

The Texas Commission on Environmental Quality (commission) adopts an amendment to §37.11.

Section 37.11 is adopted *with change* to the proposed text as published in the September 27, 2002 issue of the *Texas Register* (27 TexReg 9087).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of the adopted rule is to implement House Bill (HB) 2912, Article 5, §5.06, and Article 9, §9.07, 77th Texas Legislature, 2001. HB 2912 amended Texas Health and Safety Code (THSC), §361.082 and Texas Water Code (TWC), §7.031. The commission now has the authority, consistent with federal law, to issue orders for “the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.” Until the change was made by the 77th Legislature, owners and operators of hazardous waste management units and facilities could only apply for, and the commission could only issue, post-closure permits. HB 2912 became effective on September 1, 2001.

Adopted §37.11 adds the definition of a post-closure order. The definition states that a post-closure order is an order issued by the commission for post-closure care of interim status units, a corrective action management unit unless authorized by permit, or alternative corrective action requirements for contamination commingled from Resource Conservation Recovery Act (RCRA) and solid waste management units.

Corresponding amendments and new sections are adopted for 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 30

TAC Chapter 80, Contested Case Hearings; 30 TAC Chapter 305, Consolidated Permits; and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, in this issue of the *Texas Register*. The adopted new sections in Chapter 39 add public participation requirements applicable to post-closure orders during three stages of the post-closure ordering process and when the orders are amended. The adopted amendment to Chapter 55 would specify how the executive director would prepare responses to public comments. An opportunity for a hearing would also be provided upon request by the executive director, the applicant, and the Public Interest Counsel in accordance with the amendment adopted in Chapter 80. Consistent with the October 22, 1998 federal regulations, the adopted amendment to §305.50 is intended to streamline the application process for post-closure orders and post-closure permits. The adopted amendments to Chapter 335 would allow the agency to issue an order in lieu of a permit for post-closure care of interim status units and give the agency the discretion to approve corrective action requirements as an alternative to current RCRA closure requirements when certain environmental conditions are met. The adopted rulemaking would be consistent with federal regulations promulgated by the United States Environmental Protection Agency (EPA) in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

SECTION DISCUSSION

Adopted §37.11, Definitions, adds the definition of “Post-closure order” as new paragraph (20). Based on the comments received, the definition has been amended since proposal. The definition states that a post-closure order is an order issued by the commission for post-closure care of interim status units at hazardous waste management facilities. Subsequent paragraphs have been renumbered to accommodate

the added definition. An administrative correction has been made to renumbered paragraph (21) for “Post-closure plan” to add a hyphen.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rule 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 adopted amendment to Chapter 37 is intended to protect the environment or reduce risks to human health from facilities that are required to obtain a post-closure permit, but have failed to do so, by bringing them into compliance through an alternative regulatory mechanism. However, it is not expected to 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 adopted rule will protect public health and safety by bringing into compliance those facilities that have not obtained a post-closure permit by providing an equally protective alternative. The adopted rule also allows the agency the discretion to use corrective action requirements, rather than closure requirements, to address regulated units that have released hazardous constituents.

Even if the rule was considered to be a major environmental rule, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard

set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed 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) adopt a rule solely under the general powers of the agency instead of under a specific state law. This adopted rule does not meet any of these four applicability requirements. This adopted rule does not exceed any standard set by federal law for interim status units or facilities, or regulated units with releases of hazardous constituents, and in fact implements a federal regulation authorized by federal law. This adopted rule does not exceed the requirements of state law under THSC, Chapter 361 or TWC, Chapter 7; those chapters specifically allow the type of orders adopted in this rulemaking. There is no delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program specifically on post-closure orders; Texas' authorization, by the EPA, of the RCRA program does relate to post-closure activities, but the activities that will be authorized in accordance with this rule are authorized by EPA RCRA regulations. This rule is not adopted solely under the general powers of the agency, but specifically under THSC, §361.082 and TWC, §7.031, as well as the other general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rule is to implement applicable requirements of HB 2912, which amended THSC, §361.082 and TWC, §7.031. The purpose of this adopted rule is to allow the commission to issue orders in lieu of permits for post-

closure care at interim status facilities and to give the commission the discretion to approve corrective action requirements as an alternative to closure requirements when certain environmental conditions are met. The adopted rule substantially advances the stated purpose by incorporating the applicable requirements of HB 2912 and by amending the applicable provisions relating to corrective action requirements.

Promulgation and enforcement of this adopted rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rule will not burden private real property, nor restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond what will otherwise exist in the absence of these regulations. The adopted rule merely allows the commission to issue an order in place of a permit for post-closure care at interim status facilities. Under existing rules, the facilities affected by this adopted rule are already required to obtain a permit. Thus, the adopted rule provides an option for a new mechanism to provide post-closure care. The adopted rule also allows for corrective action requirements as an alternative to closure requirements. Therefore, this adopted rule will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the CMP.

PUBLIC COMMENT

The public comment period closed October 28, 2002. The commenters were Thompson and Knight, L.L.P, on behalf of Lone Star Steel Company (Lone Star Steel); Lloyd, Gosselink, Blevins, Rochelle & Townsend, P.C. (Lloyd, Gosselink); and Chevron Environmental Management Company (CEMC).

RESPONSE TO COMMENTS

Lloyd, Gosselink and CEMC commented that the definition of post-closure order in §37.11(20) could be confused “to mean that corrective action management units (CAMUs) must be associated with commingled contamination in order to be eligible for a post-closure order.” CEMC and Lloyd, Gosselink suggested that the definition of post-closure order be changed to read: “an interim status unit, a corrective action management unit, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units.”

The commission agrees with the proposed sequence of eligible units; however, the commission is retaining the language in the definition of post-closure order stipulating that corrective action management units are eligible “unless authorized by a permit.” The definition of post-closure order in §37.11(20) has been amended to read: “an order issued by the commission for post-closure care of interim status units, a corrective action management unit unless authorized by permit, or alternative corrective action requirements for contamination commingled from RCRA and solid waste management units.”

CEMC and Lloyd, Gosselink commented that most references in the preamble indicate that it is either interim status “units and facilities” or interim status “facilities” that are eligible for post-closure orders. CEMC and Lloyd, Gosselink believed that interim status is only relevant to post-closure order eligibility as it relates to units, not facilities. They suggested that the adopted rule and preamble not reference interim status facilities, but only reference interim status units to avoid confusion about the eligibility of other types of units (e.g., corrective action management units) that might not be located at interim status facilities.

The commission disagrees with the portion of the comment that regards not referencing interim status facilities in the rule or preamble. While interim status units are expected to receive the most attention, interim status facilities do exist. As such, the ability to require facility-wide corrective action remains a concern of the commission. In addition, the commission is aware that there may be hazardous waste facilities that have not filed Part A and Part B hazardous waste permit applications. Although these facilities are not in interim status, they would, after discovery, be eligible for a post-closure order or permit and subject to the corresponding rules for facility-wide corrective action. The commission agrees that for additional clarity and consistency regarding “units” and “facilities,” the reference in the first paragraph in the Background and Summary of the Factual Basis for the Adopted Rule portion of this preamble has been amended to read: “Until the change made by the 77th Legislature, owners and operators of hazardous waste management units and facilities could only apply for, and the commission could only issue, post-closure permits.”

SUBCHAPTER A: GENERAL FINANCIAL ASSURANCE REQUIREMENTS

§37.11

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §7.031(c), which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility; Solid Waste Disposal Act, THSC, §361.024, which authorizes the commission to adopt rules consistent with Chapter 361; and THSC, §361.082, which authorizes the commission to issue an order for the closure, post-closure care, or other remediation of hazardous waste or hazardous waste constituents from a solid waste management unit at a solid waste processing, storage, or disposal facility.

§37.11. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Assets** - All existing and all probable future economic benefits obtained or controlled by a particular entity.

(2) **Closure plan** - The plan for closure prepared in accordance with commission requirements.

(3) **Corporate guarantor** - Must be the direct or higher-tier parent corporation or a firm with a substantial business relationship with the owner or operator.

(4) **Current assets** - Cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

(5) **Current closure cost estimate** - The most recent of the estimates prepared for closure.

(6) **Current cost estimate** - The most recent estimates prepared in accordance with commission requirements for the purpose of demonstrating financial assurance for closure, post closure, or corrective action.

(7) **Current liabilities** - Obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

(8) **Current post closure cost estimate** - The most recent of the estimates prepared in accordance with commission requirements.

(9) **Current plugging and abandonment cost estimate** - The most recent of the estimates prepared in accordance with Chapter 331 of this title (relating to Underground Injection Control).

(10) **Entity** - For the purposes of this chapter, means a legal organization engaged in lawful business or purpose, such as a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or limited partnership or similar business organization.

(11) **Face amount** - The total amount the insurer is obligated to pay under an insurance policy, excluding legal defense costs.

(12) **Financial responsibility** - This term shall be used interchangeably with financial assurance.

(13) **Independent audit** - An audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

(14) **Liabilities** - Probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

(15) **Net working capital** - Current assets minus current liabilities.

(16) **Net worth** - Total assets minus total liabilities and equivalent to owner's equity.

(17) **Parent corporation** - A corporation which directly owns at least 50% of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a subsidiary of the parent corporation.

(18) **Permit** - Written permission from the commission, including a permit, license, registration, or other authorization, to engage in a business or occupation, to perform an act (such as to build, install, modify, or operate a facility), or to engage in a transaction, which would be unlawful absent such permission.

(19) **Post closure** - This term shall be used interchangeably with the term "Post closure care."

(20) **Post-closure order** - An order issued by the commission for post-closure care of interim status units, a corrective action management unit unless authorized by permit, or alternative

corrective action requirements for contamination commingled from RCRA and solid waste management units.

(21) **Post-closure plan** - The plan for post-closure care prepared in accordance with commission requirements.

(22) **Program area** - Commission areas under which the facility is permitted, licensed, or registered to operate, including, but not limited to, Industrial and Hazardous Waste, Underground Injection Control, Municipal Solid Waste, or Petroleum Storage Tanks.

(23) **Standby trust** - An unfunded trust established to meet the requirements of this chapter.

(24) **Substantial business relationship** - A relationship where the guarantor is a corporation and owns at least 50% of the entity guaranteed.

(25) **Tangible net worth** - The tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.