

The Texas Commission on Environmental Quality (Commission) adopts amendments to §335.6 and §335.25. Section 335.6 is adopted *with changes* to the proposed text as published in the February 1, 2008 issue of the *Texas Register* (33 TexReg 895). Section 335.25 is adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bills (HB) 1457 and 1719, 80th Legislature, 2007, amended Texas Water Code (TWC), §26.303(a)(1) and Texas Agriculture Code, §201.026(b), (c), (f), (g), (h), (i), and (j). The rule will implement the statutory requirements of HB 1719 which eliminates certain notification requirements and HB 1457 which eliminates the use of poultry carcasses as swine food.

HB 1719 eliminated the requirement to notify the commission of the burial of animal carcasses provided that at the time of disposal of animal carcasses on-site, the landowner has requested and complies with a water quality management plan developed for that site under Texas Agricultural Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 (relating to Nonpoint Source Pollution). HB 1457 eliminates the disposal option of using poultry carcasses as swine food.

SECTION BY SECTION DISCUSSION

Since proposal, the text of §335.6(c) has been moved to §335.6(l) without changes. Adopted §335.6 has also been re-lettered accordingly. This change was necessary to avoid creating conflicting cross-references in other portions of Chapter 335, which would require correction in subsequent rulemakings.

This change will also eliminate the need for the commission to revise both internal training and public guidance documents which currently reference §335.6(c) - (k).

Adopted §335.6(l) will exempt landowners who comply with a certified water quality management plan developed for that site under Texas Agricultural Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 from notification requirements found in §335.6(a) and (b). This new language will meet the statutory requirements of HB 1719.

Adopted amendments to §335.25(a)(6) will eliminate the disposal option of using poultry carcasses for swine food. The item following subsection (a)(6) will be re-numbered to acknowledge removal of this subsection. The elimination of the use of poultry carcasses as swine food will make §335.25 consistent with the Texas Agriculture Code, which currently prohibits the use of poultry carcasses as swine food. This new language will meet the statutory requirements of HB 1457.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 definition of a "major environmental rule" as defined in the act.

A "major environmental rule" is 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 rulemaking is to conform commission rules to the newly amended language of Texas Agriculture Code, §201.026(g), as added by Acts 2001, 77th Legislature, Chapter 1189, §1, and TWC, §26.303(a)(1). The adopted rulemaking does this by exempting landowners who comply with a certified water quality management plan under Texas Agriculture Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 from the notification requirements imposed by §335.6(a) and (b), and by eliminating "cooking for swine food" as an acceptable method of disposal of poultry carcasses. Since the adopted rulemaking simply harmonizes commission rules with the Texas Agriculture Code and TWC, there will be no impact on the environment, human health, or public health and safety. In this same way, the adopted rulemaking will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. The commission concludes that the adopted rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, it 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 only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) was adopted solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the adopted rulemaking does not exceed an express requirement of state law, but rather is necessary to harmonize commission rules with Texas Agriculture Code, §201.026(g), as added by Acts 2001, 77th Legislature, Chapter 1189, §1, and TWC, §26.303(a)(1). Third, the adopted rulemaking does not 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 or federal program. Finally, the commission adopts this rulemaking under TWC, §§5.103, 5.105, and 26.303(a), and under Texas Health and Safety Code (THSC), §361.017 and §361.024. Therefore, the commission does not adopt the rules solely under the commission's general powers. The commission invited but received no public comments regarding the Regulatory Impact Analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rulemaking is to conform commission rules to the newly amended language of Texas Agriculture Code, §201.026(g), as added by Acts 2001, 77th Legislature, Chapter 1189, §1, and TWC, §26.303(a)(1). This rulemaking substantially advances that stated purpose by exempting landowners who comply with a certified water quality management plan under Texas Agriculture Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1, from the notification requirements imposed by §335.6(a) and (b), and by eliminating "cooking for swine food" as an acceptable method of disposal of poultry carcasses.

Promulgation and enforcement of the adopted rules will not be a statutory or constitutional taking of private real property. Specifically, the adopted rulemaking does not affect a landowner's rights in private real property because it does not burden (constitutionally), restrict, or limit the owner's right to real property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the adopted rulemaking exempts landowners with a water quality management plan in place from notifying the commission before burying animal carcasses on their property, and eliminates "cooking for swine food" as an acceptable method of disposal of poultry carcasses. These actions will not affect private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and determined that the adopted rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the adopted rulemaking action is not subject to the CMP.

PUBLIC COMMENT

A public hearing was held in Austin on February 26, 2008 at 10:00 a.m. at the commission's central office located at 12100 Park 35 Circle. The comment period closed on March 3, 2008.

An oral comment was received from the Texas Poultry Federation and Affiliates, at the public hearing.

No written comments were received.

RESPONSE TO COMMENTS

Texas Poultry Federation and Affiliates, indicated support of the proposed rule.

The commission appreciates this comment. No changes have been made in response to this comment.

**SUBCHAPTER A: INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS
WASTE IN GENERAL
§335.6, §335.25**

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which authorizes the commission to adopt rules as necessary to carry out its powers and duties under the TWC; and TWC, §26.303(a), which authorizes the commission to adopt rules for the safe and adequate handling, storage, transportation, and disposal of poultry carcasses. The amendments are also adopted under Texas Health and Safety Code (THSC), §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.

The amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, and 26.303(a) and THSC, §361.017 and §361.024.

§335.6. Notification Requirements.

(a) Any person who intends to store, process, or dispose of industrial solid waste without a permit, as authorized by §335.2(d), (e), (f), or (h) of this title (relating to Permit Required) or §335.24 of this title

(relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), shall notify the executive director in writing or using electronic notification software provided by the executive director, that storage, processing, or disposal activities are planned, at least 90 days prior to engaging in such activities. Recycling operations may commence 90 days after the initial notification of the intent to recycle, or upon receipt of confirmation that the executive director has reviewed the information found in this section. The executive director may require submission of information necessary to determine whether storage, processing, or disposal is compliant with the terms of this chapter. Required information may include, but is not limited to, information concerning waste composition, waste management methods, facility engineering plans and specifications, or the geology where the facility is located. Any registered generator who generates 1,000 kilograms or more of hazardous waste in any calendar month, must meet the requirements of this subsection by electronic notification using software provided by the executive director unless the executive director has granted a written request to use paper forms or an alternative notification method or the software does not have features capable of meeting the requirements.

(b) Any person who stores, processes, or disposes of municipal hazardous waste or industrial solid waste shall have the continuing obligation to immediately provide notice to the executive director in writing or using electronic notification software provided by the executive director, of any changes or additional information concerning waste composition, waste management methods, facility engineering plans and specifications, or the geology where the facility is located to that reported in subsection (a) of this section, authorized in any permit, or stated in any application filed with the commission. Any registered generator who generates 1,000 kilograms or more of hazardous waste in any calendar month, must meet the requirements of this subsection by electronic notification using software provided by the executive director

unless the executive director has granted a written request to use paper forms or an alternative notification method or the software does not have features capable of meeting the requirements.

(c) Any person who generates hazardous waste in a quantity greater than the limits specified in §335.78 of this title (relating to Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators) in any calendar month or greater than 100 kilograms in any calendar month of industrial Class 1 waste shall notify the executive director of such activity using electronic notification software or paper forms provided by the executive director. Any registered generator who generates 1,000 kilograms or more of hazardous waste in any calendar month, must meet the requirements of this subsection by electronic notification using software provided by the executive director unless the executive director has granted a written request to use paper forms or an alternative notification method or the software does not have features capable of meeting the requirements. The executive director may require submission of information necessary to determine whether the storage, processing, or disposal is compliant with the terms of this chapter. Notifications submitted pursuant to this section shall be in addition to information provided in any permit applications required by §335.2 of this title, or any reports required by §335.9 of this title (relating to Recordkeeping and Annual Reporting Procedures Applicable to Generators), §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste), and §335.13 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste). Any person who provides notification pursuant to this subsection shall have the continuing obligation to immediately document any changes or additional

information with respect to such notification and within 90 days of the occurrence of such change or of becoming aware of such additional information, provide notice to the executive director in writing or using electronic notification software provided by the executive director, of any such changes or additional information to that reported previously. Any registered generator who generates 1,000 kilograms or more of hazardous waste in any calendar month, must meet the requirements of this subsection by electronic notification using software provided by the executive director unless the executive director has granted a written request to use paper forms or an alternative notification method or the software does not have features capable of meeting the requirements. If waste is recycled on-site or managed pursuant to §335.2(d) of this title, the generator must also comply with the notification requirements specified in subsection (h) of this section. The information submitted pursuant to the notification requirements of this subchapter and to the additional requirements of §335.503 of this title (relating to Waste Classification and Waste Coding Required) shall include, but is not limited to:

- (1) a description of the waste;
- (2) a description of the process generating the waste;
- (3) the composition of the waste;
- (4) a proper hazardous waste determination which includes the appropriate EPA

hazardous waste number(s) described in 40 Code of Federal Regulations (CFR) Part 261. Generators must

determine whether such waste is hazardous as defined in 40 CFR Part 261 and submit the results of that hazardous waste determination to the executive director;

(5) the disposition of each solid waste generated, if subject to the notification requirement of this subsection, including the following information:

(A) whether the waste is managed on-site and/or off-site;

(B) a description of the type and use of each on-site waste management facility unit;

(C) a listing of the wastes managed in each unit; or

(D) whether each unit is permitted, or qualifies for an exemption, under §335.2 of this title.

(d) Any person who transports hazardous or Class 1 waste shall notify the executive director of such activity on forms furnished or approved by the executive director, except:

(1) industrial generators who generate less than 100 kilograms of Class 1 waste per month and less than the quantity limits of hazardous waste specified in §335.78 of this title and who only transport their own waste; and

(2) municipal generators who generate less than the quantity limits of hazardous waste

specified in §335.78 of this title and who only transport their own waste.

(e) Persons operating transfer facilities in accordance with §335.94 of this title (relating to Transfer Facility Requirements) shall notify the executive director of such activity.

(f) Upon written request of the executive director, any person who ships, stores, processes, or disposes of industrial solid waste or hazardous waste, as defined in this subchapter, shall perform a chemical analysis of the solid waste and provide results of the analysis to the executive director.

(g) Any person who stores, processes, or disposes of industrial solid waste or municipal hazardous waste shall notify the executive director in writing of any activity of facility expansion not authorized by permit, at least 90 days prior to conducting such activity. Such person shall submit to the executive director upon request such information as may reasonably be required to enable the executive director to determine whether such activity is compliant with this chapter.

(h) Any person who conducts or intends to conduct the recycling of industrial solid waste or municipal hazardous waste as defined in §335.24 of this title or Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities) and who is required to notify under §335.24 of this title or Subchapter H of this chapter must submit in writing to the executive director, at a minimum, the following information: the type(s) of industrial solid waste or municipal hazardous waste to be recycled, the method of storage prior to recycling, and the nature of the recycling activity. New recycling activities require such notification a minimum of 90 days prior to engaging in such

activities. Recycling operations may commence 90 days after the initial notification of the intent to recycle, or upon receipt of confirmation that the executive director has reviewed the information found in this section. Persons engaged in recycling of industrial solid waste or municipal hazardous waste prior to the effective date of this section shall submit such notification within 60 days of the effective date of this subsection.

(i) The owner or operator of a facility qualifying for the small quantity burner exemption under 40 CFR §266.108 must provide a one-time signed, written notification to the EPA and to the executive director indicating the following:

(1) The combustion unit is operating as a small quantity burner of hazardous waste;

(2) The owner and operator are in compliance with the requirements of 40 CFR §266.108, §335.221(a)(19) of this title (relating to Applicability and Standards) and this subsection of this section; and

(3) The maximum quantity of hazardous waste that the facility may burn as provided by 40 CFR §266.108(a)(1).

(j) Notification and regulation requirements on nonhazardous used oil, oil made characteristically hazardous by use (instead of mixing), CESQG hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil).

(k) Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title (relating to Definitions), under the definition of "Solid Waste," §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.24 of this title, and Subchapter H of this chapter.

(l) A landowner who disposes of domestic or exotic animal carcasses and who complies with a certified water quality management plan developed for their site under Texas Agriculture Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 (relating to Nonpoint Source Pollution) is exempt from the notification requirements of subsections (a) and (b) of this section.

§335.25. Handling, Storing, Processing, Transporting, and Disposing of Poultry Carcasses.

(a) Acceptable methods for disposal of poultry carcasses include the following storage, processing, and disposal methods:

(1) placement in a landfill permitted by the commission to receive municipal or industrial solid waste;

(2) composting, as defined in §332.2 of this title (relating to Definitions), and as further described in §332.23 of this title (relating to Operational Requirements);

(3) cremation or incineration;

(4) extrusion;

(5) rendering; and

(6) any other method the commission determines to be appropriate.

(b) Prior to disposition by any method listed in subsection (a) of this section, poultry facilities may:

(1) store poultry carcasses on site for no more than 72 hours provided that storage is in a varmint-proof receptacle to prevent odor, leakage, or spillage, but

(2) shall freeze, or refrigerate at a temperature of 40 degrees Fahrenheit or less, any poultry carcasses which require on-site storage for more than 72 hours.

(c) Poultry carcasses may not be disposed of by burial on-site except in the event of a major die-off that exceeds the capacity of a poultry facility to store and process poultry carcasses by the normal means used by the facility. A mortality rate of 0.3% or more per day of the facility's total poultry inventory shall

be deemed a major die-off for the purposes of this section. This subsection supersedes any provisions of a permit or other authorization issued by the commission or its predecessor agencies which may have authorized on-site burial of poultry carcasses. This section does not authorize violation of any applicable regulations or laws.

(d) Transportation of poultry carcasses to an off-site location for final disposition shall be in accordance with applicable local, state or federal regulations or laws.