

The Texas Commission on Environmental Quality (commission) proposes an amendment to §330.4, Permit Required.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The proposal is made in response to a petition received on December 16, 2002 from the City of Houston requesting a permit exemption for transfer stations that also operate source-separated recycling programs. The petitioner requested that the rule be changed to state that a permit is not required for any municipal solid waste Type V transfer station that is owned by a local government that operates a source-separated recycling program or, as provided by the existing rule, includes a material recovery operation that meets all of the requirements established by this subsection. The requested revisions to the rule language were to delete the word “new” in the phrase “a permit is not required for any new municipal solid waste Type V transfer station that,” and to insert the following phrase describing an additional exemption: “either is owned by a local government that operates a source-separated recycling program or”

On February 5, 2003, the commission voted to initiate rulemaking and instructed the executive director to examine the issues in the petition, including whether to establish appropriate criteria for the exemption and whether to broaden the permit exemption beyond local governments, and to initiate rulemaking.

Existing rules allow municipal solid waste transfer facilities which recover 10% or more by weight or weight equivalent of the total incoming waste stream for reuse or recycling to obtain a registration in

lieu of a permit. The proposed rule will be amended to allow transfer facilities to deduct incoming waste that has already been reduced by 10% or more through recycling in calculating their qualification to obtain a registration in lieu of a permit.

For example, under the current rule, if a transfer facility receives 50,000 tons annually of incoming waste from one source, then that transfer facility can only qualify for the permit exemption if the transfer facility can demonstrate that it recycles 10% or more (5,000 tons or more) at the transfer facility prior to transferring the waste to a landfill. Under the proposed rule, if a transfer facility receives 50,000 tons annually of incoming waste from two sources, 25,000 tons annually from each source, but one source, Source A, has a source-separation recycling program that recycles 10% or more (2,500 tons or more), then in order to qualify for the permit exemption, that transfer facility must only demonstrate that it recycles 10% or more (2,500 tons or more) of the amount of incoming waste from Source B prior to transferring the waste to a landfill.

The commission determined that the proposed new language contained in the petition, “either is owned by a local government that operates a source-separated recycling program or . . .” is not appropriate. The rule is broadened, beyond the requested application to local governments, to allow any transfer facility meeting the criteria to qualify for this permit exemption. However, the rule applies the permit exemption only for a specific transfer facility location, not as a blanket exemption for owners or operators.

A registration does not have a contested case hearing requirement; however, a public meeting must be held for each application as required by Texas Health and Safety Code, §361.111, and the existing rules in §330.65(d)(3)(C). By allowing a registration in lieu of a permit, it could be more cost-effective for transfer stations to operate, which could have the effect of increased recycling of municipal solid waste.

The proposed rule is an amendment to add a new ongoing recordkeeping requirement in addition to the current annual reporting requirement.

SECTION BY SECTION DISCUSSION

Proposed §330.4(e), Permit Required, adds a cross-reference to subsection (q), which is now applicable under this rulemaking.

Proposed §330.4(e) also deletes the word “shall” and replaces it with the word “must” to conform with the Texas Legislative Council Drafting Manual. “Shall” imposes a duty upon a person named in the sentence. “Must” imposes a precedent condition on a thing named in the sentence.

Proposed §330.4(q) deletes the word “new” to allow both new and existing transfer stations that meet all the requirements of this subsection to register their operations in lieu of obtaining a permit. This should result in increased recycling efforts of transfer stations by extending their recycling requirements beyond their application for registration, thereby, creating an ongoing performance-based requirement for permit exemption. Additionally, proposed §330.4(q) deletes the phrase “that includes a material recovery operation” because a transfer facility that demonstrates that its total incoming waste stream has

been reduced by 10% or more through source-separated recycling does not need to include a material recovery operation at the transfer station. Thus, this phrase is unnecessary under the proposed exemption.

Subsection (q) is also amended for readability by combining two redundant sentences; deleting the word “must” and replacing it with the word “shall”; adding a cross-reference that had been inadvertently omitted; and deleting text to be consistent with *Texas Register* formatting requirements.

Subsection (q)(1) is amended to correct a catch line that is rendered inaccurate as a result of this rulemaking.

Subsection (q)(1) deletes the word “total” and adds the sentence, “Incoming waste that has already been reduced by at least 10% through a source-separation recycling program is not subject to this requirement and may be excluded from this calculation.” This relieves transfer facilities from the burden of having to recover an additional 10% from source-reduced waste streams, and provides an incentive for transfer facility operators to establish effective source-reduction programs. This amendment is consistent with Texas Health and Safety Code, §361.111(a)(4), which exempts from municipal solid waste permit requirements “a materials recovery facility that recycles for reuse more than 10% of its incoming *nonsegregated* waste stream if the remaining non-recyclable waste is transferred to a permitted landfill not more than 50 miles from the materials recovery facility.”

Subsection (q)(1) also deletes the word “must” and replaces it with the word “shall” and removes an obsolete effective date.

Subsection (q)(1) also adds new subparagraphs (A) and (B) to outline the documentation requirements needed by a transfer station to apply for and maintain the permit exemption. This complements the deletion of the word “new” in subsection (q) in creating an ongoing performance-based standard for this permit exemption.

Subsection (q)(3) deletes the word “shall” and replaces it with the word “must” and updates a cross-reference.

Subsection (q)(4) deletes the word “such” for readability.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Analyst with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the agency and most units of state and local government due to implementation of the proposed rule. However, units of local government that own and operate Type V municipal solid waste transfer stations may experience cost savings, which could be significant, due to implementation of the proposed rule. Units of state and local government that do not own or operate Type V municipal solid waste transfer stations would not be affected by the proposed rule.

The proposed rule is intended to amend existing commission municipal solid waste rules that allow Type V municipal solid waste transfer stations to apply for a registration authorization instead of a solid waste permit. Currently, a transfer station is allowed to apply for a registration authorization if the station recycles on-site 10% or more, by weight or weight equivalent, of the total incoming waste it receives prior to transferring the waste to a landfill. The proposed rule would also allow a station to apply for a registration authorization if it shows that 10% of all incoming waste is recycled off-site prior to arriving at the station.

The commission anticipates there will be cost savings for Type V municipal solid waste transfer stations that qualify for, and choose to apply for, a permit exemption. The commission estimates that the cost for obtaining a registration authorization ranges from \$35,000 to \$250,000 for each registration, depending on the location of the site. The cost for a permit could range from \$225,000 to over \$1,000,000. Applying for a registration authorization is less expensive because there is no opportunity for a contested case hearing and other public involvement requirements are reduced from those required for a permit, and consequently legal fees and other professional service fees are less if expert witness fees are not needed. There could be cost savings in the range of \$215,000 to \$750,000 for a facility that receives a registration authorization where a permit authorization was previously required. The total cost savings to these facilities will depend on the number of new or amended permit applications that will qualify for the exemption. There are approximately 25 local government owned and operated permitted Type V transfer stations that could potentially be eligible for a registration authorization. Additionally, the commission receives approximately five applications for new sites annually. The

majority of these are from units of local government and will likely qualify to receive a registration authorization due to implementation of the proposed rule.

PUBLIC BENEFIT AND COSTS

Mr. Davis has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule would be a potential increase in municipal solid waste being recycled, and a more cost-effective regulation and control of municipal solid waste.

Cost savings are anticipated for individuals and businesses resulting from the enforcement of or compliance with the proposed rule.

The proposed rule will affect current and future Type V municipal solid waste transfer stations.

Currently, there are approximately 13 commercially owned and operated permitted transfer stations.

Any new or existing transfer station that would be eligible to apply for a registration authorization in lieu of a permit could save from \$215,000 to \$750,000 in permitting costs.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed rule for small or micro-businesses that own or operate Type V municipal solid waste transfer stations. It is not known how many new or existing commercially owned and operated transfer stations are small or

micro-businesses. If any of them are small or micro-businesses, anticipated costs savings would be the same as for larger businesses due to the enforcement of or compliance with the proposed rule.

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 rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rule is not subject to §2001.0225, because it does not meet the criteria for a “major environmental rule” as defined in that statute.

A “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 specific intent of the proposed rule is to promote recycling and materials recovery at Type V transfer facilities by exercising commission discretion under Texas Health and Safety Code, §361.111, to increase the number of facilities eligible for an exemption from permit requirements. Therefore, it is not anticipated that the proposed rule will 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 commission concludes that this proposed rule does not meet the definition of major environmental rule.

Furthermore, even if the proposed rule did meet the definition of a major environmental rule, the proposed rule is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, 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.

In this case, the proposed rule does not meet any of these requirements. First, there are no applicable federal standards that this rule would address. Second, the proposed rule does not exceed an express requirement of state law because there is no expressly applicable state law. Third, there is no delegation agreement that would be exceeded by the proposed rule. Fourth, the commission proposes this rule to allow for more Type V transfer facilities to qualify for an exemption from permit requirements under Texas Health and Safety Code, §361.111. This rule is also proposed under the authority of Texas Health and Safety Code, §361.011 and §361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste

Disposal Act, and §361.022, which sets public policy in the management of municipal solid waste to include reuse or recycling of waste. Therefore, the commission does not propose the adoption of the rule solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rule and performed a preliminary assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to promote recycling and materials recovery at Type V transfer facilities by exercising commission discretion under Texas Health and Safety Code, §361.111 to increase the number of facilities eligible for an exemption from permit requirements. The proposed rule would substantially advance this stated purpose by deleting the requirement that only new facilities may qualify for the exemption and allowing a facility to use the reduction in the incoming waste stream from a source-separated recycling program to count toward the exemption.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property because the rule does not affect real property. This rule exercises commission discretion by broadening the exemption from permit requirements for Type V transfer facilities.

There are no burdens imposed on private real property, and the benefits to society are increased recycling and extended life to existing landfills. In addition, because the proposed rule increases the

number of facilities eligible for an exemption from permit requirements, the proposed rule does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, this proposed rule will not constitute a taking under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found the proposed rule is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. The commission determined that the proposed rule concerns permit exemptions, which is administrative and procedural in nature; does not impact any CMP goals and policies; will have no substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the proposed rule will not violate (exceed) any standards identified in the applicable CMP goals and policies. Therefore, this proposed rule is consistent with CMP goals and policies. The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on November 17, 2003, at 10:00 a.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. 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 be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before 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 hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-028-330-WS. Comments must be received by 5:00 p.m., November 24, 2003. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

SUBCHAPTER A: GENERAL INFORMATION

§330.4

STATUTORY AUTHORITY

The amendment is proposed under Texas Health and Safety Code, §361.111, which authorizes the commission to exempt from permit requirements certain municipal solid waste management facilities that meet specific criteria; §361.022, which sets public policy in the management of municipal solid waste to include reuse or recycling of waste; §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; and §361.024, which provides the commission with rulemaking authority.

The proposed amendment implements Texas Health and Safety Code, §361.111.

§330.4. Permit Required.

(a) - (d) (No change.)

(e) A request for registration for sites or facilities exempted from permits under subsections (c), (d), and (q) [(c) and (d)] of this section must [shall] be submitted in a format provided by the executive director and must [shall] include all information requested thereon and any additional information considered necessary by the applicant or that may be requested by the executive director.

(f) - (p) (No change.)

(q) In addition to permit exemptions established in subsection (d) of this section, a permit is not required for any [new] MSW Type V transfer station [that includes a material recovery operation] that meets all of the requirements established by this subsection. [Owners and operators of Type V transfer facilities meeting the requirements of this subsection are allowed to register their operations in lieu of permitting them.] Owners and operators of Type V transfer stations that meet the permit exemption requirements of this subsection and wish to exercise the exemption option shall [must] register their operation in accordance with §330.60 and §330.65 of this title.

(1) Source-separated recycling/materials [Materials] recovery. The transfer facility must recover 10% or more by weight or weight equivalent of the [total] incoming waste stream for reuse or recycling. Incoming waste that has already been reduced by at least 10% through a source-separation recycling program is not subject to this requirement and may be excluded from this calculation. The applicant shall [must] demonstrate in the registration application the method that will be used to assure the 10% requirement is achieved. [The effective date of this subsection is February 2, 1995.]

(A) After the transfer facility operations commence, documentation of recycling or recovery of 10% of waste material from the waste stream must be annually updated and maintained at the transfer facility for records inspection.

(B) Failure to maintain the standard of 10% recovery of materials shall be grounds for revocation of the registration.

(2) (No change.)

(3) Exempt facilities. Transfer facilities exempted from a permit under this subsection must [shall] register with the executive director in accordance with §330.60 and §330.65 of this title and meet the additional design criteria of §330.65(f) of this title.

(4) Revocation. Failure to operate [such] registered facilities in accordance with the requirements established in Subchapter G of this chapter (relating to Operational Standards for Solid Waste Processing and Experimental Sites) may be grounds for revocation of the registration.

(r) - (aa) (No change.)