

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §335.5, Deed Recordation of Waste Disposal. The commission proposes this revision to Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, to implement the provisions of House Bill (HB) 3355, 77th Legislature, 2001.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

House Bill 3355 amended Texas Agriculture Code, §201.026, to authorize the Texas State Soil and Water Conservation Board (TSSWCB) to develop and certify a water quality management plan for any agricultural or silvicultural land at the request of the landowner. The bill added §201.026(f) to the Agriculture Code requiring that a water quality management plan for the land on which animal carcasses will be buried must describe specific disposal management methods for the carcasses as well as burial site requirements. New §201.026(g) of the Agriculture Code provides that a landowner who requests and complies with a water quality management plan that includes the required disposal management practices and burial site requirements is not required to record the burial of animal carcasses in the county deed records. Prior to the effective date of HB 3355 (September 1, 2001), a person who intended to bury agricultural waste was required by §335.5 to record in the county deed records certain information about the generator, location, and classification of the waste. The proposed rulemaking revises §335.5 to implement an exemption from deed recordation in accordance with HB 3355.

Although HB 3355 gives the option of obtaining a certified water quality management plan to owners of agricultural and silvicultural land, it is important to note that Texas Water Code (TWC), §26.302, as

amended by Senate Bill (SB) 1339, 77th Legislature, 2001, requires a person who owns or operates a poultry facility to implement and maintain a water quality management plan for the facility that is certified by the TSSWCB under Texas Agriculture Code, §201.206. Senate Bill 1339 establishes a phased-in schedule for poultry facilities to submit plans for certification.

The TSSWCB proposed an amendment to 31 TAC §523.3, concerning water quality management plans to implement the provisions of SB 1339 in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6277). Additionally, the commission proposed revisions to 30 TAC §321.33(d), regarding facilities operating under certified water quality management plans, to add the phrase "including all poultry operations as described in TWC, §26.302" for consistency with SB 1339 provisions. This proposed amendment was published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7482). The commission anticipates no need for further rulemaking to implement the provisions of SB 1339.

SECTION DISCUSSION

The proposed amendment to §335.5 adds subsection (d) to provide an exemption from deed recordation for a landowner who requests and complies with a water quality management plan developed under Texas Agriculture Code, §201.026(f). This proposed amendment is necessary to implement HB 3355, which exempts a landowner who requests and complies with a water quality management plan that includes the required disposal management practices and burial site requirements from the requirement to record the burial of animal carcasses in the county deed records.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendment is in effect, there will be no significant fiscal implications for the commission and other units of state and local government due to administration and enforcement of the proposed amendment.

This rulemaking is intended to implement provisions of HB 3355. The bill prohibits the commission from requiring a landowner to record the burial of animal carcasses in the county deed records if the landowner requests and complies with a water quality management plan developed and certified by the TSSWCB.

The water quality management plans pertinent to this rulemaking cover agricultural or silvicultural land on which animal carcasses will be buried and are intended to ensure compliance with state water quality rules. Since state and local governments are not routinely engaged in agricultural or silvicultural operations which generate animal carcasses, this rulemaking is not expected to affect units of state and local government.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be lessening the burden of deed recordation on landowners who comply with water quality management plans. Additionally, in order to be exempted from the requirement to deed record,

facilities that are not already required to have a certified water quality management plan may choose to request and comply with one which should lead to increased compliance with state water quality rules at those facilities.

This rulemaking is intended to implement provisions of HB 3355 which prohibits the commission from requiring a landowner to record the burial of animal carcasses in the county deed records if the landowner requests and complies with a water quality management plan developed and certified by the TSSWCB.

The proposed amendment does not introduce additional regulatory requirements for landowners who bury animal carcasses on their property, but provides an exemption from deed recordation requirements for owners of agricultural or silvicultural land who request and comply with a certified water quality management plan.

Since owners or operators of poultry facilities are required by existing state regulations to implement and maintain a certified water quality management plan, the commission anticipates that there will be a cost savings resulting from this rule to the owners or operators of compliant poultry facilities in not being required to record the burial of animal carcasses in the county deed records. The cost savings from being exempt from filing a deed recordation is estimated to be \$125 per waste burial, which is based on the following estimates: \$15 filing fee, \$10 notary fee, and \$100 attorney fee, if needed. Additionally, property value may be maintained or increased, in an amount that cannot be determined,

due to the implementation of a water quality management plan which is intended to result in improved carcass burial practices and protection of natural resources.

For the owners and operators of other agricultural or silvicultural facilities, requesting and complying with a certified water quality management plan is optional. There may be an increased cost or a savings to owners or operators of agricultural or silvicultural facilities who choose to request and comply with a certified water quality management plan and, therefore, obtain exemption from deed recordation requirements.

The cost savings from being exempted from the deed recordation requirements is estimated to be \$125 per waste burial. Additionally, property value may be maintained or increased, in an amount that cannot be determined, due to the implementation of a water quality management plan which is intended to result in improved carcass burial practices and protection of natural resources. However, there are costs associated with the development and implementation of a water quality management plan. The commission anticipates that the average cost of implementing a water quality management plan at a facility will be approximately \$3,000. The decision to obtain a certified water quality management plan and exemption from deed recordation requirements is optional for owners or operators of agricultural or silvicultural facilities other than poultry facilities.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There may be adverse fiscal implications to small or micro-business as a result of implementing the proposed amendment, which is intended to implement provisions of HB 3355. The bill prohibits the

commission from requiring a landowner to record the burial of animal carcasses in the county deed records if the landowner requests and complies with a water quality management plan developed and certified by the TSSWCB.

The proposed amendment does not introduce additional regulatory requirements for landowners who bury animal carcasses on their property, but provides an exemption from deed recordation requirements for landowners of agricultural or silvicultural land who request and comply with a certified water quality management plan. The commission anticipates that there may be small and micro-businesses affected by the proposed amendment.

Since owners or operators of poultry facilities are required by existing state regulations to implement and maintain a certified water quality management plan, the commission anticipates that there will be a cost savings resulting from this rule to the owners or operators of compliant poultry facilities in not being required to record the burial of animal carcasses in the county deed records. The cost savings from being exempt from filing a deed recordation is estimated to be \$125 per waste burial.

Additionally, property value may be maintained or increased, in an amount that cannot be determined, due to the implementation of a water quality management plan which is intended to result in improved carcass burial practices and protection of natural resources.

For the owners and operators of other agricultural or silvicultural facilities, requesting and complying with a certified water quality management plan is optional. There may be an increased cost or a savings to owners or operators of agricultural or silvicultural facilities who choose to request and

comply with a certified water quality management plan and, therefore, obtain exemption from deed recordation requirements.

The cost savings from being exempted from the deed recordation requirements is estimated to be \$125 per waste burial. Additionally, property value may be maintained or increased, in an amount that cannot be determined, due to the implementation of a water quality management plan which is intended to result in improved carcass burial practices and protection of natural resources. However, there are costs associated with the development and implementation of a water quality management plan. The commission anticipates that the average cost of implementing a water quality management plan at a facility will be approximately \$3,000. The decision to obtain a certified water quality management plan and exemption from deed recordation requirements is optional for owners or operators of agricultural or silvicultural facilities other than poultry facilities.

The following is an analysis of the estimated cost per employee for a small or micro-business to develop and implement a water quality management plan which would be required for the facility to be exempt from deed recordation requirements under this proposed rule. A small business is defined as a business with 100 or fewer employees, while a micro-business is defined as having fewer than 20 employees.

For a small business to develop and implement a certified water quality management plan, it would cost an additional \$30 per employee. For a micro-business to develop and implement a certified water quality management plan, it would cost an additional \$150 per employee.

LOCAL EMPLOYMENT IMPACT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are 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 is not subject to §2001.0225 because it 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 intent of the rule is to implement HB 3355, which prohibits the commission from requiring a landowner to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan. To the extent a landowner elects or is required, as is the case for poultry facilities, to seek and comply with a water quality management plan, this rule could protect human health and the environment; however, should the landowner of facilities other than poultry facilities not wish to seek and comply with a water quality management plan, the current potential requirement to deed record the burial of animal carcasses on the landowner’s property is unchanged. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). Specifically, the proposed rules do not exceed a federal standard, exceed an express requirement of state law, or exceed

a requirement of a delegation agreement. Finally, the proposed rules were not developed solely under the general powers of the commission, but were specifically developed to implement HB 3355, which prohibits the commission from requiring a landowner to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed a preliminary assessment of whether the proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to implement HB 3355, which prohibits the commission from requiring a landowner to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan. The proposed rules would substantially advance this stated purpose by exempting a landowner from the requirement to deed record the burial of carcasses in the county deed records if the landowner has requested and is complying with a water quality management plan.

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed rule does not affect a landowner's rights in private real property because this rulemaking does not burden, nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the proposed rule exempts a landowner from the requirement to deed record the burial of carcasses in the county deed records if the landowner has

requested and is complying with a water quality management plan. There are no burdens imposed on private real property under this rulemaking as the proposed rule neither relates to nor has any impact on the use or enjoyment of private real property, and there is no reduction in value of the property as a result of this rulemaking.

Further, property value may be maintained or increased due to the implementation of a water quality management plan which is intended to result in improved carcass burial practices and protection of natural resources..

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking is subject to the Coastal Management Program (CMP). In accordance with the regulations of the Coastal Coordination Council, the commission reviewed the proposed rulemaking for consistency with the CMP goals and policies. The CMP goals applicable to this rulemaking are the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)), and the goal to ensure sound management of all coastal resources (31 TAC §501.12(2)). The CMP policy applicable to this rulemaking is the policy related to the construction and operation of solid waste treatment, storage, and disposal facilities (31 TAC §501.14(d)).

House Bill 3355 provides that a landowner who requests and complies with a water quality management plan that includes the required disposal management practices and burial site requirements is not required to record the burial of animal carcasses in the county deed records. The purpose of the

proposed rulemaking is to implement the exemption from deed recordation in accordance with HB 3355. Promulgation and enforcement of the proposed rule will not have a direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. However, due to promulgation of the proposed rulemaking, facilities that are not already required to have a certified water quality management plan may choose to request and comply with one in order to be exempted from the requirement to deed record which should lead to increased compliance with state water quality rules at those facilities. Therefore, the rulemaking is consistent with the applicable goals and policy. The commission seeks public comment on this preliminary consistency determination.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-060-335-WS. Comments must be received by 5:00 p.m., March 4, 2002. For further information, please contact Jill Burditt, Regulation Development Section, (512) 239-0560.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103 and §5.105, which provide the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from HB 3355, 77th Legislature, 2001, which prohibits the commission from requiring a landowner to deed record the burial of carcasses in the

county deed records if the landowner has requested and is complying with a water quality management plan.

The proposed amendment implements, in part, Texas Agriculture Code, §201.026, as amended by HB 3355, 77th Legislature, 2001.

**SUBCHAPTER A: INDUSTRIAL SOLID WASTE AND
MUNICIPAL HAZARDOUS WASTE IN GENERAL**

§335.5

§335.5. Deed Recordation of Waste Disposal.

(a) - (c) (No change.)

(d) Exemption. A landowner who disposes of animal carcasses on-site and requests and complies with a water quality management plan developed under Texas Agriculture Code, §201.026(f) (relating to Nonpoint Source Pollution) is exempt from the deed recordation requirements of this section.