

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §335.5, Deed Recordation of Waste Disposal. Section 335.5 is adopted *with change* to the proposed text as published in the February 1, 2002 issue of the *Texas Register* (27 TexReg 732).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 3355 amended Texas Agriculture Code, §201.026, to authorize the Texas State Soil and Water Conservation Board (TSSWCB) to develop and certify a water quality management plan for any agricultural or silvicultural land at the request of the landowner. The bill added §201.026(f) to the Texas Agriculture Code, requiring that a water quality management plan for the land on which animal carcasses will be buried must describe specific disposal management methods for the carcasses as well as burial site requirements. New §201.026(g) of the Texas Agriculture Code provides that a landowner who requests and complies with a water quality management plan that includes the required disposal management practices and burial site requirements is not required to record the burial of animal carcasses in the county deed records. Prior to the effective date of HB 3355 (September 1, 2001), a person who intended to bury agricultural waste was required by §335.5 to record in the county deed records certain information about the generator, location, and classification of the waste. The adopted rulemaking revises §335.5 to implement an exemption from deed recordation in accordance with HB 3355.

Although HB 3355 gives the option of obtaining a certified water quality management plan to owners of agricultural and silvicultural land, it is important to note that Texas Water Code (TWC), §26.302, as amended by Senate Bill (SB) 1339, 77th Legislature, 2001, requires a person who owns or operates a

poultry facility to implement and maintain a water quality management plan for the facility that is certified by the TSSWCB under Texas Agriculture Code, §201.206. Senate Bill (SB) 1339 establishes a phased-in schedule for poultry facilities to submit plans for certification.

The TSSWCB adopted an amendment to 31 TAC §523.3, concerning water quality management plans to implement the provisions of SB 1339 in the January 4, 2002 issue of the *Texas Register* (27 TexReg 270). Additionally, the commission adopted revisions to 30 TAC §321.33(d), regarding facilities operating under certified water quality management plans, to add the phrase "including all poultry operations as described in TWC, §26.302" for consistency with SB 1339 provisions. The adopted amendment was published in the March 1, 2002 issue of the *Texas Register* (27 TexReg 1511). The commission anticipates no need for further rulemaking to implement the provisions of SB 1339.

SECTION DISCUSSION

The adopted amendment to §335.5 adds subsection (d) to provide an exemption from deed recordation for a landowner who disposes of animal carcasses on-site in compliance with a certified water quality management plan developed under Texas Agriculture Code, §201.026(f). This amendment is necessary to implement HB 3355, which exempts a landowner who requests and complies with a water quality management plan that includes the required disposal management practices and burial site requirements from the requirement to record the burial of animal carcasses in the county deed records.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rule is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. 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. The intent of the rule is to implement HB 3355, which prohibits the commission from requiring a landowner to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan. To the extent a landowner elects or is required, as is the case for poultry facilities, to seek and comply with a water quality management plan, this rule could protect human health and the environment; however, should the landowner of facilities other than poultry facilities not wish to seek and comply with a water quality management plan, the current potential requirement to deed record the burial of animal carcasses on the landowner’s property is unchanged. Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). Specifically, the adopted rule does not exceed a federal standard, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, the adopted rule was not developed solely under the general powers of the commission, but was specifically developed to implement HB 3355, which prohibits the commission from requiring a landowner to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management

plan. The commission invited public comment on the draft regulatory impact analysis determination, and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an assessment of whether the rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement HB 3355, which prohibits the commission from requiring a landowner to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan. The adopted rule will substantially advance this stated purpose by exempting a landowner from the requirement to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan.

Promulgation and enforcement of the adopted rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject rule does not affect a landowner's rights in private real property because this adopted rule does not burden, nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the adopted rule exempts a landowner from the requirement to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan. There are no burdens imposed on private real property under this rulemaking as the rule neither relates to nor has any impact on the use or enjoyment of private real property, and there is no reduction in value of the property as a result of this rulemaking.

Further, property value may be maintained or increased due to the implementation of a water quality management plan which is intended to result in improved carcass burial practices and protection of natural resources.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking is subject to the Texas Coastal Management Program (CMP). In accordance with the regulations of the Coastal Coordination Council, the commission reviewed the rulemaking for consistency with the CMP goals and policies. The CMP goals applicable to this rulemaking are the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)), and the goal to ensure sound management of all coastal resources (31 TAC §501.12(2)). The CMP policy applicable to this rulemaking is the policy related to the construction and operation of solid waste treatment, storage, and disposal facilities (31 TAC §501.14(d)).

HB 3355 provides that a landowner who requests and complies with a water quality management plan that includes the required disposal management practices and burial site requirements is not required to record the burial of animal carcasses in the county deed records. The purpose of the rulemaking is to implement the exemption from deed recordation in accordance with HB 3355. Promulgation and enforcement of the adopted rule will not have a direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. However, due to promulgation of the rulemaking, facilities that are not already required to have a certified water quality management plan may choose to request and comply with one in order

to be exempted from the requirement to deed record, which should lead to increased compliance with state water quality rules at those facilities. Therefore, the rulemaking is consistent with the applicable goals and policy. The commission invited public comment on the CMP consistency determination, and no comments were received.

HEARING AND COMMENTERS

A public hearing was not held. One comment was received from the commission's Office of Public Interest Counsel (OPIC) suggesting changes to the rule.

RESPONSE TO COMMENTS

OPIC commented that, as drafted, the proposed rule is subject to a misinterpretation that would authorize a landowner to bury animal carcasses, thereafter obtain and comply with a certified water quality management plan, and then claim that the exemption somehow "related back" to before the burial. OPIC suggested revised rule language that it believes would ensure that it is clear that a landowner must already be operating in compliance with the water quality management plan that was developed and certified by the TSSWCB under Texas Agricultural Code, §201.026(f), if the landowner wishes to be exempt from the deed recordation requirements that would otherwise apply to an anticipated burial of animal carcasses.

The commission agrees with the comment and revised the rule to clarify that a landowner must first obtain a certified water quality management plan and then bury animal carcasses in compliance with the plan to be exempt from the deed recordation requirements.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from HB 3355, 77th Legislature, 2001, which prohibits the commission from requiring a landowner to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan.

**SUBCHAPTER A: INDUSTRIAL SOLID WASTE AND
MUNICIPAL HAZARDOUS WASTE IN GENERAL**

§335.5

§335.5. Deed Recordation of Waste Disposal.

(a) Deed recordation of disposal of industrial solid waste or municipal hazardous waste. No person may cause, suffer, allow, or permit the disposal of industrial solid waste or municipal hazardous waste in a landfill prior to recording in the county deed records of the county or counties in which the disposal takes place the following information:

(1) a metes and bounds description of the portion or portions of the tract of land on which disposal of industrial solid waste or municipal hazardous waste will take place;

(2) the class or classes of industrial solid wastes or municipal hazardous wastes to be disposed of and waste description; and

(3) the name or permanent address of the person or persons operating the facility where more specific information on the disposal activity can be obtained.

(b) Proof of recordation. Proof of recordation shall be provided to the executive director in writing prior to instituting disposal operations.

(c) Additional requirements. Owners of property on which facilities for disposal of hazardous waste are located are subject to further requirements adopted by reference in §335.112(a)(6) of this title (relating to Standards).

(d) Exemption. A landowner who, at the time of disposal of animal carcasses on-site, complies with a certified water quality management plan developed for that site under Texas Agriculture Code, §201.026(f) (relating to Nonpoint Source Pollution) is exempt from the deed recordation requirements of this section.