

The Texas Commission on Environmental Quality (commission) proposes amendments to §§37.901, 37.911, 37.921, and 37.931.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking implements the requirements of House Bill 1823, 78th Legislature, 2003, which amends Texas Health and Safety Code (THSC), §361.119, to require that owners and operators of recycling facilities, including composting or mulching facilities, have sufficient financial assurance in place. The financial assurance must be conditioned on satisfactorily operating and closing the facility, consistent with the requirements of THSC, §361.085, for a solid waste facility other than a facility for the disposal of hazardous waste. House Bill 1823 applies to an owner or operator of a recycling facility at which combustible material is stored outdoors or that poses a significant risk to public health and safety as determined by the commission. The legislation also exempts a facility that is owned, operated, or affiliated with a person who has a permit to dispose of municipal solid waste from rules adopted under this section of law.

Corresponding rulemakings published in this issue of the *Texas Register* include changes to 30 TAC Chapter 328, Waste Minimization and Recycling; Chapter 330, Municipal Solid Waste; Chapter 332, Composting; and Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are proposed throughout the sections to be consistent with Texas Register requirements and to improve readability. The title of Subchapter J is changed from “Financial Assurance for Permitted Compost Facilities” to “Financial Assurance for Recycling Facilities.”

Proposed §37.901, Applicability, amends incorrect terminology and adds cross-references to establish consistency in the commission’s rules.

Proposed §37.911, Definitions, adds cross-references to establish consistency in the commission’s rules.

Proposed §37.921, Financial Assurance Requirements for Closure, amends incorrect terminology.

Paragraphs (1) and (3) - (5) outline financial assurance requirements that will not apply to owners and operators of recycling facilities. Paragraph (2) specifies that financial assurance mechanisms must be submitted to the executive director 60 days prior to receipt of materials at new facilities while mechanisms related to existing facilities must be submitted when directed by the executive director.

Paragraph (6) requires that insurers providing insurance as a financial assurance mechanism must be either licensed to transact the business of insurance in Texas or eligible to provide insurance as an excess or surplus insurer in Texas.

Proposed §37.931, Financial Assurance Mechanism, amends incorrect terminology and explains the types of financial assurance mechanisms that cannot be used to demonstrate financial assurance.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Grants Management, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of the administration or enforcement of the proposed rules. No fiscal implications are anticipated for other units of state or local government as a result of the proposed rules.

The proposed amendments implement House Bill 1823. The proposed amendments require owners or operators of recycling facilities that store combustible material outdoors or recycling facilities that pose a significant risk to public health and safety to have sufficient financial assurance to properly operate and close the facility. The proposed amendments do not apply to a facility that is owned or operated by, or affiliated with a person who has a permit to dispose of municipal solid waste or to facilities owned or operated by local governments, affiliates of metal smelters, or facilities that accept no financial compensation to accept materials.

The agency estimates that there are approximately 206 composting, recycling, and industrial recycling facilities that may store combustible materials and otherwise be subject to the proposed rules. Under the proposed amendments, owners and operators would need to calculate the costs of properly closing the facility in order to determine how much financial assurance they would need to have in place. The agency's Waste Permits Division would need to evaluate closure cost estimates submitted by the

facilities, and the agency's Financial Administration Division would need to review and monitor financial assurance mechanisms obtained by the facilities. These operational impacts are expected to have fiscal implications for the agency, though they are not anticipated to be significant.

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 compliance with state law. Financial assurance for recycling facilities may also provide financial support in some cases to local governments if they are ever faced with the costs of closing one of the affected facilities.

Fiscal implications, which may be significant, are anticipated for businesses and individuals affected by the proposed amendments.

Owners and operators of recycling facilities that store combustible materials outdoors or that pose a significant risk to public health and safety would need to obtain sufficient financial assurance to cover the costs of properly closing the facility. Owners and operators would need to calculate the costs of properly closing the facility in order to determine how much financial assurance they would need to have in place. These closure cost estimates would be submitted for approval to the agency. Except for facilities that have a tangible net worth of at least \$10 million and meet other financial qualifications to self-insure, affected facilities will incur an annual cost to obtain a financial assurance mechanism.

Financial assurance costs will vary depending upon the specific facility, as well as the financial strength

and size of the owner/operator. If affected owners and operators do not meet the qualifications of the financial test, they could obtain financial assurance in the form of a surety bond, letter of credit, trust, or the purchase of an insurance policy. These costs are estimated to range between 1% and 5% per year of the cost of closing the facility.

Costs to properly close most composting, mulching, and affected recycling facilities are estimated to range between \$20,000 and \$200,000 depending upon the amount and type of material that would need to be disposed of, and the method of disposal. A few larger facilities may require up to \$2 million to properly dispose of their wastes, while some smaller facilities may require less than \$20,000. For the purposes of this fiscal note, it is assumed that for the estimated 206 affected facilities, most of them would incur costs of between \$20,000 and \$200,000 to properly close their site. Further, the cost to obtain proper financial assurance is estimated to be 5% of the closure costs, and is therefore estimated to be between \$1,000 and \$10,000 per year for each of the estimated 206 affected facilities. Total costs for all owners and operators are roughly estimated to be as low as \$206,000 and as high as \$2.06 million each year for the five-year period covered by the fiscal note.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated as a result of implementation of the proposed rules for small or micro-businesses. It is not known how many of the estimated 206 affected facilities are small or micro-businesses, but it is likely that most of these facilities would meet the criteria.

The following is an analysis of the potential costs per employee for small or micro-businesses affected by the proposed amendments. Small and micro-businesses are defined as having fewer than 100 or 20 employees, respectively. A small business that purchases a financial assurance mechanism could incur additional costs of between \$1,000 to \$10,000 per year or between \$10.00 and \$100 per employee. A micro-business that purchases financial assurance could incur additional costs of between \$50 and \$500 per employee.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission 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 rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules are not subject to §2001.0225 because they do 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 rules is to require the owner or operator of an affected recycling facility to have sufficient financial assurance to properly close a facility. These rules will apply to recycling facilities that store combustible material outdoors and recycling facilities that pose a significant risk to public health and safety. 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 these proposed rules do not meet the definition of a major environmental rule.

Furthermore, even if the proposed rules did meet the definition of a major environmental rule, the proposed rules are not subject to Texas Government Code, §2001.0225, because they do 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 rules 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, but instead implement the statutory requirement of THSC, §361.119. Third,

there is no delegation agreement that would be exceeded by these proposed rules because none relate to this subject matter. Fourth, the commission proposes these rules under the direction of House Bill 1823, amending THSC, §361.119, and not 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 these proposed rules and performed an assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rules is to require the owner or operator of an affected recycling facility to have sufficient financial assurance to properly close a facility. These rules will apply to recycling facilities that store combustible material outdoors and recycling facilities that pose a significant risk to public health and safety. The proposed rules would substantially advance this stated purpose by requiring that regulated facilities obtain adequate financial assurance to properly close a facility.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property because the proposed rules do not affect real property.

In particular, there are no burdens imposed on private real property, and the proposed rules would improve the commission's ability to ensure proper closure of certain recycling facilities. Because the regulation does not affect real property, it 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, these proposed rules 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), concerning rules subject to the Texas Coastal Management Program (CMP), and therefore, requires 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 and determined that the proposed rulemaking is consistent with CMP goals and policies because the rulemaking is an administrative action that requires financial mechanisms to pay for closure activities; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the proposed rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

Written comments on the consistency of this rulemaking 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 May 20, 2004 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 Joyce Spencer, 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 Project Number 2004-002-037-AD. Comments must be received by 5:00 p.m., May 24, 2004. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

SUBCHAPTER J: FINANCIAL ASSURANCE FOR RECYCLING [PERMITTED COMPOST]

FACILITIES

§§37.901, 37.911, 37.921, 37.931

STATUTORY AUTHORITY

The amendments are proposed under THSC, §361.119, as amended by House Bill 1823; and §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.

The proposed amendments implement House Bill 1823.

§37.901. Applicability.

This subchapter applies to owners and operators [an owner or operator] of recycling facilities [a compost facility] required to provide evidence of financial assurance under Chapters 328, 330, 332, or 335 of this title (relating to Waste Minimization and Recycling; Municipal Solid Waste; Composting; and Industrial Solid Waste and Municipal Hazardous Waste) [Chapter 332 of this title (relating to Composting)]. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure.

§37.911. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapters 328, 330, 332, and 335 of this title (relating to Waste Minimization and Recycling; Municipal Solid Waste; Composting; and Industrial Solid Waste and Municipal hazardous Waste) [Chapter 332 of this title (relating to Composting)].

§37.921. Financial Assurance Requirements for Closure.

In addition to the requirements of this subchapter, owners and operators [owners or operators] of recycling facilities [a compost facility] required to demonstrate financial assurance for closure 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; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action) except:

(1) §37.31 of this title (relating to Submission of Documents) is not applicable;

(2) owners or operators shall submit an originally signed financial assurance mechanism to the executive director 60 days prior to receipt of materials or as otherwise directed by the executive director;

(3) §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates) is not applicable;

(4) §37.161 of this title (relating to Establishment of a Standby Trust) is not applicable;

(5) §37.241(b) of this title (relating to Insurance) is not applicable; and

(6) insurers providing insurance in accordance with §37.241 of this title must be licensed to transact the business of insurance in Texas or eligible to provide insurance as an excess or surplus lines insurer in Texas.

§37.931. Financial Assurance Mechanisms.

Owners and operators [An owner or operator] subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action) to demonstrate financial assurance for closure except:

(1) a pay-in trust fund may not be used; and

(2) a surety bond guaranteeing performance may not be used unless the owner or operator is required to provide financial assurance under §332.47 of this title (relating to Permit Application Preparation).