

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §335.1 and §335.2, concerning industrial solid waste. These sections are adopted without changes to the proposed text as published in the July 8, 1997 issue of the *Texas Register* (22 TexReg 6402) and will not be republished.

EXPLANATION OF ADOPTED RULES

The purpose of these rules is to clarify the commission's regulations regarding permitting requirements for certain nonhazardous industrial solid waste management activities and to establish permit exemptions from certain requirements for nonhazardous industrial solid waste management activities that are inappropriately more stringent than the requirements for similar hazardous waste management activities. These amendments are adopted in response to three separate regulatory reform proposals received from outside entities and in response to proposals from commission staff. The commission has identified three issues to be addressed in order to more appropriately regulate nonhazardous industrial solid waste management activities. These rules are intended: (1) to clarify that a permit is not required to store, process, or dispose of nonhazardous industrial solid waste on property owned or controlled by the owner or operator of the generating facility within 50 miles of the plant or operation from which the waste results; (2) to adopt off-site nonhazardous industrial solid waste management permit exemptions that are similar to current hazardous waste permit exemptions and permits-by-rule; and (3) to lift the 50-mile limit to store nonhazardous industrial solid waste without a permit.

Prior to adoption of these amendments, the hazardous waste management permit exemptions for treatability studies, elementary neutralization units, wastewater treatment units, and transfer facilities,

as well as the permit-by-rule for publicly owned treatment works, did not apply to nonhazardous industrial solid waste management. The amendments to §335.1 and §335.2 adopt nonhazardous industrial solid waste permit exemptions that are analogous to the state and federal hazardous waste management regulations found in §335.2(f)-(g), §335.41(b)-(d), 40 Code of Federal Regulations (CFR) §261.4(d)-(f), 40 CFR §264.1(e) and (g), 40 CFR §270.1(c)(2), and 40 CFR §270.60(c).

When the federal hazardous waste program was incorporated into the existing state industrial solid waste program, hazardous waste permit exemptions were not applied to all other industrial solid waste management activities. The on-site management and disposal of nonhazardous industrial solid waste was largely unregulated, with prevailing economic incentives favoring on-site disposal. Over time waste management standards and practices have improved to the point that there are now incentives for sending nonhazardous wastes off-site for storage, processing, and disposal. The amendments adopted today will apply the hazardous waste permit exemptions and permit-by-rule in a similar manner to off-site nonhazardous industrial solid waste management activities as well.

Persons engaging in these activities must continue to follow all applicable reporting requirements of §335.12 (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities) and §335.15 (relating to Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities).

The amendments to §335.1 expand certain definitions to include nonhazardous industrial solid waste management activities. The definitions for elementary neutralization unit, transfer facility, treatability

study, and wastewater treatment unit in §335.1 were previously written only in terms of hazardous waste management activities. The amendments also include administrative revisions to abbreviate cross-references to the Code of Federal Regulations.

The amendments to §335.2(d) state that no permit shall be required for the storage or processing of nonhazardous industrial solid waste in an elementary neutralization unit, wastewater treatment unit, transfer facility, treatability study, or publicly owned treatment works having a National Pollutant Discharge Elimination System permit.

Previously, §335.2(d) stated that no permit was required for nonhazardous industrial solid waste storage, processing, or disposal if the waste was *disposed* on land owned or controlled by the generator and not commingled with other generator's wastes, and the property where the waste was disposed was within 50 miles of the generator's plant or operation. If applied literally, a permit would be required for the on-site storage or processing of any nonhazardous industrial solid waste that was subsequently *not disposed* at a site owned or controlled by the generator within 50 miles from the generation point. Although the rule language of §335.2(d) was based on Texas Health and Safety Code §361.090, §361.061 provides that the commission *may* issue permits for nonhazardous industrial solid waste. Therefore, the commission has authority to adopt a rule that does not require permits for certain nonhazardous industrial solid waste management activities. Historically, the commission has not required a permit for the storage, processing, or disposal of nonhazardous industrial solid waste on property owned or controlled by the generator within 50 miles of the point of generation. However, the commission is revising §335.2(d) to *clarify* that no permit is required for the storage, processing, or

disposal of nonhazardous industrial solid waste on property owned or controlled by the owner or operator of the generating facility that is within 50 miles of the plant or operation from which the waste results, provided that the waste is not commingled with waste from any other source or sources.

Further, the amendments to §335.2(d) will allow storage of nonhazardous industrial solid waste on property owned or controlled by the generator without distance limitation. This will allow industrial owners or operators to store nonhazardous industrial solid waste at their own collection facilities that are greater than 50 miles from the point of generation without having to obtain a permit. The commission does not believe a permit should be required for storage activities that make nonhazardous industrial solid waste management more economical. Changing the rule to allow this activity to occur without a permit will continue to be protective of human health and the environment. However, industrial owners or operators who process (unless otherwise exempted) or dispose of nonhazardous industrial solid waste on property they own or control that is greater than 50 miles from the point of generation must still obtain a permit.

Those facilities choosing to manage nonhazardous industrial solid waste without a permit using any of the above proposals will still be required to provide an initial notification of the activity under §335.6 (relating to Notification Requirements) and manage the waste in accordance with §335.4 (relating to General Prohibitions).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to revise the commission's regulations regarding permitting requirements for certain nonhazardous industrial solid waste management activities and to establish permit exemptions from certain requirements for nonhazardous industrial solid waste management activities that are inappropriately more stringent than the requirements for similar hazardous waste management activities. The rules will substantially advance this specific purpose by: (1) clarifying that a permit is not required to store, process, or dispose of nonhazardous industrial solid waste on property owned or controlled by the owner or operator of the generating facility within 50 miles of the plant or operation from which the waste results; (2) adopting off-site nonhazardous industrial solid waste management permit exemptions that are similar to current hazardous waste permit exemptions and permits-by-rule; and (3) lifting the 50-mile limit to store nonhazardous industrial solid waste without a permit. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the proposed changes revise permitting requirements and exemptions for certain nonhazardous industrial solid waste management activities and do not limit or restrict a person's rights in private real property.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed this rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the rulemaking is consistent with the applicable CMP goals and policies.

SUMMARY OF COMMENTERS

The commission received six sets of written comments regarding the proposed amendments. Houston Lighting & Power (HL&P), Central and South West Corporation (C&SW), Southwestern Public Service Company (SPSC), Texas Chemical Council (TCC), and Texas Utilities Services, Inc. (TU Services), on behalf of Texas Utilities Electric Company, Texas Utilities Fuel Company, and Texas Utilities Mining Company, submitted written comments expressing general support for the proposal and suggesting additional rule changes. Brazos Electric Cooperative (Brazos Electric) submitted written comments expressing support for the proposal and did not suggest any additional changes.

ANALYSIS OF TESTIMONY

HL&P, C&SW, and TU Services pointed out that while the commission is allowing storage of nonhazardous industrial solid waste on property owned or operated by the generator over 50 miles from the point of generation without a permit, §335.10 of the commission's rules still requires a manifest for Class I waste that is shipped over 50 miles even though it is going to a facility owned by the generator. The commenters suggested that §335.10(g) be amended to remove the language that requires a manifest for Class I waste shipped over 50 miles.

The commission acknowledges the commenters suggestion but is unable to make changes based on this comment. Because no changes to §335.10 were proposed as part of this rulemaking, the commission is not allowed to open this section to make changes during the adoption phase. The rules of the Texas Register require that every section that goes through the rulemaking process must be published as a proposal in the Texas Register prior to being published as an adopted rule.

However, the commission will continue to study the commenters' suggested changes and, if needed, can address the issue through a separate rulemaking.

C&SW expressed concern that the proposed rule does not describe a mechanism for cancelling or revoking existing permits. The commenter indicated that many permits state that "suspension, cancellation, or revocation" is a condition for which "facility closure shall commence," which could require a large expenditure of funds for site investigation, decontamination, and removal of all wastes. C&SW argued that companies with existing permits should not have to maintain their permits and go through periodic permit renewal simply to avoid the closure requirements associated with cancellation or revocation of their permit.

The commission acknowledges the commenter's concerns. The "suspension, cancellation, or revocation" provisions in existing permits were intended to address situations where the units or facility would cease to operate. Under the circumstances described by the commenter, where the facility will continue to manage the same types of waste, it is not the commission's intent to require cessation of waste management activities in order for a facility to terminate its permit and continue operating under these new rules. The commission's rules concerning voluntary revocation should be followed for termination of these permits, however, if the units are to remain in waste management service, revocation will not require removal of all wastes and closure of the facility.

The commission considered other options for handling these existing permits, including enforcement discretion or some other type of determination that the permit is no longer in effect. However, the commission was unable to develop alternative solutions that would work within the commission's existing rules and still satisfy the concerns of all permittees.

SPSC expressed support for the commission's decision to lift the 50-mile limit for storage of nonhazardous industrial solid waste but urged the commission to also lift the 50-mile limit for processing and disposal. SPSC indicated that most of its power plants generate essentially the same waste streams, and likewise, the majority of its service centers generate similar waste streams. The commenter suggested that the processing and disposal of similar waste streams from several different facilities is more economical, and affords greater protection of human health and the environment, when it is conducted at newer facilities, which in many cases are more than 50 miles from the generation source. SPSC also noted that almost all facilities permitted for the commercial processing and disposal of Class 1 wastes are located several hundred miles from SPSC facilities.

The commission disagrees and has not made changes in response to this comment. The commission has added several exemptions in this rulemaking which would cover some processing outside of the 50-mile limit. However, the commission believes that other forms of processing and disposal over 50 miles from the generation point continue to warrant the protections provided by the application process, such as notice, public participation, technical review, and commission consideration.

TCC expressed concern that incorporating nonhazardous waste terminology into traditional hazardous waste definitions will cause confusion due to cross-referencing of hazardous waste citations within the actual definitions. The commenter requested the commission to confirm that hazardous waste standards and limitations applicable to treatability studies will not be applied to similar nonhazardous waste activities.

The commission acknowledges the commenter's concern but notes that the cross-reference to the federal treatability study exemption is found in §335.2(g) of the commission's rules, and this section applies only to hazardous wastes. By expanding the commission's definition of "treatability study" to include nonhazardous industrial solid waste, it is not the commission's intent to incorporate any federal standards or limitations related to the hazardous waste treatability study exemption. However, the commission's amended definition of "treatability study" does indicate that a treatability study is not a means to commercially treat or dispose of an industrial solid waste, and possible violations of this requirement will be reviewed on a case-by-case basis.

TCC also expressed concern that the word "neutralizing" in the definition of "elementary neutralization unit" would be interpreted to require that the pH of a substance be adjusted all the way to "neutral" or a pH of 7.0. The commenter suggested that the word "neutralizing" be replaced with the word "adjusting" to confirm that the intent of the rule was not to require a pH of 7.0 to qualify for the exemption.

The commission acknowledges the commenter's concern but has not made changes based on this comment. The word "neutralizing" is used in the definition of "elementary neutralization unit" to indicate that the pH of the waste must be adjusted *toward neutral*. The word "adjusting" does not limit the direction in which the pH may be moved. Although it may be uncommon that an entity would want to make a waste stream more acidic or more alkaline, the commission must ensure that its rules are appropriate for any scenario. However, it is not the commission's intent that the word "neutralizing" be interpreted to require the pH of a substance to be adjusted all the way to "neutral."

STATUTORY AUTHORITY

These amendments are adopted under Texas Water Code §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state; and under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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

§335.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly requires otherwise.

Corrective action management unit or CAMU--An area within a facility that is designated by the commission under 40 Code of Federal Regulations (CFR) Part 264, Subpart S, for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated (Vernon Pamphlet 1993), §361.303 (concerning Corrective Action). A CAMU shall only be used for the management of remediation wastes pursuant to implementing such corrective action requirements at the facility.

Elementary neutralization unit--A device which:

(A) is used for neutralizing wastes which are hazardous only because they exhibit the corrosivity characteristic defined in 40 CFR §261.22, or are listed in 40 CFR Part 261, Subpart D, only for this reason; or is used for neutralizing the pH of non-hazardous industrial solid waste; and

(B) (No change.)

Transfer facility--Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste are held during the normal course of transportation.

Treatability study--A study in which a hazardous or industrial solid waste is subjected to a treatment process to determine:

(A) - (D) (No change.)

(E) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the purpose of 40 CFR §261.4(e) and (f) (§§335.2, 335.69, and 335.78 of this title (relating to Permit Required; Accumulation Time; and Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A treatability study is not a means to commercially treat or dispose of hazardous or industrial solid waste.

Wastewater treatment unit--A device which:

(A) (No change.)

(B) receives and processes or stores an influent wastewater which is a hazardous or industrial solid waste, or generates and accumulates a wastewater treatment sludge which is a hazardous or industrial solid waste, or processes or stores a wastewater treatment sludge which is a hazardous or industrial solid waste; and

(C) (No change.)

§335.2. Permit Required.

(a) - (c) (No change.)

(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, or a wastewater treatment 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 10 days or less, unless the executive director determines that a permit should be required in order to protect human health and the environment; or

(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, Section 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 that permit.

(e) - (i) (No change.)

(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 Environmental Protection Agency (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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 28, 1997.