

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §328.2. The amendment is adopted *without change* to the proposed text as published in the September 30, 2005, issue of the *Texas Register* (30 TexReg 6228), and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Senate Bill (SB) 1298, 79th Legislature, 2005, amended Texas Occupations Code, §1956.103, by adding subsection (c), which allows for the sale or transfer of scrap metal that contains a fuel tank without obtaining from the metal recycling entity a written acknowledgment that the scrap metal contains a fuel tank, and which allows for the sale or other transfer of a motor vehicle that has a fuel tank to a metal recycling entity, provided in both cases that the fuel tank has been completely drained and rendered unusable. In order to define the meaning of the terms “Completely drained” and “Unusable,” the commission amends §328.2 by adding definitions for these two terms. SB 1298 also amends Texas Occupations Code, §1956.104(3), to require recycling facilities to post notice that it is a violation of state law to sell a fuel tank that has not been drained and rendered unusable. SB 1298 §3(a) requires the commission to adopt the standards required under Texas Occupations Code, §1956.103(c) by December 1, 2005.

SECTION DISCUSSION

The adopted amendment to §328.2, Definitions, adds the definitions of “Completely drained” and “Unusable,” and renumbers the existing definitions to accommodate these new definitions. Under adopted §328.2(2), for the purposes of Texas Occupations Code, §1956.103(c), a fuel tank will be considered to be completely drained if it meets three criteria. First, all fuel must be removed from the

tank using commonly employed practices for removing fuel from a tank, such as pouring, pumping, or aspirating. Second, the procedure used to remove the fuel from the tank must conform with accepted industry practices. Third, the tank must be emptied of all accumulated sludges or residues, and must be purged of all residual vapors in accordance with accepted industry procedures commonly employed for the type of fuel. Existing definitions in §328.2(2) - (5) are renumbered as §328.2(3) - (6), respectively. Under adopted §328.2(7), the term “Unusable” is defined, for the purposes of Texas Occupations Code, §1956.103(c), as a fuel tank that has been completely drained and can no longer be used because it has been punctured, ruptured, crushed, shredded, or has other significant structural changes or alterations. The two new definitions will apply only to the sale or transfer of a fuel tank to a metal entity on or after January 1, 2006.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the 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 rule is to protect the environment from possible spills of a potentially hazardous material, motor vehicle fuel, and to reduce risks to human health from environmental exposure to motor fuel. However, 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 the rule does not meet the definition of a major environmental rule.

Furthermore, even if the rule did meet the definition of a major environmental rule, the 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). Texas Government Code, §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 rule does not meet any of these requirements. First, there are no applicable federal standards that this rule would address. Second, the rule does not exceed an express requirement of state law in Texas Occupations Code, §1956.103. Third, there is no delegation agreement that would be exceeded by the rule. Fourth, the commission adopts this rule under the specific authority of Texas Occupations Code, §1956.103. This rule is also adopted under the authority of Texas Health and

Safety Code, §§361.011, 361.017, 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, and §361.022 and §361.023, which set public policy in the management of municipal solid waste and hazardous waste to include reuse or recycling of waste. Therefore, the commission does not adopt the adoption of the rule solely under the commission's general powers.

The commission invited public comment on the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rule and performed an assessment of whether the rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rule is to protect the environment from possible spills of a potentially hazardous material, motor vehicle fuel, and to reduce risks to human health from environmental exposure to motor fuel. The rule would substantially advance this stated purpose by requiring that fuel tanks on motor vehicles intended for scrap metal recycling entities be properly drained of fuel, and emptied of accumulated sludges or residues.

Promulgation and enforcement of this rule would be neither a statutory nor a constitutional taking of private real property because the rule does not affect real property. This rule exercises commission jurisdiction over municipal solid waste and hazardous waste and the reuse and recycling of municipal solid waste and hazardous waste.

There are no burdens imposed on private real property, and the benefits to society are increased safety at metal recycling facilities and the prevention of pollution. In addition, 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. Therefore, this rule will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action or authorization identified in §505.11(a)(6). Therefore, the rule is not subject to the Texas Coastal Management Program.

PUBLIC COMMENTS

The proposed rule was published for comment in the September 30, 2005, issue of the *Texas Register*. A public hearing on this proposal was not held. No public comments were received on the proposed rule.

SUBCHAPTER A: PURPOSE AND GENERAL INFORMATION

§328.2

STATUTORY AUTHORITY

The amendment is adopted under Texas Occupations Code, §1956.103, which prohibits the sale of a motor vehicle for scrap metal unless the fuel tank has been completely drained and rendered unusable in accordance with commission rules; SB 1298, §3, which directs the TCEQ to adopt standards required under Texas Occupations Code, §1956.103, by December 1, 2005; Texas Solid Waste Disposal Act in Texas Health and Safety Code, §361.022, which sets public policy in the management of municipal solid waste to include reuse or recycling of waste; §361.023, which sets public policy in the management of hazardous waste to include reuse or recycling of waste; §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; §361.017, which establishes the commission's jurisdiction over all aspects of the management of industrial solid waste and hazardous municipal waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; and §361.024, which provides the commission with rulemaking authority.

The adopted amendment implements Texas Occupations Code, §1956.103 and SB 1298, §3.

§328.2. Definitions.

The following terms, when used in this subchapter, have the following meanings. Other definitions may be found in Chapters 3, 330, and 332 of this title (relating to Definitions; Municipal Solid Waste; and Composting).

(1) **Affiliated with**--A person, "A" is affiliated with another person, "B," if either of the following two conditions applies:

(A) "A" owns or controls more than 20% of the voting interest, fair market value, profits, proceeds, or capital gains of "B"; or

(B) "B" owns or controls more than 20% of the voting interest, fair market value, profits, proceeds, or capital gains of "A."

(2) **Completely drained**--For the purposes of Texas Occupations Code, §1956.103(c), regarding the sale or transfer of a fuel tank to a metal recycling entity on or after January 1, 2006, a fuel tank is completely drained if:

(A) all fuel has been removed that can be removed using practices commonly employed to remove fuel from a tank, e.g., pouring, pumping, and aspirating;

(B) the procedures used to remove fuel from the tank conform with accepted industry practices; and

(C) the tank is emptied of all accumulated sludges or residues, and is purged of all residual vapors in accordance with accepted industry procedures commonly employed for the type of fuel.

(3) Incidental amount(s) of non-recyclable waste or incidental non-recyclable waste--Non-recyclable waste that accompanies recyclable material despite reasonable efforts to maintain source-separation and that is no more than 10% by volume or scale weight of each incoming load, and averages no more than 5% of the total scale weight or volume of all materials received in the last six-month period, as substantiated by the facility's records. The practices and standards of recycling facilities of a particular type will be considered by the executive director to allow alternative compliance with these standards on a case-by-case basis, as provided for in §328.4(e) of this title (relating to Limitations on Storage of Recyclable Materials). Reasonable efforts to maintain source-separation must include: having dual collection and transportation systems in place for recyclable material and non-recyclable waste at the point of generation; having informed generators and haulers of the source-separation requirements; and the recycling facility having instituted quality control measures including, at a minimum, inspection of incoming loads and rejection by the recycling facility of those loads that would cause the facility to exceed these percentages as described in this paragraph. After incoming loads are processed for recycling, all resulting non-recyclable waste must be managed according to the requirements of this chapter or taken to an authorized solid waste facility within one

week. Incidental amount(s) of non-recyclable waste does not include non-recyclable components that are integral to recyclable material, including:

(A) the non-recyclable components of white goods, whole computers, whole automobiles, or other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical, such as insulation or electronic components in white goods;

(B) source-separated recyclable material rendered unmarketable by damage during collection, unloading, and sorting, such as broken recyclable glass; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

(ii) nails and roofing felt attached to recyclable shingles;

(iii) nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and

(iv) pallets and packaging materials.

(4) **Processed for recycling or processing for beneficial use**--Material has been or is processed for recycling, or undergoes processing for beneficial reuse, if it has been subjected to activities including extraction or separation of component materials (such as the separation of commingled recyclable materials), cleaning, grinding, or other preparation at a recycling facility to make it amenable for subsequent recycling or beneficial reuse.

(5) **Secondary metals recycling facility**--A facility that:

(A) is predominately engaged in the business of obtaining ferrous or nonferrous metals that have served their original economic purpose in order to convert those metals, or to sell those metals for conversion, into raw material products consisting of prepared grades and having an existing or potential economic value;

(B) has the capability for performing the process by which ferrous or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value, other than by the exclusive use of hand tools, by methods including, without limitation, the processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content thereof; and

(C) sells or purchases those ferrous or nonferrous metals solely for purposes of use in the form of raw materials in the production of new products.

(6) **Source-separated recyclable material**--Recyclable material from residential, commercial, municipal, institutional, recreational, industrial, and other community activities, that at the point of generation has been separated, collected, and transported separately from municipal solid waste, or transported in the same vehicle as municipal solid waste, but in separate containers or compartments. Source-separation does not require the recovery or separation of non-recyclable components that are integral to a recyclable product, including:

(A) the non-recyclable components of white goods, whole computers, whole automobiles, or other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical, such as insulation or electronic components in white goods;

(B) source-separated recyclable material rendered unmarketable by damage during collection, unloading, and sorting, such as broken recyclable glass; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

(ii) nails and roofing felt attached to recyclable shingles;

(iii) nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and

(iv) pallets and packaging materials.

(7) **Unusable**--For the purposes of Texas Occupations Code, §1956.103(c) regarding the sale or transfer of a fuel tank to a metal recycling entity on or after January 1, 2006, a fuel tank is rendered unusable if the tank is completely drained and can no longer be used because it has been punctured, ruptured, crushed, shredded, or has other significant structural changes or alterations.