

The Texas Commission on Environmental Quality (commission) proposes amendments to §55.101 and §55.201.

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

There are three separate reasons for the proposed amendments.

First, the proposed amendments to §55.101(f)(5) and §55.201(i)(6) 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 to §55.101(g)(11) and the addition of §55.201(i)(7) 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.

Third, the proposed amendment to §55.101(f)(4) will remove applications for weather modification licenses or permits from the list of applications that are not subject to a contested case hearing because the commission no longer administers the weather modification licensing and permitting program. Senate Bill (SB) 1175, 77th Legislature, 2001 transferred all powers, duties, obligations, rights, records, employees, and property that are used to administer the weather modification licensing and permitting program from the commission to the Texas Department of Licensing and Regulation. Additionally, SB 1175 transferred all powers, duties, obligations, rights, contracts, records, property, and unspent and unobligated appropriations and other funds used to administer the weather modification grant program to the Texas Department of Agriculture. The commission repealed the majority of the rules regarding weather modification in the March 1, 2002 issue of the *Texas Register* (27 TexReg 1498).

Changes to 30 TAC Chapters 50, 305, and 331 are also proposed in this issue of the *Texas Register* to implement HB 2567.

## SECTION BY SECTION DISCUSSION

The proposed amendment to §55.101, Applicability, will update the lists in subsections (f) and (g).

Subsection (f) contains a list of applications and exemptions and provides that the hearing requests related to those applications and exemptions are not subject to the provisions of Subchapters D - G of Chapter 55. Subsection (g) contains a list of applications and permits that are not subject to Subchapters D - G. In subsection (f), the proposed amendment will delete paragraph (4), which references weather modification licenses or permits. These licenses or permits are no longer regulated by the commission. The proposed amendment will also add applications for Class I injection well permits used only for the disposal of desalination brine as new paragraph (4). In subsection (g), the proposed amendment will add applications for pre-injection unit registrations to existing paragraph (11), and the existing language in paragraph (11) will move to new paragraph (12).

The proposed amendment to §55.201, Requests for Reconsideration or Contested Case Hearing, will update subsection (i), which contains the list of applications for which there is no right to a contested case hearing. Two applications will be added to the list. First, applications for Class I injection well permits used only for the disposal of brine from desalination operations will be added to paragraph (6), and the existing language under paragraph (6) will be added to new paragraph (8). Second, applications for pre-injection unit registrations will be added to new paragraph (7). This second change will update the list so it will conform to previous rule adoptions.

#### 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 amendments are in effect, there will be no adverse fiscal implications for the agency or any other state agency. These amendments implement 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 these proposed amendments.

#### PUBLIC BENEFITS AND COSTS

Ms. Washburn determined that for the first five years the proposed amendments are 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 these proposed amendments.

#### 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 amendments for the first five years they are 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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are 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 rulemaking 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 rules substantially advance 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 matters 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 relating to 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 requirements 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 the proposed amendments and performed an assessment of whether the proposed amendments constitute a taking under Texas Government Code, §2007.043.

The specific purpose of the proposed amendments is to revise the lists in §55.101 and §55.201 so they reflect recent amendments to the Texas Water Code, §27.021 and conform to current rules regarding pre-injection unit registrations. In §55.101, the proposed amendment will revise subsection (f), which contains a list of applications and exemptions not subject to hearing requests under Subchapters D - G, and the list in subsection (g), which contains a list of applications and permits not subject to Subchapters D - G. The proposed amendment will add applications for Class I injection well permits used only for the disposal of desalination brine to subsection (f), and will add applications for pre-injection unit registrations to subsection (g). In §55.201, the proposed amendment will revise the list in

subsection (i), which contains the list of applications for which there is no right to a contested case hearing. The proposed amendment will add applications for Class I injection well permits used only for the disposal of brine from desalination operations and applications for pre-injection unit registrations to subsection (i). These changes will revise the lists in §55.101 and §55.201.

The proposed amendments 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 amendments do not impose any burden on private real property and they do not result in any benefit to society from the proposed use of private real property because the proposed amendments do not directly apply to the ownership or use of a particular parcel of private real property. In addition, because the amendments do not apply to ownership or use of a particular parcel of private real property, the amendments do not burden, restrict, or limit an owners 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 amendments.

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

The commission has no reasonable alternative actions that could accomplish the specified purpose of revising the lists in §55.101 and §55.201 so they reflect recent amendments to the Texas Water Code and conform to current rules. Without the proposed amendments to the rules, these lists 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 proposed amendments are 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 amendments 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 D: APPLICABILITY AND DEFINITIONS**

### **§55.101**

#### **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.

**§55.101. Applicability.**

(a) Subchapters D - G of this chapter (relating to Applicability and Definitions; Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) apply to permit applications that are declared administratively complete on or after September 1, 1999, as specified in subsections (b) - (g) of this section [below].

(b) Subchapters D - G of this chapter apply to public comments, public meetings, hearing requests, and requests for reconsideration.

(c) Subchapters D - F of this chapter apply only to applications filed under Texas Water Code, Chapters 26 and 27[,] and Texas Health and Safety Code, Chapters 361 and 382.

(d) Subchapter G of this chapter applies to all applications other than those listed in subsection (e) of this section [§55.101(e)] and other than those filed under Texas Water Code, Chapters 26 and 27[,] and Texas Health and Safety Code, Chapters 361 and 382.

(e) Subchapters D - F of this chapter apply to applications for amendment, modification, or renewal of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may not seek further public comment or hold a public hearing under the procedures provided by §39.419 of this title

(relating to Notice of Application and Preliminary Decision), §55.156 of this title (relating to Public Comment Processing), and Subchapter F of this chapter for such applications. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(f) Subchapters D - G of this chapter do not apply to hearing requests related to:

(1) applications for emergency or temporary orders;

(2) applications for temporary or term permits for water rights;

(3) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Exemptions from Permitting) except for construction of concrete batch plants which are not temporarily located contiguous or adjacent to a public works project;

(4) applications for Class I injection well permits 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 [applications for weather modification licenses or permits under Texas Water Code, Chapter 18]; and

(5) applications where the opportunity for a contested case hearing does not exist under other laws.

(g) Subchapters D - G of this chapter do not apply to:

(1) applications for sludge registrations and notifications under Chapter 312 of this title (relating to Sludge Use, Disposal and Transportation);

(2) applications for authorization under Chapter 321 of this title (relating to Control of Certain [certain] Activities by Rule) except for applications for individual permits under Subchapter B of that chapter;

(3) applications for registrations under Chapter 330 of this title (relating to Municipal Solid Waste);

(4) applications for registrations and notifications under Chapter 332 of this title (relating to Composting);

(5) applications under Texas Water Code, Chapter 13 and Texas Water Code, §§11.036, 11.041, or 12.013. The executive director shall review hearing requests concerning applications filed under these provisions, determine the sufficiency of hearing requests under standards specified by law, and may refer the application to the chief clerk for hearing processing. The maximum

expected duration of a hearing on an application referred to The State Office of Administrative Hearings [SOAH] under this provision shall be no longer than one year from the first day of the preliminary hearing, unless otherwise directed by the commission. The issues to be considered in a State Office of Administrative Hearings [SOAH] hearing on an application subject to this provision are all those issues that are material and relevant under the law;

(6) applications under Chapter 122 of this title (relating to Federal Operating Permits);

(7) applications for initial issuance of voluntary emissions reduction permits under Texas Health and Safety Code, §382.0519.

(8) applications for initial issuance of permits for electric generating facility permits under Texas Utilities Code, §39.264;

(9) air quality standard permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(10) applications for multiple plant permits under Texas Health and Safety Code, §382.05194; [and]

(11) applications for pre-injection unit registrations under §331.17 of this title (relating to Pre-injection Units Registration); and

(12) [(11)] applications where the opportunity for a contested case hearing does not exist under other laws.

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR  
CONTESTED CASE HEARING**

**§55.201**

**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.

**§55.201. Requests for Reconsideration or Contested Case Hearing.**

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

- (1) the commission;
- (2) the executive director;
- (3) the applicant; and
- (4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows:[:]

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case

hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file\_ [; and]

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, and the public interest counsel, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this chapter (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this chapter;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits); or

(C) amendment, modification, or renewal of an air 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. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(a)(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit  
if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be  
discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will  
maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public  
comment has been given; and

(E) the applicant's compliance history for the previous five years raises no  
issues regarding the applicant's ability to comply with a material term of the permit; [and]

(6) 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;

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

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