

The Texas Commission on Environmental Quality (commission) proposes an amendment to §335.24.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

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 332, Composting.

SECTION DISCUSSION

Administrative and grammatical changes are proposed throughout the section to be consistent with Texas Register requirements and to improve readability. As appropriate, subsections have been relettered to accommodate new language.

The proposed amendment to §335.24, Requirements For Recyclable Materials and Nonhazardous Recyclable Materials, modifies subsection (a) to indicate that nonhazardous recyclable materials are subject to regulation under subsections (h) - (l) rather than the previous provisions under subsection (h) only. This modification is necessary to reflect the addition of new subsections (j) - (l).

Proposed subsection (j) requires the owner or operator of an affected facility to submit a detailed written cost estimate for closure of the facility. In order to ensure that financial assurance will cover closure costs for a facility, this estimate must be based on the collection, transportation, and disposal of processed and unprocessed materials in cubic yards and/or short ton measure by a third party not owned or affiliated with the recycling facility.

Proposed subsection (k) establishes the actual financial assurance requirement for owners or operators of recycling facilities that store combustible materials outdoors or pose a significant risk to public health and safety. The section also refers affected entities to proposed Chapter 37, Subchapter J for specific financial assurance requirements for recycling facilities.

Proposed subsection (l) describes requirements for closure of affected recycling facilities. This subsection defines closure to include the collection, transportation, and disposal of processed and unprocessed materials. The deadline for closure is set at 180 days following the most recent acceptance of material unless otherwise approved or directed by the executive director.

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 rule is in effect, no significant fiscal implications are anticipated for the agency as a result of the administration or enforcement of the proposed rule. No fiscal implications are anticipated for other units of state or local government as a result of the proposed rule.

The proposed amendment implements House Bill 1823. The proposed amendment requires 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 amendment does 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 rule. Under the proposed amendment, 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 rule is in effect, the public benefit anticipated from the enforcement of and compliance with the proposed rule 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 amendment.

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 rule 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 amendment. 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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rule 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 specific intent of the proposed rule is to require the owner or operator of an affected recycling facility to have sufficient financial assurance to properly close a facility. This rule 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 rule 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 the proposed rule does not meet the definition of a major environmental rule.

Furthermore, even if the proposed rule did meet the definition of a major environmental rule, the proposed rule 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 rule does not meet any of these requirements. First, there are no applicable federal standards that the rule would address. Second, the proposed rule does not exceed an express requirement of state law, but instead implements the statutory requirement of THSC, §361.119. Third, there is no delegation agreement that would be exceeded by the proposed rule because it does not relate to this subject matter. Fourth, the commission proposes the rule 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 the proposed rule and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to require the owner or operator of an affected recycling facility to have sufficient financial assurance to properly close a facility. This rule 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 rule would substantially advance this stated purpose by requiring that regulated facilities obtain adequate financial assurance to properly close a facility.

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

In particular, there are no burdens imposed on private real property, and the proposed rule 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, the proposed rule 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 rule 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 A: INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

IN GENERAL

§335.24

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.

§335.24. Requirements For Recyclable Materials and Nonhazardous Recyclable Materials.

(a) Hazardous wastes that are recycled are subject to the requirements for generators, transporters, and storage facilities of subsections (d) - (f) of this section, except for the materials listed in subsections (b) and (c) of this section. Hazardous wastes that are recycled will be known as recyclable materials. Nonhazardous industrial wastes that are recycled will be known as nonhazardous recyclable materials. Nonhazardous recyclable materials are subject to the requirements of subsections (h) - (l) [and (i)] of this section.

(b) The following recyclable materials are not subject to the requirements of this section, except as provided in subsections (g) and (h) of this section, but are regulated under the applicable

provisions of Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities) and all applicable provisions in Chapter 305 of this title (relating to Consolidated Permits); Chapter 1 of this title (relating to Purpose of Rules, General Provisions); Chapter 3 of this title (relating to Definitions); Chapter 10 of this title (relating to Commission Meetings); Chapter 17 of this title (relating to Tax Relief for Property Used for Environmental Protection); Chapter 20 of this title (relating to Rulemaking); Chapter 37 of this title (relating to Financial Assurance); Chapter 39 of this title (relating to Public Notice); Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure [Procedures]); Chapter 50 of this title (relating to Action on Applications and Other Authorizations); Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment [Request for Contested Case Hearings]); Chapter 70 of this title (relating to Enforcement); Chapter 80 of this title (relating to Contested Case Hearings); Chapter 86 of this title (relating to Special Provisions for Contested Case Hearings); and Chapter 261 of this title (relating to Impact Statements) [(Introductory Provisions); and Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property)].

(1) - (4) (No change.)

(c) The following recyclable materials are not subject to regulation under Subchapters B - I or O of this chapter (relating to Hazardous Waste Management General Provisions; Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Harzardous Waste Storage, Processing, or Disposal Facilities;

Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; [Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities;] Location Standards for Hazardous Waste Storage, Processing, or Disposal; Standards for the Management of Specific Wastes and Specific Types of Facilities; Prohibition on Open Dumps; and Land Disposal Restrictions); Chapter 1 of this title [(relating to Purpose of Rules, General Provisions)]; Chapter 3 of this title [(relating to Definitions)]; Chapter 10 of this title [(relating to Commission Meetings)]; Chapter 17 of this title; Chapter 20 of this title [(relating to Rulemaking)]; Chapter 37 of this title [(relating to Financial Assurance)]; Chapter 39 of this title [(relating to Public Notice)]; Chapter 40 of this title [(relating to Alternative Dispute Resolution Procedures)]; Chapter 50 of this title [(relating to Action on Applications)]; Chapter 55 of this title [(relating to Request for Contested Case Hearings)]; Chapter 70 of this title [(relating to Enforcement)]; Chapter 80 of this title [(relating to Contested Case Hearings)]; Chapter 86 of this title [(relating to Special Provisions for Contested Case Hearings)]; Chapter 261 of this title; [(relating to Introductory Provisions); Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property)] or Chapter 305 of this title [(relating to Consolidated Permits)], except as provided in subsections (g) and (h) of this section:

(1) - (4) (No change.)

(d) (No change.)

(e) Owners or operators of facilities that store recyclable materials before they are recycled are regulated under all applicable provisions of this chapter, and Chapter 305 of this title [(relating to Consolidated Permits)]; Chapter 1 of this title [(relating to Purpose of Rules, General Provisions)]; Chapter 3 of this title [(relating to Definitions)]; Chapter 10 of this title [(relating to Commission Meetings)]; Chapter 17 of this title; Chapter 20 of this title [(relating to Rulemaking)]; Chapter 37 of this title [(relating to Financial Assurance)]; Chapter 39 of this title [(relating to Public Notice)]; Chapter 40 of this title [(relating to Alternative Dispute Resolution Procedures)]; Chapter 50 of this title [(relating to Action on Applications)]; Chapter 55 of this title [(relating to Request for Contested Case Hearings)]; Chapter 70 of this title [(relating to Enforcement)]; Chapter 80 of this title [(relating to Contested Case Hearings)]; [Chapter 277 of this title (relating to Use Determinations for Tax Exemption for Pollution Control Property)]; and the notification requirements under §335.6 of this title, except as provided in subsections (a) - (c) of this section. The recycling process itself is exempt from regulation.

(f) - (g) (No change.)

(h) Industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsections [subsection] (b)(4) and [subsection] (c)(2) of this section remain subject to the requirements of §335.4 of this title. In addition, industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsection (c)(2) of this section remain subject to the requirements of §335.6 of this title. Industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsections [subsection] (b)(4) and [subsection] (c)(2) of this

section may also be subject to the requirements of §§335.10 - 335.15 of this title, as applicable, if the executive director determines that such requirements are necessary to protect human health and the environment. In making the determination, the executive director shall consider the following criteria:

(1) - (7) (No change.)

(8) whether subjecting the waste to additional regulation will provide additional protection for human health and the environment; and

(9) (No change.)

(i) Except as provided in Texas Health and Safety Code, §361.090, facilities managing recyclable materials that are required to obtain a permit under this section may also be permitted to manage nonhazardous recyclable materials at the same facility if the executive director determines that such regulation is necessary to protect human health and the environment. In making this determination, the executive director shall consider the following criteria:

(1)- (10) (No change.)

(11) whether subjecting the waste to additional regulation will provide additional protection for human health and the environment; and

(12) (No change.)

(j) Closure cost estimates.

(1) An owner or operator of a recycling facility that stores combustible nonhazardous materials outdoors, or that poses a significant risk to public health and safety as determined by the executive director, shall provide a detailed written cost estimate, in current dollars, showing the cost of hiring a third party to close the facility in accordance with the requirements of this section.

(2) The estimate must:

(A) equal the costs of closure of the facility, including disposal of the maximum inventories of all processed and unprocessed materials on-site during the life of the facility;

(B) be based on the costs of hiring a third party that is not affiliated (as defined in §328.2 of this title (relating to Definitions) with the owner or operator; and

(C) be based on a per cubic yard and/or short ton measure for collection and disposal costs.

(k) Financial assurance. An owner or operator of a recycling facility that stores nonhazardous combustible recyclable materials outdoors, or that poses a significant risk to public health and safety as

determined by the executive director, shall establish and maintain financial assurance for closure of the facility in accordance with Chapter 37, Subchapter J of this title (relating to Financial Assurance for Recycling Facilities).

(l) Closure requirements.

(1) Closure shall include collecting processed and unprocessed materials, and transporting the materials to an authorized facility for disposition unless otherwise approved or directed in writing by the executive director.

(2) Closure of the facility must be completed within 180 days following the most recent acceptance of processed or unprocessed materials unless otherwise approved or directed in writing by the executive director.

(m) [(j)] Used oil that is recycled and is also a hazardous waste solely because it exhibits a hazardous characteristic is not subject to the requirements of Subchapters A - I or O of this chapter [(relating to Industrial Solid Waste and Municipal Hazardous Waste in General; Hazardous Waste Management General Provisions; Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Location Standards for Hazardous Waste Storage, Processing, or Disposal; Standards for the Management of Specific Wastes

and Specific Types of Facilities; Prohibition on Open Dumps; and Land Disposal Restrictions)], but is regulated under Chapter 324 of this title (relating to Used Oil Standards). Used oil that is recycled includes any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes, but is not limited to, oil which is re-refined, reclaimed, burned for energy recovery, or reprocessed.

(n) [(k)] Owners or operators of facilities subject to hazardous waste permitting requirements with hazardous waste management units that recycle hazardous wastes are subject to the requirements of 40 CFR Part 264 or Part 265, Subparts AA and BB, as adopted by reference under §335.152(a)(17) and [-] (18) and §335.112(a)(19) and [-] (20) of this title (relating to Standards).

(o) [(l)] Hazardous waste that is exported to or imported from designated member countries of the Organization for Economic Cooperation and Development (OECD), as defined in 40 CFR §262.58(a)(1), for purpose of recovery, and any person who exports or imports such hazardous waste, is subject to the requirements of 40 CFR Part 262, Subpart H (both federal regulation references as amended and adopted through April 12, 1996 at 61 FedReg 16290), if the hazardous waste is subject to the federal manifesting requirements of 40 CFR Part 262, or subject to the universal waste management standards of 40 CFR Part 273, or subject to Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(p) [(m)] Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title (relating to Definitions), under the definition of “Solid waste [Waste],” §335.6 of

this title, §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), and Subchapter H of this chapter.