

The Texas Commission on Environmental Quality (commission) proposes amendments to §37.6001 and §37.6021.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission proposes these amendments to establish financial assurance requirements for owners and operators of commercial nonhazardous industrial solid waste 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. Proposed Chapter 335, Subchapter T, which is also published in this issue of the *Texas Register*, would establish specific requirements for the location, design, construction, and operation of commercial industrial nonhazardous solid waste landfills.

SECTION BY SECTION DISCUSSION

The commission proposes amended §37.6001, Applicability. Section 37.6001(a) contains new language making Chapter 37, Subchapter P applicable to owners and operators of commercial nonhazardous industrial solid waste 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 commercial industrial nonhazardous waste landfill facilities; and 2) existing commercial industrial nonhazardous waste landfill facilities with areal expansions of the commercial industrial nonhazardous waste landfill. A typographical error is proposed to be corrected under subsection (a) by replacing the phrase “an owner or operator” with the phrase “owners and operators.”

Under proposed §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 (relating to Financial Assurance Required) would be allowed to use a fully funded trust, pay-in trust, or standby trust as provided by §37.201 (relating to 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). Proposed 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; and submit the initial certification with the initial trust payment with subsequent annual certifications to be submitted with the subsequent payments, which are due no later than 30 days after the anniversary date of the initial payment. Under proposed 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.

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 amendments are 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 amendments. There are no units of state or local government that operate facilities that would be affected by the proposed amendments, nor do they typically use such commercial facilities for disposal of nonhazardous industrial solid waste.

The proposed rulemaking is intended to provide financial assurance requirements for owners and operators of commercial nonhazardous industrial solid waste landfill facilities. Facilities affected by the proposed amendments are already subject to similar standards.

Commercial landfills subject to the standards proposed in this rulemaking are utilized to dispose of nonhazardous industrial waste, including wastewater treatment sludges, petroleum contaminated soils, spent air purification cartridge filters, metal bearing solids, and spent solvents. The proposed amendments would only apply to existing sites that apply for an areal or capacity expansion or to new facilities for which an initial application was filed on or after June 20, 2003, or for which an application was pending on June 20, 2003.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of implementing the proposed amendments will be potential improved compliance and environmental protection due to the implementation of more clear and concise financial assurance rules relating to the disposal of nonhazardous industrial solid waste in commercial industrial nonhazardous waste landfills.

No significant fiscal implications are anticipated due to implementation as the amendments are not expected to have a significant impact on current practices. The proposed rulemaking is intended to provide financial assurance requirements for owners and operators of commercial nonhazardous industrial solid waste landfill facilities. Facilities affected by the proposed amendments are already subject to similar standards. This rulemaking is only intended to increase consistency of existing rules and to provide specificity. The proposed amendments would only apply to existing sites that apply for an areal or capacity expansion or to new facilities for which an initial application was filed on or after June 20, 2003, or for which an application was pending on June 20, 2003.

The agency does not anticipate that a large number of sites in Texas will be affected by the proposed amendments. There are only two existing sites, located in the Houston area, that could be affected if they apply for capacity expansion. Additionally, the agency only receives less than one new application per year from facilities that would be affected by the proposed amendments.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed amendments, which are intended to provide financial assurance requirements for owners and operators of commercial nonhazardous industrial solid waste landfill facilities. Facilities affected by the proposed amendments are already subject to similar standards. This rulemaking is only intended to increase consistency of existing rules and to provide specificity. The proposed amendments would only apply to existing sites that apply for an areal or capacity expansion or to new facilities for which

an initial application was filed on or after June 20, 2003, or for which an application was pending on June 20, 2003.

There are no small or micro-businesses that would currently be affected by the proposed amendments. Although possible, the agency anticipates that very few, if any, future applications will be from small or micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 has reviewed the proposed amendments in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the proposed 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 proposed amendments is to protect the environment and reduce risks to human health. The proposed rulemaking is intended to provide financial assurance requirements for owners and operators of commercial

nonhazardous industrial solid waste landfill facilities. The proposed amendments substantially advance their purpose by spelling out the financial assurance requirements. However, because the proposed amendments do not require substantially more from an applicant than is required or allowed by current rules and law, the proposed amendments do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The proposed 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 proposal specifies financial assurance requirements for owners and operators of commercial nonhazardous industrial solid waste landfill facilities.

In addition, the proposed amendments do not exceed the four applicability requirements of Texas Government Code, §2001.0025(a)(1) - (4) in that the proposal does 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) propose to adopt a rule solely under the general powers of the agency.

The proposal does 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 commercial industrial nonhazardous solid waste landfills. Further, the proposal does 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 commercial industrial nonhazardous solid waste landfills. The proposal does not exceed the requirements of a delegation agreement because there is no delegation agreement that establishes express requirements concerning commercial industrial nonhazardous solid waste landfills. This rulemaking is not proposed 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.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

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

The proposed amendments do not impose a greater burden than is necessary to achieve the health and safety purpose because the proposed 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 would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the amendments would only amend financial assurance requirements to apply to commercial industrial nonhazardous waste landfills, 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 proposed 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 proposed amendments do not require substantially 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 taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the proposal will affect an action and/or authorization identified in §505.11(a)(6), and will therefore require that applicable goals and policies of the CMP be considered during the rulemaking process. The commission has prepared a consistency determination for the proposed amendments under 31 TAC §505.22 and has found the proposed rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed 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 proposed amendments are consistent with the applicable CMP goals and policies because the proposed amendments would provide financial assurance standards for the disposal of

nonhazardous industrial solid waste in commercial industrial nonhazardous waste landfill units. In addition, the proposed amendments do not violate any applicable provisions of the CMP's stated goals and policies. The commission invites public comment on the consistency of the proposed amendments.

PUBLIC HEARING

A public hearing on this proposal will be held in Austin on September 30, 2003 at 10:00 a.m. in Building F, Room 2210, of the commission's central office, located at 12100 Park 35 Circle, Austin, Texas. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-052-335-WS. Comments must be received by 5:00 p.m., October 6, 2003. For further information, please contact Ray Henry Austin, Regulation Development Section, at (512) 239-6814.

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

§37.6001, §37.6021

STATUTORY AUTHORITY

The amendments are proposed 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.

The proposed amendments implement Texas Health and Safety Code, Chapter 361.

§37.6001. Applicability.

(a) This subchapter applies to owners and operators [an owner or operator] 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) (No change.)

§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 [A, B, C, and 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) (No change.)

(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 (D) [(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; and

(II) submit the initial certification with the initial trust payment with subsequent annual certifications to be submitted with the subsequent payments, which are due 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) [(C)] 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) - (7) (No change.)

(c) - (d) (No change.)