

The Texas Commission on Environmental Quality (commission) proposes amendments to §332.34 and §332.47.

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 37, Financial Assurance; Chapter 328, Waste Minimization and Recycling; Chapter 330, Municipal Solid Waste; 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.

Proposed amended §332.34, Registration Application, adds, in new paragraph (15), a financial assurance requirement to the application process for registered composting facilities and provides cross-references to establish consistency in the commission's rules.

Proposed amended §332.47, Permit Application Preparation, modifies, in paragraph (9), a cross-reference for financial assurance requirements for permitted composting facilities to establish consistency in the commission's rules. The pay-in trust mechanism will not be allowed since determination of the payment amount requires a known permit life and no permit life will be specified in applicable permits.

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 77 mulching and composting facilities that 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 77 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 77 affected facilities. Total costs

for all owners and operators are roughly estimated to be as low as \$77,000 and as high as \$770,000 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 77 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 rulemaking 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), relating to 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 C: OPERATIONS REQUIRING A REGISTRATION

§332.34

STATUTORY AUTHORITY

The amendment is 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 amendment implements House Bill 1823.

§332.34. Registration Application.

Registration applications for composting must include:

(1) Title page. The title page shall show the name of the project, the name of the applicant, and the location by city and county.

(2) - (4) (No change.)

(5) Legal authority. The applicant shall provide verification of his/her legal status.

Normally, this is a one-page certificate of incorporation issued by the Office of the Secretary of State.

(6) (No change.)

(7) Notice of appointment [Appointment]. The applicant shall provide a notice of appointment identifying the applicant's engineer.

(8) (No change.)

(9) Legal description. The applicant shall provide the following:

(A) (No change.)

(B) a boundary metes and bounds drawing and description of the site signed and sealed by a registered professional land surveyor [Registered Professional Land Surveyor].

(10) Location description.

(A) Map. The applicant shall clearly show the boundaries of the planned facility on a map that is all or a portion of a county map prepared by Texas Department of Transportation (TxDOT). At a minimum, the map shall be at a scale of 1/2 [one-half] inch equals one mile.

(B) (No change.)

(11) (No change.)

(12) Site operating plan. The applicant shall submit a site operating plan. This document is to provide guidance from the design engineer to site management and operating personnel in sufficient detail to enable them to conduct day-to-day [day to day] operations in a manner consistent with the engineer's design. At a minimum, the site operating plan shall include specific guidance or instructions on all of the following:

(A) [Process description.] the [The] process description, which must [shall] be composed of a descriptive narrative along with a process diagram. The process description shall include the items listed in clauses (i) - (vi) of this subparagraph. [:]

(i) (No change.)

(ii) Tipping process. Indicate what happens to the feedstock material from the point it enters the gate. Indicate how the material is handled in the tipping area, how long it remains in the tipping area, what equipment is used, how the material is evacuated from the tipping area, at what interval the tipping area is cleaned, and the process used to clean the tipping area.

(iii) (No change.)

(iv) Post-processing. Provide a complete narrative on the post-processing process, include post-processing times, identification and segregation of product, storage of product, quality assurance, and quality control.

(v) (No change.)

(vi) Process diagram. Present a process diagram that displays graphically, the narrative generated in response to clauses (i) - (v) of this paragraph; [.]

(B) the [The] minimum number of personnel and their functions to be provided by the site operator in order to have adequate capability to conduct the operation in conformance with the design and operational standards; [.]

(C) the [The] minimum number and operational capacity of each type of equipment to be provided by the site operator in order to have adequate capability to conduct the operation in conformance with the design and operational standards; [.]

(D) security [Security], site access control, traffic control, and safety; [.]

(E) control [Control] of dumping within designated areas, screening for unprocessable, prohibited, and unauthorized material; [.]

(F) a [A] fire prevention and suppression plan that complies [shall comply] with provisions of the local fire code, which shall also be sent to the local fire protection entity responsible for responding to a fire at the facility; [.]

(G) control [Control] of windblown material; [.]

(H) vector [Vector] control; [.]

(I) quality [Quality] assurance and quality control.

(i) (No change.)

(ii) All other registered facilities. As a minimum, the applicant shall provide testing and assurance in accordance with the provisions of §332.71 of this title (relating to Sampling and Analysis Requirements for Final Product).

(J) equipment [Equipment] failures, including alternative plans in the event of an equipment failure; and [.]

(K) a [A] description of the anticipated final grade of the materials.

(13) Construction plans and specifications. The applicant shall submit facility construction plans and specifications. The facility plans and specifications [specification] shall reflect the provisions of this chapter to the maximum extent possible.

(14) Closure plan. The applicant shall provide a plan for proper closure of the facility, including disposition of any remaining feedstocks, in-process, and processed materials.

(15) Financial assurance. The applicant shall be subject to the requirements of §328.5(c) - (e) of this title (relating to Reporting and Recordkeeping Requirements).

SUBCHAPTER D: OPERATIONS REQUIRING A PERMIT

§332.47

STATUTORY AUTHORITY

The amendment is proposed under THSC, §361.119, as amended by House Bill 1823; and THSC, §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 amendment implements House Bill 1823.

§332.47. Permit Application Preparation.

To assist the commission in evaluating the technical merits of a compost facility, an applicant subject to this chapter shall submit a site development plan to the commission along with Compost Form Number 3. The site development plan must be sealed by a registered professional engineer in accordance with the provisions of 22 TAC §131.166 (relating to Engineers' Seals). If the site development plan is submitted in a three-ring binder or in a format that allows the removal or insertion of individual pages, it will not be considered a bound document. The site development plan must contain all of the following information.

(1) - (5) (No change.)

(6) Facility development. To assist the executive director in evaluating the impact of the facility on the environment, the applicant shall provide the following.

(A) Surface water protection plan. The surface water protection plan shall be prepared by a registered professional engineer. At a minimum, the applicant shall provide all of the following:

(i) (No change.)

(ii) a design for a runoff [run-off] management system to collect and control at least the peak discharge from the facility generated by a 25-year, 24-hour rainfall event;

(iii) (No change.)

(iv) drainage calculations as follows_ [:]

(I) - (II) (No change.)

(III) Calculations for sizing containment facilities for leachate shall be determined by a mass balance based on the facility's [facilities] proposed leachate disposal method.

(IV) (No change.)

(v) drainage maps and drainage plans shall be provided as follows:

(I) an off-site topographic drainage map showing all areas which contribute to the facility's [facilities] run-on. The map shall delineate the drainage basins and sub-basins, show the direction of flow, time of concentration, basin area, rainfall intensity, and flow rate. This map shall also show all creeks, rivers, intermittent streams, lakes, bayous, bays, estuaries, arroyos, and other surface waters in the state;

(II) - (VII) (No change.)

(B) Geologic/hydrogeologic report. The geologic/hydrogeologic report shall be prepared by an engineer or qualified geologist/hydrogeologist. The applicant shall include discussion and information on all of the following:

(i) - (iii) (No change.)

(iv) subsurface investigation report. This report shall describe all borings drilled on-site to test soils and characterize groundwater and shall include a site map drawn to scale showing the surveyed locations and elevations of the boring. Boring logs shall include a detailed description of materials encountered including any discontinuities such as fractures, fissures,

slickensides, lenses, or seams. Each boring shall be presented in the form of a log that contains, at a minimum, the boring number; surface elevation and location coordinates; and a columnar section with text showing the elevation of all contacts between soil and rock layers description of each layer using the Unified Soil Classification, color, degree of compaction, and moisture content. A key explaining the symbols used on the boring logs and the classification terminology for soil type, consistency, and structure shall be provided.

(I) - (V) (No change.)

(VI) The report shall contain a summary of the investigator's interpretations of the subsurface stratigraphy based upon the field investigation; [.]

(v) (No change.)

(C) Groundwater protection plan. The application shall demonstrate that the facility is designed so as not to contaminate the groundwater and so as to protect the existing groundwater quality from degradation. For the purposes of these sections, protection of the groundwater includes the protection of perched water or shallow surface infiltration. As a minimum, groundwater protection shall consist of all of the following.

(i) (No change.)

(ii) Groundwater monitor system. The groundwater monitoring system shall be designed and installed such that the system will reasonably assure detection of any contamination of the groundwater before it migrates beyond the boundaries of the site. The monitoring system shall be designed based upon the information obtained in the "Groundwater investigation report" required by subparagraph (B)(v) of this paragraph.

(I) (No change.)

(II) A groundwater sampling program shall provide four background groundwater samples of all monitor wells within 24 months from the date of the issuance of the permit. The background levels shall be established from samples collected from each well at least once during each of the four calendar quarters: January - March; April - June; July - September; and October - December. Samples from any monitor well shall not be collected for at least 45 days following collection of a previous sample, unless a replacement sample is necessary. At least one sample per well shall be collected and submitted to a laboratory for analysis within 60 days of permit issuance for existing or previously registered operations, or prior to accepting any material for processing at a new facility. Background samples shall be analyzed for the parameters as follows:

(-a-) - (-b-) (No change.)

(-c-) after background values have been determined, the following indicators shall be measured at a minimum of 12-month intervals: TOC (four replicates),

iron, manganese, pH, chloride, groundwater elevation (MSL), and total dissolved solids. After completion of the analysis, an original and two copies shall be sent to the executive director and a copy shall be maintained on site [on-site].

(-d-) - (-e-) (No change.)

(D) Facility plan and facility layout. The facility plan and facility layout must be prepared by a registered professional engineer. All proposed facilities, structures, and improvements must be clearly shown and annotated on this drawing. The plan must be drawn to standard engineering scale. Any necessary details or sections must be included. As a minimum, the plan must show property boundaries, fencing, internal roadways, tipping area, processing area, post-processing area, facility office, sanitary facilities, potable water facilities, storage areas, etc. If phasing is proposed for the facility, a separate facility plan for each phase is required.

(E) Process description. The process description shall be composed of a descriptive narrative along with a process diagram. The process description shall include all of the following.

(i) - (iii) (No change.)

(iv) Post-processing. Provide a complete narrative on the post-processing, including [include] post-processing times, identification and segregation of product, storage of product, quality assurance, and quality control.

(v) - (vi) (No change.)

(7) - (8) (No change.)

(9) Financial assurance. The applicant shall prepare a closure plan acceptable to the executive director and provide evidence of financial assurance to the commission for the cost of closure. The closure plan at a minimum, shall include evacuation of all material on site [on-site] (feedstock, in process, and processed) to an authorized facility and disinfection of all leachate handling facilities, tipping area, processing area, and post-processing area and shall be based on the worst case closure scenario for the facility, including the assumption that all storage and processing areas are filled to capacity. Financial assurance mechanisms must be established and maintained in accordance with Chapter 37, Subchapter J of this title (relating to Financial Assurance for Recycling Facilities). [The financial assurance may be demonstrated by using one or more of the following mechanisms: trust funds, surety bonds, letters of credit, insurance, financial test, and corporate guarantee.] These mechanisms shall be prepared on forms approved by the executive director and shall be submitted to the commission 60 days prior to the receiving of any materials for processing, or within 60 days of a permit being issued for facilities operating under an existing registration. [Financial assurance

mechanisms prepared are subject to the requirements of Chapter 37 of this title (relating to Financial Assurance]).

(10) (No change.)

(11) Landowner list. The applicant shall include a list of landowners, residents, and businesses within 1/2 [one half] mile of the facility boundaries along with an appropriately scaled map locating property owned by the landowners.