The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §37.6001 and §37.6021. Section 37.6021 is adopted *with change* to the proposed text as published in the September 5, 2003 issue of the *Texas Register* (28 TexReg 7623). Section 37.6001 is adopted *without change* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopts these amendments to establish financial assurance requirements for owners and operators of commercial nonhazardous industrial solid waste landfill (CINWL) facilities required to provide financial assurance under 30 TAC Chapter 335, Subchapter T, Permitting Standards for Owners and Operators of Commercial Industrial Nonhazardous Waste Landfill Facilities. Adopted Chapter 335, Subchapter T, which is also published in this issue of the *Texas Register*, establishes specific requirements for the location, design, construction, and operation of commercial industrial nonhazardous solid waste landfills.

SECTION BY SECTION DISCUSSION

The commission adopts amended §37.6001, Applicability. Section 37.6001(a) contains new language making Chapter 37, Subchapter P, applicable to owners and operators of CINWL facilities required to provide financial assurance under Chapter 335, Subchapter T. Chapter 335, Subchapter T, applies to the following types of facilities at which nonhazardous industrial solid waste is stored, processed, or disposed: 1) new CINWL facilities; and 2) existing CINWL facilities with areal expansions of the CINWL. Also, a typographical error is corrected under subsection (a) by replacing the phrase “an owner or operator” with the phrase “owners and operators.”

Under adopted §37.6021(b)(1)(B), a typographical error is corrected by replacing "subparagraph (D)" with "subparagraph (A)." Under adopted §37.6021(b)(1)(C), owners or operators of nonhazardous industrial solid waste facilities required to provide financial assurance under Chapter 335, Subchapter T, or §335.7, concerning Financial Assurance Required, are allowed to use a fully funded trust, pay-in trust, or standby trust as provided by §37.201, concerning Trust Fund, except the pay-in period is ten years or the remaining life of the facility, whichever is shorter, unless the owner or operator satisfies the requirements of subparagraph (C)(i). Adopted subparagraph (C)(i) states that, if a pay-in period in excess of ten years is used, the owner or operator shall submit, on an annual basis, certification from an independent registered professional engineer that there is adequate financial assurance for closure or post closure. Also, the owner or operator would have to submit the completed certification on the form provided by the executive director. In addition, the owner or operator must submit subsequent annual certifications with subsequent payments no later than 30 days after the anniversary date of the initial payment. Under adopted subparagraph (C)(ii), the pay-in trust would revert to a fully funded trust and the entire current closure or post-closure cost estimate would have to be paid into the trust upon direction of the executive director if: 1) the owner or operator fails to submit the annual certification by the required time frame in subsection (b)(1)(C)(i); 2) the certification is incomplete; or 3) the certification is not submitted on the form provided by the executive director.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted amendments in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted amendments are not subject to §2001.0225 because they do 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted amendments is to protect the environment and reduce risks to human health. The rulemaking is intended to provide financial assurance requirements for owners and operators of CINWL facilities. The adopted amendments substantially advance their purpose by spelling out the financial assurance requirements. However, because the adopted amendments do not require significantly more from an applicant than is required or allowed by current rules and law, the amendments do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted amendments are not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because the adopted amendments specify financial assurance requirements for owners and operators of CINWL facilities, of which there are only two existing in the state that could be affected if they apply for capacity expansion and one pending application for a proposed facility which would be subject to the new regulations, if adopted.

In addition, the adopted amendments do not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the adopted rules do not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) adopt a rule solely under the general powers of the agency.

The adopted amendments do not exceed a standard set by federal law because there are no such corresponding federal standards for the disposal of nonhazardous industrial solid waste in CINWLs. Further, the adopted amendments do not exceed an express requirement of state law because Texas Health and Safety Code, Chapter 361 does not establish express requirements for the disposal of nonhazardous industrial solid waste in CINWLs. The adopted amendments do not exceed the requirements of a delegation agreement because there is no delegation agreement that establishes express requirements concerning CINWLs. These rules are not adopted solely under the general powers of the agency, but under the provisions of Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state; and under Texas Health and Safety Code, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Texas Health and Safety Code.

TAKINGS IMPACT ASSESSMENT

The commission performed a takings impact assessment for these adopted amendments under Texas Government Code, §2007.043.

The adopted amendments do not impose a greater burden than is necessary to achieve the health and safety purpose because the adopted requirements represent the financial practice necessary to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste. Promulgation and enforcement of these amendments are neither a

statutory nor a constitutional takings because they do not affect private real property. Specifically, the amendments only amend financial assurance requirements to apply to CINWLs, and do not affect a landowner's rights in private real property by burdening private real property, nor by restricting or limiting a landowner's right to property, or reducing the value of property by 25% or more beyond that which would otherwise exist in the absence of the amendments. In addition, the adopted amendments will not affect private real property which is the subject of the rules and there is no burden on private real property because the adopted amendments do not require significantly more from an applicant than is required or allowed by current rules, law, or consistent practice of the agency. Finally, the subject regulations do not affect a landowner's rights in private real property. Therefore, the amendments do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted amendments and found that they will affect an action and/or authorization identified in 31 TAC §505.11(a)(6), and will therefore require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission has undertaken a consistency determination for the adopted amendments under 31 TAC §505.22 and has found the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated

to prevent releases of pollutants that may adversely affect coastal natural resource areas, and at a minimum, comply with standards established under Solid Waste Disposal Act, 42 United States Code, §§6901 *et seq*. Promulgation and enforcement of these adopted amendments are consistent with the applicable CMP goals and policies because the amendments provide financial assurance standards for the disposal of nonhazardous industrial solid waste in CINWL units. In addition, the adopted amendments do not violate any applicable provisions of the CMP's stated goals and policies.

PUBLIC COMMENT

A public hearing on the proposal was scheduled to be held in Austin on September 30, 2003. No formal public comment was offered at the scheduled hearing; so a hearing was not held. The comment period for written comments ended at 5:00 p.m., October 6, 2003. Written comments were submitted during the comment period by the City of Baytown; Fritz, Byrne, Head & Harrison, L.L.P. (FBH&H), on behalf of Chambers County, Texas and Informed Citizens United; and the Galveston Bay Foundation. The comments are addressed in the RESPONSE TO COMMENT section of this preamble.

RESPONSE TO COMMENTS

No commenter expressed opposition to the proposed rules. Most commenters expressed support for the commission's efforts to adopt rules establishing comprehensive and consistent standards for the disposal of nonhazardous industrial solid waste in CINWLs, or stated that the rules are a "step in the right direction." Nonetheless, the commenters provided suggestions for change in the proposed rules at adoption.

The City of Baytown commented that the financial assurance requirements for hazardous waste facilities found in Chapter 37, Subchapter P, should be the starting point for development of the CINWL rules. The Galveston Bay Foundation commented that financial assurance should be required for as long as waste components will be buried at the facility.

The commission disagrees with these comments. The commission asserts that CINWL facilities pose a lesser risk of endangering human health and the environment than hazardous waste landfill facilities, as discussed extensively throughout the preamble to the Chapter 335, Subchapter T adoption published in this issue of the *Texas Register*. Therefore, the commission maintains that it is not appropriate to adopt financial assurance rules for CINWL facilities that are equivalent or more stringent than those required for hazardous waste landfill facilities. The commission notes that requiring financial assurance for as long as waste components will be buried at the facility would be more stringent than the financial assurance requirements applicable to hazardous waste management facilities. The commission has made no changes to the proposed text in response to these comments.

FBH&H commented that the rules should require financial assurance for bodily injury and property damage to third parties caused by both sudden accidental occurrences and non-sudden accidental occurrences arising from operations of the facility. The City of Baytown commented that the rules should require CINWL facilities to have financial assurance for liability.

The commission disagrees with these comments. The commission notes that the requirement for liability insurance is based on the perceived risk presented by the wastes managed at a facility. Liability insurance is required for hazardous waste facilities, but not for municipal solid waste facilities. Although the perceived risks associated with Class 1 (nonhazardous) wastes are greater than those for municipal solid waste, they are less than those for hazardous waste. Landfills make up only a very small percentage of units permitted at hazardous waste facilities. These permitted facilities contain many other types of units which treat, store, and dispose of hazardous waste which include tanks, container storage areas, surface impoundments, incinerators, boilers, etc. Because of the physical nature and volume of hazardous wastes handled as well as the types of units the waste is handled in, the commission requires all permitted industrial hazardous waste facilities to provide liability insurance, which is a state requirement based on federal regulations. However, the commission asserts that in general the perceived risks associated with Class 1 wastes do not warrant liability insurance. Nevertheless, the commission notes that, under §335.7, if the executive director determines that there might be a significant risk to human health and the environment from sudden or non-sudden accidental occurrences resulting from the operations of a nonhazardous industrial solid waste treatment, storage, or disposal facility, the owner/operator may be required to provide liability insurance in accordance with Chapter 37, Subchapter P. The commission has made no changes to the proposed text in response to these comments.

SUBCHAPTER P : FINANCIAL ASSURANCE FOR HAZARDOUS AND NONHAZARDOUS INDUSTRIAL SOLID WASTE FACILITIES

§37.6001, §37.6021

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state; and under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Texas Health and Safety Code.

§37.6001. Applicability.

(a) This subchapter applies to owners and operators of interim status hazardous waste facilities required to provide financial assurance under §335.128 of this title (relating to Financial Assurance); owners or operators of hazardous waste facilities required to provide financial assurance under §335.179 of this title (relating to Financial Assurance); owners or operators of industrial solid waste or municipal hazardous waste facilities required to provide financial assurance under §335.7 of this title (relating to Financial Assurance Required); owners and operators of commercial nonhazardous industrial solid waste facilities required to provide financial assurance under Chapter 335, Subchapter T of this title (relating to Permitting Standards for Owners and Operators of Commercial Industrial

Nonhazardous Waste Landfill Facilities); and owners or operators required to provide financial assurance for corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units).

(b) This subchapter does not apply to owners or operators which are state or federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States.

(c) This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure, post closure, or corrective action.

§37.6021. Financial Assurance Requirements for Closure, Post Closure, and Corrective Action.

(a) In addition to the requirements of this subchapter, owners or operators required to demonstrate for closure, post closure, or corrective action must comply with Subchapters A - D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action), §335.112 of this title (relating to Standards), and §335.152 of this title (relating to Standards).

(b) Owners or operators subject to this subchapter may use any of the following mechanisms as specified in Subchapter C of this chapter to demonstrate financial assurance for closure, post closure, or corrective action:

(1) trust fund (fully funded or pay-in trust), except that:

(A) owners or operators of interim status hazardous waste facilities required to provide evidence of financial assurance under §335.128 of this title (relating to Financial Assurance) must make annual payments to fully fund the trust fund by July 6, 2002 or must make annual payments into the trust fund over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter;

(B) owners or operators of permitted hazardous waste facilities required to provide evidence of financial assurance under §335.179 of this title (relating to Financial Assurance), who previously operated under interim status rules and choose to establish a trust fund after having used one or more alternate mechanisms specified in this chapter, must make an initial payment in at least the amount that the fund would contain if the trust fund were established initially and annual payments made as specified in subparagraph A of this paragraph; and

(C) owners or operators of nonhazardous industrial solid waste facilities required to provide financial assurance under Chapter 335, Subchapter T of this title (relating to Permitting Standards for Owners and Operators of Commercial Industrial Nonhazardous Waste Landfill

Facilities) or §335.7 of this title (relating to Financial Assurance Required) using a pay-in trust must use a pay-in period of the shorter of ten years or the remaining life of the facility, unless the owner or operator satisfies the requirements of clause (i) of this subparagraph.

(i) If a pay-in period in excess of ten years is used, the owner or operator shall submit, on an annual basis, certification from an independent registered professional engineer that there is adequate financial assurance for closure or post closure. The owner or operator must:

(I) submit the completed certification on the form provided by the executive director;

(II) submit the initial certification with the initial trust payment; and

(III) submit subsequent certifications annually with subsequent payments no later than 30 days after the anniversary date of the initial payment.

(ii) The pay-in trust will revert to a fully funded trust and the entire current closure or post closure cost estimate shall be paid into the trust upon direction of the executive director if:

(I) the owner or operator fails to submit the annual certification by the required time frame in clause (i) of this subparagraph;

(II) the certification is incomplete; or

(III) the certification is not submitted on the form provided by the executive director.

(D) the executive director will respond in writing within 60 days to requests for reimbursements made in accordance with §37.201(j) of this title (relating to Trust Fund);

(2) surety bond guaranteeing payment;

(3) surety bond guaranteeing performance, except that this mechanism may not be used by interim status hazardous waste facilities required to provide evidence of financial assurance under §335.128 of this title (relating to Financial Assurance);

(4) irrevocable standby letter of credit;

(5) insurance;

(6) financial test; or

(7) corporate guarantee.

(c) References in Subchapter D of this chapter to permit numbers should be changed to solid waste registration numbers.

(d) Owners or operators using a financial test or corporate guarantee must comply with §37.141 of this title (relating to Increase in Current Cost Estimate) except that mechanism increases must be made within 90 days after the close of each succeeding fiscal year.