The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amended §55.201 *with changes* to the proposed text as published in the September 5, 2008, issue of the *Texas Register* (33 Tex Reg 7423) and will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The changes adopted to this chapter are part of a larger adoption to revise the commission's radiation control and underground injection control (UIC) rules. The purpose of this rulemaking is to implement the remaining portions of Senate Bill (SB) 1604, 80th Legislature, 2007, its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)), and House Bill (HB) 3838, 80th Legislature, 2007. This rulemaking incorporates new provisions for notice and contested case hearing opportunities related to Production Area Authorizations and UIC Area Permits, financial assurance requirements, and new state fees on gross receipts associated with the radioactive waste disposal. HB 3838 specifically addresses the period between uranium exploration, which is regulated by the Railroad Commission of Texas (RRC), and permitting of injection wells for in situ uranium mining, which is regulated by TCEQ. HB 3838 requires TCEQ to establish a registration program for exploration wells permitted by the RRC that are used for development of the UIC area permit application. In response to a previous petition for rulemaking, the commission has also directed staff to review, seek stakeholder input on, and recommend revision of commission rules related to in situ uranium recovery.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapters 37, 39, 305, 331, and 336.

SECTION DISCUSSION

The commission adopts the amendment to §55.201 to implement Texas Water Code (TWC), §27.0513(d), which was added to the TWC through passage of SB 1604. Under adopted §55.201(i)(11), there is no opportunity for a contested case hearing on an application for a production area authorization, unless the authorization seeks to amend a restoration table value as provided in §331.107(g), addresses the initial establishment of monitor wells unless the executive director uses the recommendations of an independent third-party expert, or amends the type or amount of financial assurance required for groundwater restoration or plugging and abandonment. Qualifications and requirements for the use of an independent third-party expert are addressed elsewhere in this rulemaking. The commission does point out that the requirements of TWC, §27.0513(d)(3) do not apply to the initial establishment of the cost estimates for aquifer restoration or plugging and abandonment of wells. And, under existing permit and radioactive material licensing program requirements, the amount of required financial assurance for closure activities including aquifer restoration and well plugging abandonment can be increased without the submission of a license, permit, or production area authorization application. That is, the permits, licenses and rules require automatic increases based on current cost estimates for the various activities requiring financial assurance. Furthermore, the commission does not consider the intent of this rule to apply to pure economic adjustments in the amount of financial assurance based solely on the annual inflation rate adjustment required under §37.131 or reductions in the amount of financial assurance required when the permittee plugs and abandons wells for which financial assurance is required. In response to comments, the commission has made two changes to §55.201 to clarify that it is the application for the production area authorization that seeks amendment under §55.201(i)(11) and to add the word "table” before "value" in §55.201(i)(11)(A).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission adopts the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A 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 rulemaking action implements SB 1604, establishing requirements for production area authorizations for in situ recovery of uranium. The adopted amendment to Chapter 55 is not anticipated to 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, because the amendment affects only procedural requirements for participating in a contested case hearing on a production area authorization application. The rulemaking action also amends requirements for in situ recovery of uranium in Chapter 331, amends technical requirements and for radioactive materials licenses and establishes fees for applications and waste disposal in Chapter 336, amends license application requirements and permit term limits in Chapter 305, amends financial assurance requirements in Chapter 37, and amends public notice requirements in Chapter 39.

Furthermore, the rulemaking action does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, 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 rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The commission's UIC program is authorized by the United States Environmental Protection Agency and the adopted changes for injection well permits, production area authorizations, and exempt aquifers do not exceed a standard of federal law or requirement of a delegation agreement. There are no federal standards for production area authorizations. The adopted rulemaking is compatible with federal law.

The adopted rule does not exceed a requirement of state law. TWC, Chapter 27, the Injection Well Act, establishes requirements for the commission's UIC program. SB 1604 amended the Injection Well Act to establish requirements for production area authorizations and for determining when production area authorization applications are subject to an opportunity for participation in a contested case hearing. The purpose of the rulemaking is to implement requirements consistent with TWC, Chapter 27, as amended by SB 1604.

The adopted rule is compatible with the requirements of a delegation agreement or contract between the state and an agency of the federal government. The commission's UIC program is authorized by the United States Environmental Protection Agency, and the adopted rule is compatible with the state's delegation of the UIC program.

The adopted rule is adopted under specific laws. TWC, Chapter 27, establishes requirements for the commission's UIC program and TWC, §27.019, requires the commission to adopt rules reasonably required to implement the Injection Well Act, and TWC, §27.0513 authorizes the commission to adopt rules to establish requirements for production area authorizations.

The commission invited public comments regarding the draft regulatory impact analysis during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of the adopted rule would not constitute a taking of real property.

The purpose of the adopted rule is to implement legislative requirements in SB 1604, establishing requirements for production area authorizations for in situ recovery of uranium. The adopted rule would substantially advance this purpose by amending the requirements applicable to participation in contested case hearings on applications for production area authorizations.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. The adopted rule does not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the

regulations. The adopted amendment is procedural, affecting the participation in contested case on applications for production area authorizations, and does not affect real property. The adopted rule implements provisions already effective in statute. Therefore, the adopted rule does not affect real property in a manner that is different than would have been affected without these revisions.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on September 16, 2008. The public comment period closed on October 6, 2008. The commission received comments from Kleberg County Citizen Review Board (KCCRB); Mesteña Uranium, LLC (Mesteña); the Lone Star Chapter of the Sierra Club (Sierra Club); Texas Mining and Reclamation Association (TMRC); and URI, Inc. (URI).

RESPONSE TO COMMENTS

KCCRB commented that there should be a right to a contested case hearing on a production area authorization application if there is a proposed change in production area boundaries or there is a proposed change in the aquifer restoration timetable.

**The requirements for determining whether an application for a production area authorization is subject to the opportunity for a contested case hearing are established in state statute. Under TWC, §27.0513(d), an application for a production area authorization is an uncontested matter and not subject to contested case**

**hearing requirements unless specific exceptions established in statute apply. The commission cannot expand the exceptions through rulemaking that are created in statute. As a practical matter, though, production area authorizations are not typically subject to an amendment application for expanding the production area. Expansion would require additional monitor wells and would require changes to restoration values. Permittees expand mining operations by applying for a new production area authorization. No change has been made in response to this comment.**

TMRA and URI commented that if an application for a production area authorization is required to include cost estimates for aquifer restoration and plugging and abandonment of injection wells, then every application will have the effect of seeking to amend the form or amount of financial assurance for that production area. Then, according to TMRA and URI, all applications for a production area authorization would be subject to an opportunity for a contested case hearing in contradiction of the intent of SB 1604 and TWC, §27.0513(d). TMRA and URI commented that production area authorization applications should be required by rule to include cost estimates for aquifer restoration or plugging and abandonment.

**The commission does not agree that the requirement to include cost estimates for aquifer restoration and plugging and abandonment of wells as part of an application for a production area authorization conflicts with the intent of SB 1604 and TWC, §27.0513(d). The commission agrees that cost estimates for aquifer restoration and plugging and abandonment of wells should be included as part of an application for a production area authorization. As an application requirement, cost estimates will be subject to administrative and technical review by the executive director, will be available as part of the application provided in a public location for public review, and will be subject to public comment. A new production area authorization would establish the *initial* cost estimates for aquifer restoration of the production area and plugging and abandonment**

**of wells within the production area. TWC, §27.0513(d) distinguishes the initial establishment of production area authorization requirements from subsequent amendment of production area authorization requirements. TWC, §27.0513(d)(2) addresses the "initial establishment" of monitoring wells, while TWC, §27.0513(d)(1) and (3) address an "amendment" of a restoration table value or "amendment" to the type or amount of bond required for groundwater restoration or plugging and abandonment of wells. If TWC, §27.0513(d)(3) were intended to apply to the initial establishment of the cost estimates for financial assurance for the production area authorization, it would have the same "initial establishment" language used in TWC, §27.0513(d)(2). An application for a new production area authorization that provides cost estimates for aquifer restoration of the production area and cost estimates for plugging and abandonment of wells will not be subject to an opportunity for a contested case hearing under the applicability of TWC, §27.0513(d)(3) or §55.201(i)(11)(C) because the application is not seeking an *amendment* to the type or amount of financial assurance. In order to maintain compatibility with the United States Nuclear Regulatory Commission's requirements, the financial assurance for aquifer restoration is held under the requirements of the radioactive materials license. While the cost estimate for aquifer restoration will be established in a production area authorization, the financial assurance, based on that cost estimate, will be required under the license. The licensee's financial assurance requirements are addressed in Chapter 336, Subchapter L and Chapter 37. Because the financial assurance for aquifer restoration is held under the licensing requirements of Chapter 336, and the financial assurance for well plugging and abandonment is held under the area permit requirements of Chapter 331, an amendment application for the production area authorization is not required and the exception in TWC, §27.0513(d)(3) or §55.201(i)(11)(C) would not be triggered for subsequent**

**updates to financial assurance for aquifer restoration or well plugging and abandonment for inflation adjustments or cost increases. No change has been made in response to this comment.**

TMRA commented that §55.201(i)(11) should be revised to add a comma after the date and replace the phrase "unless the authorization seeks" with "unless the application for the production area authorization seeks." TMRA explained that the authorization is granted by the commission and does not seek anything while the application seeks authorization from the commission.

**The commission agrees with the comment and has revised §55.201(i)(11) accordingly.**

Mesteña commented that §55.201(i)(11)(A) should be changed to add the word "table" to match the language in statute in TWC, §27.0513(d)(1).

**The commission agrees with the comment and has revised §55.201(i)(11)(A) accordingly.**

TMRA commented that §55.201(i)(11)(B) is confusing because the word "unless" is used twice to determine whether a particular application for a production area authorization is subject to a contested case hearing. TMRA commented that language in §55.201(i)(11)(B) should be changed from "unless the executive director uses the recommendations the recommendations of an independent third-party expert …" to "and the executive director does not use the recommendations …".

**The commission does not agree with the comment. The language in §55.201(i)(11)(B) is derived from TWC, §27.0513(d)(2). The exclusion from the applicability of contested case hearing**

**opportunity requires the executive director's affirmative use of the recommendation of an independent third-party expert chosen by the commission. No changes were made in response to this comment.**

TMRA commented that §55.201(i)(11)(C) should be amended to add a citation to the Radiation Control Act for financial assurance for groundwater restoration.

**The commission does not agree with the comment. The language in §55.201(i)(11)(C) is derived from TWC, §27.0513(d)(3) and the statute does not specify that the financial assurance for groundwater restoration is under THSC, §401.109. No changes were made in response to this comment.**

Sierra Club commented that they believe the proposed changes to §55.201(i)(11) conforms to the legislative changes required by SB 1604.

**The commission appreciates the comment.**

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION**

**OR CONTESTED CASE HEARING**

**§55.201**

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (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 adopted under TWC, §27.019, which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act; and §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements Senate Bill 1604, 80th Legislature, 2007; and TWC, §27.023 and §27.0513.

**§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.

(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 title (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 title;

(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 Program); 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 that are unresolved and that constitute a recurring pattern of egregious conduct that 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;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

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

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization that is submitted after September 1, 2007, unless the application for the production area authorization seeks:

(A) an amendment to a restoration table value in accordance with the requirements of §331.107(g) of this title (relating to Amendment of Restoration Table Values);

(B) the initial establishment of monitoring wells for any area covered by the authorization, including the location, number, depth, spacing, and design of the monitoring wells, unless the executive director uses the recommendations of an independent third-party expert as provided in §331.108 of this title (relating to Independent Third-Party Experts); or

(C) an amendment to the type or amount of financial assurance required for aquifer restoration, or by Texas Water Code, §27.073, to assure that there are sufficient funds available to the state to utilize a third-party contractor for aquifer restoration or plugging of abandoned wells in the area. Adjustments solely associated with the annual inflation rate adjustment required under §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), or for adjustments due to decrease in the cost estimate for plugging and abandonment of wells when plugging and abandonment has been approved by the executive director in accordance with §331.144 of this title (relating to Approval of

Plugging and Abandonment) are not considered an amendment to the type or amount of financial assurance required for aquifer restoration or well plugging and abandonment.