

The Texas Commission on Environmental Quality (commission) adopts an amendment to §80.109.

Section 80.109 is adopted *without change* to the proposed text as published in the September 27, 2002 issue of the *Texas Register* (27 TexReg 9098) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The adopted rule implements 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 adopts an amendment to Chapter 80 to clarify who can request a hearing on a post-closure order by adding new §80.109(b)(11). New §80.109(b)(11) identifies the parties to a post-closure order contested case hearing. These requirements are similar to those in place for enforcement cases. In order to meet the public participation requirements promulgated by the United States Environmental Protection Agency (EPA) in the October 22, 1998 issue of the *Federal Register* (63 FR 56509), the commission is providing three notice and comment periods. Since authority for this new rule comes in part from TWC, Chapter 7, the commission is also providing the applicant the opportunity to request a hearing, much like what is available in the enforcement context. New

§80.109(b)(11) will limit the parties to the executive director, the applicant, and the Public Interest Counsel in a manner similar to an enforcement hearing, which is limited to the executive director, the respondent, and Public Interest Counsel.

Corresponding amendments are also adopted for 30 TAC Chapter 37, Financial Assurance; 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 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 amendment to Chapter 37 will entail the minor addition of a post-closure order definition. The financial assurance requirements for post-closure orders will be the same as for post-closure permits. The adopted amendments to Chapter 39 will 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 will specify how the executive director will prepare responses to public comments. 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 for interim status units. 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 EPA in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

SECTION DISCUSSION

Adopted §80.109, Designation of Parties, adds a new paragraph (11) in subsection (b). Section 80.109(b)(11) will identify the parties to a post-closure order contested case as the executive director, the applicant(s), and the Public Interest Counsel.

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 80 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 rulemaking 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 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

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 C: HEARING PROCEDURES

§80.109

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.

§80.109. Designation of Parties.

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no person other than the executive director, as

provided in §80.108 of this title (relating to Executive Director Party Status in Permit Hearings), will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed.

(b) Parties.

(1) The executive director is a mandatory party to all commission proceedings concerning matters in which the executive director bears the burden of proof, and in the following commission proceedings:

(A) matters concerning Texas Water Code (TWC), §§11.036, 11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; and Texas Local Government Code, Chapters 375 and 395;

(B) matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D of this title (relating to Resolution of Contract Claims); and

(C) matters under TWC, Chapter 26, Subchapter I, and Chapter 334, Subchapters H and L of this title (relating to Reimbursement Program and Overpayment Prevention).

(2) In addition to subsection (b)(1) of this section, the executive director may also be a party in contested case hearings concerning permitting matters, pursuant to, and in accordance with, the provisions of §80.108 of this title.

(3) The public interest counsel of the commission is a party to all commission proceedings.

(4) The applicant is a party in a hearing on its application.

(5) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 and §55.203 of this title (relating to Determination of Affected Person).

(6) The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status.

(7) The Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status.

(8) The parties to a contested enforcement case include:

(A) the respondent(s);

(B) any other parties authorized by statute; and

(C) in proceedings alleging a violation of or failure to obtain an underground injection control or Texas Pollutant Discharge Elimination System permit, or a state permit for the same discharge covered by a National Pollutant Discharge Elimination System (NPDES) permit that has been assumed by the state under NPDES authorization, any other party granted permissive intervention by the judge. In exercising discretion whether to permit intervention, the judge shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(9) The parties to a hearing upon a challenge to commission rules include the person(s) challenging the rule and any other parties authorized by statute.

(10) The parties to a permit revocation action initiated by a person other than the executive director shall include the respondent and the petitioner.

(11) The parties to a post-closure order contested case are limited to:

(A) the executive director;

(B) the applicant(s); and

(C) the Public Interest Counsel.

(c) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge may require participants of an aligned class to select one or more persons to represent them in the proceeding. Unless otherwise ordered by the judge, each group of aligned participants shall be considered to be one party for the purposes of §80.115 of this title (relating to Rights of Parties) for all purposes except settlement.

(d) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.