

The Texas Commission on Environmental Quality (commission) adopts an amendment to §55.156.

Section 55.156 is adopted *without change* to the proposed text as published in the September 27, 2002 issue of the *Texas Register* (27 TexReg 9096) and will not be republished.

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 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.

The commission proposes to amend §55.156 by adding new subsection (f). Section 55.156(f) identifies the subsections of §55.156 that apply to a post-closure order. The executive director will prepare a response to all timely, relevant and material, or significant public comment. The response will specify the provision of the draft order that has been changed in response to public comment and the reasons for the change. The chief clerk will mail the executive director’s decision and response to public comment to the applicant, any person who submitted comments during the public comment period, any person who requested to be on the mailing list for the order action, the Office of Public Interest Counsel, and the Office of Public Assistance. Instructions on how to request a hearing will not be

included for post-closure orders since only the applicant, executive director, and the Public Interest Counsel could request a hearing.

Corresponding amendments are also adopted for 30 TAC Chapter 37, Financial Assurance; 30 TAC Chapter 39, Public Notice; 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 amendments to Chapter 37 will entail the minor addition of a post-closure order definition. 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. An opportunity for a hearing will be provided upon request by the executive director, the applicant, and the Public Interest Counsel, in accordance with the amendment adopted in Chapter 80. The financial assurance requirements for post-closure orders will be the same as for post-closure permits. The adopted amendments to Chapter 305 are intended to streamline the application process for post-closure orders and post-closure permits. Post-closure applications will be limited to that information pertinent to post-closure care.

The adopted amendments to Chapter 335 will allow greater flexibility for the agency and the regulated community in two areas. First, the adopted rulemaking will allow the agency to issue an order in lieu of a permit for post-closure care at interim status units or facilities. Second, the adopted rulemaking gives the agency the discretion to approve corrective action requirements as an alternative to the Resource Conservation Recovery Act (RCRA) closure requirements when certain environmental conditions are met.

Last, the adopted rulemaking will 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 §55.156, Public Comment Processing, adds a reference to §39.420(e) in subsection (c) as a transmittal in which instructions for requesting reconsideration of the executive director's decision or hold a contested case hearing will not be required to be included. As with most other orders issued by the commission, only the applicant, executive director, and the Public Interest Counsel will be able to request a hearing.

Adopted new subsection (f) will list the subsections that apply to post-closure orders. Since only the applicant, executive director, and the Public Interest Counsel can request a hearing, the chief clerk will not be required to include instructions for requesting a hearing when sending out the executive director's response to comments for post-closure orders.

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 rule 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 adopted 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 rulemaking 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 rule 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

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 E: PUBLIC COMMENT AND PUBLIC MEETINGS

§55.156

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, 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.

§55.156. Public Comment Processing.

(a) The chief clerk shall deliver or mail to the executive director, the Office of Public Interest Counsel, the Office of Public Assistance, the director of the Alternative Dispute Resolution Office, and the applicant copies of all documents filed with the chief clerk in response to public notice of an application.

(b) If comments are received, the following procedures apply to the executive director.

(1) Before an application is approved, the executive director shall prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn, and specify if a comment has been withdrawn. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes.

(2) The executive director may call and conduct public meetings, under §55.154 of this title (relating to Public Meetings), in response to public comment.

(3) The executive director shall file the response to comments with the chief clerk within the shortest practical time after the comment period ends, not to exceed 60 days.

(c) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing. Instructions for requesting reconsideration of the executive director's decision or requesting a contested case hearing are not required to be included in this transmittal for the applications listed in §39.420(c) - (e) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision). The chief clerk shall provide the information required by this section to the following:

- (1) the applicant;
- (2) any person who submitted comments during the public comment period;
- (3) any person who requested to be on the mailing list for the permit action;
- (4) any person who timely filed a request for a contested case hearing in response to the Notice of Receipt of Application and Intent to Obtain a Permit for an air application;
- (5) the Office of Public Interest Counsel; and
- (6) the Office of Public Assistance.

(d) The instructions sent under §39.420(a) of this title regarding how to request a contested case hearing shall include at least the following statements:

- (1) for air applications, that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission;
- (2) that a contested case hearing request must include the requestor's location relative to the proposed facility or activity;

(3) that a contested case hearing request should include a description of how and why the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(4) that only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing request is granted; and

(5) that a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(e) Subsections (b)(2), (c), and (d) of this section do not apply to a case referred to SOAH under §55.210 of this title (relating to Direct Referrals).

(f) Subsection (d) of this section does not apply to post-closure order applications.