

INSIGHTS

## Texas Railroad Commission Proposes Regulation to Address Earthquake Risks from Disposal Wells

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In the August 29, 2014 issue of the Texas Register (39 Tex. Reg. 6775), the Railroad Commission of Texas proposed several amendments to the regulations governing saltwater and other oil and gas waste disposal (SWD) wells (16 T.A.C. § 3.9 and § 3.46). If adopted as proposed, the amendments would create an obligation for SWD well permit applicants to provide the Railroad Commission with additional information regarding seismic events.

Specifically, if the amendments are adopted, future applications would need to include information from the United States Geological Survey's (USGS's) website regarding the locations of any historical seismic events within the estimated radius of the ten-year, five-pounds-per-square-inch pressure front boundary of the disposal well location. The amendments also propose to authorize the Railroad Commission to require an applicant to provide additional information, such as logs, geologic cross-sections, and structure maps if the well is located in an area with complex geology or with a history of seismic events. The Commission could also request the submission of this additional information if there are concerns about proximity of the baserock to the injection interval or transmissive faults. The purpose of gathering this additional information is to demonstrate the injected fluids will remain confined in higher risk areas.

The amendments would also authorize the Commission to modify, suspend, or terminate an existing SWD well permit after providing notice and an opportunity for a hearing if the injection activity is suspected of causing seismic activity. Additionally, the proposal would allow the Commission to require more frequent monitoring and reporting of information related to injection pressures and injection rates.

The proposed amendments would only apply to SWD wells and would not apply to enhanced recovery wells. Comments on the proposed amendments may be submitted online and are due by noon on September 29, 2014.

### **Potential Impact of the Proposed Rule**

As described by the Railroad Commission in the preamble to this rule proposal, direct burdens on the regulated community from this rule should be comparatively limited. When permitting a SWD well, the applicant will be expected to produce significant additional information about the geology of the proposed well location, as well as information on the history of seismicity in the vicinity, to better demonstrate the appropriateness of the location and well design for purposes of confining injected waste to the intended injection interval. Since much of this information is publicly available from the USGS, the Railroad Commission estimates that additional costs to industry per well would be in the hundreds of dollars. While that estimate seems low, the direct impact of this rule would be to marginally increase the costs associated with preparing a permit application for a new SWD well.

In addition to those new obligations, the proposed rule would directly provide for the Commission to increase the frequency of monitoring of injection pressures and rates beyond the current monthly frequency, and to increase the frequency of related reporting. This obviously has the effect of multiplying monitoring and reporting costs, although again, those costs are not likely to be material to most companies in the SWD business.

The likely more important concerns for industry come less directly – from the discretion the rule will give the Commission (i) to terminate or modify an existing SWD permit if injection is “suspected of or shown to be causing seismic activity” and (ii) to deny applications for new SWD permits based on an unspecified level of seismic risk. The proposed rule provides no standard for how strong such a “suspicion” needs to be in order for the Commission to terminate a permit or how the agency is to exercise its discretion in approving or denying new SWD permits in light of the new information on geology and seismicity the Commission is now authorized to request. In the absence of some such standards, it may be hard for a permittee or an applicant to pursue a legal challenge to a Commission termination, modification, or denial. And with quake-related litigation on the rise, one can be certain that a Commission termination or modification of an SWD permit based on suspected or demonstrated seismicity could provide significant evidence in such a proceeding.

### **Railroad Commission's Continued Primacy for UIC Permitting**

The Commission's proposal comes against the backdrop of repeated calls by environmental advocacy groups for increased EPA oversight of state management of Underground Injection Control (UIC) programs and, in particular, the Class II wells at issue here. Since 1982, the Commission has maintained "primacy" for the UIC program under the federal Safe Drinking Water Act, implementing the Act's requirement and overseeing the regulated community in place of EPA. Significantly, this authorization includes Class II UIC wells utilized for oil and gas activities such as SWD and enhanced oil recovery operations. In total, the Commission has oversight over 50,000 Class II wells.

In their complaints, environmental advocacy groups typically allege that the increased domestic oil and gas activity combined with inadequate state programs pose a risk to drinking water supplies. These groups received a boost earlier this year when the Government Accountability

Office issued a report focusing on the adequacy of EPA's periodic reviews of the state programs. As we have seen with similar efforts involving Resource Conservation and Recovery Act (RCRA) state authorizations, environmental groups catalog individual instances of what they deem to be examples of environmental risks and damages and then present them in a cumulative report in support of an argument that state programs are lacking, ultimately calling for EPA to withdraw its state approvals and take over permitting efforts.

Just as the RCRA efforts targeted the oil and gas industry, so do their current focus on seismic events and the use of diesel in frac fluids. Arguably a state's primacy for UIC programs could be the subject of attack by EPA or a citizen suit under the SDWA for failing to enforce permitting requirements and protect underground sources of drinking water. By taking steps to better understand seismic events and incorporate a base level of considerations in its permitting process, the Railroad Commission has taken off the table a significant potential line of attack against its continued primacy. The proposed regulation discussed above makes clear that the Commission is taking a comprehensive look at potential risks to drinking water as part of its permitting program and will establish enforcement provisions should seismic concerns merit agency engagement. Moreover, by its recent hiring of a seismic expert, the Commission will build up crucial expertise and programmatic experience for considering the relationship, if any, between underground injection and seismicity - once again cementing the state's leadership position for the regulation of oil and gas activities and proactively protecting against federal and citizen suit overreach.

### **Next Steps**

While this proposed rule is less cumbersome than approaches to seismicity being considered in other states such as Ohio, industry should certainly consider how the Railroad Commission's discretion will be applied under the proposed rule, think carefully about how the rule might be improved, and participate in the public comment process which is open until September 29th.