

The Texas Commission on Environmental Quality (commission) proposes an amendment to §335.347.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission proposes these revisions to Chapter 335 to implement legislation from the 78th Legislature, 2003.

House Bill (HB) 2252 amended Texas Health and Safety Code (THSC), Chapter 361 (also known as the Solid Waste Disposal Act), Subchapter F, Registry and Cleanup of Certain Hazardous Waste Facilities. THSC, §361.181(c) was amended to add a definition of “homestead.” THSC, §361.194(b) was amended to allow the executive director to consider a landowner’s financial ability to satisfy a lien in determining whether to prepare a lien affidavit or whether a lien is satisfied, including whether the landowner received financial compensation for the disposal of the substance addressed by the remedial action and whether the real property that is the subject of the lien is a homestead with a fair market value of \$250,000 or less. THSC, §361.197 was amended by the addition of new subsection (e), which prohibits the commission from filing a cost recovery action under that section against an individual whose only significant asset is a homestead that includes the facility that is subject to, or affected by, a remedial action, that is occupied by the individual as a home, and that has a fair market value of \$250,000 or less. THSC, §361.201 was amended by the addition of new subsections (d) and (e) which require, in cases where an individual’s homestead includes the facility that is subject to, or affected by, a remedial action, that the commission adopt criteria by rule to determine whether the individual is financially capable of conducting any necessary remediation studies or remedial action and that the rule must provide that the individual’s homestead may not be included in the total amount of the individual’s

assets if the homestead is occupied by the individual as a home and has a fair market value of \$250,000 or less.

SECTION DISCUSSION

The proposed amendment to §335.347 places existing rule language into a new subsection (a) and adds new subsections (b) - (g) to address the requirements of HB 2252. In subsection (a)(8) the commission changed the words “pursuant to” to “under” to comply with agency rule writing standards. The title of §335.347 is changed to better describe the information proposed to be included in the section.

Proposed new §335.347(b) includes provisions from new THSC, §361.201(d) and (e). The new provisions in §335.347(b) require that the executive director make a determination of the potentially responsible party’s financial capacity if the party is an individual whose homestead includes the facility subject to, or affected by, a remedial action. The proposed new §335.347(b) prohibits the agency from including the value of an individual’s homestead in the total amount of the individual’s assets if the individual is occupying the homestead as a home and the fair market value of the homestead is \$250,000 or less.

Proposed new §335.347(c) includes provisions from new THSC, §361.194(b)(2). These provisions cover new criteria that the executive director may consider in determining whether to prepare an affidavit to attach a lien to real property or whether a lien is satisfied.

Proposed new §335.347(d) includes provisions from new THSC, §361.197(e). These provisions prohibit the commission from filing a cost recovery action under specified circumstances.

Proposed new §335.347(e) addresses how the fair market value of a homestead is determined.

Proposed new §335.347(f) addresses the information that must be provided by the potentially responsible party within 90 days of a written request so that the executive director may make the determinations under the proposed new §335.347(b) - (d). This provision is important to allow a case to move forward in a timely manner and to allow the commission to proceed with a cost recovery action within any required statute of limitations if the potentially responsible party does not qualify for the cost recovery prohibition.

Proposed new §335.347(g) allows the potentially responsible party to request an extension of the time frame for providing documents in subsection (f).

Proposed new §335.347(h) states that for the purposes of the section, the executive director may determine that the property is not a homestead that is occupied by the individual as a home if the potentially responsible party does not provide the requested information within the required time frame. This provision is important so that the issue may be resolved and the case moved forward in situations where the information needed to make a determination that the property is a homestead that is occupied by the individual as a home is not provided. In addition, provisions are included which state that the

potentially responsible party will receive notice of such a determination and that the determination is appealable.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, determined that, for the first five-year period the proposed rule is in effect, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rule.

The proposed amendment implements HB 2252. The specific purpose of the proposed rule is to allow, and in some instances require, the executive director to consider certain financial information when pursuing cost recovery and liens or when compelling an individual to perform remediation studies or remedial actions.

Under current law, state Superfund remediation costs for which a person is liable constitute a lien in favor of the state on the real property and rights to the real property subject to, or affected by, the remedial action. HB 2252 amended THSC, Chapter 361, Subchapter F, Registry and Cleanup of Certain Hazardous Waste Facilities. The legislation and rule amendment make the following changes:

- 1) allow the executive director to consider when imposing liens against properties where remedial actions have been conducted whether the landowner profited from the disposal activity that led to the remediation, and whether the property is a homestead with a fair market value of \$250,000 or less if occupied as a home by the landowner;
- 2) prohibit the commission from filing a cost recovery action

against an individual whose only significant asset is a homestead occupied as that individual's home that includes the facility that is subject to the remedial action and has a fair market value of \$250,000 or less; and 3) exempt from including as assets homesteads occupied by the owner as a home if the fair market value of the property is \$250,000 or less, when the commission determines if the owner is financially capable of conducting remediation studies or remedial actions. The rulemaking tracks the legislation except that a provision is added to allow the executive director to find that a property does not meet the criteria for an exemption in cases where requested information needed to make the determination is not provided within 90 days of the request.

The rule provides criteria to be considered in evaluating whether a property owner should be subject to cost recovery for remediation conducted at facilities that are also homesteads occupied by the owner as a home and with a fair market value of \$250,000 or less. The rule also prohibits the commission from filing cost recovery actions under some circumstances. Landowners who may qualify for the exemption would only need to provide, in a timely manner (within 90 days), information needed to determine if the exemption would apply to their property.

No significant fiscal implications are anticipated for the agency to conduct any additional financial capability determinations required to implement the proposed amendment. There are 46 facilities that are currently subject to state Superfund action. Of these, approximately three (6.5%) are thought to be homesteads that are residences for their owners with liens currently in place. According to the affected counties, the total appraised value for all of these properties is approximately \$150,000. Historically, little, if any, cost recovery has resulted from liens in place on residential properties.

Therefore, no significant fiscal implications are anticipated for the agency in terms of the inability to obtain cost recovery from these property owners. Local governments may be able to collect additional tax revenues generated on some residential properties in the future. Owners often do not pay taxes on properties subject to Superfund liens, which typically exceed the value of the property. Any additional tax revenue collected by local governments is not expected to be significant.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that, for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the enforcement of and compliance with the proposed rule will be compliance with state law and the establishment of criteria to be considered in evaluating whether a property owner should be subject to cost recovery for remediation conducted at facilities that are also homesteads occupied by the owner as a home with a fair market value of \$250,000 or less.

Fiscal implications are anticipated to certain homestead property owners as a result of the implementation or enforcement of the proposed amendment.

As previously mentioned, there are three properties thought to be homesteads that are residences for their owners with liens currently in place. The total appraised value for all of these properties is approximately \$150,000. If a homestead site meeting the proposed requirements is remediated, the owners may be protected from any cost recovery actions by the commission and would be able to sell the property as no lien would be attached. Superfund liens typically far exceed the value of the property. Assuming the three properties would have a market value near the appraised value and the

owners were able to sell the properties, there would be a positive fiscal impact to all three owners of an estimated \$150,000, exclusive of the amount of money they paid for the properties.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed rule for small or micro-businesses. None of the affected properties are small or micro-businesses, and if any future properties affected by the rulemaking are small or micro-businesses, any fiscal implications are expected to be similar to those for the three property owners.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. While the specific intent of a "major environmental rule" is to protect the environment or reduce the risks to human health from environmental exposure, the specific intent of the proposed rule is to allow, and in some instances require, the executive director to consider certain financial information when pursuing cost recovery and liens or when compelling an individual to perform remediation studies or remedial

actions. Thus, the specific intent of the proposed rule is not to protect the environment nor reduce the risks to human health from environmental exposure. Additionally, the proposed rule would 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 invites public comment on this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an assessment of whether the proposed rule constitutes a takings under the Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to allow, and in some instances require, the executive director to consider certain financial information when pursuing cost recovery and liens or when compelling an individual to perform remediation studies or remedial actions.

The proposed rule would substantially advance this stated purpose by amending §335.347 to: 1) require the executive director to determine a potentially responsible party's financial capacity if the party is an individual whose homestead includes the facility subject to or affected by a remedial action; 2) prohibit the agency from including the value of an individual's homestead in the total amount of the individual's assets if the individual is occupying the homestead as a home and the fair market value of the homestead is \$250,000 or less; 3) specify criteria that the executive director may consider in determining whether to prepare an affidavit to attach a lien to real property or whether a lien is satisfied; 4) prohibit the commission from filing a cost recovery action under specified circumstances;

5) state how the fair market value of a homestead is determined; 6) require the potentially responsible party to submit certain information within 90 days of a written request so that the executive director may make such determinations; and 7) specify that, for the purposes of the rule, the property is not a homestead that is occupied by the individual as a home if the potentially responsible party does not provide the requested information within the required time frame.

The proposed rule does not impose a burden on private real property and it does not propose a use of private real property. Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rule does not affect a landowner's rights in private real property because the rulemaking does not burden the property in a manner that requires compensation as provided in specific articles of the United States and Texas Constitutions; nor does it restrict or limit the owner's right to the property resulting in a reduction in value by 25% or more beyond that which would otherwise exist in the absence of regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendment is consistent with CMP goals and policies because the rulemaking relates only to the procedural mechanisms for cost recovery for remediation actions taken by the commission. The rulemaking will not have direct or significant adverse effect on any coastal natural resource areas; the rulemaking will not have a substantive effect on commission actions subject to the

CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2003-054-335-WS. Comments must be received by 5:00 p.m., January 5, 2004. For further information or questions concerning this proposal, please contact Joseph Thomas, Office of Environmental Policy, Analysis, and Assessment, (512) 239-4580.

**SUBCHAPTER K: HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND
REMEDATION**

§335.347

STATUTORY AUTHORITY

The proposed amendment is authorized under HB 2252, 78th Legislature, 2003, which requires rules to implement the changes in law made to THSC, §§361.181, 361.194, 361.197, and 361.201. The proposed amendment is also authorized by THSC, §361.024, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under THSC, Chapter 361.

Additionally, the proposed amendment is authorized by Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code.

The proposed amendment implements THSC, §§361.181, 361.194, 361.197, 361.201, and 361.024.

The proposed amendment also implements Texas Water Code, §5.103.

§335.347. Financial Considerations Concerning a Potentially Responsible Party [Capability Determinations].

(a) The executive director may make a determination of whether a potentially responsible party (PRP) is financially capable of participating in a facility investigation or remediation. Such a determination may be based on some or all of the following financial information:

- (1) a PRP's audited financial statements;
- (2) a PRP's federal or state income tax returns;
- (3) a PRP's gross and net income for each of the preceding three years;
- (4) a PRP's net worth for each of the preceding three years;
- (5) a PRP's current cash flow position;
- (6) a PRP's long-term liabilities;
- (7) the liquidity of a PRP's assets; and

(8) any other data requested under [pursuant to] §335.345 of this title (relating to Requests for Information or Production of Documents), which in the opinion of the executive director is relevant to a determination of the ability of the PRP to participate in a facility investigation or remediation.

(b) The executive director will determine whether a PRP is financially capable of conducting any necessary remediation studies or remedial action if the PRP is an individual whose homestead includes the facility subject to, or affected by, a remedial action. The value of an individual's homestead may not be included in the total amount of the individual's assets if:

(1) the individual is occupying the homestead as a home; and

(2) the fair market value of the homestead is \$250,000 or less.

(c) In making a determination under Texas Health and Safety Code, §361.194, as to whether to prepare an affidavit for lien or whether a lien is satisfied, the executive director may take into account a landowner's financial ability to satisfy the lien, including consideration of whether the landowner received financial compensation for the disposal of any substance addressed by the remedial action and whether the real property that is the subject of the lien:

(1) is a homestead and is being occupied as a home by the landowner; and

(2) has a fair market value of \$250,000 or less.

(d) The executive director may not file a cost recovery action under Texas Health and Safety Code, §361.197 against an individual if the individual's only significant asset is a homestead that:

(1) includes the facility subject to, or affected by, a remedial action;

(2) is occupied by the individual as a home; and

(3) has a fair market value of \$250,000 or less.

(e) For the purposes of this section, the fair market value of a homestead is the market value ascribed to a property by the tax appraisal authority of the county or counties in which the property is located, exclusive of any downward adjustment related to contamination. If this information is unavailable, the executive director may determine the fair market value of the property, which excludes any downward adjustment related to contamination, from information available at the time.

(f) The PRP shall provide the following information within 90 days after receipt of a written request by the executive director so that the executive director may conduct the determinations under subsections (b) - (d) of this section:

(1) information listed in subsection (a) of this section;

(2) evidence that the subject property is the individual's homestead; and

(3) evidence that the individual is occupying the property as a home.

(g) The PRP may request an extension of the required time frame for providing documents in subsection (f) of this section if the extension is requested by the PRP within the initial 90-day time frame.

(h) For the purposes of this section, the executive director may determine that the property is not a homestead that is occupied by the individual as a home if the PRP does not provide the information requested in subsection (f) of this section within the required time frame, including any extensions granted by the executive director. The executive director will provide any such determination in writing to the PRP. The executive director's determination that the property is not a homestead that is occupied by the individual as a home is final and appealable under Texas Health and Safety Code, §361.321.