

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

Background and Summary of the Factual Basis for the Proposed Rule

This rulemaking 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.

The Act 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 proposes to amend 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.”

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated would be compliance with state law and the potential for a more streamlined application and permit approval process for Class VI injection well programs. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first

five years that the proposed rule is in effect. The amendment would apply statewide and have the same effect in rural communities as in urban communities

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking removes 30 TAC §331.11(d) and its applicability to certain individuals. The proposed

rulemaking would not create a new regulation or expand, limit, or repeal an existing rule. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis

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 proposed amendment 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 proposed 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 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 proposed amendment 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 rulemaking is not subject to the regulatory analysis provision of TGC, §2001.0225(b).

The Commission invites public comment regarding the Draft Regulatory Impact Analysis during the public comment period. Written comments on the Draft Regulatory Impact Analysis 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 TGC, Chapter 2007, is applicable. The proposed amendment 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 proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed amendment 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 proposed rule does not directly prevent a nuisance or prevent an immediate threat to life or property.

Therefore, this rulemaking action would not constitute a taking under TGC, Chapter 2007.

Consistency with the Coastal Management Program

The Commission reviewed the proposed rule and found it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would 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.

Virtual Public Hearing

The commission will hold a virtual public hearing on this proposal on January 25, 2022, at 10:00 a.m. 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 virtual hearing; however, Commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Registration

The hearing will be conducted remotely using an internet meeting service. Individuals who plan to attend the hearing and want to provide oral comments and/or want their attendance on record must **register by January 24, 2022**. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on January 24, 2022, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_YzFiMTViZDMtMTlINC00NDRmLTgwNWYtNzA0ZGE4N2JiYTiz%40tHread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%2230ec010b-ff0b-4618-bbc4-622a14f9cb18%22%2c%22IsBroadcastMeeting%22%3atru%7d&btype=a&role=a.

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.

Written Comments

Written comments may be submitted to Cecilia Mena, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to fax4808@tceq.texas.gov. Electronic comments may be submitted at <https://www6.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 2021-025-331-WS. The comment period closes on February 1, 2022. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Dan Hannah, Radioactive Materials Division at (512) 239-2161.

SUBCHAPTER A: GENERAL PROVISIONS

§ 331.11

Statutory Authority

The amended rule is proposed under Texas Water Code (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 RRC and direct the RRC to apply for and obtain primacy of this permitting program from the EPA.

§ 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.

[(d) 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.]