

The Texas Commission on Environmental Quality (commission) adopts amendments to §335.2 and §335.41. Section 335.2 is adopted *with changes* to the proposed text as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7372). Section 335.41 is adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 1281, 79th Legislature, 2005, added Texas Health and Safety Code (THSC), §361.0901, which requires commercial industrial solid waste facilities that receive solid waste for discharge to a publicly owned treatment works (POTW) to obtain a permit under THSC, Chapter 361, Solid Waste Disposal Act, or under Texas Water Code (TWC), Chapter 26, Texas Water Quality Control.

The commission recognizes that there are a small number of commercial industrial solid waste facilities that receive industrial solid waste for discharge to POTWs that currently are not required to obtain an industrial solid waste permit because of the wastewater treatment exemptions under §335.2 and §335.41. The adopted rules will require these facilities to obtain a permit and, at a minimum, meet certain requirements related to tank engineering and design, waste analysis, facility operations, personnel training, quality assurance, closure, and for new facilities, siting requirements. Financial assurance for closure will be required. Facilities will also be required to keep on-site appropriate plans and operating records that document compliance with these requirements. The adopted amendments will require the facility to obtain a solid waste permit issued under this chapter or an interim general permit issued under 30 TAC Chapter 205 in order to continue operations. Authorization under the

general permit would be for a period not to exceed 15 months, but may be extended at the discretion of the executive director in one-year increments.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout the rules to be consistent with Texas Register requirements and agency guidelines.

The commission adopts an amendment to §335.2, Permit Required. The adopted revision to §335.2(d)(3) removes the reference to wastewater treatment units. SB 1281 removes the exemption from permitting for wastewater treatment units that process or store industrial solid waste received on a commercial basis for discharge to a POTW. The different types of exemptions from permitting for facilities that operate wastewater treatment units previously covered under §335.2(d)(3) are now covered under new §335.2(d)(7) - (9).

New §335.2(d)(7) exempts from permitting units that store or process nonhazardous industrial solid waste if the wastewater is discharged under a Texas Pollutant Discharge Elimination System authorization issued under TWC, Chapter 26. These units were previously covered under §335.2(d)(3).

New §335.2(d)(8) exempts from permitting units located at noncommercial solid waste management facilities that store or process nonhazardous industrial waste if the wastewater is discharged to a POTW. These units were previously covered under §335.2(d)(3).

New §335.2(d)(9) is added as a result of the implementation of THSC, §361.0901(c), which exempts from permitting certain wastewater treatment units at municipal solid waste facilities or commercial industrial solid waste landfill facilities. This exemption from permitting covers wastewater treatment units that process or store liquid wastes that are incidental to the handling, processing, storage, or disposal of solid wastes at a municipal solid waste or commercial industrial solid waste landfill facility if the waste is discharged to a POTW. These units were previously covered under §335.2(d)(3).

New §335.2(n) is added as a result of the implementation of THSC, §361.0901(b). This section requires owners or operators of commercial industrial solid waste management facilities that receive industrial solid waste for treatment and/or storage for discharge to a POTW to acquire a permit issued under §335.2. Existing facilities may obtain authorization under an interim general permit issued under Chapter 205 in order to continue operations until the issuance of the solid waste permit or for 15 months, whichever is earlier. The general permit will authorize operation of the facility for a maximum term of 15 months in order to continue operations. Authorization may be extended at the discretion of the executive director on an individual basis in one-year increments. The commission intends for the executive director to consider the status of the application at the State Office of Administrative Hearings when considering a request for extension of authorization under the general permit. The facility must be authorized to continue operations under the general permit or an individual solid waste permit by June 1, 2006. Facilities that apply for a general permit to continue operations must also submit to the commission appropriate information to demonstrate compliance with the financial assurance requirements for closure of industrial solid waste facilities in accordance with 30 TAC Chapter 37, Subchapter P, Financial Assurance for Hazardous and Nonhazardous Industrial Solid

Waste Facilities, by June 1, 2006. All owners or operators of facilities that are operating under a Chapter 205 general permit shall submit an application for an individual solid waste permit by September 1, 2006.

The commission adopts an amendment to §335.41, Purpose, Scope, and Applicability. The adopted revision to §335.41(d)(1) removes the reference to wastewater treatment units. SB 1281 removes the exemption from permitting for wastewater treatment units that process or store industrial solid waste received on a commercial basis for discharge to a POTW. The exemptions from permitting for facilities that operate hazardous wastewater treatment units previously covered under §335.41(d)(1) are now covered under new §335.41(d)(5) - (8).

New §335.41(d)(5) exempts from permitting units that store or process hazardous industrial solid waste that is discharged under a Texas Pollutant Discharge Elimination System authorization issued under TWC, Chapter 26. These units were previously covered under §335.41(d)(1).

New §335.41(d)(6) exempts from permitting units located at noncommercial solid waste management facilities that store or process hazardous industrial waste that is discharged to a POTW. These units were previously covered under §335.41(d)(1).

New §335.41(d)(7) is added as a result of the implementation of THSC, §361.0901(c), which exempts from permitting certain wastewater treatment units at municipal solid waste facilities or commercial industrial solid waste landfill facilities. This exemption from permitting covers wastewater treatment

units that process or store hazardous industrial liquid wastes that are incidental to the handling, processing, storage, or disposal of solid waste and discharged to a POTW. These units were previously covered under §335.41(d)(1).

New §335.41(d)(8) is added as a result of the implementation of THSC, §361.0901(b) and exempts owners or operators of commercial industrial solid waste management facilities that receive hazardous waste for discharge to a POTW from the permitting requirements of Subchapters E and F of this chapter, but will require these facilities to acquire a permit issued under §335.2 or Chapter 205. These units were previously covered under §335.41(d)(1).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225 because they do 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 adopted rules is to require commercial industrial solid waste facilities that receive solid waste for discharge to a POTW to obtain a permit under THSC, Chapter 361, Solid Waste

Disposal Act. Therefore, it is not anticipated that the adopted 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 these adopted rules do not meet the definition of a major environmental rule.

Furthermore, even if the adopted rules 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). 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 adopted rules do not meet any of these requirements. First, while these rules may exceed a standard set by federal law by requiring a permit for commercial industrial solid waste facilities that receive waste for discharge to a POTW, they are specifically required by state law. Second, the adopted rules do not exceed an express requirement of state law but instead implement statutory requirements for commercial industrial solid waste facilities that receive solid waste for discharge to a POTW. Third, there is no delegation agreement that would be exceeded by these adopted rules because no agreement relates to this subject matter area. Fourth, the commission

proposes these rules under the rulemaking direction of SB 1281 and not solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an assessment of whether the rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rules is to require commercial industrial solid waste facilities that receive industrial solid waste for discharge to a POTW to obtain a permit under THSC, Chapter 361, Solid Waste Disposal Act. The adopted rules would substantially advance this stated purpose by removing an existing exemption from permitting for wastewater treatment units that process or store industrial solid waste received on a commercial basis for discharge to a POTW. Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property because the adopted rules do not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted rules would improve the commission's ability to ensure proper management of industrial solid waste. Because the adopted rules do not affect real property, they 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. Therefore, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted rules include the goals to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal waters and to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing coastal natural resource areas, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone.

CMP policies applicable to the adopted rules include the construction and operation of solid waste treatment, storage, and disposal facilities. The agency shall comply with the policies of 31 TAC §501.19 when issuing permits and adopting rules under THSC, Chapter 361.

The rules are consistent with and comply with the policies of 31 TAC §501.19 when issuing permits and adopting rules under THSC, Chapter 361.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

PUBLIC COMMENT

A public hearing on this rulemaking was held in Austin, Texas, on November 21, 2005. No oral or written comments were received during the public hearing. The public comment period ended December 12, 2005.

Hance Scarborough Wright Woodward & Weisbart on behalf of Newpark Resources, Inc. (Newpark), Liquid Environmental Solutions (LES), and Texas Molecular LLC (Texas Molecular) submitted written comments in support of the rulemaking.

US Filter Corporation (US Filter) and US Oil Recovery LP (US Oil Recovery) generally opposed the rulemaking. US Oil Recovery recommended changes to the rulemaking.

RESPONSE TO COMMENTS

US Oil Recovery commented that general permits are presently not based on a discharge of wastewater to a POTW.

The commission agrees that currently there are no general permits based on wastewater discharge to a POTW. The interim general permit being developed as a result of this rulemaking will not authorize an effluent discharge to a POTW. The interim general permit will authorize the continued operations of existing commercial industrial solid waste facilities that discharge to a POTW by requiring the facilities to meet certain technical and operational standards, which are substantially similar to those required by an individual solid waste permit.

US Oil Recovery requested that the term of the general permit be extended to two years rather than 15 months and be similar in nature to §335.2, concerning interim status of hazardous waste facilities.

The proposed rule will allow existing facilities to continue operations under a general permit for a maximum period of 15 months, which is the normal processing time for individual permit applications. The commission does not anticipate that applications will be complex or require a longer than normal processing time. No change has been made to the rule as a result of this comment.

US Oil Recovery expressed a need for an exemption of certain effluent standards in order to meet the discharge requirements set by the POTW. In addition, US Oil Recovery stated that, Gulf Coast Waste Authority (GCA) is “liable for enforcement action under the Clean Water Act for violation of any effluent limitation contained in its NPDES or TPDES permit. . . . Furthermore, GCA has the ability granted in its charter to exempt industrial users from categorical pretreatment standards.”

The interim general permit and the individual permit will not regulate effluent limits or standards; instead, the rules will authorize and regulate the units used to store or process that waste prior to it being sent to a POTW.

LES, Newpark, and Texas Molecular supported and endorsed the proposal to require financial assurance in conjunction with the interim general permit.

The commission appreciates the timely comments received regarding the requirement for a financial assurance demonstration in conjunction with the interim general permit.

US Filter commented that compliance with state law can be achieved through a general permitting system that takes into account existing financial assurance requirements and "...affected facilities which already maintain financial assurance under other applicable standards should not be required to obtain additional financial assurance pursuant to the proposed rule change."

The guarantee of financial assurance for the closure of solid waste management units reduces the risk to human health and the environment and potential liability to the state for cleanup of unsecured units. Therefore, financial assurance will be required for the closure of tanks dedicated to the treatment and storage of wastewater prior to being sent to a POTW. Currently, there is no mechanism for general permits issued under TWC, Chapter 26, to require financial assurance. The commission agrees that if adequate financial assurance has already been

demonstrated for the waste management units to be permitted, no additional financial assurance would be required.

US Filter stated that the rule change proposal says “the public benefit anticipated from the changes seen in the proposed rules will be compliant with state law and the continued protection of the public health and the environment.” US Filter maintained that “since the agency anticipates only continued, rather than increased, protection of human health and the environment, a general permitting system is adequate to meet the commissions goals in that regard.”

The individual permit that will be issued to commercial industrial solid waste facilities that accept waste for discharge to a POTW will not call for more stringent requirements than those of other commercial treatment and storage facilities in the state which have permits issued under THSC, Chapter 361. The requirements in the individual permit will be consistent for all similar facilities and will be compliant with state law, as well as maintain the continued protection of human health and the environment already established. General permits issued under TWC, Chapter 26, do not have a mechanism for requiring financial assurance or public participation in the permitting process and, therefore, are not consistent with the requirements of individual permits. In order to maintain consistent and established standards for the protection of human health and the environment, all commercial solid waste facilities that accept waste for discharge to a POTW must have an individual permit issued under THSC, Chapter 361; therefore, the commission has made no change to the rule based on this comment.

US Filter commented that because of the small number of facilities potentially affected by the proposed rulemaking, the commission would be able to adequately enforce the rule requirements if general permits were issued rather than individual permit.

Site inspections occur for facilities issued individual permits or general permits. Oversight and enforcement of noncompliance would be would be substantially similar under both permits. The commission has made no change to the rules based on this comment.

LES, Newpark, and Texas Molecular submitted comments that supported the opportunity to allow public participation in the permitting process for commercial industrial solid waste facilities that receive waste for discharge to a POTW.

The commission appreciates the timely comments supporting public participation in the permitting process.

US Oil Recovery commented that SB 1281 does not require a public notice or a public hearing. The commenter requested that the commission not “require a public hearing on an individual permit” issued to a commercial facility that accepts waste for discharge to a POTW.

The rules will require affected facilities to obtain an individual permit issued under §335.2.

Individual permits are required to follow the public notice procedures of 30 TAC §39.503 for industrial and hazardous waste facilities. This notice under 30 TAC §39.411 provides the public

with the opportunity to request a hearing on the application. The rules do not stipulate that a public hearing is required for individual permits issued to affected facilities.

US Oil Recovery commented that it currently pay fees to the POTW that accepts its wastewater and requested that any additional fees be waived.

Fees paid to the POTW are for wastes being sent from the facility to the POTW for disposal; they are not fees being assessed for the management of wastes at a permitted facility. All facilities permitted under THSC, Chapter 361, must pay the appropriate fees under THSC, Chapter 361, Subchapter D. The rule language has not been changed.

US Oil Recovery stated that the rules should be revised to ensure that all existing affected facilities should be exempt or “grandfathered” from any additional tank engineering and design standards, waste analysis, and facility operations above what is currently in place at the existing facility.

The commission’s review of an application for an individual permit is completed to ensure that the waste management units being permitted meet the minimum standards established for the protection of human health and the environment. Allowing active, permitted commercial facilities that may currently utilize substandard engineering practices, waste analysis practices, and facility operations to continue to operate because they were in existence prior to the enactment of the rules would defeat the intent of SB 1281, which is to provide protection of human health and the environment. The rule language has not been changed.

US Oil Recovery requested that commercial solid waste facilities that accept waste for discharge to GCA be permit exempt under these rules because, through its charter, GCA has been granted powers by the state to enforce and adopt rules that would give GCA civil authority to assess penalties for discharge violations. The commenter stated that GCA can issue permits and assess penalties for discharge violations. US Oil Recovery requested that facilities permitted by GCA be exempt from individual and interim general permitting because such facilities would be subject to duplicative permits, compliance monitoring, and enforcement action. The commenter stated that “GCA should be recognized as a stand-alone entity different than any POTW.”

The commission does not dispute the fact that GCA has the authority to issue effluent permits and assess penalties for discharge violations of the effluent permit. The interim general permit and the individual permit will not regulate effluent limits or standards; instead, the rules will authorize and regulate the units used to store or process that waste prior to it being sent to GCA or any POTW. Therefore, the overlap of permitting requirements, effluent monitoring, and enforcement action will be negligible. The rule language has not been changed.

US Oil Recovery requested that the commission define the authority to assess fines that would allow both the commission and the POTW (GCA) to assess penalties for a violation.

The commission would use its authority under THSC, Chapter 361, and Chapter 335, to pursue an enforcement action against a person or entity who fails to comply with the terms of an interim general permit and an individual permit relating to storage and treatment of commercial

industrial solid waste that is discharged to a POTW. In addition, the commission would use its authority under TWC, Chapter 7, to initiate enforcement actions. A POTW may use its independent enforcement authority to pursue an enforcement action against a person or entity who fails to comply with the terms of a pretreatment ordinance, permit, and associated effluent limits relating to quality of the wastewater sent to the POTW.

US Oil Recovery commented that §335.2 and §335.41 may meet the definition of a major environmental rule if commercial facilities that accept waste for discharge to GCA are not exempt, as the GCA was formed under a specific state law, including its ability to issue permits for wastewater disposal.

As explained in the FINAL REGULATORY IMPACT ANALYSIS section of this preamble, the commission determined that this rulemaking does not meet the definition of a major environmental rule. 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 adopted rules is to require commercial industrial solid waste facilities that receive solid waste for discharge to a POTW to obtain a permit under THSC, Chapter 361, Solid Waste Disposal Act. Therefore, it is not anticipated that the adopted 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. Most importantly, this rulemaking is intended to implement new requirements in THSC, Chapter 361.

**SUBCHAPTER A: INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS
WASTE IN GENERAL**

§335.2

STATUTORY AUTHORITY

The amendment is adopted under the authority granted to the commission by the Texas Legislature in TWC, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; and THSC, §361.011, which provides the commission with the authority to manage municipal waste; §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste; §361.017, which provides the commission with powers and duties necessary or convenient to manage industrial solid waste activities; §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste; and §361.0901, as added by SB 1281, which requires commercial industrial solid waste facilities that receive solid waste

for discharge to a POTW to obtain a permit under THSC, Chapter 361, Solid Waste Disposal Act, or under TWC, Chapter 26, Water Quality Control.

The adopted amendment implements SB 1281.

§335.2. Permit Required.

(a) Except with regard to storage, processing, or disposal to which subsections (c) - (h) of this section apply, and as provided in §335.45(b) of this title (relating to Effect on Existing Facilities), and in accordance with the requirements of §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials) and §335.25 of this title (relating to Handling, Storing, Processing, Transporting, and Disposing of Poultry Carcasses), and as provided in §332.4 of this title (relating to General Requirements), no person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization from the Texas Commission on Environmental Quality (commission) or its predecessor agencies, the Department of State Health Services (DSHS), or other valid authorization from a Texas state agency. No person may commence physical construction of a new hazardous waste management facility without first having submitted Part A and Part B of the permit application and received a finally effective permit.

(b) In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit its

wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit. In the event this requirement is violated, the executive director will seek recourse against not only the person who stored, processed, or disposed of the waste, but also against the generator, transporter, owner or operator, or other person who caused, suffered, allowed, or permitted its waste to be stored, processed, or disposed.

(c) Any owner or operator of a solid waste management facility that is in existence on the effective date of a statutory or regulatory change that subjects the owner or operator to a requirement to obtain a hazardous waste permit who has filed a hazardous waste permit application with the commission in accordance with the rules and regulations of the commission, may continue the storage, processing, or disposal of hazardous waste until such time as the commission approves or denies the application, or, if the owner or operator becomes subject to a requirement to obtain a hazardous waste permit after November 8, 1984, except as provided by the United States Environmental Protection Agency (EPA) or commission rules relative to termination of interim status. If a solid waste facility which has become a commercial hazardous waste management facility as a result of the federal toxicity characteristic rule effective September 25, 1990, and is required to obtain a hazardous waste permit, such facility that qualifies for interim status is limited to those activities that qualify it for interim status until the facility obtains the hazardous waste permit. Owners or operators of municipal hazardous waste facilities that satisfied this requirement by filing an application on or before November 19, 1980, with the EPA are not required to submit a separate application with the DSHS. Applications filed under this section shall meet the requirements of §335.44 of this title (relating to Application for Existing On-Site Facilities). Owners and operators of solid waste management facilities that are in existence on the

effective date of statutory or regulatory amendments under the Texas Solid Waste Disposal Act (Vernon's Supplement 1991), Texas Civil Statutes, Article 4477-7, or the Resource Conservation and Recovery Act (RCRA), 42 United States Code, §§6901 *et seq.*, that render the facilities subject to the requirement to obtain a hazardous waste permit, may continue to operate if Part A of their permit application is submitted no later than six months after the date of publication of regulations by the EPA under RCRA, which first require them to comply with the standards in Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), or Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities); or 30 days after the date they first become subject to the standards in these subchapters, whichever first occur; or for generators who generate greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month and who process, store, or dispose of these wastes on-site, a Part A permit application shall be submitted to the EPA by March 24, 1987, as required by 40 Code of Federal Regulations (CFR) §270.10(e)(1)(iii). This subsection shall not apply to a facility if it has been previously denied a hazardous waste permit or if authority to operate the facility has been previously terminated. Applications filed under this section shall meet the requirements of §335.44 of this title. For purposes of this subsection, a solid waste management facility is in existence if the owner or operator has obtained all necessary federal, state, and local preconstruction approvals or permits, as required by applicable federal, state, and local hazardous waste control statutes, regulations, or ordinances; and either:

- (1) a continuous physical, on-site construction program has begun; or

(2) the owner or operator has entered into contractual obligations, which cannot be cancelled or modified without substantial loss, for construction of the facility to be completed within a reasonable time.

(d) No permit shall be required for:

(1) the processing or disposal of nonhazardous industrial solid waste, if the waste is processed or disposed on property owned or otherwise effectively controlled by the owner or operator of the industrial plant, manufacturing plant, mining operation, or agricultural operation from which the waste results or is produced; the property is within 50 miles of the plant or operation; and the waste is not commingled with waste from any other source or sources (An industrial plant, manufacturing plant, mining operation, or agricultural operation owned by one person shall not be considered an “other source” with respect to other plants and operations owned by the same person.);

(2) the storage of nonhazardous industrial solid waste, if the waste is stored on property owned or otherwise effectively controlled by the owner or operator of the industrial plant, manufacturing plant, mining operation, or agricultural operation from which the waste results or is produced, and the waste is not commingled with waste from any other source or sources (An industrial plant, manufacturing plant, mining operation, or agricultural operation owned by one person shall not be considered an “other source” with respect to other plants and operations owned by the same person.);

(3) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in an elementary neutralization unit;

(4) the collection, storage, or processing of nonhazardous industrial solid waste, if the waste is collected, stored, or processed as part of a treatability study;

(5) the storage of nonhazardous industrial solid waste, if the waste is stored in a transfer facility in containers for a period of ten days or less, unless the executive director determines that a permit should be required in order to protect human health and the environment;

(6) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in a publicly owned treatment works with discharges subject to regulation under the Clean Water Act, §402, as amended through October 4, 1996, if the owner or operator has a National Pollutant Discharge Elimination System permit and complies with the conditions of the permit;

(7) the storage or processing of nonhazardous industrial solid waste, if the waste is stored or processed in a wastewater unit and is discharged in accordance with a Texas Pollutant Discharge Elimination System authorization issued under Texas Water Code, Chapter 26;

(8) the storage or processing of nonhazardous industrial solid waste, if the waste is stored or processed in a wastewater treatment unit that discharges to a publicly owned treatment works and the units are located at a noncommercial solid waste management facility; or

(9) the storage or processing of nonhazardous industrial solid waste, if the waste is processed in a wastewater treatment unit that discharges to a publicly owned treatment works liquid wastes that are incidental to the handling, processing, storage, or disposal of solid wastes at municipal solid waste facilities or commercial industrial solid waste landfill facilities.

(e) No permit shall be required for the on-site storage of hazardous waste by a person who is a conditionally exempt small quantity generator as described in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators).

(f) No permit under this chapter shall be required for the storage, processing, or disposal of hazardous waste by a person described in §335.41(b) - (d) of this title (relating to Purpose, Scope, and Applicability) or for the storage of hazardous waste under the provisions of 40 CFR §261.4(c) and (d).

(g) No permit under this chapter shall be required for the storage, processing, or disposal of hazardous industrial waste or municipal hazardous waste that is generated or collected for the purpose of conducting treatability studies. Such samples are subject to the requirements in 40 CFR §261.4(e) and (f), as amended and adopted in the CFR through February 18, 1994, as published in the *Federal Register* (59 FR 8362), which are adopted by reference.

(h) A person may obtain authorization from the executive director for the storage, processing, or disposal of nonhazardous industrial solid waste in an interim status landfill that has qualified for interim status in accordance with 40 CFR Part 270, Subpart G, and that has complied with the

standards in Subchapter E of this chapter, by complying with the notification and information requirements in §335.6 of this title (relating to Notification Requirements). The executive director may approve or deny the request for authorization or grant the request for authorization subject to conditions, which may include, without limitation, public notice and technical requirements. A request for authorization for the disposal of nonhazardous industrial solid waste under this subsection shall not be approved unless the executive director determines that the subject facility is suitable for disposal of such waste at the facility as requested. At a minimum, a determination of suitability by the executive director must include approval by the executive director of construction of a hazardous waste landfill meeting the design requirements of 40 CFR §265.301(a). In accordance with §335.6 of this title, such person shall not engage in the requested activities if denied by the executive director or unless 90 days' notice has been provided and the executive director approves the request except where express executive director approval has been obtained prior to the expiration of the 90 days. Authorization may not be obtained under this subsection for:

(1) nonhazardous industrial solid waste, the storage, processing, or disposal of which is expressly prohibited under an existing permit or site development plan applicable to the facility or a portion of the facility;

(2) polychlorinated biphenyl compounds wastes subject to regulation by 40 CFR Part 761;

(3) explosives and shock-sensitive materials;

(4) pyrophorics;

(5) infectious materials;

(6) liquid organic peroxides;

(7) radioactive or nuclear waste materials, receipt of which will require a license from the TDH or the commission or any other successor agency; and

(8) friable asbestos waste unless authorization is obtained in compliance with the procedures established under §330.136(b)(6)(B) - (E) of this title (relating to Disposal of Special Wastes). Authorizations obtained under this subsection shall be effective during the pendency of the interim status and shall cease upon the termination of interim status, final administrative disposition of the subject permit application, failure of the facility to operate the facility in compliance with the standards set forth in Subchapter E of this chapter, or as otherwise provided by law.

(i) Owners or operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners or operators of surface impoundments, landfills, land treatment units, and waste pile units that received wastes after July 26, 1982, or that certified closure (according to 40 CFR §265.115) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under 40 CFR §270.1(c)(5) and (6), or obtain an order in lieu of a post-closure permit, as provided in subsection (m)

of this section. If a post-closure permit is required, the permit must address applicable provisions of 40 CFR Part 264, and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) provisions concerning groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care requirements. The denial of a permit for the active life of a hazardous waste management facility or unit does not affect the requirement to obtain a post-closure permit under this section.

(j) Upon receipt of the federal Hazardous and Solid Waste Act (HSWA) authorization for the commission's Hazardous Waste Program, the commission shall be authorized to enforce the provisions that the EPA imposed in hazardous waste permits that were issued before the HSWA authorization was granted.

(k) Any person who intends to conduct an activity under subsection (d) of this section shall comply with the notification requirements of §335.6 of this title.

(l) No permit shall be required for the management of universal wastes by universal waste handlers or universal waste transporters, in accordance with the definitions and requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(m) At the discretion of the commission, an owner or operator may obtain a post-closure order in lieu of a post-closure permit for interim status units, a corrective action management unit unless authorized by a permit, or alternative corrective action requirements for contamination commingled

from RCRA and solid waste management units. The post-closure order must address the facility-wide corrective action requirements of §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and groundwater monitoring requirements of §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response).

(n) Except as provided in subsection (d)(9) of this section, owners or operators of commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works are required to obtain a permit under this subchapter. By June 1, 2006, owners or operators of existing commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works must have a permit issued under this subchapter or obtain a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges) to continue operating. A general permit issued under Chapter 205 of this title will authorize operations until a final decision is made on the application for an individual permit or 15 months, whichever is earlier. The general permit shall authorize operations for a maximum period of 15 months except that authorization may be extended on an individual basis in one-year increments at the discretion of the executive director. Should an application for a general permit issued under Chapter 205 of this title be submitted, the applicant shall also submit to the commission, by June 1, 2006, the appropriate information to demonstrate compliance with financial assurance requirements for closure of industrial solid waste facilities in accordance with Chapter 37, Subchapter P of this title (relating to Financial Assurance for Hazardous and Nonhazardous Industrial Solid Waste Facilities). Owners or operators of commercial industrial solid waste facilities that receive industrial solid waste for discharge to a publicly owned treatment works operating under a general permit issued under Chapter

205 of this title shall submit an application for a permit issued under this subchapter prior to September 1, 2006.

SUBCHAPTER B: HAZARDOUS WASTE MANAGEMENT GENERAL PROVISIONS

§335.41

STATUTORY AUTHORITY

The amendment is adopted under the authority granted to the commission by the Texas Legislature in TWC, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; and THSC, §361.011, which provides the commission with the authority to manage municipal waste; §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste; §361.017, which provides the commission with powers and duties necessary or convenient to manage industrial solid waste activities; §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste; and §361.0901, as added by SB 1281, which requires commercial industrial solid waste facilities that receive solid waste for discharge to a POTW to obtain a permit under THSC, Chapter 361, Solid Waste Disposal Act, or under TWC, Chapter 26, Water Quality Control.

The adopted amendment implements SB 1281.

§335.41. Purpose, Scope, and Applicability.

(a) The purpose of this chapter is to implement a state hazardous waste program which controls from point of generation to ultimate disposal those wastes which have been identified by the administrator of the United States Environmental Protection Agency (EPA) in 40 Code of Federal Regulations (CFR) Part 261.

(b) Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities); Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities); §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities); and §335.15 of this title (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities) do not apply to an owner or operator of a totally enclosed treatment facility, as defined in §335.1 of this title (relating to Definitions).

(c) Except as provided in §335.47 of this title (relating to Special Requirements for Persons Eligible for a Federal Permit by Rule), Subchapters E and F of this chapter do not apply to the owner or operator of a publicly owned treatment works (POTW) that processes, stores, or disposes of hazardous waste.

(d) Subchapters E and F of this chapter do not apply to:

(1) the owner or operator of an elementary neutralization unit provided that if the owner or operator is diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory as defined in 40 CFR §268.40, Table Treatment Standards for Hazardous Wastes), or reactive (D003) waste, to remove the characteristic before land disposal, the owner/operator must comply with the requirements in 40 CFR §264.17(b);

(2) persons engaged in processing or containment activities during immediate response to a discharge of a hazardous waste; an imminent and substantial threat of discharge of hazardous waste; a discharge of a material which, when discharged, becomes a hazardous waste; or an immediate threat to human health, public safety, property, or the environment, from the known or suspected presence of military munitions, other explosive material, or an explosive device, as determined by an explosive or munitions emergency response specialist as defined in §335.1 of this title, except that:

(A) an owner or operator of a facility otherwise regulated under Subchapter E of this chapter must comply with all applicable requirements of §335.112(a)(2) and (3) of this title (relating to Standards) and §335.113 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator);

(B) an owner or operator of a facility otherwise regulated under Subchapter F of this chapter must comply with all applicable requirements of §335.152(a)(2) and (3) of this title

(relating to Standards) and §335.153 of this title (relating to Reporting of Emergency Situations by Emergency Coordinator);

(C) any person who continues or initiates hazardous waste processing or containment activities after the immediate response is over is subject to all applicable requirements of Subchapters E and F of this chapter and Chapter 305 of this title (relating to Consolidated Permits); and

(D) in the case of an explosives or munitions emergency response, if a federal, state, tribal, or local official acting within the scope of his or her official responsibilities, or an explosives or emergency response specialist, determines that immediate removal of the material is necessary to protect human health or the environment, that official or specialist may authorize the removal of the material or waste by transporters who do not have EPA identification numbers and without the preparation of a manifest. In the case of emergencies involving military munitions, the responding military emergency response specialist's organizational unit must retain records for three years identifying the dates of the response, the responsible persons responding, the type and description of material addressed, and its disposition;

(3) persons adding absorbent material to waste in a container, as defined in §335.1 of this title and persons adding waste to absorbent material in a container, provided that these actions occur at the time that waste is first placed in the container, and that in the case of permitted facilities, 40 CFR §§264.17(b), 264.171, and 264.172 are complied with, and for all other facilities, 40 CFR §§265.17(b), 265.171, and 265.172 are complied with;

(4) a farmer disposing of waste pesticides from the farmer's own use in compliance with §335.77 of this title (relating to Farmers);

(5) the owner or operator of a wastewater treatment unit, as defined in §335.1 of this title, provided that the wastewater is discharged in accordance with a Texas Pollutant Discharge Elimination System authorization issued under Texas Water Code, Chapter 26, and if the owner or operator is diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory as defined in 40 CFR §268.40) or reactive (D003) waste to remove the characteristic before land disposal, must comply with the requirements in 40 CFR §264.17(b);

(6) the owner or operator of a wastewater treatment unit, as defined in §335.1 of this title, located at a noncommercial solid waste management facility that discharges to a publicly owned treatment works, provided that if the owner or operator is diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory as defined in 40 CFR §268.40) or reactive (D003) waste to remove the characteristic before land disposal, must comply with the requirements in 40 CFR §264.17(b);

(7) the owner or operator of a wastewater treatment unit, as defined in §335.1 of this title, located at a municipal solid waste facility or commercial industrial solid waste landfill disposal facility that discharges to a publicly owned treatment works liquid wastes that are incidental to the handling, processing, storage, or disposal of solid wastes, provided that if the owner or operator is diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory as defined in

40 CFR §268.40) or reactive (D003) waste to remove the characteristic before land disposal, must comply with the requirements in 40 CFR §264.17(b); or

(8) the owner or operator of a wastewater treatment unit, as defined in §335.1 of this title, located at a commercial industrial solid waste facility that receives waste for discharge to a publicly owned treatment works, provided that if the owner or operator is diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory as defined in 40 CFR §268.40) or reactive (D003) waste to remove the characteristic before land disposal, must comply with the requirements in 40 CFR §264.17(b), but is subject to the permitting requirements of §335.2(n) of this title (relating to Permit Required).

(e) Subchapter E of this chapter does not apply to:

(1) a person who stores, processes, or disposes of hazardous waste on-site and meets the requirements of §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators); or

(2) the owner or operator of a solid waste facility who stores, processes, or disposes of hazardous waste received from a conditionally exempt small quantity generator.

(f) The following requirements apply to residues of hazardous waste in containers.

(1) Subchapters B - F and O of this chapter (relating to Hazardous Waste Management General Provisions; Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; and Land Disposal Restrictions) do not apply to any hazardous waste remaining in either an empty container or an inner liner removed from an empty container, as defined in paragraph (2) of this subsection. This exemption does not apply to any hazardous waste in either a container that is not empty or an inner liner removed from a container that is not empty.

(2) For purposes of determining whether a container is empty under this subsection, the following provisions apply:

(A) a container or an inner liner removed from a container that has held any hazardous waste, except a waste that is a compressed gas or that is identified as an acute hazardous waste listed in 40 CFR §§261.31, 261.32, or 261.33(e) is empty if:

(i) all wastes have been removed that can be using the practices commonly employed to remove materials from that type of container, e.g., pouring, pumping, and aspirating; and

(ii) no more than 2.5 centimeters (one inch) of residue remains on the bottom of the container or inner liner; or

(iii) no more than 3.0% by weight of the total capacity of the container remains in the container or inner liner if the container is less than or equal to 110 gallons in size, or no more than 0.3% by weight of the total capacity of the container remains in the container or inner liner if the container is greater than 110 gallons in size;

(B) a container that has held a hazardous waste that is a compressed gas is empty when the pressure in the container approaches atmosphere; or

(C) a container or an inner liner removed from a container that has held an acute hazardous waste listed in 40 CFR §§261.31, 261.32, or 261.33(e) is empty if:

(i) the container or inner liner has been triple rinsed using a solvent capable of removing the commercial chemical product or manufacturing chemical intermediate;

(ii) the container or inner liner has been cleaned by another method that has been shown in the scientific literature, or by tests conducted by the generator, to achieve equivalent removal; or

(iii) in the case of a container, the inner liner that prevented contact of the commercial chemical product or manufacturing chemical intermediate with the container has been removed.

(g) Subchapters B - F and O of this chapter do not apply to hazardous waste that is managed as a recyclable material described in §335.24(b) and (c) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), except to the extent that requirements of these subchapters are referred to in Subchapter H of this chapter and Chapter 324 of this title (relating to Used Oil Standards).

(h) Subchapters E and F of this chapter apply to owners or operators of all facilities that treat, store, or dispose of hazardous waste referred to in Subchapter O of this chapter.

(i) Except as provided in §335.47 of this title, Subchapter F of this chapter does not apply to persons disposing of hazardous waste by means of underground injection. However, Subchapter F of this chapter does apply to the aboveground storage or processing of hazardous waste before it is injected underground.

(j) Except as specified in Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule), Subchapters B - F and O of this chapter and Chapter 305 of this title do not apply to universal wastes, universal waste handlers, or universal waste transporters as defined in §335.261 of this title

(relating to Universal Waste Rule). Universal wastes are not fully regulated hazardous wastes, but are subject to regulation under Subchapter H, Division 5 of this chapter.