

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §335.344, concerning delisting of facilities from the State Superfund Registry.

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 Government Code Chapter 2001. Texas Health and Safety Code §361.189 requires the commission to establish procedures including public hearings for delisting facilities. The commission believes that a public meeting to receive comment is more appropriate for the delisting decision. 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 (30 TAC 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 Voluntary Cleanup Program 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 Voluntary Cleanup Program, 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.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be a reduction in costs associated with the ranking and listing of sites on the state Superfund registry. These sections as proposed will authorize a more cost-effective process for delisting sites and will reduce the direct costs to the state of contested case hearings. Indirectly, the reduced costs of remediation and further oversight of sites removed from the registry will potentially allow limited funds available for site cleanup to be used for higher priority remediation and removal projects. The actual number of sites to be delisted and the potential cost savings cannot be determined at this time. There are no direct fiscal implications for units of local government. Local governments and local taxing authorities will potentially benefit indirectly to the extent that properties successfully remediated and returned to productive use will generate tax revenues and indirect economic benefits not currently produced by abandoned and contaminated sites.

PUBLIC BENEFIT

Mr. Minick has also determined that, for the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be simplification of existing regulations, more cost-effective administration of the state Superfund program and the remediation of facilities contaminated with hazardous substances. Persons identified as responsible parties may realize a cost savings from the proposed elimination of the requirement for certain contested case hearings. More significantly, responsible parties may realize a cost savings from the increased opportunity for use of the voluntary cleanup option for remediating contaminated sites. These savings will depend on the participation of responsible parties under these rules, will vary on a case-by-case basis and have not been estimated. There are no economic costs anticipated to any person, including small business, required to comply with the sections as proposed.

SUBMITTAL OF COMMENTS

Written comments may be submitted by mail to Bettie Bell, Office of Policy and Regulatory Development, MC-205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received within 30 days following the date of this publication and should reference Rule Log No. 96176-335-WS. Comments received by 5:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. For further information, please contact Jim Feeley at (512) 239-2462, or Ray Henry Austin at (512) 239-6814.

STATUTORY AUTHORITY

The amendments are proposed 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), Texas Health and Safety Code (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.

The proposed amendments implement THSC, §361.189.

**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. [the Administrative Procedure and Texas Register Act, Texas Civil Statutes, Article 6252-13a (Vernon Supplement 1990)] This meeting shall be held upon [on] requests filed with or initiated by the executive director under [pursuant to] subsection (a) of this section [, provided that a written request for hearing is filed with the Chief hearings examiner of the commission by any PRP of a facility listed or proposed

for listing on the Registry, or any interested person, within 30 days after receipt of a determination by the executive director made pursuant to a request filed in accordance with subsection (a) of this section]. At least 30 days prior to the date set for hearing, 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 [pursuant to] 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; [or]

(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 [pursuant to] the terms of an RI/FS or other similar study approved by the executive director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on November 27, 1996.