

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes to amend §55.201.

### **Background and Summary of the Factual Basis for the Proposed 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 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 is proposing to establish 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 proposes to include 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 proposed rulemaking, the revisions to TWC, §27.0513(d) under HB 1079 are addressed through the proposed amendment to §55.201(i)(11).

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes to amend 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 proposed 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 is proposing to amend §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 permit that does not include a permit range table.

## **Fiscal Note: Costs to State and Local Government**

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. Other units of state or local government are not expected to experience

fiscal impacts under the proposed rule since it does not typically participate in uranium mining activities.

The proposed amendment is part of a rulemaking that implements the provisions of HB 1079. HB 1079 amended the TWC regarding permits for Class III injection wells used for *in situ* uranium mining activities and applications for PAAs submitted to the agency on or after September 1, 2013. HB 1079 changed the conditions under which a PAA would not be subject to an opportunity for a contested case hearing. The agency is also proposing rules to amend Chapters 305 and 331 to complete the implementation of HB 1079. This fiscal note will address the fiscal impacts of the proposed rules in Chapter 55, and the fiscal impacts of the provisions in Chapters 305 and 331 will be addressed in separate, but related fiscal notes.

This proposed amendment amends the requirements concerning contested case hearings for PAAs to state that those hearings are not available except where the provisions of the proposed rules in Chapter 331 apply. Briefly, the proposed rule would apply only to new applications for Class III injection well permits, permit amendments, or permit renewals authorizing *in situ* uranium mining, and new PAAs, or amended PAAs issued on or after September 1, 2013. The proposed rule is administrative in nature and would ensure that there is uniformity in applicable parts of the TAC to implement HB 1079.

The proposed rule would not have a significant fiscal impact on the agency, and units of local government or other state agencies are not expected to experience any fiscal impact as a result of the proposed rule since it does not typically engage *in situ* uranium mining activities.

### **Public Benefits and Costs**

Ms. 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 compliance with state law, a more efficient authorization process for new *in situ* uranium mining production areas, and a continued protection of groundwater in the state.

The proposed rule would not have a significant fiscal impact on individuals if it does not own or operate a business that engages *in situ* uranium mining activities. The proposed rule is administrative in nature and would ensure uniformity between different chapters of the TAC to implement the provisions of HB 1079. The proposed rule is expected to result in fewer opportunities to request a contested case hearing for certain PAA authorizations, but since there have been only two contested case hearings regarding new PAAs in the past ten years, individuals and businesses are not expected to experience a significant fiscal impact as a result of the proposed amendment to Chapter

55.

Currently, there are seven existing permits for *in situ* uranium mining, and all of them have been issued to four small businesses. The fiscal impact of the proposed rules is expected to be minimal and will be discussed under the Small Business and Micro-Business Assessment section of this preamble.

#### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Currently there are four small businesses with permits for Class III injection wells for *in situ* uranium mining. When limiting the opportunity to request a contested case hearing per the requirements of HB 1079, the proposed amendment to Chapter 55 could lower small business costs spent for contested case hearings.

However, any savings are not expected to be significant since there have only been two contested case hearings for new PAAs in the past ten years. The significance of any cost savings would vary among permittees depending on the business circumstances of each small business.

#### **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 comply with state law 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 proposes 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed rule is compatible with federal law.

The proposed 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 proposed 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 proposed rule is compatible with the state's delegation of the UIC program.

The rule is proposed 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.

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.

### **Takings Impact Assessment**

The commission evaluated the proposed 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 proposed rule would not constitute a taking of real property.

The purpose of the proposed 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 proposed 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 proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed 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 proposed 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 proposed rule applies only to the procedural requirements for PAA applications. HB 1079 became effective on September 1, 2013, and applies in the absence of this proposed amendment. Therefore, the proposed 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 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on June 17, 2014, at 2:00 p.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 Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Bruce McAnally, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-058-331-WS. The comment period closes June 30, 2014.

Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact David Murry, Underground Injection Control Section, (512) 239-6080.

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED  
CASE HEARING**

**§55.201**

**Statutory Authority**

The amendment is proposed 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 proposed 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 proposed amendment implements HB 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(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, except as provided in accordance with §331.108 of this title (relating to Independent Third-Party Experts). [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 Restoration);]

[(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.]