

The Texas Commission on Environmental Quality (commission) proposes to amend §305.72.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rulemaking amends §305.72 in order to implement House Bill (HB) 2654, 80th Legislature, 2007, and its amendments to Texas Water Code (TWC), §27.021. HB 2654 removed the requirement for a contested case hearing under the provisions of TWC, §27.018 for Class I injection wells that dispose of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals. HB 2654 does not exclude Class I injection wells for the disposal of any other waste streams from the requirement to provide an opportunity for a contested case hearing.

The purpose of this rulemaking is to subject permit amendments to the opportunity for a contested case hearing when the amendment is to a Class I injection well permit authorizing only disposal of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals and the amendment requests authority to dispose of other types of wastes. The proposed rulemaking specifies that a permit for a Class I injection well used only for the disposal of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals may not be administratively modified, under §305.72(b)(4), in order to add waste streams disposed in the Class I injection well other than nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals. A permit change to dispose of other types of wastes will require a major amendment under §305.62(c)(1)(A), which provides an opportunity for a contested case hearing. This rulemaking will ensure that the hearing requirements of TWC, §27.018 for conventional Class I injection well permits will be retained after a permit is issued under the provisions of HB 2654.

Amendments to 30 TAC Chapters 50, 55 and 331 to implement HB 2654 are also proposed in this issue of the *Texas Register*.

SECTION DISCUSSION

§305.72. Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee.

The proposal would amend §305.72(b)(4) to specify that the kind of permit modification allowed to a conventional Class I injection well permit by this paragraph shall not include modifying a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals to a conventional Class I injection well permit. This amendment effectively precludes a permit holder for this type of Class I injection well (used only for the disposal of nonhazardous brine produced by a desalination operation or of nonhazardous drinking water treatment residuals) from adding other types of waste streams without providing the opportunity for a contested case hearing.

The commission proposes an administrative change in §305.72(b)(4) to correct the spelling of "judgement" to "judgment."

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule. The agency will utilize existing resources to develop rules and guidelines for a general permit to authorize

the use of Class I injection wells for disposal of nonhazardous desalination concentrate or drinking water treatment residuals.

This rulemaking implements HB 2654, 80th Legislature, 2007 and aligns state standards for Class I wells disposing only of nonhazardous desalination concentrate and nonhazardous drinking water treatment residuals with federal Class I injection well standards for nonhazardous wells. HB 2654 allows the commission to issue a general permit to authorize the use of a Class I injection well for disposal of nonhazardous desalination concentrate or drinking water treatment residuals and eliminates the necessity of obtaining a permit from the commission when the Railroad Commission of Texas authorizes the use of these wastes as appropriate injection fluids for enhanced recovery purposes. The proposed rule is part of the agency's proposal to establish regulations to govern the general permit, and they amend the appropriate sections of Chapter 305 to ensure that if wastes, other than those authorized by the proposed general permit, are modified, then the change will constitute a major permit amendment and provide the opportunity for a contested case hearing. This proposed rulemaking is part of amendments proposed for appropriate sections of Chapters 50, 55, and 331 to establish a general permit program for these types of Class I injection wells. This fiscal note addresses only the fiscal implication of proposed changes to Chapter 305, and the fiscal implications for needed amendments to other chapters are addressed in separate fiscal notes.

The proposed amendment to Chapter 305 would ensure that if the waste stream permitted under the proposed general permit is modified to include waste other than nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, the owners or operators of the Class I injection well would be subject to the requirements of a major permit amendment. These requirements include the

chance that the well owners would become subject to a contested case hearing as well as public notice and meeting requirements.

The proposed rule is not expected to have a significant fiscal impact on local governments that have a general permit to operate a Class I injection well for disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals unless they decide to dispose of other types of wastes in these injection wells. If a local government decides to modify the waste stream, it will be subject to a contested case hearing and other regulations governing other types of injection wells or disposal methods. A contested case hearing could cost as much as \$500,000 although it would likely cost less. Public notices could cost as much as \$1,000 to \$3,000 per notice depending on the circulation size of the newspaper used. If there is sufficient public interest to warrant a public meeting, meeting expenses for an applicant could range from \$1,700 to \$4,700 depending on the cost of notices and the price for renting a meeting space. It is unknown how many local governments might choose to modify their waste streams and become subject to the proposed rule.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be continued protection of public health and the environment by requiring owners of Class I injection wells authorized by general permit to dispose of nonhazardous desalination concentrate or drinking water treatment residuals and who desire to change the waste stream to comply with major permit amendment requirements.

Regulated entities that elect to modify the waste stream to be disposed of in a Class I injection well authorized by the proposed general permit issued for a Class I injection well for disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals will be subject to a contested case hearing and other regulations governing other types of injection wells or disposal methods. A contested case hearing could cost as much as \$500,000 although it would likely cost less. Public notices could cost as much as \$1,000 to \$3,000 per notice depending on the circulation size of the newspaper used. If there is sufficient public interest to warrant a public meeting, meeting expenses for an applicant could range from \$1,700 to \$4,700 depending on the cost of notices and the price for renting a meeting space.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Typically, small or micro-businesses do not own or operate Class I injection wells, and staff does not expect these businesses to request a general permit to operate a well of this type. If a small business does request a general permit to own or operate this type of Class I injection well and it elects to modify the wastes injected into the well, it can expect to incur the same costs for a contested case hearing as those incurred by local governments and large businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to protect human health and the environment and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 rulemaking does not meet the definition of a "major environmental rule" as defined by that 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 does not meet the statutory definition of a "major environmental rule" because it is not intended to reduce risks to human health from environmental exposure, nor does it 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 intent of the proposed rulemaking is to implement HB 2654, passed during the 80th Legislature, 2007, and to revise criteria for authorizing Class I nonhazardous wells injecting desalination concentrate and other water treatment residuals from public water systems so that the state's rules are no more stringent than federal Class I nonhazardous injection well regulations. The specific intent of the proposed amendment to §305.27 is to protect the opportunity for a contested case hearing when a permittee

proposes to add a type of waste other than desalination concentrate or drinking water treatment residuals to those permitted to be injected to its Class I injection well and the permit was issued without the opportunity for a contested case hearing. The rule substantially advances this purpose by providing that a minor modification shall not be used to add a waste stream other than desalination concentrate or drinking water treatment residuals to the permit of a Class I injection well issued without the opportunity for a contested case hearing.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed amendment would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the proposed amendment will be significant with respect to the economy; therefore, the proposed amendment will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking 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. This rulemaking does not meet any of these four applicability requirements because this rulemaking does not exceed any standard set by federal law but rather amends the rules so that they

are no more stringent or restrictive than the federal regulations. The proposed rule does not exceed the requirements of state law under the TWC, Chapter 27. Further, the proposed rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program. Finally, the rule is not proposed solely under the general powers of the agency, but rather specifically under TWC, §27.023(m), which allows the commission to adopt rules to implement the general permit authorizing use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals and TWC, §27.109, which authorizes the commission to adopt rules to implement TWC, Chapter 27 (regarding Injection Wells), as well as the other general powers of the agency.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKING IMPACT ASSESSMENT

The commission evaluated the proposed amendment to Chapter 305 and performed a preliminary assessment of whether the amendment would constitute a taking under Texas Government Code, Chapter 2007. The primary purposes of the proposed amendment are to implement HB 2654 and correct a misspelling identified during review of the rule language. The proposed amendment would substantially advance these purposes by amending §305.72 to ensure that additional waste streams shall not be added as minor modifications to a Class I injection well permitted in such a manner that no opportunity exists for a contested case hearing, and by changing the spelling of "judgement" to "judgment."

Promulgation and enforcement of the proposed amendment would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rule because the proposed amendment neither relates to, nor has any impact on the use or enjoyment of private real property, and there would be no reduction in property value as a result of this rule.

Therefore, the proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

The commission has no reasonable alternative that could accomplish the specific purpose of ensuring that additional waste streams are not added as minor modifications to a Class I injection well permitted in such a manner that no opportunity exists for a contested case hearing. Without the proposed amendment, a Class I injection well for disposal of only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals could be permitted under an individual permit or other authorization not requiring a contested case hearing, then add another waste stream as a minor modification without the public ever having an opportunity to contest the additional waste stream through the contested case hearing process.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on April 8, 2008 at 10:00 a.m. in Building E Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing

is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Ms. Kristin Smith, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Ms. Kristin Smith, 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. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-030-331-PR. The comment period closes April 14, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Ms. Kathryn Hoffman, Waste Permits Division, (512) 239-6890.

**SUBCHAPTER D: AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS,
REVOCATION, AND SUSPENSION OF PERMITS**

§305.72

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §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 §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The proposed amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

§305.72. Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee.

- (a) This section applies only to Underground Injection Control permits.

(b) With the permittee's consent, the executive director may modify administratively a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures and notice requirements of this chapter. Any change to the permit not processed as a minor modification under this section must be made for cause and in compliance with appropriate public notice requirements. Minor modifications may only:

(1) correct typographical errors;

(2) require more frequent monitoring or reporting by the permittee;

(3) change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement;

(4) change quantities or types of fluids injected which are within the capacity of the facility as permitted and in the judgment [judgement] of the executive director, would not interfere with the operation of the facility or its ability to meet conditions described in the permit and would not change its classification, provided however, that this provision shall not be used to add a waste stream other than nonhazardous [desalination] brine produced by a desalination operation or nonhazardous drinking water treatment residuals to the permit of a Class I injection well issued without the opportunity for a contested case hearing;

(5) change construction requirements, provided that the alterations comply with the requirements of Chapter 331 of this title (relating to Underground Injection Control); or

(6) amend a plugging and abandonment plan which has been updated under §305.154(7) of this title (relating to Standards).