SIERRA CLUB
LONE STAR CHAPTER

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Sent via Email to rulescoordinator@rrc.texas.gov

Re; Amend §3.8 and other rules in Chapter 3, and new and amended rules in Chapter 4 to update oil and gas waste management procedures and incorporate recent legislation

From: Cyrus Reed, Legislative and Conservation Director, Lone Star Chapter, Sierra Club, cyrus.reed@sierraclub.org

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The Lone Star Chapter of the Sierra Club is the state chapter of the Sierra Club, the nation's oldest and largest conservation organization. We frequently comment on proposed rules at the Railroad Commission related to oil and gas production, pipelines and other issues. We are also active in discussions at the state legislature where many policies, budgets and issues are discussed.

We have also been involved in the past about discussions involving waste pits and the need to modernize the regulations surrounding these locations, whether onsite at an oil and gas waste, or for more commercial purposes. As an example, we opposed the commercial waste pit that was authorized near Nordheim Texas, and supported legislation to require the use of more realistic flood protections for commercial waste pits. Locating commercial waste pits in areas prone to flooding or located near streams and rivers has real and dangerous consequences and the Sierra Club is supportive of efforts to better protect the public, the environment and water resources from wastes and recycling of the protects that occur from drilling and processing hydrocarbons.

While there are aspects of the rules proposed by the Commission that we do support, we also believe the proposal is too weak in many aspects and should be strengthened.

Overall, the Commission must: (1) Better protect human & environmental health from waste & recycling operations; (2) Make operators protect communities from bad practices; and (3) Improve the Commission & public's ability to enforce the rules.

As has been well documented by many individuals and organizations, the Sierra Club was also concerned about the way the rules were drafted with internal meetings between commission staff and the industry without corresponding meetings with other stakeholders. Thus, the Commission excluded the public, groundwater districts, localities & community groups from most of the drafting process. It rejected calls to hold public workshops across the state & instead consulted only industry for several years. It declined to solicit comments at times & locations accessible to the public. Stakeholders should not need to beg to be invited to the table during a rulemaking---the Commission should have welcomed the input of community members, community groups, localities, groundwater conservation districts, and other stakeholders from the start, as it has done in past rulemakings, or even in the discussion about how to reduced wasted methane.The Commission should have allowed for more meaningful participation before proposing these rules.

What we support in the rule

Before we get to areas of the rule that we believe should be strengthened, we do want to highlight what we appreciate. First, moving the provisions and new requirements to a new chapter (Chapter 4), thus consolidating many provisions in other chapters is a good idea and should improve transparency at the agency. We are also very supportive of the increased data that will finally be collected on on-lease pits. We also acknowledge that for certain types of pits, these rules are more protective than present rules, and we acknowledge strengthening many provisions as required by recent legislation such as HB 3516, including a requirement that the Commission establish minimum siting standards for fluid recycling pits, such as 1,000 feet from a resident. While we argue that these siting standards should be strengthened below, we do acknowledge that the proposed setbacks - and the new requirement that such a commercial facility can not be located in a 100-year floodplains is more protective than current rules.
We also believe the rules are responsive to legislative direction to encourage the reuse of produced water. Thus, the Legislature has directed the Commission to encourage fluid oil and gas waste recycling (House Bill 3516, 87th Legislature, 2021), and it has also created the Texas Produced Water Consortium (Senate Bill 601, 87th Legislature, 2021) to make recommendations to the Legislature on issues related to this potential activity. The Commission's rules need to address and support these developments. We recognize and support many of the rules related to this reuse within the oil and gas field and appreciate requirements to assure that the produced water does not "mix" with other wastes such as drill cuttings and commercial waste streams.

What should be strengthened

Public Participation

Require explicit surface landowner consent before a pit can be built and waste buried in it. A previous version of the rule would have required consent for a pit but this version does not. That seems fundamentally unfair to landowners.

The Commission should create a more participatory permit process

— require multiple notices, at least 30 days before an application or hearing, but also after an application is considered valid by the Commission.

— send notice to all residents, landowners & groundwater districts within at least one mile of a facility's property boundary;

— at hearings, let anyone ask questions, participate, present testimony, facts, or evidence

Create an electronic mailing list for all applications that anyone can join. The Texas Commission on Environmental Quality has such a list. As an example, the Sierra Club receives all notices related to wastewater discharge permits since we have many members concerned about projects.

Approving Suitable Projects

Don't presume a project will protect Texans & Texas; make them prove it. Applicants must bear the actual & financial responsibility to show with credible evidence that their projects will be safe. As is, it falls to the public to disprove this, which is costly & backwards. Don't let an applicant modify its application during a hearing — if it's deficient, deny it. We would note that in amendments proposed in §4.272 the Commission has added a presumption that an applicant's proposed location for an off-lease commercial fluid recycling facility does not present an unreasonable risk of pollution or threat to public health or safety if the permit application complies with §4.264(a). Again, we believe this is not protective and there may be a case where particular geography or geology might mean even complying with 4.264 (a) is not protective of public health and the environment. The applicant should have to prove it.

Increase setbacks from sensitive places. Negative effects extend beyond the setbacks proposed; sometimes over a mile. We would suggest doubling the proposed setbacks to 2,000 feet for residential premises as an example, and 1,000 feet from a public water system or well, and 1,000 feet from a wetland.

Improve design, operating & monitoring for all facilities. Groundwater investigations to 100 feet and monitoring should be required more often with
fewer exceptions—once polluted, groundwater is basically impossible to clean up.

• Liner requirements (when, what, and how to install) are still too lax, and for Schedule A pits, are basically non-existent. The rule would let pits that hold drilling muds, cuttings, or completion fluids avoid the permit process & not install a true liner even if groundwater exists just below the pit. This is not protective of the public health.

• Double lined pits are allowed to leak 1,000 gallons/day/acre or more, which is too much, and again can put undue burden on the environment and communities. This is 365,000 gal/year/acre, equivalent to nearly 40 tanker trucks of waste per year.

• More sampling should be required, by third-party labs, for all potential contaminants in the waste, including NORM.

As proposed, this rule would leave thousands of acres of waste in on-lease pits, with no testing to confirm that it is not harmful & won't harm property, waters, or wildlife.

Clean-up of contamination should be required. The rule generally fails to test to ecological and health-based limits even though the public and wildlife can be harmed from this waste.

Test waste before it's left onsite. This rule would leave 1,000s of acres of waste in on-lease pits, with no testing to confirm that it's not toxic & won't harm property, waters, or wildlife. Clean-up should be required.

Don't allow a broad swath of exceptions, especially without public input. Section 4.109 (and 4.205) would allow exceptions for anything other than financial security, notice, and sampling & analysis if the Commission finds the alternative is at least as protective of health and environment: i.e., siting, applications, design, construction, operation, closure, reporting, pilot programs, water protection, and waste hauling rules. Yet the rules don't allow for public input in these decisions. All operations seeking exceptions should go to a hearing where any interested person should be allowed to participate and provide relevant information. The rule should vastly narrow allowable exceptions.

Data Access and Enforcement

Make all data collected publicly accessible. All data related to pits, waste, and waste hauling collected by operators according to rule requirements should be submitted to the Commission and made part of the public record rather than kept on-site and made available only upon request. These types of data are in the public interest and should be available in full and text- searchable online. Without access to these types of data in a timely manner, neither the Commission nor the public can assess whether operators are protecting public health and the environment and whether the rules are sufficiently enforced by the Commission.
Create institutional memory of on-site & nearby applications. All application files—including public comments—should be kept online and searchable, easily accessible by the public and applicants so similar proposals aren't made repeatedly in areas that the Commission has already deemed unsuitable. Applicants should review this data and analyze it in their applications.**Improve enforcement and apply meaningful penalties**. The penalty section should strongly commit the Commission to vigorous, transparent, and speedy enforcement of the new rules. The remaining rules should be drafted to provide no wiggle room for bad actors to escape liability. While we appreciate the specific fines that are mentioned in the rule, more is needed. As an example, while we appreciate having a range in fines for the pollution of surface or subsurface water between $2,500 to $10,000 in penalties, it should be clearer that is meant to be per violation per day and not a one time fine, and we believe that the range should be more narrow such as $5,000 to $10,000. We understand that the Legislature has generally put in a cap of $10,000 per violation per day and have long argued it is time for the Legislature to increase these maximum penalties. If and when the Legislature changes the statutes, we hope that the Commission can revisit these penalty amounts. We would note that the suggested penalty of $2,500 for a variety of violations for operating without a permit seems low. There should be a strong deterrence for using any operator or carrier that is not permitted.

We are Very Concerned by Subchapter B Division 7: It should be removed from the rule and studied more thoroughly

We do not believe the proposal is in keeping with the Commission's statutory requirements to protect public health. Specifically, the Commission should be following the statutory requirement to "adopt criteria for beneficial uses to ensure that a beneficial use of recycled drill cuttings . . . is at least as protective of public health, public safety, and the environment as the use of an equivalent product made without recycled drill cuttings." The proposed rules in Subchapter B Division 7 are not built on risk assessments nor do they require adequate testing. Instead, these new rules would let treated drill cuttings be used as construction fill anywhere, or in county roads. Cuttings can contain hazardous, radioactive & carcinogenic chemicals, but the rule doesn't test enough for them, creating potential environmental hazards & risking public funds to clean up these materials. More study is needed before this rule is re-proposed.

We do not have the same objection to the use of pilot projects using produced water because we believe the rule more adequately sets out the use of produced water and there is a separate pilot process developed by the Commission.

Conclusion

The Sierra Club agrees that the Commission should and must update rules and regulations related to waste streams and management from the oil and gas industry, in part to meet requirements of legislative directives from recent legislative sessions. Nonetheless, we were disappointed that the Commission did not engage in a more collaborative rulemaking process with all stakeholders. While we acknowledge that overall the proposal does increase some level of protection for certain types of activities, we believe these rules should not be adopted but instead strengthened. In our comments we have pointed to areas that should be strengthened, including more setbacks, required testing and stiffer penalties, as well as more potential for public input on proposed permits. Finally, we are not supportive of Subchapter B, Division 7 and believe the Commission should take up a separate rulemaking on the use of drill cuttings and other recycled materials.