

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** May 9, 2003

Thru: LaDonna Castañuela
Chief Clerk

From: Randolph Wood, Deputy Director
Office of Environmental Policy, Analysis, and Assessment

Subject: Consideration of Petitions for Proposed Rulemaking

Docket No.: 2003-0497-RUL

Rule Log No.: 2003-033-PET-WS

Who Submitted the Petitions:

On April 4, 2003, the executive director received a petition for rulemaking from Waste Management of Texas, Inc., submitted by Mr. John A. Riley, Vinson & Elkins, L.L.P. On May 1, 2003, the executive director received a petition for rulemaking from the City of Dumas, North Texas Municipal Water District, Texoma Area Solid Waste Authority, Republic Waste Services of Texas, Ltd., and Regional Land Management Services, Ltd., submitted by Brent W. Ryan, McElroy, Sullivan, Ryan & Miller, L.L.P. Because the content of both petitions are so closely related, staff has responded to these petitions as one rule project and one document item as discussed in the following.

What the Petitioners Request:

- The petitioners request that the commission initiate rulemaking to amend certain language regarding the required level of detail and specificity of municipal solid waste site operating plans.
- The petition filed by Waste Management of Texas, Inc. requests that the agency initiate rulemaking to amend 30 Texas Administrative Code (TAC) §330.114, Site Operating Plan, as follows in ~~strikeout~~ format:
- **§330.114. Site Operating Plan.**

The Site Operating Plan (SOP) shall provide operating procedures for the site management and the site operating personnel ~~in sufficient detail to enable them to conduct the day-to-day operations of the facility~~. The SOP shall be retained during the active life of the site and throughout the post-closure care maintenance period. As a minimum, the SOP shall include ~~specific~~ guidance, procedures, instructions, and schedules on the following:

- (1) - (2) (No change.)

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(3) a ~~detailed~~ description of the procedures that the operating personnel shall follow concerning the operational requirements of this subchapter;

(4) - (6) (No change.)

- This petitioner asserts that requiring applicants to include an unnecessarily high degree of detail in their site operating plans is inconsistent with the commission's vision that these plans should be sufficiently flexible for long-term operations. To support this assertion, the petitioner points to the definition of "Site Operating Plan" under §330.2(135):

"A document, prepared by the design engineer in collaboration with the site operator, that provides guidance to site management and operating personnel in sufficient detail to enable them to conduct day-to-day operations throughout the life of the site in a manner consistent with the engineer's design and the commission's regulations."

- The petitioner argues that because this definition includes the phrase "throughout the life of the site," it is clear that the commission expects site operating plans to contain adequate flexibility and generality such that the plans are capable of governing the long-term operation of landfills.
- In addition, this petitioner asserts that the recent court decision of the Third Court of Appeals in *BFI Waste Systems of North America, Inc. v. Martinez Envtl. Group, et al.*, 93 S.W.3d 570 (*BFI* case) has created significant confusion in the regulated community regarding the level of site-specific detail in site operating plans that the commission might require for current and future municipal solid waste applicants. The petitioner asserts that, without the petitioned revisions, the commission and the regulated community are left to apply an appellate court decision that does not provide sufficient guidance to the agency, public, and applicants to prevent costly litigation over the adequacy of particular site operating plans. Finally, the petitioner states that the logical way for applicants to seek to comply with the court decision would be to add additional operational details to their site operating plans, which would likely decrease the flexibility of those plans for the long-term life of the landfills and thereby undercut what the petitioner believes is the commission's goal of encouraging site operating plan flexibility, as discussed earlier. Note that the *BFI-Tessman Road* litigation is still pending at the Supreme Court, and that the Court has requested briefing from the protestant group, due May 30, 2003.
- The petition filed by the City of Dumas, North Texas Municipal Water District, Texoma Area Solid Waste Authority, Republic Waste Services of Texas, Ltd., and Regional Land Management Services, Ltd. requests that the agency initiate rulemaking to amend §330.2, Definitions, and §330.114, as follows in redline/strikeout format:

- **§330.2. Definitions.**

(1) - (134) (No change.)

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(135) **Site operating plan** - A document, prepared by the design engineer in collaboration with the site operator, that provides guidance to site management and operating personnel **regarding in sufficient detail to enable them to conduct day-to-day** operations throughout the life of the site in a manner consistent with the engineer's design and the commission's regulations.

(136) - (175) (No change.)

- **§330.114. Site Operating Plan.**

The Site Operating Plan (SOP) shall provide operating **standards** ~~procedures~~ for the site management and the site operating personnel **consistent with the requirements of this subchapter in sufficient detail to enable them to conduct the day-to-day operations of the facility.** The SOP shall be retained during the active life of the site and throughout the post-closure care maintenance period. As a minimum, the SOP shall **also** include ~~specific guidance, procedures, instructions, and schedules on~~ the following:

(1) - (2) (No change.)

(3) **provisions for training** ~~a detailed description of the procedures that the operating personnel to comply with shall follow concerning~~ the operational requirements of this subchapter **and the SOP;**

~~(4) other instructions as necessary to ensure that operating personnel comply with any other local, state, or federal regulation for the operational standards of the type of work involved at the facility; and~~

(4) ~~(5)~~ procedures for the detection and prevention of the disposal of regulated hazardous waste as defined in 40 Code of Federal Regulations Part 261 and of polychlorinated biphenyls (PCB) wastes as defined in 40 Code of Federal Regulations Part 761. The detection and prevention program **must** ~~shall~~ include the following:

(A) random inspections of incoming loads unless the owner or operator takes other steps to ensure that the incoming loads do not contain regulated hazardous waste or PCB wastes. The inspection procedures shall be identified in the plan along with **procedures to be followed** ~~a backup procedure~~ if hazardous waste is identified. The procedure **must** ~~shall~~ include the inspection of compactor vehicles;

(B) - (C) (No change.) ~~and~~

(E) provisions for the remediation of the incident; **and**

(5) ~~(6)~~ a Fire Protection Plan that **must** ~~shall~~ identify the fire protection standards to be used at the facility and **require** the training of personnel in fire-fighting techniques.

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- This second petitioner asserts that the *BFI* case has created uncertainty and confusion regarding the contents and focus of site operating plans in municipal solid waste facility permit applications, and that this uncertainty and confusion can most efficiently and appropriately be resolved by the commission adopting the amendments to the site operating plan rules proposed by their petition.

Recommended Action and Justification:

The executive director recommends that the petitions for rulemaking be approved, that the commission instruct the executive director to examine the issues in the petitions, recommend appropriate changes, consider additional changes, and initiate rulemaking. Furthermore, the executive director recommends that staff be directed to seek input from the existing stakeholder group which was formed to provide guidance on the draft Technical Guidance on Site Operating Plans, and that staff expedite the rulemaking.

The executive director agrees that §330.114 should allow flexibility for site operating plans to be performance based by including provisions consistent with the overall purpose of Subchapter F which do not necessarily track all of the specific provisions of the subchapter. The executive director also agrees that the *BFI* case has resulted in uncertainty regarding the required content of site operating plans.

Key Points in the Schedule for the Petitions:

Deadline for consideration by commission: June 3, 2003
Last available agenda for consideration: May 29, 2003

Applicable Law:

Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule and 30 Texas Administrative Code, §20.15, which provides such procedures specific to the commission.

Texas Health and Safety Code, §§361.011, 361.017, and 361.024, which provide the commission the authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; and §361.022, which establishes state public policy concerning municipal solid waste to include recycling as a preferred method and requires the commission to consider that policy when adopting rules.

Affected Public:

Owners and operators of municipal solid waste facilities and persons who are involved in activities near such facilities.

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Affected Agency Programs:

Municipal Solid Waste Permits Section of the Office of Permitting, Remediation and Registration.
Environmental Law Division, Office of Legal Services.
Field Operations Division, Office of Compliance and Enforcement.
Small Business and Environmental Assistance Division.

Agency Contacts:

Ray Austin, Rule Project Manager, 239-6814
Wayne Lee, Program Lead, 239-6815
Steve Shepherd, Staff Attorney, 239-0464
Patricia Durón, Texas Register Coordinator, 239-6087

Attachment: Petitions

cc: 5 copies to the Chief Clerk for distribution
Carolyn Brittin
Sonia Ralls
David Schanbacher
Brian Christian
Dan Eden
Derek Seal
Randolph Wood
Jim Muse
Office of General Counsel
Raymond Austin
Patricia Durón

cc (without attachments):
Wayne Lee, Program Lead
Steve Shepherd, Staff Attorney/OLS acting Liaison
Kathy Vail, Regulation Development Team Leader
Kari Bourland, Program Liaison