

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §335.324, concerning Facility Fee Assessment.

#### EXPLANATION OF PROPOSED RULE

The purpose of this rule is to modify existing rule language to address the need 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 propose elimination of the facility fee for unbuilt facilities, but rather proposes the assessment of 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 proposed to retroactively 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 proposed fees.

On July 30, 1998, the commission considered a Petition for Rulemaking by American Envirotech, Inc., to amend §335.324. The commission decided to initiate rulemaking to propose 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. The proposed rule change is intended to reform §335.324 of commission rules to make it consistent with the Texas Health and Safety Code, §361.139. Section §361.139 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. Currently, §335.324 provides for the assessment of fees up to a maximum of \$25,000 even for hazardous waste facilities where no construction has 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 wholly unbuilt. 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. Section 335.324 does not currently take into account the lesser costs to the commission of regulating wholly unbuilt facilities. The proposed change to §335.324 will correct this mistake of law and lower the annual facility fee for wholly unbuilt facilities.

Section 335.324(d) is proposed to be modified 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(a) defines a wholly unbuilt facility to be a permitted Class 1 industrial solid waste or hazardous waste facility that has not initiated any physical construction; it 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) explains that a permittee shall be responsible for fees as required by §335.324(i) when physical construction is initiated.

#### FISCAL NOTE

Matthew Johnson, Financial Administration Division, has determined that there will be fiscal implications as a result of administration and enforcement of the amended section. For the first five-year period the section as proposed is in effect there will be a small revenue loss to state government as a result of administration or enforcement of these sections. No change in state government operating cost is expected. The proposed rule would reduce annual waste facility fee assessments for permitted wholly unbuilt hazardous waste facilities from the current maximum of \$25,000 to \$2,500. For permitted wholly unbuilt Class 1 industrial solid waste facilities, the proposed rule would reduce the annual waste facility assessment from the current maximum of \$5,000 to \$500. A small decrease in revenues to the agency is expected because approximately six of the agency's 198 hazardous waste facility permittees will pay a smaller annual fee than is currently being assessed. Currently, there are no wholly unbuilt Class 1 industrial solid waste facilities, so these proposed rules are not expected to affect annual facility fee revenue the agency has received from Class 1 industrial solid waste facilities.

On an annual basis, the agency's revenue loss associated with the approximately six affected permittees is estimated to total \$73,000. In FY98, the commission received \$2.26 million in Hazardous Waste Facility Fee revenue from all hazardous facility permittees; a loss of \$73,000 in revenue would represent a 3% decline to approximately \$2.19 million. This change should not affect the agency's

ability to fund its operating budget or legislative appropriation for the Waste Management Account.

Credit toward future fees will be given, in lieu of a refund, in cases where a fee has been paid in excess of the proposed fee during the four years prior to the effective date of these rules.

The effect on owners of facilities subject to this amendment will be a potential reduction in cost as a result of the reduction of fees for wholly unbuilt facilities. These cost savings may represent a savings for any person affected by the proposed rules or a part of the costs of any project. Of the approximately six existing facilities that would be affected by these proposed sections, all are hazardous waste facilities, three are currently assessed at the \$25,000 maximum for the annual facility fee and three are assessed lower amounts. In addition, any future wholly unbuilt facilities will be subject to the proposed annual fees of \$2,500 for a hazardous waste facility and \$500 for a Class 1 Industrial Solid Waste facility. The commission anticipates that future wholly unbuilt commercial hazardous waste facilities will be rarely affected because of the unit construction rule found at 30 TAC §305.149 which imposes a two-year time limit on construction of these facilities. This proposed amendment would lower the annual fee assessment for these approximately six unconstructed hazardous facilities to \$2,500. The potential cost savings will affect small businesses on the same basis as any larger business. No new costs to operators or owners of Class 1 industrial solid waste or hazardous waste facilities are expected as a result of this rule.

#### PUBLIC BENEFIT

Mr. Johnson also has determined that for the first five-year period the section as proposed is in effect, the public benefit anticipated as the result of enforcement of and compliance with the section will not

change. The effect on owners of facilities subject to this section will be a potential reduction in costs as a result of lowering of annual fees for wholly unbuilt facilities. These cost savings may represent a savings for any person affected by the proposed rules or a part of the costs of any project. The potential cost savings will affect small businesses on the same basis as any larger business. There are no new economic costs anticipated for any owners required to comply with the section as proposed. A small decrease in revenues to the agency is expected due to the proposed reduction in the annual fee for wholly unbuilt facilities.

#### SMALL BUSINESS ANALYSIS

The proposed rule will not negatively affect small businesses. Small businesses subject to the proposed sections could, in fact, realize a cost savings since this rule proposes to reduce fee rates for wholly unbuilt hazardous waste facilities and Class 1 industrial solid waste facilities.

#### DRAFT 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.

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.

The rule change does not 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, because the rule change will merely reduce the fees assessed for wholly unbuilt Class 1 industrial solid waste or hazardous waste facilities. This rule is administrative in nature.

This proposal does not exceed a standard set by federal law and is specifically allowed by state law (§361.135 of the Texas Health and Safety Code, Chapter 361, Solid Waste Disposal Act). In accordance with Texas Health and Safety Code §361.13(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 proposed solely under the general powers of the commission; instead, it is proposed under a specific state law. The specific state law is Texas Health and Safety Code, Chapter 361, §361.135, Solid Waste Disposal Act.

#### 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 the proposed rule will merely change a rule regarding the annual facility fee assessed the permittee of a wholly unbuilt facility.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed 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 proposed rules are not subject to the CMP and are consistent with applicable CMP goals and policies. The commission has determined that the proposed rulemaking is consistent with each applicable CMP goal and policy, which are found in 31 TAC §501.12 and §501.14. The following is a summary of that determination. The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the

administrative policies and the policies for specific activities related to construction and operation of solid waste treatment, storage, and disposal facilities.

Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the proposed rule modifications will have no change on the safe and appropriate storage, management, and treatment of solid waste, and will result in no impact on coastal areas. In addition, the proposed rule will not violate any applicable provisions of the CMP's stated goals and policies. The commission seeks public comment on the consistency of the proposed rules.

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 a negligible impact upon the coastal area.

#### PUBLIC HEARING

A public hearing on this proposal will be not be held unless one is requested.

#### SUBMITTAL OF COMMENTS

Written comments regarding this proposal and request for alternatives may be mailed to Bettie Bell, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. The fax must be followed up with the submission and receipt of the written comments within three working days of when they were faxed. All comments should reference Rule Log Number 98034-335-WS. Comments must be received by 5:00 p.m., October 11, 1999. For further

information or questions concerning this proposal, contact Wayne Lee of the Policy and Regulations Division, Office of Environmental Policy, Analysis, and Assessment, (512) 239-6815.

#### STATUTORY AUTHORITY

The amended section is proposed 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.

The amended section implements Texas Health and Safety Code, §361.135 and §361.139.

**SUBCHAPTER J : INDUSTRIAL SOLID WASTE AND  
HAZARDOUS WASTE 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) - (c) (No change).

(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) - (i) (No change.)