

The Texas Commission on Environmental Quality (commission or agency) proposes amendments to §335.6 and §335.25.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

House Bills 1457 and 1719, 80th Legislature, 2007, Regular Session, amended Texas Water Code (TWC), §26.303(a)(1) and Texas Agriculture Code, §201.026(b), (c), (f) - (j), respectively. The rulemaking will meet the statutory requirements of House Bill 1719 which eliminates certain notification requirements and House Bill 1457 which eliminates the use of poultry carcasses as swine food.

House Bill 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). House Bill 1457 eliminates the disposal option of using poultry carcasses as swine food.

SECTION BY SECTION DISCUSSION

Proposed §335.6(c) will exempt landowners who comply with a certified water quality management plan developed for their site under Texas Agricultural Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 (relating to Nonpoint Source Pollution) from notification requirements found in §335.6(a) and (b). This amendment will meet the statutory requirements of House Bill 1719.

The proposed amendment to §335.25(a)(6) would eliminate the disposal option of using poultry carcasses for swine food. Items 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 this section consistent with the Texas Agriculture Code, which currently prohibits the use of poultry carcasses as swine food. These amendments will meet the statutory requirements of House Bill (HB) 1457.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rulemaking is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

The proposed rules implement statutory changes required by HB 1457 and HB 1719, 80th Legislature by amending the appropriate sections of Chapter 335. HB 1457 eliminated the option to use poultry carcasses as swine food. HB 1719 eliminated the need for a landowner to notify the agency regarding the burial of animal carcasses if, at the time of burial, the landowner has requested and complies with a water quality management plan under Texas Agriculture Code, §201.026(f) as added by Acts 2001, 77th Legislature, Chapter 1189, §1 (relating to Nonpoint Source Pollution).

In general, local governments do not participate in the types of businesses that would generate poultry or other animal carcasses. Therefore, the proposed rulemaking is not anticipated to have a fiscal impact on local governments.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and protection of public health and safety concerning disposal of animal carcasses.

The proposed rulemaking is not expected to have a significant fiscal impact on landowners and poultry growers required to properly manage the disposal of carcasses resulting from livestock and poultry die-offs. While the proposed rulemaking does eliminate one disposal method for poultry carcasses, other methods more commonly used remain available as disposal options. Given the remaining disposal options, disallowing the disposal of poultry carcasses by using them as swine food will not significantly change disposal methods used by producers, and no significant fiscal implications are expected as a result of this rulemaking. The rulemaking also eliminates the cost of preparing any paperwork to notify the agency of the burial of animal carcasses if the landowner requests and complies with a water quality management plan. However, any cost savings is not anticipated to be significant. Any cost savings or increases under the proposed rulemaking would vary depending on the location and size of the operation, and staff is unable to estimate the amount of savings.

Although the agency permits over 800 concentrated animal feeding operations (CAFOs) and 16-egg laying operations, it does not track how many of these operations are considered to be large or small businesses. Consequently, the agency does not have the necessary data available to determine the number of poultry operations and livestock operations statewide that may be affected by the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. The agency permits over 800 concentrated animal feeding operations (CAFOs) and 16-egg laying operations but does not have the data to determine how many animal operations statewide may be affected by the proposed rules nor does it have the data needed to determine how many of these facilities might be classified as small or micro-businesses.

While the proposed rulemaking does eliminate one disposal method for poultry carcasses, other methods more commonly used remain available as disposal options, and the elimination of the use of poultry carcasses as swine food is not expected to have a significant fiscal impact on small or micro-business poultry producers. The proposed rulemaking eliminates the cost of paperwork associated with carcass burial if a landowner requests and complies with a water quality management plan.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rulemaking is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect any local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of “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 proposed 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 (relating to Nonpoint Source Pollution), and Texas Water Code, §26.303(a)(1). The proposed 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 (relating to Nonpoint Source Pollution) 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 proposed rulemaking simply harmonizes commission rules with the Texas Agriculture Code and Texas Water Code, there will be no impact on the environment, human health, or public health and safety. In this same way, the proposed 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 proposed rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, 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 proposed rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the proposed 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 (relating to Nonpoint Source Pollution) and Texas Water Code, §26.303(a)(1). Third, the proposed 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 the proposed rulemaking under Texas Water Code, §§5.103, 5.105, and 26.303(a), and under Texas Health and Safety Code, §361.017 and §361.024. Therefore, the commission does not adopt the rule solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed 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 (relating to Nonpoint Source Pollution) and Texas Water Code, §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 (relating to Nonpoint Source Pollution) 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 proposed rules will not be a statutory or constitutional taking of private real property. Specifically, the proposed 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 proposed 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 proposed rules and determined that the proposed rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, concerning Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the proposed rulemaking action is not subject to the CMP.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on February 26, 2008 at 10:00 am in E201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Kristin Smith, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512)239-4808. Electronic copies may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. All comments should reference Rule Project Number 2007-042-335-PR. The comment period closes March

3, 2008. Copies of the proposed rule can be obtained from the commission's Web site at

http://www.tceq.state.tx.us/nav/rules/proposes_adopt.html. For further information, please contact Tom

Weirich, Industrial and Hazardous Waste Permits Section, (512) 239-6609.

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

§335.6, §335.25

STATUTORY AUTHORITY

These amendments are proposed 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 proposed 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 proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 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) 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.

(d) [(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;

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

(e) [(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.

(f) [(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.

(g) [(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.

(h) [(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.

(i) [(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.

(j) [(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).

(k) [(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).

(l) [(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.

§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) cooking for swine food; and]

(6) [(7)] 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.