

The Texas Commission on Environmental Quality (commission) adopts the amendment to §335.347 *with change* to the proposed text as published in the December 5, 2003 issue of the *Texas Register* (28 TexReg 10877).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The commission adopts these revisions to Chapter 335 to implement legislation from the 78th Legislature, 2003.

House Bill (HB) 2252 amended Texas Health and Safety Code (THSC), Chapter 361 (also known as the Solid Waste Disposal Act), Subchapter F, Registry and Cleanup of Certain Hazardous Waste Facilities. The legislation required the commission to adopt rules to implement the changes to THSC, §§361.181, 361.194, 361.197, and 361.201. THSC, §361.181(c) was amended to add a definition of “homestead.” THSC, §361.194(b) was amended to allow the executive director to consider a landowner’s financial ability to satisfy a lien in determining whether to prepare a lien affidavit or whether a lien is satisfied, including whether the landowner received financial compensation for the disposal of the substance addressed by the remedial action and whether the real property that is the subject of the lien is a homestead with a fair market value of \$250,000 or less. THSC, §361.197 was amended by the addition of new subsection (e), which prohibits the commission from filing a cost recovery action under that section against an individual whose only significant asset is a homestead that includes the facility that is subject to, or affected by, a remedial action, that is occupied by the individual as a home, and that has a fair market value of \$250,000 or less. THSC, §361.201 was amended by the addition of new subsections (d) and (e), which require, in cases where an individual’s homestead includes the facility

that is subject to, or affected by, a remedial action, that the commission adopt criteria by rule to determine whether the individual is financially capable of conducting any necessary remediation studies or remedial action and that the rule must provide that the individual's homestead may not be included in the total amount of the individual's assets if the homestead is occupied by the individual as a home and has a fair market value of \$250,000 or less.

The adopted rule addresses the procedures and information necessary for the executive director to make these determinations under HB 2252. Additionally, the rule sets forth the statutory deadline for filing certain cost recovery actions and requires the agency to provide notice to property owners after a lien is filed.

#### SECTION DISCUSSION

The proposed amendment to §335.347 placed existing rule language into a new subsection (a) and added new subsections (b) - (h) to address the requirements of HB 2252 at proposal. The commission makes several changes to the proposed rules, including placing proposed subsections (g) and (h) into subsection (f). The name of the section is also changed from proposal to reflect the changes made at adoption.

In subsection (a), the commission added, at adoption, the catch phrase "Financial capability- general" to describe the contents of the subsection and changed "a" to "any" in two instances to clearly show that the new subsections do not alter the applicability of subsection (a) to all superfund sites. In subsection (a)(8) the commission changed, at proposal, the words "pursuant to" to "under" to comply

with agency rule writing standards. The title of §335.347 is changed at adoption to better describe the information included in the section.

New §335.347(b) includes provisions from new THSC, §361.201(d) and (e). The new provisions in §335.347(b) require that the executive director make a determination of the potentially responsible party's (PRP) financial capacity if the party is an individual whose homestead includes the facility subject to, or affected by, a remedial action. New §335.347(b) prohibits the agency from including the value of an individual's homestead in the total amount of the individual's assets if the individual is occupying the homestead as a home and the fair market value of the homestead is \$250,000 or less. At adoption, the catch phrase "Homesteads" is added to the subsection and the word "will" is changed to "shall" to conform with agency style requirements.

New §335.347(c) includes provisions from new THSC, §361.194(b)(2). These provisions cover new criteria that the executive director may consider in determining whether to prepare an affidavit to attach a lien to real property or whether a lien is satisfied. At adoption, the catch phrase "Liens under Texas Health and Safety Code, §361.194" is added to describe the content of the subsection. At adoption, a new paragraph (1) is added and the proposed language in the subsection is renumbered as paragraph (2). The catch phrase "Filing of lien" is added to paragraph (1) and the catch phrase "Financial ability to satisfy lien" is added to paragraph (2). In paragraph (1), a provision is added, at adoption, to require that the executive director send notice to property owners after placing a lien on their property. The notice is required so that property owners are aware of the encumbrance on the property and may take steps to resolve the matter. In paragraph (2), the phrase "under Texas Health and Safety Code,

§361.194" is deleted, at adoption, because the statutory section is cited in the catch phrase of the subsection. Additionally at adoption, the two paragraphs that had been in the proposed language are relettered as subparagraphs.

New §335.347(d) includes provisions from new THSC, §361.197(e). These provisions prohibit the commission from filing a cost recovery action under specified circumstances. At adoption, the catch phrase "Cost recovery actions" is added to the subsection to describe its content. Also at adoption, the proposed language is placed in paragraph (1) with the catch phrase "Homesteads" is added and the proposed three paragraphs are relettered as subparagraphs. A new paragraph (2) is added to reflect the statutory deadline of one year for the agency to file cost recovery actions in certain circumstances and the catch phrase "Limitation on filing" is added to describe the content at adoption.

New §335.347(e) addresses how the fair market value of a homestead is determined, since fair market value is a key element in HB 2252. At adoption, the catch phrase "Fair market value" is added to describe the content.

New §335.347(f) addresses the information that must be provided by the PRP within 90 days of a written request so that the executive director may make the determinations under the new §335.347(b) - (d). This provision is important to allow a case to move forward in a timely manner and to allow the commission to proceed with a cost recovery action within any required statute of limitations if the PRP does not qualify for the cost recovery prohibition. The catch phrase "PRP information" is added, at

adoption, to describe the content. At adoption, the proposed language is placed into paragraph (1), with the existing paragraphs relettered as subparagraphs, and a citation is updated.

Proposed §335.347(g), which is moved to §335.347(f)(2) at adoption, allows the PRP to request an extension of the time frame for providing documents in subsection (f)(1). This provision gives the executive director the flexibility to consider extenuating circumstances when PRPs are having difficulties meeting the 90-day deadline. At adoption, this proposed subsection is placed into §335.347(f)(2) so that all provisions relating to a PRP's submittal of information are in subsection (f).

Proposed §335.347(h), which is moved to §335.347(f)(3) at adoption, states that for the purposes of the section, the executive director may determine that the property is not a homestead that is occupied by the individual as a home if the PRP does not provide the requested information within the required time frame. This provision is important so that the issue may be resolved and the case moved forward in situations where the information needed to make a determination that the property is a homestead that is occupied by the individual as a home is not provided. In addition, provisions are included which state that the PRP will receive notice of such a determination and that the determination is appealable. At adoption, this proposed subsection is placed into §335.347(f)(3), a citation is corrected, and the word "will" is changed to "shall" to conform with agency style requirements.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225 because it does

not meet the definition of a "major environmental rule" as defined in that statute. While the specific intent of a "major environmental rule" is to protect the environment or reduce the risks to human health from environmental exposure, the specific intent of the rule is to allow, and in some instances require, the executive director to consider certain financial information when pursuing cost recovery and liens or when compelling an individual to perform remediation studies or remedial actions. Additionally, the intent of the rule is to set forth the statutory deadline for filing certain cost recovery actions and to require the agency to provide notice to property owners after a lien is filed. Thus, the specific intent of the rule is not to protect the environment nor reduce the risks to human health from environmental exposure. Additionally, the rule does not 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.

Additionally, Texas Government Code, §2001.0225 only applies to a major environmental rule if the result of the rule 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. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225 because it does not meet any of the four applicability requirements. Specifically, the rule is adopted to comply with and is specifically required by state law and is not adopted solely under the general powers of the agency.

The rule also does not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed an assessment of whether the rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the rule is to allow, and in some instances require, the executive director to consider certain financial information when pursuing cost recovery and liens or when compelling an individual to perform remediation studies or remedial actions. Additionally, the purpose of the rule is to set forth the statutory deadline for filing certain cost recovery actions and to require the agency to provide notice to property owners after a lien is filed.

The rule substantially advances this stated purpose by amending §335.347 to: 1) require the executive director to determine a PRP's financial capacity if the party is an individual whose homestead includes the facility subject to or affected by a remedial action; 2) prohibit the agency from including the value of an individual's homestead in the total amount of the individual's assets if the individual is occupying the homestead as a home and the fair market value of the homestead is \$250,000 or less; 3) specify criteria that the executive director may consider in determining whether to prepare an affidavit to attach a lien to real property or whether a lien is satisfied; 4) prohibit the commission from filing a cost recovery action under specified circumstances; 5) state how the fair market value of a homestead is determined; 6) require the PRP to submit certain information within 90 days of a written request so that the executive director may make such determinations; 7) specify that, for the purposes of the rule, the

property is not a homestead that is occupied by the individual as a home if the PRP does not provide the requested information within the required time frame; 8) limit the period in which the agency may file a cost recovery action against responsible parties that have not complied with the terms of an administrative order under THSC, §361.188 to no later than one year after all remedial action has been completed; and 9) require the executive director to provide notice to property owners after a lien is filed on property under THSC, §361.194.

The rule does not impose a burden on private real property and it does not require a use of private real property. Promulgation and enforcement of the rule are neither a statutory nor a constitutional taking of private real property. Specifically, the rule does not affect a landowner's rights in private real property because the rulemaking does not burden the property in a manner that requires compensation as provided in specific articles of the United States and Texas Constitutions; nor does it restrict or limit the owner's right to the property resulting in a reduction in value by 25% or more beyond that which would otherwise exist in the absence of regulations.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendment is consistent with CMP goals and policies because the rulemaking relates only to the procedural mechanisms for cost recovery for remediation actions taken by the commission. The rulemaking will not have direct or significant adverse effect on any coastal natural resource areas; the rulemaking will not have a substantive effect on commission actions subject to the

CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

#### PUBLIC COMMENT

The public comment period ended at 5:00 p.m. on January 5, 2004. No comments were received during the comment period.

**SUBCHAPTER K: HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND  
REMEDATION**

**§335.347**

**STATUTORY AUTHORITY**

The adopted amendment is authorized under HB 2252, 78th Legislature, 2003, which requires rules to implement the changes in law made to THSC, §§361.181, 361.194, 361.197, and 361.201. The amendment is also authorized by THSC, §361.024, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under THSC, Chapter 361. Additionally, the amendment is authorized by Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code.

**§335.347. Financial Capability, Liens, and Cost Recovery Actions.**

(a) Financial capability – general. The executive director may make a determination of whether any potentially responsible party (PRP) is financially capable of participating in any facility investigation or remediation. Such a determination may be based on some or all of the following financial information:

- (1) a PRP's audited financial statements;
- (2) a PRP's federal or state income tax returns;

(3) a PRP's gross and net income for each of the preceding three years;

(4) a PRP's net worth for each of the preceding three years;

(5) a PRP's current cash flow position;

(6) a PRP's long-term liabilities;

(7) the liquidity of a PRP's assets; and

(8) any other data requested under §335.345 of this title (relating to Requests for Information or Production of Documents), which in the opinion of the executive director is relevant to a determination of the ability of the PRP to participate in a facility investigation or remediation.

(b) Homesteads. The executive director shall determine whether a PRP is financially capable of conducting any necessary remediation studies or remedial action if the PRP is an individual whose homestead includes the facility subject to, or affected by, a remedial action. The value of an individual's homestead may not be included in the total amount of the individual's assets if:

(1) the individual is occupying the homestead as a home; and

(2) the fair market value of the homestead is \$250,000 or less.

(c) Liens under Texas Health and Safety Code, §361.194.

(1) Filing of lien. If the executive director files a lien on property, the executive director shall send a copy of the filed lien to the last known address of the owner of the property.

(2) Financial ability to satisfy lien. In making a determination whether to prepare an affidavit for lien or whether a lien is satisfied, the executive director may take into account a landowner's financial ability to satisfy the lien, including consideration of whether the landowner received financial compensation for the disposal of any substance addressed by the remedial action and whether the real property that is the subject of the lien:

(A) is a homestead and is being occupied as a home by the landowner; and

(B) has a fair market value of \$250,000 or less.

(d) Cost recovery actions.

(1) Homesteads. The executive director may not file a cost recovery action under Texas Health and Safety Code, §361.197, against an individual if the individual's only significant asset is a homestead that:

(A) includes the facility subject to, or affected by, a remedial action;

(B) is occupied by the individual as a home; and

(C) has a fair market value of \$250,000 or less.

(2) Limitation on filing. A cost recovery action against the responsible parties that have not complied with the terms of an administrative order under Texas Health and Safety Code, §361.188, may be filed by the agency no later than one year after all remedial action has been completed.

(e) Fair market value. For the purposes of this section, the fair market value of a homestead is the market value ascribed to a property by the tax appraisal authority of the county or counties in which the property is located, exclusive of any downward adjustment related to contamination. If this information is unavailable, the executive director may determine the fair market value of the property, which excludes any downward adjustment related to contamination, from information available at the time.

(f) PRP information.

(1) The PRP shall provide the following information within 90 days after receipt of a written request by the executive director so that the executive director may conduct the determinations under subsections (b) - (d) of this section:

(A) information listed in subsection (a) of this section;

(B) evidence that the subject property is the individual's homestead; and

(C) evidence that the individual is occupying the property as a home.

(2) The PRP may request an extension of the required time frame for providing documents if the extension is requested by the PRP within the initial 90-day time frame.

(3) For the purposes of this section, the executive director may determine that the property is not a homestead that is occupied by the individual as a home if the PRP does not provide the information requested in paragraph (1) of this subsection within the required time frame, including any extensions granted by the executive director. The executive director shall provide any such determination in writing to the PRP. The executive director's determination that the property is not a homestead that is occupied by the individual as a home is final and appealable under Texas Health and Safety Code, §361.321.