

The Texas Commission on Environmental Quality (TCEQ, agency or commission) adopts amendments to §55.101 and §55.201 *without changes* to the proposed text as published in the March 14, 2008 issue of the Texas Register (33 *TexReg* 2122) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking implements House Bill (HB) 2654, 80th Legislature, 2007. HB 2654 amended Texas Water Code (TWC), §27.021 and added new TWC, §27.023 to allow the commission to issue a general permit authorizing the use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. These legislative changes are intended to promote desalination technology and address the need for public water supply systems to dispose of drinking water treatment residuals. To implement HB 2654, this rulemaking amends §55.101(f) and §55.201(i).

The amended rules add two new types of applications and actions to a listing of applications that the commission may act on without holding a contested case hearing. This listing is in §55.101(f). There are two paragraphs under §55.101(f) that are affected by the adopted amendments. First, the amendment to §55.101(f)(4) updates the list of applications that are not subject to a contested case hearing by adding an application for a Class I injection well used only for the disposal of nonhazardous drinking water treatment residuals. This exception is in addition to the exception for applications for disposal of desalination brine which was added by a previous rulemaking in the September 10, 2004 issue of the *Texas Register* (29 *TexReg* 8817). Amendment of §55.101(f)(4) also includes updates to reflect use of the term "nonhazardous brine from a desalination operation" instead of "desalination brine," and inserts

the word "injection" into the phrase "Class I injection wells," to achieve consistency with the title of TWC, §27.021 as amended by HB 2654.

Second, a new paragraph has been inserted as §55.101(f)(5) with renumbering of the subsequent paragraph. The new paragraph implements part of TWC, §27.023 in HB 2654 that allows the commission to issue a general permit authorizing a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals, without providing the opportunity for a contested case hearing, as long as all requirements for a Class I injection well permit are met. Public notice of, and the opportunity to comment on, a permit application will not be affected by this rulemaking. Removing the opportunity for a contested case hearing may expedite the approval of Class I injection well permits for the disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals. The commission's ability to hold a discretionary hearing under the provisions of TWC, §5.102(b) was not amended by HB 2654.

Amendments to 30 TAC Chapters 50, 305 and 331 are also adopted in this issue of the *Texas Register* to implement HB 2654 and to incorporate other changes to facilitate disposal of nonhazardous desalination brine and nonhazardous drinking water treatment residuals.

SECTION BY SECTION DISCUSSION

§55.101. Applicability.

The adopted rules amend §55.101(f)(4) by adding a permit application for a Class I injection well used only for the disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals to the list of applications upon which the commission may act without holding a contested case

hearing. The rules add §55.101(f)(5) to include 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 in the list of items upon which the commission may act without holding a contested case hearing. Current paragraph §55.101(f)(5) is renumbered as paragraph (6). Adopted §55.101(f)(5) implements part of TWC, §27.023 in HB 2654 that allows the commission to issue a general permit authorizing a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals, without providing the opportunity for a contested case hearing.

§55.201. Subchapter F, Requests for Reconsideration or Contested Case Hearing.

The adopted rules amend §55.201(i)(6) by adding a permit application for a Class I injection well used only for the disposal of nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals to the list of applications for which there is no right to a contested case hearing. The adopted rule adds §55.201(i)(7) to include 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 in the list of items for which there is no right to a contested case hearing. Current paragraphs (7) - (9) are renumbered as paragraphs (8) - (10), respectively.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that 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. This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not intended to reduce risks to human health from environmental exposure, nor does it 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 intent of this rulemaking is to implement HB 2654, passed during the 80th Legislature, 2007, and to revise criteria for authorizing Class I nonhazardous wells injecting desalination concentrate and other water treatment residuals from public water systems so that the state's rules are no more stringent than federal Class I nonhazardous injection well regulations. The specific intent of the amendments to Chapter 55 is to address certain procedural rights regarding applications for Class I injection well permits used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well authorized to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. The rule substantially advances this purpose by adding notices of intent submitted under §331.203 to the applicability of Chapter 55, Subchapters D - G and by adding to the list of actions for which there is no right to a contested case hearing applications for a Class I injection well permit used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well used only for the disposal of nonhazardous brine from desalination operations or drinking water treatment residuals.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the amendments would not adversely 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. It is not anticipated that the cost of complying with the amendment will be significant with respect to the economy; therefore, the amendments will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking 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. This rulemaking does not meet any of these four applicability requirements because this rulemaking does not exceed any standard set by federal law but rather amends the rules so that they are no more stringent or restrictive than the federal regulations. The rules adopted do not exceed the requirements of state law under TWC, Chapter 27. Further, the rules adopted do not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program. Finally, the rule is not adopted solely under the general powers of the agency, but rather specifically under TWC, §27.023(m), which allows the commission to adopt rules to implement the general permit authorizing use of a Class I injection well to inject nonhazardous brine from desalination operations or nonhazardous drinking water

treatment residuals and TWC, §27.109, which authorizes the commission to adopt rules to implement TWC, Chapter 27, as well as the other general powers of the agency.

The commission invited public comment regarding the Regulatory Impact Analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the amendments to Chapter 55 and performed an assessment of whether the amendments would constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the amendments is to implement HB 2654, authorizing use of a general permit for Class I injection wells injecting only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. The amendments substantially advance this purpose by amending §55.201 to add to the list of actions for which there is no right to a contested case hearing applications for a Class I injection well permit used only for the disposal of drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well used only for the disposal of nonhazardous brine from desalination operations or drinking water treatment residuals.

Promulgation and enforcement of the amendments constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rulemaking because the amendments neither relate to, nor have any impact on the use or enjoyment of private real property, and there would be no reduction in property value as a result of this rulemaking. Therefore, the adopted rules would not constitute a taking under Texas Government Code, Chapter 2007.

The commission has no reasonable alternative that could accomplish the specific purpose of addressing certain procedural rights regarding applications for Class I injection well permits used only for the disposal of nonhazardous desalination concentrate or drinking water treatment residuals and the issuance, amendment, renewal, suspension, revocation or cancellation of a general permit or authorization under a general permit for a Class I injection well authorized to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals. These procedural issues regarding permit applications and notices of intent can only be affected through amendments to the commission's rules.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

The proposal was published in the March 14, 2008 issue of the *Texas Register* (33 *TexReg* 2122). The commission held a public hearing in Austin on April 8, 2008. The comment period closed on April 14, 2008. No comments pertaining to the proposed amendments to Chapter 55 were received.

SUBCHAPTER D: APPLICABILITY AND DEFINITIONS

§55.101

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

§55.101. Applicability.

(a) Subchapters D - G of this chapter (relating to Applicability and Definitions; Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) apply to permit applications that

are declared administratively complete on or after September 1, 1999, as specified in subsections (b) - (g) of this section.

(b) Subchapters D - G of this chapter apply to public comments, public meetings, hearing requests, and requests for reconsideration.

(c) Subchapters D - F of this chapter apply only to applications filed under Texas Water Code, Chapters 26, 27, and 32 and Texas Health and Safety Code, Chapters 361 and 382.

(d) Subchapter G of this chapter applies to all applications other than those listed in subsection (e) of this section and other than those filed under Texas Water Code, Chapters 26, 27, and 32 and Texas Health and Safety Code, Chapters 361 and 382.

(e) Subchapters D - F of this chapter apply to applications for amendment, modification, or renewal of air quality permits 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 not seek further public comment or hold a public hearing under the procedures provided by §39.419 of this title (relating to Notice of Application and Preliminary Decision), §55.156 of this title (relating to Public Comment Processing), and Subchapter F of this chapter for such applications. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(f) Subchapters D - G of this chapter do not apply to hearing requests related to:

(1) applications for emergency or temporary orders;

(2) applications for temporary or term permits for water rights;

(3) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Permits By Rule) except for construction of concrete batch plants which are not temporarily located contiguous or adjacent to a public works project;

(4) applications for Class I injection well permits 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;

(5) 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; and

(6) applications where the opportunity for a contested case hearing does not exist under other laws.

(g) Subchapters D - G of this chapter do not apply to:

(1) applications for sludge registrations and notifications under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation);

(2) applications for authorization under Chapter 321 of this title (relating to Control of Certain Activities by Rule) except for applications for individual permits under Subchapter B of that chapter;

(3) applications for registrations under Chapter 330 of this title (relating to Municipal Solid Waste);

(4) applications for registrations and notifications under Chapter 332 of this title (relating to Composting);

(5) applications under Texas Water Code, Chapter 13 and Texas Water Code, §§11.036, 11.041, or 12.013. The executive director shall review hearing requests concerning applications filed under these provisions, determine the sufficiency of hearing requests under standards specified by law, and may refer the application to the chief clerk for hearing processing. The maximum expected duration of a hearing on an application referred to the State Office of Administrative Hearings under this provision

shall be no longer than one year from the first day of the preliminary hearing, unless otherwise directed by the commission. The issues to be considered in a State Office of Administrative Hearings hearing on an application subject to this provision are all those issues that are material and relevant under the law;

(6) applications under Chapter 122 of this title (relating to Federal Operating Permits Program);

(7) applications for initial issuance of voluntary emissions reduction permits under Texas Health and Safety Code, §382.0519;

(8) applications for initial issuance of permits for electric generating facility permits under Texas Utilities Code, §39.264;

(9) air quality standard permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(10) applications for multiple plant permits under Texas Health and Safety Code, §382.05194;

(11) applications for pre-injection unit registrations under §331.17 of this title (relating to Pre-Injection Units Registration); and

(12) applications where the opportunity for a contested case hearing does not exist under other laws.

SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

§55.201

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.023, which allows the commission to adopt rules as necessary to implement and administer a general permit authorizing the use of Class I injection wells to inject nonhazardous brine from desalination operations or nonhazardous drinking water treatment residuals.

The adopted amendment implements TWC, §27.023, relating to General Permit Authorizing Use of Class I Injection Wells to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, and TWC, Chapter 27.

§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 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, and the public interest counsel, 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); or

(C) 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; and

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law.