

The Texas Commission on Environmental Quality (commission) proposes new §§37.9245, 37.9250, 37.9255, 37.9260, and 37.9265.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Senate Bill (SB) 1037, 80th Legislature, 2007, amended Subchapter D, Chapter 26 of the Texas Water Code (TWC), by adding §26.132. SB 1037 requires the commission to develop standards to prevent the contamination of ground and surface water resources from brine evaporation pit operations. SB 1037 requires an owner or operator to provide financial assurance to ensure satisfactory facility closure and obtain pollution liability insurance covering bodily injury and property damage to third parties.

A corresponding rulemaking is published in this issue of the *Texas Register* and includes the addition of proposed new 30 TAC Chapter 218, Brine Evaporation Pits.

#### SECTION BY SECTION DISCUSSION

The commission proposes new Chapter 37, Subchapter X, Financial Assurance Requirements for Brine Evaporation Pits, to describe the financial assurance requirements for brine evaporation pits required by §218.35, Financial Assurance. Proposed new §37.9245, Applicability, indicates who is subject to the financial assurance requirements of the new subchapter.

Proposed new §37.9250, Definitions, references Subchapter A of Chapter 37 as well as Chapter 218.

Since mechanism wordings all refer to the term "facility" rather than "brine evaporation pits" as used in Chapter 218, this section clarifies that the two terms shall be synonymous for financial assurance purposes. This is not meant to affect or change usage of the term "brine evaporation pits" in Chapter 218.

Proposed new §37.9255, Submission of Documents, requires that financial assurance mechanisms be submitted prior to permit issuance for new facilities or within 180 days of the effective date of the rules for existing facilities. For either case, the executive director may provide written permission for an alternate deadline at his discretion.

Proposed new §37.9260, Financial Assurance Requirements for Closure and Post Closure of Brine Evaporation Pits, subsection (a) specifies the requirements and associated framework for the financial assurance mechanisms for closure and post closure. Since these requirements are common to many of the financial assurance programs, cross reference is made to existing Subchapters A - D. The section also specifies that §37.31 does not apply to brine evaporation pit owners and operators since some brine evaporation pits are already in existence and could not comply with a requirement to provide a mechanism 60 days prior to receipt of waste. Section 37.9255 provides the submittal timing requirements for brine evaporation pits. Proposed new §37.9255(b) establishes the financial assurance mechanisms that will be allowed by cross referencing to existing Subchapter C. Pay in trusts are not proposed as an acceptable financial assurance mechanism since payment into a trust over time would not assure that financial assurance is adequate to ensure satisfactory closure of the brine evaporation pit as required by SB 1037. Only after the trust was fully funded could closure be assured by adequate funding.

Proposed new §37.9265, Third Party Pollution Liability Requirements for Brine Evaporation Pits, addresses the requirements for third party pollution liability insurance coverage. Subsection (a) describes the minimum required amount of insurance coverage, the minimum standards for an insurance company providing the coverage and establishes what constitutes proof of coverage. Subsection (b) requires that if

an endorsement rather than a certificate of insurance is chosen to provide the proof, then the insurance policy must be amended by the Endorsement of Liability. Finally, subsection (c) makes certain definitions in §37.402 regarding the terms of liability insurance applicable to brine evaporation pit owners providing third party pollution liability insurance. Section 37.411 provides that the executive director may amend the amount of third party pollution liability insurance based on the risk associated with each individual brine evaporation pit.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

The proposed rules implement the provisions of SB 1037, 80th Legislature, Regular Session. SB 1037 requires the agency to develop standards and rules to prevent the contamination of ground and surface water resources from brine evaporation pit operations. The agency is proposing new Chapter 218 that includes criteria for the design, construction, location, operation, maintenance, closure, and post closure of brine evaporation pits. In addition, the proposed Chapter 218 rules address concerns regarding storm water controls, require owners or operators to obtain financial assurance to ensure satisfactory pit closure and post closure, and require owners or operators to obtain insurance to cover bodily injury and property damage to third parties. The fiscal implications of proposed new Chapter 218 are contained in a separate fiscal note. The proposed rules for Chapter 37, Subchapter X specify the different options available to an owner or operator of a brine evaporation pit in obtaining financial assurance. These proposed rules are

administrative in nature and are not expected to have a fiscal impact on a local government or other regulated entities.

The agency does not know of any local governments or businesses that are currently operating such pits, although one small business has had activity in the past. The agency does not expect any local governments or businesses to operate such pits in the future.

#### PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater flexibility in obtaining financial assurance for regulated entities that may choose to operate brine evaporation pits. Flexibility in obtaining financial assurance will encourage future owners of these pits to ensure adequate financial resources are in place to cover clean up costs should that activity be needed in the future.

The agency does not know of any businesses or individuals that are currently operating brine evaporation pits. The proposed rules are administrative in nature and offer options of what types of financial assurance may be obtained. The proposed rules have no fiscal implications for businesses or individuals.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that own or operate a brine evaporation pit as a result of the proposed rules which are administrative in nature and provide options regarding the types of financial assurance that can be obtained in complying with rules regarding brine

evaporation pits in Chapter 218. These proposed rules in Chapter 37 have no fiscal implications for small or micro-businesses.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that the proposed rules have no fiscal implications for small or micro-businesses. The commission is required to consider alternative regulatory methods only if the proposed rules would adversely affect small or micro-businesses and alternative methods would be consistent with the health, safety, and environmental, and economic welfare of the state. The commission has developed these proposed rules in accordance with a legislative mandate and they have no adverse affect on small or micro-businesses. Consequently, no alternative methods have been considered.

#### 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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of "major environmental rule" as defined in the 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 rules are part of a larger proposal to implement rules for the regulation of brine evaporation pits. The corresponding rulemaking is published in this issue of the *Texas Register*, proposed Chapter 218, Brine Evaporation Pits. The specific intent of the proposed rules in Chapter 37 is to prescribe the manner in which an owner or operator of a brine evaporation pit may meet the third party liability pollution insurance and financial assurance requirements under proposed Chapter 218. Furthermore, the proposed rules are administrative in nature and will not 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 commission concludes that the proposed rulemaking does not meet the definition of a major environmental rule.

In addition to the fact that the proposed rulemaking does not meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Subsection (a) applies only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) was adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards governing the operation of commercial brine evaporation pits. Second, the proposed rulemaking is required by SB 1037 and does not exceed its requirements. Third, the proposed rulemaking does not 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. Finally, the proposed rulemaking will be adopted under the express authority of SB 1037, that expressly requires the commission to adopt any rules required to implement the act. Therefore, the rules are not adopted solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination. 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 these proposed rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The commission determined that the proposed rulemaking does not constitute a taking. The specific purpose of the proposed new rules is to prescribe the manner in which an owner or operator of a brine evaporation pit may meet the third party liability pollution insurance and financial assurance requirements under proposed Chapter 218. The proposed new rules substantially advance this stated purpose by delineating the insurance company rating, amount of coverage, and documentation required for acceptable third party pollution liability insurance and setting forth various options for obtaining adequate financial assurance.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by state

law, which is exempt under Texas Government Code, §2007.003(b)(4). SB 1037 mandates that the commission adopt rules implementing the act.

Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed amendments is to prescribe the manner in which an owner or operator of a brine evaporation pit may meet the third party liability pollution insurance and financial assurance requirements under proposed Chapter 218. The proposed rules substantially advance this stated purpose by delineating the insurance company rating, amount of coverage, and documentation required for acceptable third party pollution liability insurance and setting forth various options for obtaining adequate financial assurance.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden, nor restrict or limit the owner's right to real property in addition to reducing its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The proposed rules are administrative in nature, and will not affect private real property.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed 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 proposed rules are not subject to the Texas Coastal Management Program.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on June 24, 2008 at 10:00 am in Room 201 of Building B, 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 Kristin Smith, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Kristin Smith, 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.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-034-218-PR. The comment period closes on July 6, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at

*[http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html)*. For further information, please contact Mr.

David W. Galindo, Wastewater Permitting Section at (512) 239-0951.

**SUBCHAPTER X: FINANCIAL ASSURANCE REQUIREMENTS  
FOR BRINE EVAPORATION PITS**

**§§37.9245, 37.9250, 37.9255, 37.9260, 37.9265**

STATUTORY AUTHORITY

The new rules are proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103, which requires the commission to adopt any rule 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 adopt rules as necessary to carry out its powers and duties under the TWC; TWC, §26.011, which authorizes the commission to adopt any rules necessary to protect the quality of water in the state; and TWC, §26.132 as amended by the 80th Legislature, which grants the commission the rulemaking authority to adopt rules requiring the owner or operator of a brine evaporation pit to provide the commission with proof of adequate financial assurance to ensure satisfactory closure of the facility and obtain pollution liability insurance covering bodily injury and property damage to third parties.

The new rules implement TWC, §§5.013, 5.102, 5.103, 5.105, 26.011, and 26.132.

**§37.9245. Applicability.**

This subchapter applies to owners and operators of brine evaporation pits required to provide evidence of financial assurance under Chapter 218 of this title (relating to Brine Evaporation Pits). This

subchapter does not apply to state or federal governmental entities whose debts and liabilities are the debts and liabilities of a state or the United States. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure and third party pollution liability.

**§37.9250. Definitions.**

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements) and Chapter 218 of this title (relating to Brine Evaporation Pits), except the term "brine evaporation pit" shall mean the same as "facility" for purposes of this subchapter.

**§37.9255. Submission of Documents.**

An owner or operator required by this subchapter to provide financial assurance must submit an originally signed financial assurance mechanism for closure, post closure and third party pollution liability coverage.

(1) For new facilities, owners or operators shall submit the originally signed financial assurance mechanism:

(A) prior to permit issuance; or

(B) as otherwise approved in writing by the executive director.

(2) For facilities in existence upon the effective date of this section, owners or operators shall submit the originally signed financial assurance mechanism:

(A) within 180 days of the effective date of this section; or

(B) as otherwise approved in writing by the executive director.

**§37.9260. Financial Assurance Requirements for Closure and Post Closure of Brine Evaporation**

**Pits.**

(a) An owner or operator of a brine evaporation pit subject to this subchapter shall establish financial assurance for the closure and post closure of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A - D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action) except §37.31 of this title (relating to Submission of Documents) is not applicable.

(b) An owner or operator subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter C of this chapter to demonstrate financial assurance for closure except a pay-in trust fund may not be used.

**§37.9265. Third Party Pollution Liability Requirements for Brine Evaporation Pits.**

(a) An owner or operator subject to this subchapter shall establish and maintain financial assurance for third party pollution liability insurance covering bodily injury and property damage to third parties caused by accidental sudden or nonsudden occurrences arising from facility operations that:

(1) is issued by an insurance company authorized to do business in the state of Texas that has a rating by the A.M. Best Company of "A-" or better;

(2) is in an amount not less than \$3 million; and

(3) is evidenced by either an originally signed certificate of insurance worded identically to the wording specified in §37.631 of this title (relating to Certificate of Insurance for Liability) or an endorsement worded identically to the wording specified in §37.641 of this title (relating to Endorsement for Liability).

(b) If an endorsement as described within this section is used, the insurance policy shall be amended by the Endorsement for Liability.

(c) Owners and operators must also comply with §37.402 of this title (relating to Definitions), §37.404 of this title (relating to Liability Requirements for Sudden and Nonsudden Accidental Occurrences) and §37.411 (relating to Adjustments to the Level of Liability Coverage).