

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §55.201 *with change* to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4125).

Background and Summary of the Factual Basis for the Adopted Rule

Passage of House Bill (HB) 1079, 83rd Legislature, 2013, amended Texas Water Code (TWC), §27.0513 to revise the language that establishes when an application for a production area authorization (PAA) is an uncontested matter, not subject to an opportunity for a contested case hearing. Under former TWC, §27.0513(d), an application for a production area to be issued under a Class III Underground Injection Control (UIC) area permit for *in situ* uranium mining was an uncontested matter except in three circumstances. The three exceptions removed from former TWC, §27.0513(d)(1) - (3), were, respectively: an application to amend a restoration table value; an application for the initial establishment of monitor wells, unless the executive director uses the recommendations of an independent third-party expert; and an application to amend the type of amount of bond required for groundwater restoration and for plugging and abandonment of wells.

Under HB 1079, these three exceptions were removed and replaced with different conditions under which an application for a PAA is an uncontested matter. These conditions are, respectively: the authorization is for a production area within the

boundary of a Class III UIC area permit, that includes a permit range table of groundwater quality restoration values used to measure groundwater restoration by the commission; the application includes groundwater quality restoration values falling at, or below, the upper limits of the range established in TWC, §27.0513(d)(1); and the authorization is for a production area located within the boundary of a permit that incorporates groundwater baseline characteristics of the wells for the application required by commission rule. Because of the complexity of the various conditions that determine whether an application for a production authorization is, or is not, subject to an opportunity for a contested case hearing, the commission adopts the conditions in a stand-alone section in 30 TAC §331.108, Opportunity for a Contested Case Hearing on a Production Area Authorization Application. The commission included these provisions in 30 TAC Chapter 331 because the conditions that determine the procedural requirements on the PAA application are linked to the terms of the corresponding permit regarding the permit range table or compliance with rule requirements in Chapter 331 regarding baseline wells and monitor wells.

Under this rulemaking, the revisions to TWC, §27.0513(d) under HB 1079 are addressed through the adopted amendment to §55.201(i)(11).

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts amendments to 30 TAC Chapter 305, Consolidated Permits,

and 30 TAC Chapter 331, Underground Injection Control.

Section by Section Discussion

§55.201, Requests for Reconsideration or Contested Case Hearing

Section 55.201(i) is revised to amend paragraph (11). Section 55.201(i)(11)(A) - (C) was adopted in 2009 to address the amendment to TWC, §27.0513(d), Senate Bill 1604 (2007). As previously discussed, TWC, §27.0513(d)(1) - (3) was removed under HB 1079. The adopted amendment to §55.201(i)(11) now states that there is no right to a contested case hearing on an application for a PAA except as provided in §331.108. The commission adopts the amendment to §331.108 to establish the conditions for determining when an application for a PAA may be subject to a contested case hearing consistent with TWC, §27.0513, as amended by HB 1079. Under the conditions in TWC, §27.0513 and 30 TAC §331.108, the only time an application for a PAA may be subject to an opportunity for a contested case hearing is if the application proposes an amendment to increase a restoration table value and the PAA is issued under a Class III UIC area permit that does not include a permit range table.

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 Texas Government Code, §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. The adopted rulemaking action implements legislative requirements in HB 1079, establishing the conditions for when an application for a PAA may be subject to an opportunity for contested case hearing. The adopted rulemaking 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 does not alter in a material way the existing requirements for injection wells used for *in situ* recovery of uranium. The adopted rulemaking action also amends requirements for injection well permit applications by requiring a permit range table in Chapter 305 and amends requirements for injection well permits and PAAs in Chapter 331.

Furthermore, the adopted 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 adopted 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 (EPA) and the adopted changes for injection well permit applications do not exceed a standard of federal law or requirement of a delegation agreement. There are no federal standards regarding an opportunity for contested case hearings on applications for PAAs. The adopted rule 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. HB 1079 amended the Injection Well Act to establish the conditions for when an application for a PAA may be subject to a contested case hearing. The purpose of the rulemaking is to implement requirements consistent with TWC, Chapter 27, as amended by HB 1079.

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 EPA, and the adopted rule is compatible with the state's delegation of the UIC program.

The 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 PAAs.

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

Takings Impact Assessment

The commission evaluated the adopted 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 HB 1079, establishing the conditions for when an application for a PAA may be subject to an

opportunity for a contested case hearing. The adopted amendment would substantially advance this purpose by amending the conditions in §55.201(i)(11) that establish when an application for a PAA may be subject to an opportunity for a contested case hearing to be consistent with the requirements of HB 1079.

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 rule establishes the conditions for when an application for a PAA may be subject to an opportunity for a contested case hearing that does not affect real property. The adopted rule applies only to the procedural requirements for PAA applications. HB 1079 became effective on September 1, 2013, and applies in the absence of adopted amendment. 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 reviewed the adopted 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 adopted rule is not subject to the Texas Coastal Management Program (CMP).

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

Public Comment

The commission held a public hearing on this proposal in Austin on June 17, 2014. The comment period closed on June 30, 2014. The commission received no comments on the amendment to §55.201.

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 TWC, §27.0513, which requires the commission to establish rules for procedural, application and technical requirements for production area authorizations.

The adopted amendment implements House Bill 1079, 83rd Legislature, 2013 and TWC, §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, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title (relating to Definitions), 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, the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title, 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);

(C) a permit issued under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions); or

(D) 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(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, except as provided in accordance with §331.108 of this title (relating to Opportunity for a Contested Case Hearing on a Production Area Authorization Application).