

The Texas Commission on Environmental Quality (commission) proposes amendments to §330.2 and §330.114.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking implements a Commission Order regarding two rule petitions to initiate rulemaking about site operating plans (SOPs) for municipal solid waste facilities. One petition for rulemaking was received from Waste Management of Texas, Inc., and a second petition for rulemaking was received from a group of permittees consisting of 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. At Commission Agenda on May 29, 2003, the commissioners directed that rulemaking be initiated to address issues related to the two petitions. Approval for rulemaking was given by Commission Order dated June 4, 2003.

The rule petitioners wish to have rule changes that will provide greater certainty with regard to commission-approved SOPs by removing overly prescriptive language from the existing rules. The need for the amendments arises from recent court decisions that certain SOPs that had been approved by the commission did not have enough detail to meet the current requirement that the plans provide sufficient detail for staff to be able to conduct day-to-day operations throughout the life of the permit. The amendments are proposed to remove overly specific operational requirements that can reduce the flexibility of the commission and permittees to protect public health and the environment. The commission will continue to require compliance with the substantive SOP requirements of Subchapter F, which will remain unchanged. The amendments will apply to applications for proposed facilities and

amendments to existing permits, and will not require existing permittees to initiate permit amendments to conform with the amended rules.

SECTION BY SECTION DISCUSSION

An amendment is proposed to the definition of “Site operating plan” in §330.2, Definitions. The proposed amendment to §330.2(131) deletes the requirement for the plans to have sufficient detail to describe day-to-day operations to be consistent with changes proposed in §330.114.

The commission proposes to amend §330.114, Site Operating Plan. The word “shall” is proposed to be replaced with “must” throughout the section in order to indicate that the requirements are conditions predicate for SOPs rather than obligations for an individual. In the introductory paragraph, the term “provide operating procedures” is proposed to be replaced with the term “include provisions” to allow more flexibility to comply with both performance-based provisions and non-performance-based provisions contained in Subchapter F. In the introductory paragraph, the phrase “in sufficient detail to enable them to conduct the day-to-day operations of the facility” is replaced with “to meet the requirements of this subchapter” to avoid overly specific operational requirements and to allow for more flexibility in daily operations.

The commission proposes to amend §330.114(3) by replacing the phrase “a detailed description of the procedures that the” with “training requirements for” and replacing the wording “shall follow concerning” with “to comply with” in order to require training of operational staff at the facilities while allowing flexibility for changes to operational procedures. The provision is being changed to require a

plan for training staff rather than requiring a detailed description of procedures in order to allow flexibility for operational changes while ensuring that staff can meet the requirements for proper operations at a facility.

Current §330.114(4) is proposed to be deleted. This provision is not needed because the other federal, state, or local regulations that pertain to the operational standards of the type of work involved at the facility are under the jurisdiction of the corresponding governmental entity and should not be part of the commission's review. The subsequent paragraphs are proposed to be renumbered accordingly.

In renumbered §330.114(4)(A) the phrase "a backup procedure" is proposed to be replaced with the phrase "procedures to be followed" to provide clarity that the procedure is the initial response if hazardous waste is detected in incoming materials. In renumbered §330.114(4)(D), the word "and" is proposed to be deleted because it is not needed. In renumbered §330.114(4)(E), the word "and" is proposed to be added to the end of the provision to indicate that the list of the contents of SOPs is continued.

In renumbered §330.114(5), the wording "shall identify" is replaced with "identifies" to clarify that the fire protection standards must be present in the SOP from the outset. In the same paragraph, the word "requires" is inserted before "the training of personnel in fire-fighting techniques" to mandate that the fire protection section of an SOP requires the training of staff rather than just documenting the training if it is done.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, has determined that, for the first five-year period the proposed rules are in effect, there will not be fiscal implications for the commission or other units of state and local government as a result of administration or enforcement of the proposed rules.

The proposed amendments will provide greater certainty with regard to commission-approved SOPs by removing overly prescriptive language from the existing rules. SOPs are part of the permit application submitted to obtain authorization to operate a municipal solid waste facility. The SOP provides procedures for the site management and operating personnel to follow during the life of the site and throughout the post-closure care and maintenance period. Recent court decisions found that certain SOPs that had been approved by the commission did not have enough detail to meet the current requirement that the SOPs provide sufficient detail for staff to be able to conduct day-to-day operations. Therefore, amendments are being proposed to avoid overly specific operational requirements that can reduce the flexibility of the commission and permittees to protect public health and the environment. The proposed amendments will allow the commission to continue exercising its discretion in reviewing and approving SOPs on a case-by-case basis, as appropriate, to protect the environment. The commission will continue to require compliance with the substantive SOP requirements of Subchapter F, which will remain unchanged.

Current rules for SOPs require specific guidance, procedures, instructions, and schedules on each category of personnel employed at the facility, equipment to be used at the facility, and a detailed

description of the procedures used by operating personnel. The proposed amendments no longer require specific guidance, procedures, instructions, and schedules but rather require provisions for the site management and the site operating personnel to meet the requirements of the subchapter. The amendments are proposed to remove overly specific operational requirements that can reduce the flexibility of the commission and permittees to protect public health and the environment.

The Municipal Solid Waste Permits Section is charged with the review of SOPs for new and amended permit applications. The Field Operations Division will determine if a facility's operations are being conducted in accordance with the SOP. No significant fiscal implications are anticipated for the commission to implement the proposed amendments.

The proposed amendments will affect pending and future municipal solid waste permit applications and permit amendments. There are approximately 26 pending permit applications that are anticipated to be affected by the proposed rules. Of these permit applications, approximately 17 are from commercially owned and operated facilities, and the remaining nine are owned or operated by local government. The commission projects reviewing approximately 13 new or amended municipal solid waste disposal permit applications each year.

Fiscal implications are not anticipated for those facilities owned or operated by local government due to the proposed amendments. The requirements for SOPs under the amended rules will be comparable to the commission's interpretation of the requirements for SOP requirements under the existing rules, before that interpretation was drawn into question by recent court decisions.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that, for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the enforcement of, and compliance with, the proposed rules will be increased flexibility for the commission in regulating and controlling municipal solid waste to protect public health and the environment. No fiscal implications are anticipated for businesses or individuals as a result of the enforcement of or compliance with the proposed amendments.

The proposed amendments will affect current and future municipal solid waste permit applications and permit amendments. Currently, there are approximately 17 municipal solid waste permit applications from commercially owned and operated facilities. The requirements for SOPs under the amended rules will be comparable to the commission's interpretation of the requirements for SOP requirements under the existing rules, before that interpretation was drawn into question by recent court decisions. No fiscal implications are therefore anticipated for future municipal solid waste permit applications and permit amendments.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed rules for small or micro-businesses that own or operate municipal solid waste disposal facilities. It is not known how many of the 17 pending permit applications for commercially owned and operated municipal solid waste facilities are from small or micro-businesses. No fiscal implications are anticipated due to the proposed amendments if any of the facilities are 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 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 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 purpose of this rulemaking is to provide more certainty with regard to commission-approved SOPs to avoid overly specific operational requirements and to allow for greater flexibility in daily operations. The affected regulated community is the current and future municipal solid waste permit applicants who are required to comply with existing SOP rules. The proposed rules do not create any new requirements; therefore, it is not anticipated that the proposed rules 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 rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, the amendment 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 amendments to Chapter 330 do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the proposed rules do not exceed an express requirement of state law, because there is no express requirement of state law related to the content of SOPs. Third, the amendments would not exceed the commission's obligations to implement its federally approved Subtitle D permit program. Fourth, the commission does not propose these rules under the general powers of the agency but rather under the authority of Texas Health and Safety Code, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste. These rules are 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. Therefore, the commission does not propose the adoption of the rules solely under the commission's general powers.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed a preliminary assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of this rulemaking is to provide certainty with regard to SOPs, because rule interpretation questions have been raised by a recent Appeals Court ruling. The proposed rules would substantially advance this stated purpose by amending §330.114 and an associated definition in §330.2. The change would provide greater certainty with regard to SOPs. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property because the rules do not affect real property.

The proposed rules do not create any new requirements or impose burdens on private real property. The benefits to society are that providing greater regulatory certainty will benefit the program, the regulated community, the environment, and the general public. The rules do 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, because they do not create more stringent requirements. Therefore, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (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, and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is therefore consistent with CMP goals and policies. Although the rulemaking involves deleting requirements that municipal solid waste facilities' SOPs show detailed procedures for day-to-day operations and for training of site personnel on legal requirements, the requirements will remain in place that the facilities must both comply with rules and laws and operate so as not to cause environmental harm.

Written comments on the consistency of this rulemaking with the CMP may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on November 12, 2003 at 2:00 p.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

Written 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 2003-040-330-WS. Comments must be received by 5:00 p.m., November 17, 2003. For further information or questions concerning this proposal, please contact Joseph Thomas, Office of Environmental Policy, Analysis, and Assessment, (512) 239-4580.

SUBCHAPTER A: GENERAL INFORMATION

§330.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Health and Safety Code, §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; §361.024, which provides the commission with rulemaking authority; and §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; and Texas Health and Safety Code, §361.024 and §361.061.

§330.2. Definitions.

Unless otherwise noted, all terms contained in this section are defined by their plain meaning. This section contains definitions for terms that appear throughout this chapter. Additional definitions may appear in the specific section to which they apply. As used in this chapter, words in the masculine gender also include the feminine and neuter genders, words in the feminine gender also include the masculine and neuter genders; words in the singular include the plural and words in the plural include the singular. The following words and terms, when used in this chapter, have the following meanings.

(1) - (130) (No change.)

(131) **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 relating to [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.

(132) - (168) (No change.)

**SUBCHAPTER F: OPERATIONAL STANDARDS FOR SOLID WASTE LAND DISPOSAL
SITES**

§330.114

STATUTORY AUTHORITY

The amendment is proposed under Texas Health and Safety Code, §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; §361.024, which provides the commission with rulemaking authority; and §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The proposed amendment implements Texas Water Code, §5.103 and §5.105; and Texas Health and Safety Code, §361.024 and §361.061.

§330.114. Site Operating Plan.

The site operating plan (SOP) must include provisions [shall provide operating procedures] for the site management and the site operating personnel to meet the requirements of this subchapter [in sufficient detail to enable them to conduct the day-to-day operations of the facility]. The SOP must [shall] be retained during the active life of the site and throughout the post-closure care maintenance period. The [As a minimum, the] SOP must also [shall] include [specific guidance, procedures, instructions, and schedules on] the following:

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

(3) training requirements for [a detailed description of the procedures that the] operating personnel to comply with [shall follow concerning] the operational requirements of this subchapter;

[(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 must [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) records of all inspections;

(C) training for appropriate facility personnel responsible for inspecting loads to recognize regulated hazardous waste or PCB waste;

(D) notification of the executive director of any incident involving the disposal of a regulated hazardous waste or a PCB waste at the landfill; [and]

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

(5) [(6)] a fire protection plan that identifies [shall identify] the fire protection standards to be used at the facility and requires the training of personnel in fire-fighting techniques.