

The Texas Commission on Environmental Quality (commission or TCEQ) adopts new §39.510 *with change* to the proposed text as published in the December 17, 2004, issue of the *Texas Register* (29 TexReg 11549).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking is based on instructions given at the commission agenda on December 3, 2003. The adopted rule is based on a petition for rulemaking from the Environmental Law and Justice Center on behalf of the Coalition Against Ruffino Trash Transfer Station. The petition was filed on October 17, 2003. This rulemaking requires notification to the public, by municipal solid waste (MSW) owners or operators, of the existence of an inactive MSW facility when a facility has not accepted waste within two years of the issuance of its permit or the permitted MSW facility has stopped accepting waste for two consecutive years.

A corresponding adopted rulemaking, published in this issue of the *Texas Register*, includes changes to 30 TAC Chapter 305, Consolidated Permits.

SECTION DISCUSSION

Adopted new §39.510, Notice Requirements for Inactive Municipal Solid Waste Permit, adds provisions regarding the contents and types of public notice for permitted MSW facilities that have not accepted waste within two years of permit issuance or have stopped accepting waste for at least two consecutive years. The adopted rule requires that notification to the public be overseen by the executive director and that the notification to the public indicate when the permitted facility expects to begin

operations. Mailed notice and newspaper notice are required on an annual basis following permit issuance when a facility has not initiated operations or has ceased accepting waste. Additionally, at the owner's or operator's expense, a sign or signs will be required to be placed at the site of the permitted facility declaring that the permit has been issued and stating the manner in which the commission and owner or operator may be contacted for further information. The new requirements are applicable to MSW facility permits issued on or after the effective date of this rule and to MSW facility permits issued before the effective date of this rule. The adopted rule applies to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The adopted rule does not apply to registered MSW facilities.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The purpose of this rulemaking is to require public notice for permitted MSW facilities that have not yet begun accepting waste or have stopped accepting waste. The affected regulated community is current and future owners or operators who may have a permitted MSW facility that has not begun accepting

waste or has stopped accepting waste. The adopted rule does not create any burdensome new requirements; therefore, it is not anticipated that the 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 this adopted rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the rulemaking did meet the definition of a major environmental rule, the adopted 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 adopted new §39.510 does not meet any of these requirements. First, there are no applicable federal standards that this rule would address. Second, the adopted rule does not exceed an express requirement of state law, because there is no express requirement of state law related to the required public notice for permitted MSW facilities that have not yet begun operations or have stopped accepting waste. Third, the adopted rule does not exceed the commission's obligations to implement its federally approved Subtitle D permit program. Fourth, the commission does not adopt this rule under

the general powers of the agency but rather under the authority of Texas Health and Safety Code, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste. This rule is also adopted under the authority of Texas Health and Safety Code, §361.011 and §361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. Therefore, the commission does not adopt the rule solely under the commission's general powers.

Comments on the draft regulatory impact analysis determination were solicited; however, no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The purpose of this rulemaking is to provide notice to the public regarding permitted MSW facilities that have not yet begun accepting waste or have stopped accepting waste. Promulgation and enforcement of the adopted rule is neither a statutory nor a constitutional taking of private real property because the rule does not affect real property.

The adopted rule does not create any new requirements or impose burdens on private real property. Providing greater public notice will benefit the program, the regulated community, the environment, and the general public. The rule 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, because it does not create more stringent requirements. Therefore, this rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found the rulemaking is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, and therefore, required that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Comments on the consistency of this rulemaking with the CMP were solicited; however, no comments were received.

PUBLIC COMMENT

A public hearing for this rulemaking was held on January 11, 2005, in Austin. The comment period closed on January 18, 2005. Written or oral comments were submitted by: City of Dumas (Dumas); City of El Paso (El Paso); Fritz, Byrne, Head & Harrison, LLP (FBHH); Lone Star Chapter of the

Solid Waste Association of North America (TXSWANA); Waste Management of Texas, Inc. (WMTX); and an individual.

All commenters either opposed portions of the rulemaking or supported the rulemaking with suggested changes.

RESPONSE TO COMMENTS

TXSWANA supported the basic premise of the rule that provides notice to citizens in the vicinity of permitted, but unutilized MSW facilities.

The commission appreciates TXSWANA's comments and support on the basic premise of the rule.

FBHH commented that §39.510(a) is unclear regarding the time frame for compliance with the three types of notices and requested clarification.

The rule requires that inactive permitted MSW facilities that have not accepted waste for two years after permit issuance or have ceased accepting waste for two consecutive years, notify the executive director, publish newspaper notice, and mail notice in accordance with the rule. This notice is required within two years of the date of permit issuance, within two years of the date of ceasing to accept waste, or the effective date of this rule, whichever is later. For the purposes of this rule, the term "permit issuance" means the date that the permit is issued by the commission or the date of a final, non-appealable decision regarding the permit. Therefore, existing

permitted facilities that have not accepted waste for two consecutive years on the effective date of the rule must comply within two years of the effective date of this rule. Existing facilities that have ceased accepting waste must comply within two years of the effective date of the rule or within two years of the date of ceasing to accept waste, whichever is later. Facilities that are issued permits after the effective date of this rule are required to comply within two years of permit issuance or if the facility accepts waste and then ceases waste acceptance, within two years of ceasing to accept waste. Language has been added to §39.510(a) in response to this comment.

WMTX commented that the commission should define the date of “permit issuance” in §39.510 as the date that the permit is issued by the commission, or, if issuance of the permit is challenged, the date of a final, non-appealable decision regarding such challenge.

The commission agrees and has added rule language in response to this comment, which states that for the purposes of this rule, “permit issuance” means the date that the permit is issued by the commission or the date of a final, non-appealable decision regarding the permit.

WMTX and TXSWANA expressed concerns about the requirements of §39.510(a)(5)(E) regarding the requirement for notice to include a statement indicating when construction and operation is expected in the future. They recommended that the rule language make it clear that this is an estimate, that the owner or operator disclose the expected date of construction or operation when, and only when, reasonably foreseeable, and that any such date is in no way binding upon the owner or operator.

The commission agrees and has added language in §39.510(a)(5)(E) in response to this comment, which states that the required notice shall provide an estimated date of when the facility is expected to begin construction and operation.

WMTX and TXSWANA commented that permittees may not be able to contact all landowners despite due diligence as required in the mailed notice requirements in §39.510(a)(3)(A). They recommended that notification to landowners be made by certified mail to the owners within 500 feet as determined by the county tax rolls on the date that the notice is mailed, and that this requirement is satisfied by proof of mailing.

The commission agrees and has added language in §39.510(a)(3) in response to this comment, which states that the mailed notice required by §39.510(a)(3)(A) shall be sent by certified mail. The commission also agrees that a permittee shall rely on county tax rolls or other reliable sources when compiling a list of landowners within 500 feet of a permitted facility and has added this language to the rule.

An individual commented that mailed notice to landowners may create significant difficulties and recommended that the commission record notice in the county deed records at the time the permit is granted in lieu of a mail out. TXSWANA and Dumas commented that the requirements for mailed notice and publication of notice are not cost effective nor are they effective in reaching new residents, and should be eliminated from the rule.

The commission disagrees with this comment. The commission has found that mailed notice is an effective means of providing notice to landowners and this method of providing notice is used frequently by the commission. No changes have been made in response to this comment.

WMTX recommended replacing the word “paralleling” with the word “bordering” or “adjoining” in §39.510(c) to clarify that the requisite signs are required only on property lines lying next to public highways, streets, or roads.

The commission agrees and in response to this comment has made the recommended change to the rule language.

FBHH commented that the time frame with respect to the definition of an inactive MSW facility in §39.510(a) should be expanded from two years to at least three years. FBHH commented that it is not unusual for a permit to be held up on appeal in the Texas courts for up to three years or longer.

The commission disagrees and no changes have been made to the rule in response to this comment. However, the commission has added language to the rule, which explains that for the purpose of this rule, the term “permit issuance” means the date that the permit is issued by the commission or the date of a final, non-appealable decision regarding the permit. This change will address the possibility of permit issuance being delayed through legal action.

FBHH and Dumas commented that §39.510(b) regarding the applicability of inactive permitted MSW facilities is confusing and erroneous. FBHH recommended deletion of the reference to inactive MSW facilities.

The commission agrees and has made the recommended change to the rule in response to this comment.

FBHH and Dumas recommended that the time frame in §39.510(b) be lengthened beyond six months.

The commission disagrees with this comment. Existing permitted facilities will have six months from the effective date of the rule to prepare signs specifying the facility's status. This is adequate time to prepare signs. No changes have been made in response to this comment.

FBHH commented that the requirements of §39.510 are inconsistent with notice requirements for other industries such as industrial and hazardous waste facilities and recommended any notice requirements maintain consistency across all environmental media.

The commission disagrees with this recommendation. The published and mailed notices required by the rule are consistent with existing notice requirements for MSW facilities. The rule language requiring signs is similar to requirements found in the TCEQ's air quality rules. No changes have been made in response to this comment.

SUBCHAPTER I: PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

§39.510

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; and Texas Health and Safety Code, §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; §361.024, which provides the commission with rulemaking authority; and §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The adopted new section implements Texas Health and Safety Code, §361.024 and §361.061.

§39.510. Notice Requirements for Inactive Municipal Solid Waste Permit.

(a) This section applies to the owners or operators of inactive permitted municipal solid waste (MSW) facilities, which are those facilities that have not accepted waste within two years of permit issuance or have ceased accepting waste for at least two consecutive years. For the purposes of this section, permit issuance means the date that a permit is issued by the commission or the date of a final, non-appealable decision regarding the permit. This section applies to facilities permitted before, on, or after the effective date of this rule.

(1) Within two years of the date of permit issuance, the date of ceasing to accept waste, or the effective date of this rule, whichever is later, the owner or operator of an inactive MSW facility shall notify the executive director, in writing, that the facility is inactive and that the owner or operator intends to operate the facility in the future. In the event that the owner or operator does not intend to operate the facility, the owner or operator should begin voluntary permit revocation procedures.

(2) Within two years of the date of permit issuance, the date of ceasing to accept waste, or the effective date of this rule, whichever is later, the owner or operator of an inactive permitted MSW facility shall publish notice of intent to operate the facility, at least once, in a newspaper of the largest circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, then the owner or operator shall publish notice in a newspaper of general circulation in the county in which the facility is located or proposed to be located, and such notice may be satisfied by a one-time publication if the publishing newspaper meets the circulation requirements. Thereafter, notice must be published annually in accordance with this paragraph, until the facility begins accepting waste or voluntary permit revocation is requested.

(3) Within two years of the date of permit issuance, the date of ceasing to accept waste, or the effective date of this rule, whichever is later, the owner or operator of an inactive permitted MSW facility shall provide, by certified mail, the notice of intent to operate the facility to:

(A) landowners within 500 feet of the facility property line, as determined by county tax rolls or other reliable sources;

(B) the mayor and health authorities of the city or town in which territorial limits or extraterritorial jurisdiction the facility is located or proposed to be located;

(C) the county judge and health authorities of the county in which the facility is located or proposed to be located; and

(D) the council of governments that serves or covers the area or county in which the facility is located or proposed to be located. Thereafter, notice must be sent annually in accordance with this paragraph, until the facility begins accepting waste.

(4) The owner or operator shall file an affidavit with the executive director certifying facts that constitute compliance with the notice requirements of paragraphs (2) and (3) of this subsection within 30 days of the last publication of the published notice required by paragraph (2) of this subsection. The owner or operator shall also file a copy of the published notice required by paragraph (2) of this subsection with the executive director that shows the date of publication and the name of the newspaper within ten business days after its publication. The deadline to file a copy of the published notice that shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with the

public notice requirements of paragraphs (2) and (3) of this subsection creates a rebuttable presumption of compliance with the requirement to publish notice.

(5) The text of the newspaper notice and the mailed notice must include:

(A) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(B) the name, address, and telephone number of the owner or operator and a contact person from whom interested persons may obtain further information and, if different, the location of the facility or activity to be regulated by the permit;

(C) a brief description of the activity authorized by the permit;

(D) the permit number and permit issuance date; and

(E) a statement indicating that the permitted facility may begin construction or operation at a future time, and an estimated date of when the facility is expected to begin construction and operation.

(b) Within six months of the date of permit issuance, the date of ceasing to accept waste, or the effective date of this rule, whichever is later, the owners or operators of permitted MSW facilities that

are not receiving waste shall provide signs specifying the facility's status. At the owner's or operator's expense, a sign or signs must be placed at the site of the permitted facility declaring that the permit has been issued and stating the manner in which the commission and owner or operator may be contacted for further information. Such signs must be provided by the owner or operator and must substantially meet the following requirements. Signs must:

(1) consist of dark lettering on a white background and must be no smaller than four feet by four feet with letters at least three inches in height and block printed capital lettering;

(2) be headed by the words "AUTHORIZED MUNICIPAL SOLID WASTE DISPOSAL FACILITY";

(3) include the words "PERMIT NO.," the number of the permit, and the type of permit;

(4) include the words "for further information contact";

(5) include the words "Texas Commission on Environmental Quality" and the address and telephone number of the appropriate commission regional office;

(6) include the name of the owner or operator, and the address of the appropriate responsible official;

(7) include the telephone number of the owner or operator;

(8) include the expected start-up date for beginning operation; and

(9) remain in place and legible until the facility is opened. The owner or operator shall provide a verification to the executive director that the sign posting was conducted according to the requirements of this section.

(c) Each sign placed at the site must be located within ten feet of every property line bordering a public highway, street, or road. Signs must be visible from the street and spaced at not more than 1,500-foot intervals. A minimum of one sign, but no more than three signs, shall be required along any property line paralleling a public highway, street, or road. This section's sign requirements do not apply to properties under the same ownership that are noncontiguous or separated by intervening public highway, street, or road, unless the property is part of the permitted facility.

(d) The executive director may approve variances from the requirements of subsections (b) and (c) of this section if the owner or operator has demonstrated that it is not practical to comply with the specific requirements of this subsection and alternative sign posting plans proposed by the applicant are at least as effective in providing notice to the public. Approval from the executive director under this subsection must be received before posting alternative signs for purposes of satisfying the requirements of this section.