The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §331.11.

Amended §331.11 is adopted *without changes* to the proposed text as published in the December 31, 2021, issue of the *Texas Register* (46 TexReg 9189), and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking adoption implements House Bill (HB) 1284, 87th Texas Legislature, Regular Session (RS), 2021, addressing agency jurisdiction over regulation of injection and geologic storage of anthropogenic carbon dioxide (CO2) in Texas.

Class VI underground injection control (UIC) wells are authorized under the federal Safe Drinking Water Act and are used to inject anthropogenic CO2 into the subsurface for geologic sequestration and storage. Owners and operators of these wells must first obtain a permit from the United States Environmental Protection Agency (EPA) in order to inject and store anthropogenic CO2, unless EPA has delegated permitting jurisdiction, known as "primacy," to a state to issue such permits. Texas has primacy over the permitting of all other classes of UIC wells, but not over Class VI wells. Prior to HB 1284, Chapter 27 of the Texas Water Code (TWC) split jurisdiction over Class VI wells between the Railroad Commission of Texas (RRC) and the TCEQ, depending on the type of project producing the anthropogenic CO2 and the zone into which the

anthropogenic CO2 will be injected. In HB 1284, the legislature consolidated the jurisdiction over onshore and offshore Class VI UIC wells solely to the RRC and directed the RRC to apply for and obtain primacy of this permitting program from the EPA.

Although permitting of Class VI injection wells under HB 1284 is delegated solely to the RRC, the TCEQ will be required to issue a letter of determination to an applicant who is pursuing a Class VI permit from the RRC stating that Class VI injection operations will not impact or interfere with any previous or existing Class I injection well, including any associated waste plume, or any other injection well authorized or permitted by the TCEQ.

HB 1284 is effective immediately and was signed by Governor Abbott on June 9, 2021.

Section Discussion

HB 1284 amends Chapter 27 of TWC; Chapter 382 of the Texas Health and Safety Code (THSC); Chapter 121 of the Natural Resources Code (NRC); and Chapter 202 of the Tax Code to give sole jurisdiction of the Class VI injection activities to the RRC.

The commission adopts amendments to 30 Texas Administrative Code (TAC) §331.11 by removing subsection (d), which states “The commission has jurisdiction over the injection of carbon dioxide produced by a clean coal project into a zone that is below

the base of usable quality water and that is not productive of oil, gas, or geothermal resources."

Final Regulatory Impact Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code (TGC), §2001.0225, and determined that the action is not subject to TGC, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined by that statute. A "Major environmental rule" is 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 rule implements legislation (HB 1284, 87th Texas Legislature, RS, 2021) which consolidates the jurisdiction over onshore and offshore Class VI UIC wells solely to the RRC and directs the RRC to apply for and obtain primacy of this permitting program from the EPA. The adopted rule implements this change in jurisdiction and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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. Existing requirements for the management of underground injection wells in 30 TAC Chapter 331 are not changed by this adopted rulemaking.

As defined in TGC, §2001.0225(a) only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general authority of the commission. The adopted rule does not exceed an express requirement of state law or a requirement of a delegation agreement as there are no express requirements for underground injection control wells. These rules were not developed solely under the general powers of the agency as they are consistent with HB 1284, Chapter 27 of the TWC, Chapter 382 of THSC, Chapter 121 of the NRC, and Chapter 202 of the Tax Code. Therefore, this adopted rulemaking is not subject to the regulatory analysis provision of TGC, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis during the public comment period. Comments were not received on the regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether TGC, Chapter 2007, is applicable. The adopted rule implements

legislative requirements in HB 1284, which consolidates the jurisdiction over onshore and offshore Class VI UIC wells solely to the RRC and directs the RRC to apply for and obtain primacy of this permitting program from the EPA.

The adopted rule will be neither a statutory nor a constitutional taking of private real property. The adopted rule does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under TGC, §2207.002(5). The adopted rule does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this adopted rulemaking action will not constitute a taking under TGC, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found 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. Comments were not received regarding the CMP.

Public Comment

The commission held a public hearing on January 25, 2022. The comment period closed on February 1, 2022. The commission received comments from Carbon Neutral Coalition, Carrizo Comecrudo Tribe of Texas, Texas 2036, and an individual.

Carbon Neutral Coalition and Texas 2036 were in support of the rulemaking. Carrizo Comecrudo Tribe of Texas and the individual were opposed to the rulemaking. Changes to the rulemaking were not suggested by any of the commenters.

Response to Comments

Comment

Carbon Neutral Coalition and Texas 2036 commented in support of the rulemaking.

Response

The commission acknowledges these comments.

Comment

Carrizo Comecrudo Tribe of Texas and an individual commented that they oppose the action taken by the legislature, passing HB 1284 and amending Chapter 382 of THSC, Chapter 121 of the Natural Resources Code, Chapter 202 of the Tax Code, and Chapter 27 of TWC, which grant jurisdiction over Class VI UIC activities to the RCC and instruct the RRC to seek primacy over Texas' Class VI UIC Program. The commenters therefore

oppose the rulemaking.

Response

This rulemaking implements the statutory provisions enacted by the legislature by revising an existing rule to be consistent with the jurisdiction granted by the legislature. The actions of the legislature are outside of TCEQ's jurisdiction and the scope of this rulemaking.

SUBCHAPTER A: GENERAL PROVISIONS

§ 331.11

Statutory Authority

The amended rule is adopted under TWC §5.013, which establishes the general jurisdiction of the commission; TWC §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC; TWC §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under TWC and other laws of the state; and TWC §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells.

The rulemaking implements House Bill 1284, 87th Texas Legislature, RS, 2021; TWC Chapter 27; Texas Health and Safety Code Chapter 382; Natural Resources Code §121.003; and Tax Code §202.0545, which consolidate the jurisdiction over onshore and offshore Class VI UIC wells solely to the Railroad Commission of Texas (RRC) and direct the RRC to apply for and obtain primacy of this permitting program from the Environmental Protection Agency.

§ 331.11. Classification of Injection Wells.

(a) Injection wells within the jurisdiction of the commission are classified as follows.

(1) Class I:

(A) wells used by generators of hazardous wastes or owners or operators of hazardous waste management facilities to inject hazardous waste, other than Class IV wells;

(B) other industrial and municipal waste disposal wells which inject fluids beneath the lower-most formation which within 1/4 mile of the wellbore contains an underground source of drinking water (USDW); and

(C) radioactive waste disposal wells which inject fluids below the lower-most formation containing a USDW within 1/4 mile of the wellbore.

(2) Class III. Wells which are used for the extraction of minerals, including:

(A) mining of sulfur by the Frasch process; and

(B) solution mining of minerals which includes sodium sulfate, sulfur, potash, phosphate, copper, uranium and any other minerals which can be mined by this process.

(3) Class IV. Wells used by generators of hazardous wastes or of radioactive wastes, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous wastes or radioactive wastes into or above a formation which within 1/4 mile of the wellbore contains a USDW.

(4) Class V. Class V wells are injection wells not included in Classes I, II, III, or IV. Generally, wells covered by this paragraph inject nonhazardous fluids into or above formations that contain USDWs. Except for Class V wells within the jurisdiction of the Railroad Commission of Texas, all Class V injection wells are within the jurisdiction of the commission and include, but are not limited to:

(A) air conditioning return flow wells used to return to the supply aquifer the water used for heating or cooling in a heat pump;

(B) closed loop injection wells which are closed system geothermal wells used to circulate fluids including water, water with additives, or other fluids or gases through the earth as a heat source or heat sink;

(C) large capacity cesspools or other devices that receive greater than 5,000 gallons of waste per day, which have an open bottom and sometimes have perforated sides;

(D) cooling water return flow wells used to inject water previously used for cooling;

(E) drainage wells used to drain surface fluid, primarily storm runoff, into a subsurface formation;

(F) drywells used for the injection of wastes into a subsurface formation;

(G) recharge wells used to replenish the water in an aquifer;

(H) salt water intrusion barrier wells used to inject water into a freshwater aquifer to prevent the intrusion of salt water into the fresh water;

(I) sand backfill wells used to inject a mixture of water and sand, mill tailings, or other solids into mined out portions of subsurface mines;

(J) septic systems designed to inject greater than 5,000 gallons per day of waste or effluent;

(K) subsidence control wells (not used for the purpose of oil or natural gas production) used to inject fluids into a non-oil or gas producing zone to reduce or eliminate subsidence associated with the overdraft of fresh water;

(L) wells used for the injection of water for storage and subsequent retrieval for beneficial use as part of an aquifer storage and recovery project;

(M) motor vehicle waste disposal wells which are used or have been used for the disposal of fluids from vehicular repair or maintenance activities, such as an automotive repair shop, auto body shop, car dealership, boat, motorcycle or airplane dealership, or repair facility;

(N) improved sinkholes;

(O) aquifer remediation wells, temporary injection points, and subsurface fluid distribution systems used to inject nonhazardous fluids into the subsurface to aid in the remediation of soil and groundwater; and

(P) subsurface fluid distribution systems.

(b) Class II wells and Class III wells used for brine mining fall within the jurisdiction of the Railroad Commission of Texas.

(c) Baseline wells and monitor wells associated with Class III injection wells within the jurisdiction of the commission are also subject to the rules specified in this chapter.