

Texas Natural Resource Conservation Commission

INTEROFFICE MEMORANDUM

To: Commissioners Date: June 12, 1998

Thru: Eugenia K. Brumm, Ph.D.
Chief Clerk

From: Beverly Hartsock, Deputy Director
Office of Policy and Regulatory Development

Subject: **Docket No.98-0668-RUL.** Consideration of petition for rulemaking for amendments to 30 TAC Chapter 330, Subchapter E, Section 330.51, concerning Permit Application for Municipal Solid Waste Facilities, 30 TAC Chapter 330, Subchapter E, Section 330.53, concerning Technical Requirements of Part II of the Application, and 30 TAC Chapter 305, Subchapter C, Section 305.50, concerning Additional Requirements for an Application for a Hazardous or Industrial Solid Waste Permit. If approved, the petition would prohibit permit applications being declared administratively complete until the applicant has demonstrated compliance with local government ordinances and zoning requirements. The staff recommends denial of the petition. (Marianne Baker) (Rule Log No. 98027-330-WS)

What the Proposed Rule Would Do:

On May 8, 1998, the agency received a request from the Upper Sabine Valley Solid Waste Management District (please see attachment) which requested modification of 30 TAC §330.51, 30 TAC §330.53, and 30 TAC §305.50(2) to prohibit solid waste permit applications being declared administratively complete until the applicant has demonstrated compliance with all applicable local government ordinances and zoning requirements. This rule would apply to (a) municipal solid waste facilities, (b) off-site industrial solid waste facilities, and (c) hazardous waste facilities. The petition includes a suggested rule change requiring that compliance with local government ordinances and zoning requirements be demonstrated by a letter signed by the local government. The Legal Division has determined that the district's request should be considered a petition for rulemaking under the commission's rules at 30 TAC §20.15.

Applicable Law:

30 TAC §20.15(c) states: "Within 60 days after submission of a petition, the commission shall consider the petition and shall either deny the petition in writing, stating its reasons for the denial, or shall initiate rulemaking proceedings in accordance with the APA." The APA is the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001. The 60-day deadline for commission action on the petition is July 7, 1998.

Re: Docket No.98-0668-RUL

The Upper Sabine Valley Solid Waste Management District Act, Article 4477-7k, Title 71, Vernon's Texas Civil Statutes gives the same powers granted to counties to the Upper Sabine Valley Solid Waste Management District.

Sections 361.162, 363.112, and 364.012 of the Texas Health and Safety Code give local governments authority regarding solid waste land use controls.

Reason Rules Are Needed:

The petitioner wishes to have a state rule that requires all local government ordinances be followed for siting of solid waste disposal facilities. The petitioner wishes to ensure that compliance with local ordinances and zoning requirements is a prerequisite to a permit application going forward. The petitioner believes that "if an applicant is not required to demonstrate compliance with local ordinances and zoning requirements before an application is declared administratively complete, a governmental entity that has adopted such an ordinance or zoning requirement is put in the difficult position of determining whether to expend significant taxpayer funds to request and participate in a contested case hearing to assert the applicability of the ordinance or zoning requirement."

Recommendation:

If the Senate Natural Resources Committee were not working on related issues, the Executive Director's staff would recommend approval of the petition, with some possible changes. However, at this time staff recommends that rule writing be initiated only if the related public policy discussions have concluded and the development of any new rule is consistent with state law as well as any directives from state leadership. Should the public policy debate result in the status quo, staff does believe that rule changes could be made to the procedures for permit applications by prohibiting applications from being processed for (a) municipal solid waste facilities, (b) off-site industrial solid waste facilities, and (c) hazardous waste facilities until the applicant has demonstrated compliance with all applicable local ordinances and zoning requirements.

If the Commission directs the Executive Director to begin rule drafting, the Executive Director's staff may ultimately recommend some changes to the precise proposal put forward by the petitioner. Three potential concerns:

- a. It might be more appropriate to Commission jurisdiction and interests for the rule to be limited to siting and zoning ordinances, rather than to all local ordinances.
- b. Careful consideration should be given to whether the rule will be tied to a particular time in the process ("administrative completeness" is suggested by the petitioner), or whether the rule should apply whenever an ordinance is passed. This might depend on whether the outcome of the Chambers County litigation provides any guidance on the applicability of these ordinances.

Re: Docket No.98-0668-RUL

c. There is some question as to whether such a rule could legally apply to hazardous waste facilities or whether it would be a preemption of the State's Resource Conservation and Recovery Act authorization.

The staff recommends denial of the petition because of legislative timing. The Senate Natural Resources Committee is considering issues regarding siting of solid waste facilities. TNRCC should refrain from rulemaking on siting related subjects until the legislature has had an opportunity to study the issues and make necessary changes.

Affected Public:

Local governments opposed to a facility siting could see a savings in time and expenditures for contested cases. Permit applicants should see a benefit of time and money savings if they have prior knowledge of being inconsistent with local ordinances or local zoning. In other cases, however, permit applicants could see an expenditure of money on an application that cannot be processed by the agency if an ordinance is adopted after substantial upfront work on a project. Potential protestants could take their concerns to local governments.

Affected Agency Programs:

The Municipal Solid Waste Division and the Industrial and Hazardous Waste Division of the Office of Waste Management are responsible for permit application processing under the requested rule revisions.

Agency Contacts:

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