

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The purpose of the proposed 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 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 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 a enforcement hearing, which is limited to the executive director, the respondent, and Public Interest Counsel.

Corresponding amendments are also proposed 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 would entail the minor addition of a post-closure order definition. The financial assurance requirements for post-closure orders would be the same as for post-closure permits. The proposed amendments to Chapter 39 would 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 proposed amendment to Chapter 55 would specify how the executive director would prepare responses to public comments. The proposed amendments to Chapter 305 are intended to streamline the application process for post-closure orders and post-closure permits. Post-closure applications would be limited to that information pertinent to post-closure care.

The proposed amendments to Chapter 335 would allow greater flexibility for the agency and the regulated community in two areas. First, the proposed rulemaking would allow the agency to issue an order in lieu of a permit for post-closure care for interim status units. Second, the proposed 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 proposed rulemaking would be consistent with federal regulations promulgated by the EPA in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

SECTION DISCUSSION

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

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rule is in effect, there will be no significant fiscal implications for the agency or any other unit of state or local government due to administration and enforcement of the proposed rule. Units of government affected by the proposed rule that are authorized to close hazardous waste management units via closure orders may experience cost savings, which would vary greatly depending on the type of facility closed. The cost savings would be due to a likely decrease in the number of contested case hearings on applications to close certain hazardous waste management units.

The proposed rule is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). HB 2912 provided the commission with 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. The 1998 federal regulations allow the EPA and authorized states to: 1) issue an enforceable document in lieu of a post-closure permit for interim status units and facilities; and 2) substitute corrective action requirements (alternative standards) for closure requirements for regulated units in cases where there is a release and both a regulated unit and a solid waste management unit or area of concern have contributed to the release. An interim status unit or facility does not have a hazardous waste permit, but has submitted a Part A permit application and is compliant with groundwater monitoring requirements. Currently, the commission's rules only allow the issuance of post-closure permits, not orders, for post-closure care at hazardous waste management facilities.

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This rulemaking would update Chapter 80 by specifying what parties would be allowed to request a hearing on a post-closure order.

The proposed rule would affect all applicants that voluntarily seek orders in lieu of permits at land-based sites that close with waste in place. Examples of sites affected include a publicly- or privately-owned hazardous waste management facility consisting of hazardous waste processing, storage, or disposal units such as one or more landfills, surface impoundments, land treatment facilities, or a combination of units. The total number of applications for orders cannot be determined at this time. There are an estimated 28 facilities affected by the proposed amendment, some of which may be owned and operated by units of government. Additional facilities may be affected by the proposed rule if and

when they choose to implement alternative corrective action requirements for commingled contaminant plumes under an order.

The commission anticipates there may be cost savings, due to a likely decrease in the number of contested case hearings. The proposed rule is voluntary in nature and is intended to provide regulated entities with post-closure regulatory alternatives. The proposed rule allowing for orders in lieu of permits would require applicants to achieve equivalent levels of environmental protection compared to existing procedures. No additional environmental controls are required by this rulemaking, beyond what is already required by existing regulations. The proposed rule would not allow the public to request a contested case hearing on post-closure orders. This change will likely result in cost savings, which cannot be estimated at this time, for the agency and other affected units of state and local government. It is unknown how many future applications, from units of state or local government, for orders would have lead to requests for contested case hearings under existing regulations. Based on commission data, the costs for contested case hearings vary greatly, but can exceed \$100,000.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed rule is in effect, the public benefit anticipated as a result of implementing the proposed rule will be implementation of provisions of HB 2912, and incorporation of rule updates to make commission rules consistent with federal regulations.

The proposed rulemaking is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509). In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This proposed rule would update Chapter 80 by specifying what parties would be allowed to request a hearing on a post-closure order.

The commission anticipates there may be cost savings, due to a likely decrease in the number of contested case hearings. There are at least 28 facilities currently eligible for post-closure orders, the majority of which are operated by larger industrial businesses. It is unknown how many of these facilities will require post-closure care or implement alternate corrective action requirements and will choose to conduct such activities under a post-closure order in lieu of a post-closure permit.

Additionally, it is unknown how many current and future applications for orders will be received by the agency that would have resulted in requests for contested case hearings under existing regulations.

Based on commission data, the costs for contested case hearings vary greatly, but can exceed \$100,000.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed rule, which is intended to implement certain provisions of HB 2912, and federal regulations that were promulgated in the October 22, 1998 issue of the *Federal Register* (63 FR 56509).

In order to implement the provisions of HB 2912 and the 1998 federal regulations, the commission is proposing several concurrent rule changes. This proposed rule would update Chapter 80 by specifying what parties would be allowed to request a hearing on a post-closure order.

The commission anticipates there may be cost savings, due to a likely decrease in the number of contested case hearings. There are at least 28 facilities currently eligible for post-closure orders, some of which may be owned and operated by small or micro-businesses. It is unknown how many of these units will require post-closure care or implement alternate corrective action requirements and will choose to conduct such activities under a post-closure order in lieu of a post-closure permit.

Additionally, it is unknown how many current and future applications for orders will be received by the agency that would have resulted in requests for contested case hearings under existing regulations.

Based on commission data, the costs for contested case hearings vary greatly, but can exceed \$100,000.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rule 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 that the rulemaking 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 proposed 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 proposed rule would 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 proposed 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 proposed rule does not meet any of these four applicability requirements. This proposed 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 proposed 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 proposed 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 would be authorized in accordance with this rule are authorized by EPA RCRA regulations. This rule is not proposed 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. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposed rule in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed 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 proposed 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 proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 would otherwise exist in the absence of these regulations. The proposed 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 proposed rule provides an option for a new mechanism to provide post-closure care. The proposed rule also allows for corrective action requirements as an alternative to closure requirements. Therefore, this proposed rule will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed 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 proposed rule is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 28, 2002, and should reference Rule Log Number 2000-048-335-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

SUBCHAPTER C: HEARING PROCEDURES

§80.109

STATUTORY AUTHORITY

The amendment is proposed 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.

The proposed amendment implements TWC, §5.103 and §7.031 and THSC, §361.024 and §361.082.

§80.109. Designation of Parties.

(a) (No change.)

(b) Parties.

(1) - (10) (No change.)

(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) - (d) (No change.)