

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §331.11.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

House Bill (HB) 2201, passed by the 79th Legislature, 2005, directs the commission to establish by rule, streamlined permitting procedures for FutureGen projects. FutureGen refers to a combination of technologies for carbon sequestration, carbon dioxide enhanced oil recovery, electric generation, and hydrogen production. FutureGen is a technology demonstration project that is a partnership between industry participants and the United States Department of Energy. In HB 2201, the legislature concluded in its findings that this technology demonstration project could result in major economic, social, and environmental benefits for Texas, and that streamlining the permitting process for FutureGen projects would serve the public's interest by improving the state's ability to compete for federal funding for FutureGen projects. A specific requirement of HB 2201 is that FutureGen permit applications shall not be subject to a contested case hearing. Under the proposed rule, the eligible permit applications for FutureGen projects will be subject to the same permitting and public participation processes that would otherwise apply to applications for most types of commission permits, except for contested case hearings. Other portions of HB 2201 reflected in the proposed rules define relevant terms, establish an emissions profile, and clarify jurisdiction issues between TCEQ and the Railroad Commission of Texas. Much of the content of the proposed rules originates from new Texas Health and Safety Code (THSC), §382.0565, Clean Coal Project Permitting Procedure, and new Texas Water Code (TWC), §5.558 and §27.022, which were created by HB 2201.

The purpose of the proposed amendment to Chapter 331 is to implement the requirements of HB 2201 with respect to the jurisdiction over injection wells used for the injection of carbon dioxide produced by a clean coal project into a zone that is below the base of usable quality water and that is not productive of oil, gas, or geothermal resources.

Corresponding rulemakings are published in this issue of the *Texas Register* that includes changes to 30 TAC Chapter 50, Action on Applications and Other Authorizations; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 30 TAC Chapter 91, Alternative Public Notice and Public Participation Requirements for Specific Designated Facilities; and 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification.

SECTION DISCUSSION

§331.11. Classification of Injection Wells.

The proposed amendment would add a new subsection (d) that states that the commission has jurisdiction over the injection of carbon dioxide produced by a clean coal project into a zone that is below the base of usable quality water and that is not productive of oil, gas, or geothermal resources. This implements new Texas Water Code Section 27.022 from HB 2201. Under federal requirements, Class II injection wells are used for injection of waste in connection with oil or gas production, enhanced recovery of oil and gas, and storage of hydrocarbons. In Texas, the Railroad Commission regulates Class II injection wells. The commission could not authorize the injection of carbon dioxide produced by a clean coal project for purposes of storage or sequestration into a zone that is below the base of usable quality water and that is not productive of oil, gas or geothermal resources in a Class II injection well. The commission could authorize the injection of carbon dioxide for storage or

sequestration in a Class I or Class V injection well depending on site-specific information such as the proposed injection formation and the location of underground sources of drinking water. Class I injection wells are authorized by a permit. Class V injection wells are generally authorized by rule.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period that the proposed rule amendment is in effect, no fiscal implications are anticipated for the agency or other units of state or local government.

The proposed rule implements HB 2201. HB 2201 directs the agency to establish by rule, streamlined permitting procedures for FutureGen projects and specifies jurisdiction over the injection of carbon dioxide produced by a clean coal project. FutureGen refers to a combination of technologies for carbon sequestration, carbon dioxide enhanced oil recovery, electric generation, and hydrogen production. FutureGen is a technology demonstration project that is a partnership between industry participants and the United States Department of Energy. The legislature determined that this technology demonstration project could result in major economic, social, and environmental benefits for Texas, and determined that streamlining the permitting process for FutureGen projects would serve the public interest by improving the state's ability to compete for federal funding for FutureGen projects. The rule clarifies that the commission has jurisdiction over the injection of carbon dioxide produced by a clean coal project and does not impose any new requirements for the agency.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years that the proposed amendment is in effect, the public benefit anticipated from the changes due to the proposed rules will be compliance with state law and improving the state's ability to compete for federal funding for FutureGen projects.

These projects are anticipated to result in the development of cleaner sources of power to meet energy demands.

The proposed rule specifies jurisdiction of carbon dioxide injection and is not expected to result in any increased costs.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. Small or micro-businesses are not expected to apply for permits for FutureGen projects, but if they do, they would experience the same cost savings as large businesses.

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 rule does 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 proposed rule is intended to establish procedural requirements for authorizing certain types of projects required for the FutureGen project without holding a contested case hearing. The proposed rule clarifies the commission’s jurisdiction over injection wells that inject carbon dioxide produced by a clean coal project into a zone that is below the base of usable quality water and that is not productive of oil, gas, or geothermal resources. The proposed rule is intended to describe the commission’s jurisdiction over these wells and does not alter the underlying technical requirements. Therefore, because this rulemaking 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, the rulemaking does not fit the Texas Government Code, §2001.0225, definition of “major environmental rule.”

Furthermore, the proposed rulemaking does not meet any of the four applicable requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental 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.

In this case, the proposed rule does not meet any of these applicability requirements. First, the proposed rule is consistent with and does not exceed the standards set by federal law. Second, the proposed rule does not exceed an express requirement of state law, instead the rule implements HB 2201. Third, the rule does 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 propose the rule solely under the general powers of the agency, but rather under the authority of HB 2201, which directs the commission to implement rules under TWC, §27.022, which establishes the commission's jurisdiction over the injection of carbon dioxide produced by a clean coal project to the extent authorized by federal law.

Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required. The commission invites public comment regarding this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking and performed a preliminary assessment of whether this rulemaking would constitute a takings under Texas Government Code, Chapter 2007. The proposed rule is intended to establish a streamlined process for authorizing certain types of projects required for the FutureGen project. The proposed rule is only a procedural rule establishing a system to administer the program for permitting FutureGen projects and is not specifically intended to protect the environment or to reduce risks to human health. The proposed rule is intended to provide an alternative mechanism for public participation and does not alter the underlying technical review requirements. Promulgation and enforcement of the rule will not affect private real property in a

manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposed rule 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 proposal does not meet the definition of a takings under Texas Government Code, §2007.002(5). Therefore, the proposed rule will not constitute a takings under Texas Government Code, Chapter 2007. The commission invites public comment on this preliminary takings impact assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by §281.45(a)(3), Actions Subject to Consistency with the Goals and Policies of the Texas Coastal Management Program (CMP), and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed revisions include procedural mechanisms to authorize new sources of air contaminants; however, the proposed revisions do not create any new types of authorizations for new sources of air

contaminants. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies. The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on December 20, 2005, at 10:00 a.m. in Building B, Room 201A, at the TCEQ's complex, 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. Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer, Office of Legal Services, at (512) 239-5017. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Office of Legal Services, 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 2005-053-091-PR. The proposed rules may be

viewed on the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.

Comments must be received by 5:00 p.m., December 27, 2005. For further information, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222.

SUBCHAPTER A: GENERAL PROVISIONS

§331.11

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is also proposed under TWC, §27.029, which requires the commission to adopt rules and procedures reasonably required for the performance of its powers, duties, and functions under TWC, Chapter 27. The amendment is proposed under Section 13 of HB 2201, which requires the commission to adopt rules under TWC, §27.022.

The proposed amendment implements TWC, §27.022.

§331.11. Classification of Injection Wells.

(a) - (c) (No change.)

(d) The commission has jurisdiction over the injection of carbon dioxide produced by a clean coal project into a zone that is below the base of usable quality water and that is not productive of oil, gas, or geothermal resources.