

The Texas Commission on Environmental Quality (commission or agency) proposes an amendment to §328.66.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

At the Commissioner's Agenda held on September 15, 2010, the commissioners directed the executive director to initiate a rulemaking to remove the requirement for applicants for Land Reclamation Projects Using Tires (LRPUT) to publish public notice in adjacent counties. The amended rule will require public notice to be published only in the county in which the facility is to be located.

SECTION DISCUSSION

§328.66, Land Reclamation Projects Using Tires (LRPUT)

The proposed amendment to §328.66(a)(11) would remove the requirement for applicants of a LRPUT to publish public notice in all adjacent counties of the proposed facility location. LRPUT applicants would only need to publish public notice in the county in which the proposed facility is to be located.

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 rule is in effect, no significant fiscal implications

are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed rule is not expected to have a fiscal impact on other units of state or local government.

Currently the rule requires public notice for LRPUTs to be published not only in the county where the facility is located but also in adjacent counties. The proposed rule amends §328.66 to remove the requirement for public notice to be published in adjacent counties.

Currently, there are nine approved LRPUTs in the state. The agency averages one LRPUT application per year. Governmental entities do not typically apply for LRPUT projects, and the proposed rule is not expected to have a fiscal impact on local governments. If a local government does apply for a LRPUT, it could experience cost savings since it will not be required to publish public notice in counties adjacent to the county where a facility is located. The amount of savings will depend on where a LRPUT is proposed to be located and what it would have cost to publish notice in adjacent counties. The average cost of publishing public notice in a metropolitan area for one Sunday is estimated to be \$1,169.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed

rule is in effect, the public benefit anticipated will be efficient and cost effective notice requirements for LRPUT projects.

The proposed rule will not have a fiscal impact on individuals, but businesses applying for authorization of LRPUT projects could have lower publication costs than they do under current rules. Currently, there are nine authorized LRPUT facilities in the state, and all are owned by businesses. Public notice will not be required in counties adjacent to the county in which a LRPUT is located. The amount of savings will depend on where a LRPUT is proposed to be located and what it would have cost to publish notice in adjacent counties. The average cost of publishing notice in a metropolitan area for one Sunday is estimated to be \$1,169.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Small businesses applying for a LRPUT project are expected to experience the same cost savings for public notice as those experienced by a large business. The amount of savings will depend on where a LRPUT is proposed to be located and what it would have cost to publish notice in adjacent counties.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small

business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

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 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 rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rule does not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "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 proposed rulemaking is intended to reduce the burden on LRPUR applicants regarding public notice and to bring the notice requirements in line with other programs notice requirements. This rule reduces the cost of preparing

an application for a LRPOT because notice is required in only one county as opposed to all adjoining counties.

Furthermore, the proposal does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule which: 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) adopts a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rule does not meet any of these applicability requirements. First, there are no standards set for authorizing these types of facilities by federal law and the proposal is not required by state law. Second, the proposed amendment does not exceed an express requirement of state law. There are no specific statutory requirements for authorizing these types of facilities. Third, the rule does not exceed an express 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. Fourth, the commission does not propose the rule solely under the general

powers of the agency, but rather under the authority of: Texas Health and Safety Code (THSC), §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, which provides the commission with rulemaking authority; THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, which governs the storage, transportation, and disposal of used or scrap tires. Therefore, the commission does not propose the adoption of the rule solely under the commission's general powers.

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 the proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific intent of the proposed amendment is to reduce the burden on LRPUT applicants regarding public notice and to bring the notice requirements in line with other programs notice requirements.

The amendment does not impose a burden on a recognized real property interest and therefore does not constitute a taking. The promulgation of the proposed rulemaking is neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rulemaking does not affect a landowner's rights in a recognized private real property interest because this rulemaking neither: burdens (constitutionally) or restricts or limits the owner's right to the property that would otherwise exist in the absence of this rulemaking; nor would it reduce its value by 25% or more beyond that value which would exist in the absence of the proposed rule. Therefore, the proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 1, 2011 at 10:00 am in Building E, Room 201S, 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 the 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 Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, 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 2010-059-328-CE. The comment period closes March 11, 2011.

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. For further information, please contact Brooke Jackson, Field Operations Support Division, (512) 239-0400.

SUBCHAPTER F: MANAGEMENT OF USED OR SCRAP TIRES
§328.66

STATUTORY AUTHORITY

The amendment is proposed under the authority of: Texas Health and Safety Code (THSC), §361.011, Commission's Jurisdiction: Municipal Solid Waste, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, Rules and Standards, which provides the commission with rulemaking authority; THSC, §361.061, Permits; Solid Waste Facility, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, Storage, Transportation, and Disposal of Used or Scrap Tires, which governs the storage, transportation, and disposal of used or scrap tires.

The proposed amendment implements THSC, §361.061 and §361.112.

§328.66. Land Reclamation Projects Using Tires (LRPUT).

(a) Any person or entity intending to initiate a Land Reclamation Projects Using Tires (LRPUT) shall notify the executive director in writing of the intent to fill land by means of a LRPUT. The application shall be submitted in triplicate either in writing or through an electronic reporting system as allowed by the executive director.

Owners/operators of LRPUTs are required to provide information to the executive

director as part of the notification document as described in this subsection. Approval in writing by the executive director (authorization to proceed) is required before the reclamation project may be initiated. The executive director may withhold authorization to proceed if the information submitted is not deemed to be complete. The executive director shall have 60 days to review the notification documents for completeness. The executive director may request additional information if the executive director determines that the notification submittal does not address all applicable requirements of this subchapter or any potential risks to public health or the environment. The following information shall be submitted in the notification document or attachments thereto.

(1) The owner/operator of the LRPOT shall disclose in the notification the location of the project on a state highway map, United States Geological Survey map or similar, and provide a legal description of the property. The general location on the site where fill activities will take place shall be shown on one or more of these maps;

(2) A property owner's affidavit shall be submitted at the time of notification of intent to initiate a LRPOT and shall include the following:

(A) legal description of the property on which the LRPOT will occur; and

(B) acknowledgment that the owner has a responsibility to file with the county deed records an affidavit to the public advising that a reclamation project utilizing tire pieces exists on the site, and providing details about the location of the filled area within the property boundaries, areal extent of the fill project, coordinates or survey data, and the approximate volume or weight of tires which were used as fill, at such time as the fill project has been completed;

(3) The approximate volume of tire pieces proposed to be placed below ground, or the equivalent number of whole tires, and the approximate size and depth of the depression or borrow area to be filled shall be disclosed in the notification document;

(4) The approximate period of time during which the project will be conducted shall be disclosed, with estimated start and finish dates;

(5) The method of placement and commingling of the tire shreds to achieve a mix of tire pieces with the inert fill material in a proportion no greater than 50% of tire material by volume.

(6) A demonstration of the seasonal high groundwater level in the area.
The executive director may require that an additional demonstration be provided for the

seasonal high groundwater level at the proposed site based on the demonstration provided for the area. If the executive director requires an additional demonstration of the seasonal high groundwater level at the proposed site, the applicant shall provide the requested information within the time frame specified by the executive director.

(7) A statement signed and sealed by a professional engineer licensed to practice in Texas shall be submitted in the notification to the executive director to certify that the LRPOT is designed in a manner that will comply with the following standards.

(A) The LRPOT shall not cause a discharge of solid waste or pollutants adjacent to or into the waters of the state, including ground water, that is in violation of the requirements of the Texas Water Code, §26.121;

(B) The LRPOT shall not adversely affect human health, public safety or the environment, either during fill operations or after the reclamation project is complete; and

(C) Tire or tire pieces shall not be placed below ground in a manner that constitutes disposal as defined in Texas Health and Safety Code §361.003(7);

(8) An affidavit signed by the property owner shall be submitted certifying that:

(A) the borrow area, hole or disturbed land area existed before the project; was excavated for another purpose; and was not excavated for the burial of tire pieces;

(B) the LRPUT will be completed in a manner that will comply with all regulations set forth in this subchapter and any other rules of the commission or any other local, state or federal agency which apply; and

(C) the local fire marshal has been notified of the tire placement or fill activity.

(9) An affidavit signed by the operator shall be submitted certifying that he or she is familiar with the application and all supporting data; is aware of all commitments represented in the notification; is familiar with all pertinent requirements in these regulations; and agrees to develop and operate the project in accordance with the application, applicable local and state regulations, and any special provisions that may be imposed by the executive director.

(10) The owner or operator shall mail a copy of the notification documents and attachments to the appropriate mayor and county judge if the proposed project is to be located within the corporate limits or extraterritorial jurisdiction of a city; or the appropriate county judge if the proposed project is to be located within an unincorporated area of a county; to the appropriate groundwater district; and to the appropriate regional council of government. Proof of mailing shall be provided in the form of return receipts for registered mail. Prior to authorizing a LRPUT, the executive director shall consider any timely written notice by a local government with jurisdiction over a proposed facility that is provided to the executive director that the proposed facility does not comply with local requirements related to managing scrap tires and protecting public health and the environment. Local governments' notice of noncompliance shall include adequate documentation of noncompliance at the proposed facility. The executive director shall determine whether any documentation of noncompliance submitted is adequate. The executive director shall disregard such notice if a court with jurisdiction over a local government's decision determines that an application complies with local requirements. Local governments shall be allowed 45 days after an applicant mails notice to mail its reply to the executive director.

(11) Upon the filing of the notification documents, the facility owner or operator shall provide notice to the general public by means of a notice by publication and a notice by mail. Each notice shall specify both the name, affiliation, address, and

telephone number of the applicant and of the commission employee who may be reached to obtain more information about the LRPUT project. The notices shall specify that the notification documents have been provided to the county judge and that they are available for review by interested parties. The applicant shall publish notice in the county in which the facility is located [, and in adjacent counties]. The notice shall be published once a week for three weeks. The applicant should attempt to obtain publication in a Sunday edition of a newspaper. The notice by certified mail, return receipt requested, shall be sent to all adjacent landowners and all owners of property within 500 feet of the boundary of the project; the health authorities of the city and county in which the project will be located, if applicable; and the appropriate state senator and representative for the area encompassing the project.

(b) Undisturbed land shall not be excavated for the purpose of filling the same land with a mixture of tires and debris or soil. Any borrow area, hole or other disturbed land area to be used for a LRPUT must have existed before the project, and it must have been excavated or soil removed for a purpose other than for the burial of tire pieces.

(c) The LRPUT shall not result in a public nuisance.

(d) An applicant for a LRPUT shall notify the local fire authority serving the area of the proposed tire placement or fill activity. If an owner or operator of a LRPUT does not intend to provide its own fire fighting personnel or system, the owner or operator

shall make arrangements with public or private emergency response personnel that are capable of complying with applicable fire and building codes. Prior to authorizing a LRPUR, the executive director shall consider any timely written notification by a local fire authority with jurisdiction over a proposed facility that is provided to the executive director that the proposed facility does not comply with local requirements relating to fire protection. Such notice shall include adequate documentation of the noncompliance at the proposed facility. The executive director shall determine whether any documentation of noncompliance submitted is adequate. The executive director shall disregard such notice if a court with jurisdiction over a local fire authority's decision determines that an application complies with local requirements. Local fire authority officials shall be allowed 45 days after an applicant mails notice to mail its reply to the executive director. Applicants must provide proof that the mailed notice was received by the fire authority.

(e) All tires used to fill land shall be split, quartered, or shredded. Whole tires shall not be placed below ground.

(f) The owner and operator of the LRPUR shall comply with all applicable local ordinances, including any public safety, or zoning and land use laws.

(g) Shredded, split or quartered tires placed below ground shall be mixed in a proportion no greater than approximately 50% by volume with inert material acceptable for filling land. If greater than 50% of tire pieces by volume are placed below ground, the site is considered a tire monofill and is subject to §328.65 of this title (relating to Tire Monofill Permit Required).

(h) Tire pieces shall be placed no closer than 18 inches to the final grade or ground surface. A soil cover unadulterated with tire pieces shall make up at least the upper 18 inches of the reclamation project.

(i) The owner or operator of the LRPOT shall register as a scrap tire facility if a shredding operation is conducted on site for processing tires.

(j) The owner or operator of the LRPOT shall register as a scrap tire storage site under §328.60 of this title (relating to Scrap Tire Storage Site Registration) if:

(1) operations requiring storage of more than 500 used or scrap tires (or weight equivalent tire pieces or any combination thereof) on the ground or more than 2,000 used or scrap tires (or weight equivalent tire pieces or any combination thereof) in enclosed and lockable containers would qualify the site as a registered tire storage site under §328.60 of this title; and

(2) the construction of the LRPUT extends beyond 90 days from the date of delivery of tires or tire pieces to the site.

(k) The executive director shall issue an identifying number at the time the approval letter for the LRPUT is issued. This identifying number shall be referenced in any correspondence relating to a particular LRPUT for which such a number is issued.

(l) A person may provide the commission with written comments on any notification of a LRPUT project. The executive director shall review any written comments when they are received within 30 days of mailing the notice. The written information received will be utilized by the executive director in determining what action to take on the application for a LRPUT.

(m) Following completion of all fill activities for the LRPUT, the owner or operator shall submit to the executive director, for review and approval, a documented certification signed by a licensed professional engineer verifying that the project has been completed in accordance with this subchapter, the notification documents, and all attachments. Once approved, this certification shall be placed in the file.

(n) The term "local government" as used in this section is defined in Texas Health and Safety Code, §361.003(17).