

The commission adopts amendments to §335.344, concerning delisting of facilities from the State Superfund Registry with changes to the proposed text as published in the December 6, 1996, issue of the *Texas Register* (21 TexReg 11749).

EXPLANATION OF PROPOSED RULE

The amendment is intended to streamline the delisting process to make it easier to remove sites from the State Registry when available information shows that the site does not pose an imminent and substantial endangerment to human health or the environment or that such endangerment has been eliminated. The commission has identified three issues to be addressed in order to effect this change.

Section 335.344(a) provides that a potentially responsible party or an interested person may request the executive director to delete a facility from the State Registry, modify the facility's priority ranking within the registry, or modify any information regarding such facility. In many cases there are no identified responsible parties and the term interested party is not defined. The commission proposes to clarify §335.344(a) by revising it to explicitly state that the executive director of the commission may initiate delisting.

Secondly, §335.344(b) provides that the commission shall hold a public contested case hearing within the meaning of Texas Government Code Chapter 2001. Texas Health and Safety Code (THSC) §361.189 requires the commission to establish procedures including public hearings for delisting facilities. The commission believes that a public meeting to receive comment complies with this

statutory requirement. This is consistent with public participation requirements when listing State Superfund sites and when selecting remedies.

The commission further proposes to add §335.344(c)(5) allowing the executive director to consider remediation of a site under the Voluntary Cleanup Program (VCP) (30 TAC Chapter 330) in making a delisting decision. The intent of this language is to encourage third parties to remediate State Registry sites which have development potential, allowing state cleanup funds to be used elsewhere. Purchasers of sites remediated under the VCP receive a release from State Superfund liability. This change, by removing what is perceived by many as the stigma of listing as a State Superfund site, should help to make sites more commercially marketable.

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 rule is to streamline the procedures for delisting and modification of sites on the state superfund registry. The rules will substantially advance this specific purpose by amending the procedures for delisting and modification of sites on the state superfund registry, thus allowing the executive director to remove completed sites from registry, which frees resources to be focused on sites that require more immediate action. The proposed rules would also create incentives for moving sites from the registry to the VCP, which frees additional resources. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the proposed changes are procedural in nature and do not change any regulatory requirements that are imposed on

owners of private real property. The proposed changes only affect the procedures by which the executive director and the commission conduct delisting and modification of sites on the state superfund registry.

Also, the following exceptions to the application of Texas Government Code Chapter 2007 listed in Texas Government Code §2007.003(b) apply to these rules: Section 2007.003(b)(13) - an action that is taken in response to a real and substantial threat to public health and safety, that is designed to significantly advance the health and safety purpose, and that does not impose a greater burden than is necessary to achieve the health and safety purpose.

HEARING AND COMMENTERS

A public hearing was not requested or held.

Written comments were received from one commenter. The Texas Chemical Council (TCC) generally supported the amendment with two comments. “First, regarding the proposed new §335.344(c)(5) which would allow the executive director to consider remediation of a site under the VCP in making a delisting decision, ...that the Texas Natural Resource Conservation Commission rules be amended ‘to make it easier to delist sites by...adding language to allow the executive director to consider acceptance into the VCP in making a delisting decision...’ The TCC understands that the agency does not believe that the THSC currently allows the executive director to use the criteria of ‘acceptance into’ the VCP as a reason for proposing delisting. Changes to the law are expected to be pursued in the upcoming

session of the Legislature, and the TCC encourages the agency to amend this provision to incorporate the ‘acceptance into’ concept as soon as the law will allow.”

The commission agrees with this comment and intends to implement this concept as soon as the statute allows.

The TCC also suggested that the word “hearing” be replaced with “the meeting” in §335.344(b) for the purposes of consistency with other changes.

The commission agrees and has made this change.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under the code and other laws of the State of Texas, and to establish and approve all general policy of the commission; and under the Texas Solid Waste Disposal Act (the Act), THSC §361.024, which gives the commission the authority to regulate solid and hazardous wastes and to adopt and promulgate rules consistent with the general intent and purposes of the Act.

**SUBCHAPTER K : HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT
AND REMEDIATION**

§335.344

§335.344. Delisting and Modifications.

(a) Any Potentially Responsible Party (PRP) of a facility listed or proposed for listing on the State Registry or any interested person may request the executive director to delete such facility from the registry, modify the facility's priority ranking within the registry, or modify any information regarding such facility by submitting a written statement setting forth the grounds of the request. The PRP or interested person shall submit to the executive director any information as may be reasonably required to enable the executive director to further evaluate the facility including, but not limited to, information on all factors used to develop a state superfund HRS score and to make a determination on the request. The executive director may also initiate the delisting procedures described in this section.

(b) The commission shall hold a public meeting to receive comment. This meeting is not a contested case hearing within the meaning of Texas Government Code, Chapter 2001. This meeting shall be held upon requests filed with or initiated by the executive director under subsection (a) of this section. At least 30 days prior to the date set for the meeting, notice shall be provided by first class mail to all other PRPs and other interested persons, and by publication in a newspaper of general

circulation in the county where the facility is located. The person submitting the request, if any, shall bear the cost of publication of the notice.

(c) In making a determination under subsection (a) of this section, the executive director or the commission will consider the following:

(1) the extent to which the facility has been remediated under the terms of the remedial action plan agreed to by the executive director;

(2) (No change.)

(3) whether the release no longer poses an imminent and substantial endangerment to public health and safety or the environment and, therefore, taking further action is not appropriate;

(4) whether, because of the nature of the remedial action implemented at the facility, it is not yet feasible to make a determination that the remedial action has effectively remediated the release or threat of release of hazardous substances; or

(5) whether the site has been remediated under the voluntary cleanup program as set out in 30 TAC Chapter 333 of this title (relating to Voluntary Cleanup Program).

(d) No requests for the delisting of a facility from the state registry or requests to modify information about a facility eligible for listing on the registry will be granted unless, at a minimum, the facility has been investigated under the terms of an RI/FS or other similar study approved by the executive director.

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

Issued in Austin, Texas, on March 24, 1997.