

The Texas Commission on Environmental Quality (commission) proposes new §305.130 and §305.131.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking is based on instructions given at the commission agenda on December 3, 2003. The proposed 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 would require notification to the public by municipal solid waste (MSW) permittees 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 rulemaking published in this issue of the *Texas Register* includes changes to 30 TAC Chapter 39, Public Notice.

#### SECTION BY SECTION DISCUSSION

Proposed new §305.130, Notice of Inactive Municipal Solid Waste Permit, adds provisions requiring public notice as described in proposed 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 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. Notice would then be required on an annual basis until the facility starts accepting waste. The new requirements would be applicable to MSW facility permits issued after the effective date of the

proposed 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.

Proposed 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 permittee has failed to provide notice to the public as required by §305.130; has not accepted waste within seven years of permit issuance; or has ceased accepting waste for seven consecutive years.

#### 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 rules are 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 rules 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. The requirements would be applicable to current MSW facility permits six months

after the effective date of the proposed rules. In addition, the proposed rules would allow for the revocation of issued MSW permits if an affected permittee has not provided the periodic notification required by these rules, has not accepted waste within seven years of permit issuance, or has ceased accepting waste for seven consecutive years. The proposed rules would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rules would not apply to registered MSW facilities.

The proposed rules 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.

Approximately 12 MSW facilities are permitted but not operating and may be affected by the proposed rules. 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 rules 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 rules are in effect, the public benefit anticipated from the changes in the proposed rules 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 rules would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rules would not apply to registered MSW facilities. There are an estimated six individually owned facilities statewide that may be impacted by the proposed rules. It is estimated that the costs for affected facilities to comply with the proposed rules would be, at the most, \$5,000 per year per facility, beginning in fiscal year 2007. The total 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 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 rules 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 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 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 have a permitted MSW facility that has not begun accepting waste or has stopped accepting waste. The proposed rules do not create any burdensome new requirements; 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 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 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 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 proposed 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 proposed rules would not exceed the commission's obligations to implement its federally approved Subtitle D permit program. Fourth, the commission does not propose 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 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 rules 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 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 proposed rules would be neither a statutory nor a constitutional taking of private real property because the rules do not affect real property.

The proposed 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 proposed 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. 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 rules can be obtained from the commission's website at <http://www.tnrcc.state.tx.us/oprd/rules/propadop.html>. For further information, please contact Clifton Wise, Policy and Regulations Division, at (512) 239-2263.

## **SUBCHAPTER F: PERMIT CHARACTERISTICS AND CONDITIONS**

### **§305.130, §305.131**

#### **STATUTORY AUTHORITY**

The new sections are proposed 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 proposed 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.

**§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 any of the following. The permittee has:

(1) failed to provide notice to the public as required by §305.130 of this title (relating to Notice of Inactive Municipal Solid Waste Permit);

(2) not accepted waste within seven years of permit issuance; or

(3) ceased accepting waste for seven consecutive years.