, which may expedite the approval of Class I injection well permits for the disposal of desalination brine by removing the possibility of a contested case hearing. Public notice of, and the opportunity to comment on, a permit application will not be affected by this rulemaking. Ms. Washburn also determined that there will be no adverse fiscal impact to units of local government as a result of the proposed amendment.

PUBLIC BENEFITS AND COSTS

Ms. Washburn determined that for the first five years the proposed amendment is in effect, the anticipated public benefit will be to allow desalination projects to come on line in a shorter time frame if disposal of brine will be via injection wells. State and local governments, small and micro-businesses, and other entities could possibly save both time and money by avoiding contested case hearings. Desalination projects could also help increase the potable water supply. Ms. Washburn also determined that there will be no adverse fiscal impacts to the public or individuals as a result of the proposed amendment.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Ms. Washburn also determined that there will be no adverse fiscal implications to small or micro-businesses as a result of implementation of the proposed amendment for the first five years it is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission 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 proposal 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. The proposal 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. The rule substantially advances this purpose by providing 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. The proposal does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because it updates the procedural rule for applications not subject to a contested case hearing. The proposal 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 regarding applications for pre-injection units reflects existing rules and will not adversely affect these interests.

In addition, the proposal does not exceed the four applicability requirements of Texas Government Code, §2001.0225(a) because the proposal does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) seek to adopt a rule solely under the general powers of the agency.

The proposal 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 proposal 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 proposal does not exceed any requirement of the delegation agreement concerning injection wells because the delegation agreement does not establish

express requirements for requiring 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, this proposal is not adopted solely under the general powers of the agency, but is adopted under the specific provisions of Texas Water Code, §27.019 and §27.021.

The commission invites public comment on the draft regulatory impact analysis determination. All comments will be addressed in the publication of the final regulatory analysis.

TAKINGS IMPACT ASSESSMENT

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

The specific purpose of the proposed amendment is to revise the list in §50.113(d) so it reflects recent amendments to the Texas Water Code and conforms to current rules. The proposed amendment will add two applications to the list of applications that are not subject to contested case hearings: 1) applications for permits to dispose of brine produced by desalination operations in Class I injection wells and 2) applications for pre-injection unit registrations.

The proposed amendment would substantially advance 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 the opportunity for a contested case hearing.

The proposed amendment does not impose any burden on private real property and it does not result in any benefit to society from the proposed use of private real property because the proposed amendment does not directly apply to the ownership or use of a particular parcel of private real property. In addition, because the amendment does not apply to the ownership or use of a particular parcel 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 proposed amendment.

Therefore, promulgation and enforcement of this proposed amendment would not be a statutory or constitutional taking of private real property.

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 Texas Water Code and conforms to current rules. Without the proposed 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 and

determined that the amendment is consistent with CMP goals and policies because the rulemaking is an administrative rule. The rulemaking will not have direct or significant adverse effect on any coastal natural resource areas, nor will it have a substantive effect on commission actions subject to the CMP. Promulgation and enforcement of the amendment will not violate or exceed any standards identified in the applicable CMP goals and policies.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2003-062-331-WS. Comments must be received by 5:00 p.m., May 10, 2004. For further information, please contact Fred Duffy of the Waste Permits Division at (512) 239-6891 or Emily Barrett of the Policy and Regulations Division at (512) 239-3546.

SUBCHAPTER F: ACTION BY THE COMMISSION

§50.113

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §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 proposed under Texas Health and Safety Code, §361.017 and §361.024, which provide the commission with 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 authority to adopt rules necessary to carry out its powers and duties under the Texas Radiation Control Act.

The proposed desalination amendment implements Texas Water Code, §27.021, relating to Permit for Disposal of Brine from Desalination Operations in Class I Wells. The proposed pre-injection unit registration amendment implements Texas Water Code, 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; [and]

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