

The Texas Commission on Environmental Quality (commission) proposes new §39.510.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rulemaking is based on instructions given at the commission agenda on December 3, 2003. The proposed 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 would require notification to the public by municipal solid waste (MSW) permittees 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 rulemaking published in this issue of the *Texas Register* includes changes to 30 TAC Chapter 305, Consolidated Permits.

SECTION DISCUSSION

Proposed 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 two consecutive years. The proposed rule would require 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 would be required on an annual basis following permit issuance when a facility has not initiated operations. Additionally, at the permittee's expense, a sign or signs would 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 permittee may be contacted for further information. The new requirements would be applicable to MSW facility permits issued after the effective date of this rule and to MSW facility permits issued before the effective date of this rule. The proposed rule would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rule would not apply to registered MSW facilities.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed new rule is in effect, no significant fiscal implications are anticipated for the agency. Those units of local government that own permitted, inoperative MSW facilities may experience increased costs due to the public notification requirements, though these costs are not expected to be significant.

The proposed rule would require that permitted MSW facilities provide notification to the public to indicate when the facility expects to begin operations if it has not begun operations within two years of permit issuance or has stopped accepting waste for at least two years. Public notice would be required on an annual basis. In addition, the proposed rule would allow for the revocation of issued MSW permits if an affected permittee has not provided the periodic notification required by this rule, has not accepted waste within seven years of permit issuance, or has ceased accepting waste for seven consecutive years. There are no new costs associated with the proposed authority to revoke issued MSW permits because it does not exceed the authority the commission has under Chapter 305. The

proposed rule would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rule would not apply to registered MSW facilities.

The proposed rule would require permitted MSW facilities that have been in an inactive state for two years or more to provide public notice in the form of written notice, mailed notice, and newspaper notice as to when the facility expects to begin operations. In addition, the proposed rule would require that sign(s) be posted at the facility declaring that a permit has been issued. The sign(s) would also provide other information including contact information and when the facility expects to begin operations.

Approximately 12 MSW facilities are permitted but not operating and may be affected by the proposed rule. The number of facilities is variable and will change as a result of the issuance of new permits and the commencement of operations at permitted facilities. Of the 12 facilities, an estimated six are owned or operated by local governments.

Costs are expected for facilities to provide public notification (including written notice, mailed notice, and newspaper notice) and to provide signs. The largest of these costs is expected to involve providing newspaper notice. This cost could be between \$400 and \$1,200 depending upon the circulation size of the newspaper.

Affected facilities will have to post at least one sign, and possibly as many as three, along any property line paralleling a public highway, street, or road. Signs may cost up to \$1,000 each.

Mailed notice must be provided to: landowners within 500 feet of the facility property line; the mayor and health authorities of the city or town in which territorial limits or extraterritorial jurisdiction the facility is located or in which waste will be managed; the county judge and health authorities of the county in which the facility is located or in which waste will be managed; and the council of governments in which the facility is located or in which waste will be managed. The facility must also file an affidavit certifying compliance with the notice requirements. It is not known what the mailing costs and the cost of filing an affidavit would be, but costs may be as high as \$800, depending upon the number of mailed notices required.

It is estimated that the costs for affected facilities to comply with the proposed rule would be, at the most, \$5,000 per year per facility, beginning in fiscal year 2007. The cost for approximately six facilities could be as high as \$30,000 per year.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed new rule is in effect, the public benefit anticipated from the changes in the proposed rule will be the opportunity for the public to be notified as to when a permitted MSW facility will be operational. Advance notice to the public would reduce the likelihood of a surprise to the public when a facility begins operations years after permit issuance or begins operations years after operations have ceased.

Fiscal implications are anticipated for owners or operators of permitted MSW facilities that have not begun operations within a two-year period or permitted facilities that have stopped accepting waste for at least two years, though these costs are not expected to be significant.

The proposed rule would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rule would not apply to registered MSW facilities. There are an estimated six individually owned facilities statewide that may be impacted by the proposed rule. It is estimated that the costs for affected facilities to comply with the proposed rule would be, at the most, \$5,000 per year per facility, beginning in fiscal year 2007. The cost for approximately six facilities could be as high as \$30,000 per year.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are likely or anticipated for MSW facilities that are small or micro-businesses. Small or micro-businesses that own or operate MSW facilities, which are permitted but are not operational within two years of the permit issuance or are permitted and stop operating for at least two years, will experience the same costs as those facilities that are large businesses. The commission estimates that few, if any, small or micro-businesses will be affected by the proposed rule since most of the owners and operators of the privately owned facilities are large businesses.

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 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 permittees who may have a permitted MSW facility that has not begun accepting waste or has stopped accepting waste. The proposed rule does not create any burdensome new requirements; 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 this proposed rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the proposed rulemaking 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 new §39.510 does not meet any of these requirements. First, there are no applicable federal standards that this rule would address. Second, the proposed 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 proposed rule would not exceed the commission's obligations to implement its federally approved Subtitle D permit program. Fourth, the commission does not propose 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 proposed 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 propose the

rule solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether the proposed 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 proposed rule would be neither a statutory nor a constitutional taking of private real property because the rule does not affect real property.

The proposed 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 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 Actions and

Rules Subject to the Coastal Management Program, and will, therefore, require 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. The commission invites public comment regarding the consistency of the proposed rulemaking with the CMP.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 11, 2005, 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. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. 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.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas

78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-036-305-WS. Comments must be received by 5:00 p.m., January 17, 2005. Copies of the proposed rule can be obtained from the commission's website at <http://www.tnrcc.state.tx.us/oprdrules/propadop.html>. For further information, please contact Clifton Wise, Policy and Regulations Division, at (512) 239-2263.

SUBCHAPTER I: PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

§39.510

STATUTORY AUTHORITY

The new section is proposed under Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; 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 proposed 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. This section applies to facilities permitted before 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 permittee of an inactive MSW facility shall notify the executive director in writing that the facility is inactive and that the permittee intends to operate the facility in the future. In the event that the permittee does not intend to operate the facility, the permittee 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 permittee 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 permittee 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 one 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 permittee of an inactive permitted MSW facility shall mail notice of intent to operate the facility to:

(A) landowners within 500 feet of the facility property line;

(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 permittee 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). The permittee shall also file a copy of the published notice required by paragraph (2) 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) 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 permittee 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 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 permittee of an inactive permitted MSW facility shall provide signs specifying the facility's status. At the permittee'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 permittee may be contacted for further information. Such signs must be provided by the permittee 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 permittee, and the address of the appropriate responsible official;

(7) include the telephone number of the permittee;

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

(9) remain in place and legible until the facility is opened. The permittee 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 paralleling 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 permittee 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.