

The Texas Commission on Environmental Quality (commission or TCEQ) adopts new §305.130 and §305.131 *with changes* to the proposed text as published in the December 17, 2004, issue of the *Texas Register* (29 TexReg 11553).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking is based on instructions given at the commission agenda on December 3, 2003. The adopted rules are 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 39, Public Notice.

SECTION BY SECTION DISCUSSION

Adopted new §305.130, Notice of Inactive Municipal Solid Waste Permit, adds provisions requiring public notice as described in adopted new 30 TAC §39.510 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. Notice is required on an annual basis until the facility starts or resumes accepting waste.

The new requirements are applicable to MSW facility permits issued on or after the effective date of the adopted 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.

Adopted new §305.131, Revocation of Inactive Municipal Solid Waste Permit, provides requirements allowing an MSW permit to be revoked at the discretion of the commission under the procedures found in 30 TAC §305.68 if the owner or operator has failed to provide notice to the public as required by §305.130.

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 and operators who have a permitted MSW facility that has not begun accepting waste or has stopped accepting waste. The adopted rules do not create any burdensome new requirements; therefore, it is not anticipated that the 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 this rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, the 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 adopted new §305.130 and §305.131 do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the adopted rules do 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 rules do not exceed the commission's obligations to

implement its federally approved Subtitle D permit program. Fourth, the commission does not adopt these rules 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. These rules are 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 rules 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 rules constitute 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 are inactive because they have not accepted waste within two years of the issuance of the permit or they have ceased accepting waste for two consecutive years. Promulgation and enforcement of the adopted rules will be neither a statutory nor a constitutional taking of private real property because the rules do not affect real property.

The adopted rules do not create any new requirements or impose burdens on private real property, because the commission already has the authority to revoke permits. Providing greater public notice

will benefit the program, the regulated community, the environment, and the general public. The rules do 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 they do 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 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. Therefore, the goals and policies of the Texas Coastal Management Program (CMP) must 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 rules.

§305.130. Notice of Inactive Municipal Solid Waste Permit.

FBHH commented that §305.130(b) is unclear with respect to the timing of the notifications referenced in §39.510(a). FBHH commented that if, in certain situations, the notification is due on the effective date of the rule, then that would be onerous and recommended that the inactive MSW facility have a certain period of time to provide the notifications.

The commission agrees with this comment and has made changes to §39.510 in an effort to make the rule clear. As revised, the rule does not require any notification on the effective date of the rule.

§305.131. Revocation of Inactive Municipal Solid Waste Permit.

FBHH indicated that the requirements in §305.131(2) and (3) would be inappropriate retroactive rulemaking as applied to currently permitted facilities. FBHH and WMTX commented that the commission does not have the statutory authority to adopt §305.131(2) and (3), unless it could show that the facility is abandoned. FBHH and WMTX commented that if the commission chooses to adopt a revocation rule such as that proposed in §305.131(2) and (3), the agency should provide a sufficient period of time before the revocation requirements go into effect to construct facilities or contract with MSW haulers or generators in order that waste can be accepted.

The commission disagrees that the proposed rule constitutes retroactive rulemaking because the MSW permits are not vested rights. In addition, current TCEQ rules allow for the revocation of a permit at any time for good cause by order of the commission after opportunity for a public hearing is provided. Good cause includes, but is not limited to, abandonment. However, the commission has changed the proposed rule and deleted §305.132(2) and (3) because it is not necessary.

TXSWANA, Dumas, and El Paso commented that the revocation requirements in §305.131 will inhibit adequate long-range planning and do not have sufficient criteria and guidance regarding the

commission's discretionary ability. TXSWANA and El Paso recommended that the revocation requirements be removed or, if kept, that the time frame be extended from seven years to fifteen years.

The commission has deleted §305.132(2) and (3) because it is not necessary.

WMTX and Dumas commented that the seven-year time period in §305.131 was chosen arbitrarily, and is also unnecessary because existing rules allow the commission to initiate revocation proceedings "for good cause at any time." They recommended removal of the requirement.

The commission agrees that the proposed language was not necessary because existing rules allow the commission to initiate revocation proceedings at any time for good cause. Therefore, the commission has deleted §305.132(2) and (3) because it is not necessary.

SUBCHAPTER F: PERMIT CHARACTERISTICS AND CONDITIONS

§305.130, §305.131

STATUTORY AUTHORITY

The new sections are 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; §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 new sections implement Texas Health and Safety Code, §361.024 and §361.061.

§305.130. Notice of Inactive Municipal Solid Waste Permit.

(a) The owner or operator of a permitted municipal solid waste (MSW) facility that has not accepted waste within two years of permit issuance or that has ceased accepting waste for two consecutive years shall provide notice to the public as specified in §39.510 of this title (relating to Notice Requirements for Inactive Municipal Solid Waste Permit) of the following:

- (1) the permitted facility may begin construction or operation at a future time; and

(2) the date that the facility is expected to begin construction and operations.

(b) The public notifications in subsection (a)(1) and (2) of this section are required on an annual basis following the second anniversary date of permit issuance, date the facility ceased accepting waste, or the effective date of this section, whichever is later, until waste acceptance begins or resumes.

(c) The notice requirements of this section are applicable to MSW permits issued:

(1) on or after the effective date of this section; and

(2) before the effective date of this section.

(d) For the purposes of this section, 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.

§305.131. Revocation of Inactive Municipal Solid Waste Permit.

A municipal solid waste permit may be revoked at the discretion of the commission under the procedures found in §305.68 of this title (relating to Action and Notice on Petition for Revocation or Suspension) if the commission finds that the owner or operator has failed to provide notice to the public as required by §305.130 of this title (relating to Notice of Inactive Municipal Solid Waste Permit).