

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §39.651.

### **Background and Summary of the Factual Basis for the Proposed Rule**

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The proposed amendment to §39.651 implements the requirements of HB 655 for providing public notice for an individual injection well permit application for an ASR injection well.

There are no requirements for providing individual public notice on ASR injection wells that are authorized by rule.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes revisions to 30 TAC Chapter 295, Water Rights, Procedural; Chapter 297, Water Rights, Substantive; and Chapter 331, Underground Injection Control.

### **Section Discussion**

The commission proposes to amend §39.651 to implement the public notice

requirements in Texas Water Code (TWC), §27.153(d). With the proposed revisions, an application for a permit for a Class V injection well, including a Class V permit for an ASR well, would be subject to similar public notice requirements for a nonhazardous Class I or Class III injection well permit. These requirements include providing mailed notice to any groundwater conservation district located in the same county as the proposed injection well and newspaper publication requirements. Section 39.651(c)(4) is proposed to be amended to add "Class V" to include Class V injection well permit applications in the requirements for the Notice of Receipt of Application and Intent to Obtain a Permit. Section 39.651(d)(4) and (6) is proposed to be amended to add "Class V" to include Class V injection well permit applications in the requirements for the Notice of Application and Preliminary Decision. Section 39.651(f)(3)(B) is proposed to be amended to add "Class V" to include Class V injection well permit applications in the requirements for a notice of hearing.

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

Jeffrey Horvath, 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 or for other units of state or local government as a result of the administration or enforcement of the proposed rule.

The proposed rule implements HB 655. HB 655 amended TWC, Chapters 11, 27, and 36,

regarding regulation of ASR projects. In corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes revisions to 30 TAC Chapters 295, 297, and 331. This fiscal note applies only to the proposed changes to Chapter 39.

ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. ASR allows the operator to utilize an existing aquifer as a storage reservoir rather than using aboveground storage options. The stored water can be available for public or private drinking water supplies, agriculture, or industrial uses. The operator must assure that the aquifer formation receiving the injected water has appropriate geologic and hydrologic properties that are amenable to injection and will allow the control or containment of the injected water. The operator must also assure that the injection will not pollute the native groundwater already in the aquifer or other underground sources of drinking water. TCEQ's Underground Injection Control program regulates the authorization, construction, operation, and closure of the injection wells used for ASR projects.

HB 655 revised TWC statutory provisions under which an application for an individual permit for an ASR project is subject to public notice. The HB 655 requirements are added in the proposed revisions to §39.651 and would now include individual permit

applications for Class V injection wells as being subject to public notice requirements.

The proposed rule would require TCEQ to mail notice of an application for an ASR individual permit to all persons who own property adjacent to the proposed ASR project and to all persons who own mineral rights on property adjacent to the proposed project. TCEQ will bear the costs of mailing these notices. These costs are not anticipated to be significant. ASR projects may also be authorized by rule. Since authorizations by rule do not have public notice requirements and most applicants are expected to apply for an ASR authorization by rule process rather than seek an individual permit, any costs to the agency to implement the proposed rule should be minimal.

Municipalities or other entities providing water supplies that use or intend to use ASR for storage of water may be affected by the changes to Chapter 39. If one of these entities chooses to obtain authorization for an ASR project under an individual permit, they will have to provide the TCEQ with the names and addresses of all adjacent landowners and mineral owners. Obtaining this information would be at some cost, depending on the number of adjacent landowners and mineral owners. However, TCEQ anticipates that this cost will be minimal in relation to the total cost of an ASR project and that most applicants will apply for an ASR authorization by rule process rather than seek an individual permit. Because notice requirements are not associated with authorization-by-rule applications, municipalities or other local governmental entities who apply for

authorization-by-rule would not be affected by the proposed rule.

### **Public Benefits and Costs**

Mr. Horvath has 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 would be compliance with state law and the implementation of a process for authorizing ASR projects which are a recognized strategy for alleviating the effects of prolonged drought and for ensuring adequate water supplies.

No significant fiscal implications are anticipated for businesses or individuals as a result of the administration or enforcement of the proposed rule. Anyone who applies for authorization for an ASR project under an individual permit would have to comply with the proposed notice requirements in §39.651. Compliance would require the applicant to supply to the TCEQ the names and addresses of all persons who own property adjacent to the proposed ASR project, and the names and addresses of all persons who own mineral rights on these adjacent property. Obtaining this information would be at some cost, depending on the number of adjacent landowners and mineral owners. However, TCEQ anticipates that this cost will be minimal in relation to the total cost of an ASR project and that most applicants will apply for an ASR authorization by rule rather than seek an individual permit. Because notice requirements are not associated with authorization-by-rule applications, entities who apply for an authorization-by-rule

would not be affected by the proposed rule.

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

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule would have the same effect on a small business as it does on a large business. The proposed rule would require the applicants for an ASR individual permit to supply to the TCEQ the names and addresses of all persons who own property adjacent to the proposed ASR project, and the names and addresses of all persons who own mineral rights on these adjacent property. Obtaining this information would be at some cost, depending on the number of adjacent landowners and mineral owners. However, TCEQ anticipates that most applicants will apply for an ASR authorization by rule rather than seek an individual permit, and because notice requirements are not associated with authorization-by-rule applications, small or micro-businesses are not expected to be affected by the proposed rule.

### **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 necessary in order to comply with state law and does not adversely affect small or micro-businesses 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 action in light of 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. "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 action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects. The proposal does not meet the definition of "major environmental rule" because the rulemaking does not 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. The proposed rule

implements public notice requirements for certain injection well permit applications associated with ASR projects, consistent with the requirements of HB 655.

Furthermore, the proposed rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The proposed rule does not exceed a standard set by federal law, because the proposed rule is consistent with applicable federal standards regarding public notice required for injection well permit applications. The proposed rule does not exceed an express requirement of state law because it is consistent with the express requirements of HB 655 and TWC, Chapter 27, Subchapter G. The proposed rule does not exceed requirements set out in the commission's Underground Injection Control program authorized for the state of Texas under the federal Safe Drinking Water Act. The rulemaking is not proposed under the general powers of the agency and is proposed under the express requirements of HB 655 and TWC, §§27.019, 27.153, and 27.154.

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 this rulemaking action and performed a preliminary

assessment of whether Texas Government Code, Chapter 2007 is applicable. The proposed action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects.

The proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed rule is procedural and would establish public notice requirement for certain injection well permit applications associated with ASR projects, consistent with the requirements of HB 655. The proposed rule does not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), 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.

### **Consistency with the Coastal Management Program**

The commission reviewed the proposed rule and found that it is neither identified in Coastal Commission 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 January 22, 2016, 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 Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Ms. Kris Hogan, 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://www1.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 2015-022-331-WS. The comment period closes on February 8, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at [http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact David Murry, Radioactive Materials Division, (512) 239-6080.

**SUBCHAPTER L: PUBLIC NOTICE OF INJECTION WELL AND OTHER  
SPECIFIC APPLICATIONS**

**§39.651**

**Statutory Authority**

The amended section is proposed under the Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and TWC, §27.153, which requires the commission to adopt rules for authorization of aquifer storage and recovery injection wells by rule or by permit.

The amended section implements House Bill 655, 84th Texas Legislature, 2015, and TWC, Chapter 27, Subchapter G.

**§39.651. Application for Injection Well Permit.**

(a) Applicability. This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must be mailed to the mayor of the municipality.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain [a] Permit). This

notice must contain the text as required by §39.411(b)(1) - (9) and (11) of this title (relating to Text of Public Notice). Notice under §39.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, notice must be given to the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice must be in the form required by Texas Water Code, §5.115(c).

(4) For Notice of Receipt of Application and Intent to Obtain a Permit [notice of receipt of application and intent to obtain a permit] concerning Class I, [or] Class III, or Class V underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(6) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1) - (6) of this title. In addition to the requirements of §39.405(h) and §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county that is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice) and to local governments located in the county of the

facility. "Local governments" have the meaning as defined in Texas Water Code, Chapter 26.

(4) For Notice of Application and Preliminary Decision concerning Class I, or Class III, or Class V underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(6) The deadline for public comments on industrial solid waste, [or] Class III, or Class V injection well permit applications will be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If an application for a new hazardous waste facility is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(II) if the executive director determines that there is substantial public interest in the proposed facility.

(2) If an application for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is located to receive public comment on the application if a person affected files with the chief clerk a request for a public meeting

concerning the application before the deadline to file public comment or to file requests for reconsideration or hearing; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment on the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is located; or

(II) if the executive director determines that there is substantial public interest in the facility.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location in which the facility is located or proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location in which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(5) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters).

(6) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) Applicability. This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area that is adjacent or contiguous to each county in which the proposed facility is located.

(B) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(C) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). The notice must appear in the section of the newspaper containing state or local news items. The text of the notice must include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title.

(B) For notice of hearings concerning Class I, [or] Class III, or Class  
V underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility;

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(v) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(C) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed

under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) Radio broadcast. If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title.

(5) Deadline. Notice under paragraphs (2)(A), (3), and (4) of this subsection must be completed at least 30 days before the contested case hearing.

(g) Approval. All published notices required by this section must be in a form approved by the executive director prior to publication.