

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §335.324, concerning Facility Fee Assessment, without changes to the proposed text as published in the September 10, 1999 issue of the *Texas Register* (24 TexReg 7176).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of this rule is to modify existing rule language to lower the annual facility fee for facilities which are permitted to manage Class 1 industrial solid waste or hazardous waste, and which are wholly unbuilt. This rulemaking does not eliminate the facility fee for unbuilt facilities, but rather assesses the minimum fees under existing §335.324(d). The new fees will be applicable until any physical construction of the facility commences, at which time the fee structure currently set forth in §335.324(i) will apply. This rule change is also retroactive and will apply to wholly unbuilt facilities for which facility fees were due during the four years prior to the effective date of this rule change. Credit toward future fees will be given, in lieu of a refund, in cases where a fee has been paid in excess of the new fees.

This rulemaking is based on a Petition for Rulemaking received from American Envirotech, Inc. On July 30, 1998, the commission considered the petition which requested an amendment to §335.324. The commission decided to initiate rulemaking regarding the prospective assessment of a minimum facility fee for wholly unbuilt facilities which would apply until the commencement of any facility construction. Upon further consideration, it was decided that the facility fee rule in §335.324 should be changed and that the change should be applied prospectively and retroactively. This rule change is intended to reform §335.324 of commission rules to make it consistent with the Texas Health and

Safety Code, §361.139, which requires an equitable fee structure and assessment of fees based, in part, upon consideration of the nature and extent of the regulated activities and the variation in the cost of regulating different types of facilities. Previously, §335.324 provided for the assessment of fees up to a maximum of \$25,000 even for hazardous waste facilities where no construction had begun. The cost to the commission of regulating a wholly unbuilt facility differs markedly from the cost of regulating a facility where construction has begun. Inspections of wholly unbuilt facilities are required merely to confirm that the facility remains without any physical construction. This is in contrast with facilities under construction or in operation which require regular and detailed inspections to ensure that facility construction and operation continues to meet the requirements of commission rules and permits. Previously, §335.324 did not take into account the lesser costs to the commission of regulating wholly unbuilt facilities. This change to §335.324 will correct this mistake of law and lower the annual facility fee for wholly unbuilt facilities.

Section 335.324(a) is amended to define a wholly unbuilt facility to be a permitted Class 1 industrial solid waste or hazardous waste facility that has not initiated any physical construction, and to state that a wholly unbuilt facility does not mean unbuilt storage, processing, or disposal units within an existing facility. Physical construction is defined as excavation, movement of earth, erection of forms or structures, or similar activity to prepare a facility to accept industrial solid waste or hazardous waste. This definition of physical construction tracks the language of Title 40, Code of Federal Regulations §270.2, the federal definition of “physical construction” which applies to hazardous waste facilities.

Section 335.324(d) is amended to lower the annual fee for wholly unbuilt Class 1 industrial solid waste facilities from \$5,000 (maximum) to \$500 and for wholly unbuilt hazardous waste facilities from \$25,000 (maximum) to \$2,500. Section 335.324(d) also provides that a permittee shall be responsible for fees as required by §335.324(i) when any physical construction is initiated and that the rule applies retroactively for the four-year period prior to the effective date of this rule.

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act, and it does not meet any of the four applicability requirements listed in §2001.0225(a). "Major environmental rule" means 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 rulemaking is not a major environmental rule because it is not adopted with the specific intent of protecting the environment or reducing risks to human health or the environment. This revision does not meet the definition of a major environmental rule, as it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. This rulemaking will result in a cost savings to industry.

The specific intent of this rule change is to modify existing rule language to address the need to lower the annual facility fee for facilities which are permitted as a Class 1 industrial solid waste or a

hazardous waste facility, and which are wholly unbuilt. The proposal is not directly related to the protection of the environment or human health; it carries out a provision of state law that allows a range of annual fees to be assessed on these facilities.

This proposal does not exceed a standard set by federal law and is specifically allowed by state law (§§361.135 and 361.139 of the Texas Health and Safety Code, Chapter 361, Solid Waste Disposal Act). In accordance with Texas Health and Safety Code, §361.135(c), the annual facility fee may not be less than \$250 and the maximum fee shall not exceed \$25,000.

This proposal does not exceed the requirements of a delegation agreement or contract between the state and federal government, as there is no agreement or contract between the commission and the federal government concerning annual facility fees.

The rule is not adopted solely under the general powers of the commission; instead, it is adopted under a specific state law. The specific state law is Texas Health and Safety Code, Chapter 361, §§361.135 and 361.139, Solid Waste Disposal Act. No comments were received during the comment period regarding the draft regulatory impact analysis.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule proposal pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of this rulemaking is to modify Chapter 335 to lower the annual facility fee for facilities which are permitted to

manage Class 1 industrial solid waste or hazardous waste, and which are wholly unbuilt. The promulgation and enforcement of this rule will not burden private real property nor adversely affect property values because this rulemaking will merely change a rule regarding the annual facility fee assessed the permittee of a wholly unbuilt facility and will result in a cost savings to industry. Therefore, this revision will not constitute a takings under Chapter 2007 of the Texas Government Code.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the rule is subject to the CMP and must be consistent with applicable CMP goals found in 31 TAC, §501.12 and policies which are found in 31 TAC, §501.14. The CMP goal applicable to the rule is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of Coastal Natural Resource Areas (CNRAs). CMP policies applicable to the rule include the administrative policies and the policies for specific activities related to construction and operation of solid waste treatment, storage, and disposal facilities. In particular, the CMP policy most applicable to this rule is to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq.

The commission has prepared a consistency determination for the rule pursuant to 31 TAC, §505.22 and has found that this rulemaking is consistent with the applicable CMP goals and policies because the modification to the rule is insignificant in relationship to the CMP, will have no impact on the CNRAs, and includes no new requirements applicable to agency action subject to the CMP. The commission has also determined that this rule will not have a direct or significant adverse effect on CNRAs identified in the applicable CMP policies and will not result in a substantive effect. Because this rule will merely lower the annual fee for wholly unbuilt Class 1 industrial solid waste facilities and for wholly unbuilt hazardous waste facilities, enforcement of this rule will have no new effect on the CNRAs. In addition, this rule does not violate any applicable provisions of the CMP's stated goals and policies. Therefore, in compliance with 31 TAC, §505.22(e), the commission affirms that this rule is consistent with CMP goals and policies, and the rule will have no new impact upon the coastal area. No public comment was received during the comment period regarding the consistency of the rule with the CMP.

#### HEARING AND COMMENTERS

A public hearing on this proposal was not held, and no public hearing was requested. No written comments were received on the proposed revisions.

#### STATUTORY AUTHORITY

The amended section is adopted under Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

Specific statutory authority for the amended section comes from Texas Health and Safety Code, §361.135 and §361.139. Section 361.135 allows the commission by rule to adopt a facility fee schedule for annual fees and sets the minimum fee at \$250 and the maximum fee at \$25,000. Section 361.139 lists the factors to be considered in setting fees for these types of facilities and requires an equitable fee structure and assessment of fees based, in part, upon consideration of the nature and extent of the regulated activities and the variation in the cost of regulating different types of facilities.

**SUBCHAPTER J : HAZARDOUS WASTE GENERATION,  
FACILITY AND DISPOSAL FEE SYSTEM**

**§335.324**

**§335.324. Facility Fee Assessment.**

(a) An annual facility fee is hereby assessed on each permittee who holds one or more Class 1 industrial solid waste or hazardous waste permits and each facility operating a Class 1 industrial solid waste or hazardous waste management unit subject to permit authorization. These fees shall be deposited in the hazardous and solid waste fees fund. The fee for each year is assessed on each facility for which a permit or the requirement to comply with permit authorization is in effect during any part of the fiscal year. For wholly unbuilt permitted facilities, the annual fee shall be assessed according to subsection (d) of this section. A wholly unbuilt facility means a permitted Class 1 industrial solid waste or hazardous waste facility that has not initiated any physical construction and does not mean unbuilt storage, processing or disposal units within an existing facility. Physical construction means excavation, movement of earth, erection of forms or structures, or similar activity to prepare a facility to accept industrial solid waste or hazardous waste.

(b) An applicant who has, prior to September 1, submitted an affidavit of exclusion from permit requirements, shall not be subject to the annual facility fee, pending a decision by the commission on the affidavit of exclusion. If the commission determines that the facility is subject to the

permit requirement, the applicant shall pay the fee within 30 days or is subject to the penalties for late payment established under §335.331 of this title (relating to Failure to Make Payment or Report).

(c) An applicant who files an affidavit after September 1 shall be subject to the annual facility fee for the billing year in which the affidavit is filed. The applicant shall not be subject to the annual facility fee for the following year, pending a decision by the commission on the affidavit of exclusion. If the commission determines that the facility is subject to the permit requirement, the applicant shall pay the fee within 30 days or is subject to the penalties for late payment established herein.

(d) The annual facility fee assessed is the cumulative total of fees for all Class 1 industrial solid waste or hazardous waste management units at the facility which are authorized by permit or subject to authorization on September 1, 1991, and September 1 of each year thereafter. The minimum fee for each hazardous waste facility shall be \$2,500. The maximum fee for each hazardous waste facility shall be \$25,000. The minimum fee for each facility authorized to manage only nonhazardous waste shall be \$500 and the maximum fee \$5,000. The annual fee for wholly unbuilt Class 1 industrial solid waste facilities shall be \$500 and the annual fee for wholly unbuilt hazardous waste facilities shall be \$2,500. A permittee shall be responsible for facility fees as required by subsection (i) of this section when any physical construction is initiated. This rule shall apply retroactively to all facility fees for wholly unbuilt Class 1 industrial solid waste facilities or wholly unbuilt hazardous waste facilities due during the four years preceding the effective date of this rule.

(e) A fee under this section for storage or processing in tanks or containers will not be assessed against the owner or operator of an elementary neutralization unit or wastewater treatment unit exempt from the requirement of a permit under §335.41(d) of this title (relating to Purpose, Scope, and Applicability).

(f) An "other unit," for the purposes of subsection (i) of this section, is an incinerator, thermal processing unit, or other processing unit, not otherwise listed in subsection (i) of this section, used for waste reduction, recycling, or hazard reduction and subject to compliance with permit requirements.

(g) For facilities which require post-closure care permits, the fee for a closed unit shall apply. A fee is assessed for each unit which received waste after January 26, 1983, and which has been closed pursuant to an approved closure plan and which is subject to the post-closure care permit requirements. Disposal units which are closed in a manner such that all hazardous wastes and hazardous constituents are removed pursuant to an approved closure plan are not subject to the fee.

(h) The facility fee assessment in subsection (i)(2)-(5) of this section shall be based on the surface area of the waste management unit in which the storage, treatment or disposal of waste has been authorized.

(i) Facility fees shall be assessed according to the following schedule.

Figure: 30 TAC §335.324(i)