

The Texas Commission on Environmental Quality (commission) adopts amendments to §§281.2, 281.5, and 281.21 *without changes* to the proposed text as published in the February 17, 2006, issue of the *Texas Register* (31 TexReg 995) and will not be republished.

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

House Bill (HB) 2651, 79th Legislature, 2005, amended the Texas Water Code (TWC) by adding Chapter 32, Subsurface Area Drip Dispersal Systems.

The commission amends Chapter 281 to regulate subsurface area drip dispersal systems that beneficially reuse treated wastewater effluent generated by treatment facilities processing more than 5,000 gallons per day. The adopted rules clarify that these systems are included in the current processes for preparing and submitting permit applications.

The commission also adopts additional rulemaking in 30 TAC Chapter 30, Occupational Licenses and Registrations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 222, Subsurface Area Drip Dispersal System; Chapter 305, Consolidated Permits; Chapter 309, Domestic Wastewater Effluent Limitation and Plant Siting; and Chapter 331, Underground Injection Control, to implement HB 2651 in this issue of the *Texas Register*.

#### SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules and guidelines and to conform to the drafting standard in the *Texas Legislative Council Drafting Manual*, November 2004.

*Section 281.2, Applicability*

Adopted §281.2(2) is amended to clarify that Chapter 281 is applicable to applications for new, amended, or renewed subsurface area drip dispersal system permits. This is the general applicability statement for Chapter 281 and permit applications for subsurface area drip dispersal systems are subject to the requirements of this section.

*Section 281.5, Application for Wastewater Discharge, Underground Injection, Municipal Solid Waste, Radioactive Material, Hazardous Waste, and Industrial Solid Waste Management Permits*

Adopted §281.5 is amended to add subsurface area drip dispersal systems, as defined in TWC, §32.002(8), to the list of wastewater permit applications that are subject to the requirements of this section.

*Section 281.21, Draft Permit, Technical Summary, Fact Sheet, and Compliance History*

Adopted §281.21(a) is amended to add subsurface area drip dispersal systems, as defined in TWC, §32.002(8), to the list of waste disposal activities subject to the requirements of this section.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a “major environmental rule.” Under Texas Government Code, §2001.0225, “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 adopted rules implement HB 2651, relating to the regulation of subsurface area drip dispersal systems. The specific intent of this rulemaking is to amend Chapter 281 to require that applications for new, amended, or renewed subsurface area drip dispersal system permits be subject to the requirements of this chapter. The adopted rules do not adversely affect, in a material way, the economy, a section 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 adopted rules simply require applications for new, amended, or renewed subsurface area drip dispersal system permits to be subject to the requirements of this chapter. The adopted rules do not meet the definition of a major environmental rule as defined in the Texas Government Code.

In addition, the adopted rules are not subject to Texas Government Code, §2001.0225, because they do not meet the criteria specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of

the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted amendments to Chapter 281 do not meet any of these criteria. First, the adopted rules do not exceed a standard set by federal law, because there is no comparable federal law. Second, the adopted rules do not exceed a requirement of state law, because they are consistent with the express requirements of TWC, Chapter 32, and are adopted to implement HB 2651. Third, the adopted rules do not exceed an express requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not adopt these rules solely under the general powers of the agency, but rather under the authority of HB 2651, which directs the commission to implement rules under TWC, Chapter 32. These adopted rules do not meet the criteria for a major environmental rule as defined by Texas Government Code, §2001.0225. Written comments on the draft regulatory impact analysis determination were solicited; no comments were received on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these adopted rules under Texas Government Code, §2007.043. The specific purpose of this rulemaking is to amend Chapter 281 to require that applications for new, amended, or renewed subsurface area drip dispersal system permits be subject to the requirements of this chapter. The promulgation and enforcement of the adopted rules will not affect private real property in a manner that requires compensation to private real property

owners under the United States Constitution or the Texas Constitution. The adopted rules also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Consequently, this rulemaking does not meet the definition of a takings under Texas Government Code, §2007.002(5). Therefore, the adopted rules will not constitute a taking under Texas Government Code, Chapter 2007. Written comments on the draft takings impact analysis determination were solicited; no comments were received on the draft takings impact analysis determination.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that it is subject to the Texas Coastal Management Program (CMP) and is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the CMP, and will therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this action for consistency and determined that Chapter 281 does not impact any CMP goals or policies because it regulates the permitting process. Chapter 281 is administrative and does not regulate the environment.

#### PUBLIC COMMENT

The public comment period ended March 20, 2006. A public hearing was held March 14, 2006, at 2:00 p.m. at the Texas Commission on Environmental Quality, Building F, Conference Room 2210, 12100 Park Thirty-Five Circle, Austin, TX. Oral comments were received from JN Technologies

(JNT). Written comments were received from Harris County Public Infrastructure Department (HCPID); United States Department of Energy, National Nuclear Security Administration, Pantex Site Office (DOE); Lower Colorado River Authority (LCRA); Drip-Tech Wastewater Systems (DTWS); Save Our Springs Alliance (SOSA); and Snowden Onsite Septic, Inc. (SOSI). Texas Council of Engineering Companies (TCEC) submitted a written comment after the close of the comment period, which was addressed. No comments were received in relation to this chapter.

## **SUBCHAPTER A: APPLICATIONS PROCESSING**

### **§§281.2, 281.5, 281.21**

#### STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; §26.013, which authorizes the executive director to conduct or have conducted any research and investigations it considers advisable and necessary for the discharge of the duties under this chapter; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; §32.054, which authorizes the executive director to inspect the dispersion area; and §32.151, which authorizes the commission, authorized agent, or employee of local government the power to enter property. Rulemaking authority is expressly granted to the commission to adopt rules under TWC, Chapter 32, as enacted by HB 2651, §2.

The adopted amendments implement HB 2651, which added Chapter 32 to the TWC. HB 2651, §2, expressly requires the commission to adopt rules to set standards and requirements for application permits and actions by the commission to carry out the responsibilities for management of beneficial reuse of treated wastewater.

**§281.2. Applicability.**

These sections are applicable to the processing of:

(1) applications for new, amended, or renewed water use permits, certificates of adjudication and certified filings, and extensions of time to commence and/or complete construction of water use facilities;

(2) applications for new, amended, or renewed wastewater discharge permits, including subsurface area drip dispersal systems;

(3) applications for new, amended, or renewed injection well permits;

(4) applications for new, amended, or modified or renewed industrial solid and/or municipal hazardous waste permits filed under §335.2 of this title (relating to Permit Required) and §335.43 of this title (relating to Permit Required) or for new or amended compliance plans filed under §305.401 of this title (relating to Compliance Plan);

(5) applications for plan approval of reclamation projects (levees, etc.);

(6) applications for creation of water districts;



- (7) water district applications and petitions requiring commission approval;
- (8) applications for new or amended certificates of convenience and necessity;
- (9) applications for new, amended, or renewed municipal solid waste permits; and
- (10) applications for new, amended, or renewed radioactive material licenses.

**§281.5. Application for Wastewater Discharge, Underground Injection, Municipal Solid Waste, Radioactive Material, Hazardous Waste, and Industrial Solid Waste Management Permits.**

Except as provided by §305.48 of this title (relating to Additional Contents of Applications for Wastewater Discharge Permits), applications for wastewater discharge including subsurface area drip dispersal systems, underground injection, municipal solid waste, radioactive material, hazardous waste and industrial solid waste management permits must include:

- (1) complete application form(s), signed and notarized, and appropriate copies provided;
- (2) the payment of fees, if applicable;
- (3) the verified legal status of the applicant;

- (4) the signature of the applicant, checked against agency requirements;
- (5) the attachment of technical reports and supporting data required by the application;
- (6) a list of adjacent and potentially affected landowners and their addresses along with a map locating the property owned by these persons; and
- (7) any other information as the executive director or the commission may reasonably require.

**§281.21. Draft Permit, Technical Summary, Fact Sheet, and Compliance History.**

(a) The provisions of this section are applicable to applications for waste disposal activities conducted under the authority of Texas Water Code, Chapters 26, 27, and 32, the Texas Solid Waste Disposal Act, and the Texas Radiation Control Act.

(b) The executive director shall prepare a draft permit consistent with all applicable commission rules, unless a recommendation is made not to grant an application. The draft permit will be filed with the commission to be included in the consideration of the application for permit and is subject to change during the course of the proceedings on the application. The draft permit shall be available for public review.

(c) The executive director shall prepare a technical summary which sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The executive director shall send this summary together with the draft permit to the applicant and on request, to any other person. The summary shall include the following information, where applicable:

(1) a brief description of the type of facility or activity which is the subject of the draft permit;

(2) the type and quantity of radioactive materials, wastes, fluids, or pollutants which are proposed to be or are being used, processed, stored, disposed, injected, emitted, or discharged;

(3) a brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(4) reasons why any requested variances or alternatives to required standards do or do not appear justified;

(5) a description of the procedures for reaching a final decision on the draft permit, including procedures whereby the public may participate in the final decision; and

(6) the name and telephone number of any persons to contact for additional information.

(d) Upon completion of technical review and prior to issuance of public notice, the executive director shall send the compliance history prepared under Chapter 60 of this title (relating to Compliance History), together with the draft permit, technical summary if applicable, and environmental analysis if applicable, to the applicant and on request, to any other person.

(e) Additional conditions for Texas Pollutant Discharge Elimination System (TPDES) draft permits and fact sheets are as follows.

(1) TPDES draft permits shall include the information required by 40 Code of Federal Regulations (CFR) §124.6(c) - (e), as in effect on the date of TPDES program authorization, as amended, which is adopted by reference; and

(2) A fact sheet shall be prepared for a TPDES permit and shall include the information required by 40 CFR §124.56, as in effect on the date of TPDES program authorization, as amended, which is adopted by reference.

(f) Additional conditions for radioactive material licenses are as follows.

(1) When the executive director is considering an application for a new license or license renewal to dispose of low-level radioactive waste from other persons and determines that the licensed activity may have a significant effect on the human environment, the executive director shall prepare or have prepared a written analysis of the effect on the environment.

(2) The executive director shall make the environmental analysis available to the applicant and the public. The environmental analysis shall be included as part of the record of the commission's proceedings.