

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §335.1 concerning industrial solid waste and municipal hazardous waste.

EXPLANATION OF PROPOSED RULES

The purpose of the proposed amendments is to revise the state rules to conform to certain federal regulations regarding an exclusion from the definition of “solid waste” for comparable fuels, and to revise the definition of “manifest.” The proposed amendments include conforming changes that are needed to establish equivalency with the federal regulations, which will enable the State of Texas to increase its level of authorization to operate aspects of the federal hazardous waste program. The federal regulations to which these proposed rules are being conformed were promulgated by the United States Environmental Protection Agency (EPA) on June 19, 1998 at 63 FedReg 33782. These federal regulations exclude from the regulatory definition of “solid waste” hazardous waste-derived fuels that meet specification levels comparable to fossil fuels for concentrations of hazardous constituents and for physical properties that affect burning. The definition of “manifest” is proposed to be amended to more fully describe its meaning and to correct and update the definition.

Under proposed §335.1(80), the definition of manifest would be amended to replace the references to a predecessor agency’s form numbers with the current form number for the Uniform Hazardous Waste Manifest. In addition, the meaning is more fully described in the proposal and it is updated with the information that the form may be printed through the agency’s “Print Your Own Manifest Program.”

The proposed definition for “manifest” is as follows: “The waste shipping document which accompanies and is used for tracking the transportation, disposal, treatment, storage, or recycling of

shipments of hazardous wastes or Class 1 industrial solid wastes. The form used for this purpose is TNRCC-0311 (Uniform Hazardous Waste Manifest) which is furnished by the executive director or may be printed through the agency's 'Print Your Own Manifest Program'.

Proposed §335.1(119)(A)(iv) has language which would incorporate the exclusion from the definition of “solid waste” found under 40 CFR §261.4(a)(16) for comparable fuels and comparable synthesis gas (i.e., syngas) fuels, as promulgated by the EPA on June 19, 1998 at 63 FedReg 33782. The comparable/syngas fuel exclusion was promulgated and is codified under 40 CFR §261.4(a)(16). The following editorial note appears in the current codification of 40 CFR §261.4(a)(16): “At 63 FR 33823, June 19, 1998, ... paragraph (a)(16) was added to Sec. 261.4; however paragraph 261.4(a)(16) ... was already added at 63 FR 28637, May 26, 1998, effective Aug. 24, 1998.” In other words, the EPA has promulgated two exclusions under 40 CFR §261.4(a)(16). If the EPA promulgates a correction to the citation for one of these exclusions prior to adoption of this proposal, the commission intends to incorporate the correction when considering adoption of this proposal. The comparable/syngas fuel exclusion is proposed today by the addition of the following phrase under §335.1(119)(A)(iv): “by 40 CFR §261.4(a)(16), as amended June 19, 1998 at 63 FedReg 33782, subject to the changes in this clause,.” The proposed exclusion is for comparable fuels or comparable syngas fuels that meet the requirements of 40 CFR §261.38, subject to certain proposed revisions under §335.1(119)(A)(iv)(I) - (VIII), which has proposed revisions to 40 CFR §261.38 to make it “fit” the state rules. The following is a description of this proposed exclusion, with the revisions of §335.1(119)(A)(iv)(I) - (VIII) incorporated into this description.

Waste materials are not solid wastes if they meet certain comparable fuel or synthesis gas fuel specifications and certain implementation requirements. The comparable fuel specifications under 40 CFR §261.38(a) include specifications of heating value greater than 5,000 British Thermal Units (BTU) per pound (lb), viscosity not greater than 50 centistokes, as-fired, and the constituent specifications listed in 40 CFR §261.38(a)(2), Table 1. Please refer to the figure, Table 1 to §261.38: Detection and Detection Limit Values for Comparable Fuel Specification.”

Figure: 30 TAC Chapter 335 - Preamble

Under this proposal, the exclusion under 40 CFR §261.38(b) for comparable syngas fuel that is generated from hazardous waste requires that the fuel must: have a minimum BTU value of 100 BTU per standard cubic foot; contain less than one part per million by volume (ppmv) of total halogen; contain less than 300 ppmv of total nitrogen other than diatomic nitrogen (N₂); contain less than 200 ppmv of hydrogen sulfide; and contain less than one ppmv of each hazardous constituent in the target list of Title 40 CFR Part 261 Appendix VIII constituents.

Under this proposal, 40 CFR §261.38(c) contains requirements relating to implementation of the exclusion. Under 40 CFR §261.38(c), waste that meets the comparable or syngas fuel specifications of 40 CFR §261.38(a) or (b) is excluded from the definition of solid waste provided that certain requirements are met, including requirements relating to notices, burning, blending, treatment, generation, dilution, waste analysis plans, sampling, analysis, speculative accumulation, records, certification, and ineligible hazardous wastes. Under 40 CFR §261.38(c)(1), a person claiming and qualifying for the exclusion is called the comparable/syngas fuel generator and the person burning the

comparable/syngas fuel is called the comparable/syngas burner. The person who generates the comparable fuel or syngas fuel must claim and certify to the exclusion. The generator must submit a one-time notice to the executive director certifying compliance with the conditions of the exclusion and providing the following documentation: the name, address, and RCRA ID number of the person/facility claiming the exclusion; the applicable EPA Hazardous Waste Codes for the hazardous waste; the name and address of the units, meeting the requirements of 40 CFR §261.38(c)(2), that will burn the comparable/syngas fuel; and the following statement signed and submitted by the person claiming the exclusion or his authorized representative: “Under penalty of criminal and civil prosecution for making or submitting false statements, representations, or omissions, I certify that the requirements of 40 CFR 261.38, as revised under 30 TAC §335.1(119)(A)(iv), have been met for all waste identified in this notification. Copies of the records and information required at 40 CFR 261.38(c)(10) are available at the comparable/syngas fuel generator's facility. Based on my inquiry of the individuals immediately responsible for obtaining the information, the information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.” If the generator is a company that generates comparable/syngas fuel at more than one facility, the generator must specify at which sites the comparable/syngas fuel will be generated. Prior to burning an excluded comparable/syngas fuel, the burner must publish in a major newspaper of general circulation local to the site where the fuel will be burned, a notice entitled “Notification of Burning a Comparable/Syngas Fuel Excluded Under the Resource Conservation and Recovery Act” containing the following information: name, address, and RCRA ID number of the generating facility; name and address of the unit(s) that will burn the comparable/syngas fuel; a brief, general description

of the manufacturing, treatment, or other process generating the comparable/syngas fuel; an estimate of the average and maximum monthly and annual quantity of the waste claimed to be excluded; and name and mailing address of the Regional or State Directors to whom the claim was submitted.

Under 40 CFR §261.38(c)(2), as revised under this proposal, the comparable/syngas fuel exclusion is limited to the following units that must be subject to federal, state, and/or local air emission requirements, including all applicable Clean Air Act (CAA) Maximum Achievable Control Technology (MACT) requirements: industrial furnaces as defined in §335.1; boilers, as defined in §335.1, that are further defined as industrial boilers located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes; or utility boilers used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale; or hazardous waste incinerators subject to regulation under Chapter 335, Subchapter E or F or applicable CAA MACT standards.

Under 40 CFR §261.38(c)(3), as proposed to be adopted herein, a hazardous waste blended to meet the viscosity specification must: as generated and prior to any blending, manipulation, or processing meet the constituent and heating value specifications of 40 CFR §261.38(a)(1)(i) and (a)(2); be blended at a facility that is subject to the applicable requirements of 30 TAC Chapter 335, Subchapters E and F, or 30 TAC §335.69; and not violate the dilution prohibition of 40 CFR §261.38(c)(6).

Under 40 CFR §261.38(c)(4), as proposed to be adopted herein, a hazardous waste may be treated to meet the exclusion specifications of 40 CFR §261.38(a)(1) and (2) provided the treatment: destroys or

removes the constituent listed in the specification or raises the heating value by removing or destroying hazardous constituents or materials; is performed at a facility that is subject to the applicable requirements of 30 TAC Chapter 335, Subchapters E and F, or 30 TAC §335.69; and does not violate the dilution prohibition of 40 CFR §261.38(c)(6). Also, residuals resulting from the treatment of a hazardous waste listed in 40 CFR Part 261, subpart D to generate a comparable fuel remain a hazardous waste.

Under 40 CFR §261.38(c)(5), as proposed to be adopted herein, a syngas fuel can be generated from the processing of hazardous wastes to meet the exclusion specifications of 40 CFR §261.38(b) provided the processing: destroys or removes the constituent listed in the specification or raises the heating value by removing or destroying constituents or materials; is performed at a facility that is subject to the applicable requirements of 30 TAC Chapter 335, Subchapters E and F, or 30 TAC §335.69, or is an exempt recycling unit pursuant to 30 TAC §335.24(e) and (f); and does not violate the dilution prohibition of 40 CFR §261.38(c)(6). Also, residuals resulting from the treatment of a hazardous waste listed in 40 CFR Part 261, subpart D to generate a syngas fuel remain a hazardous waste.

Under 40 CFR §261.38(c)(6), no generator, transporter, handler, or owner or operator of a treatment, storage, or disposal facility may in any way dilute a hazardous waste to meet the exclusion specifications of 40 CFR §261.38(a)(1)(i), (a)(2) or (b).

Under 40 CFR §261.38(c)(7), the generator of a comparable/syngas fuel must develop and follow a written waste analysis plan which describes the procedures for sampling and analysis of the hazardous

waste to be excluded. The waste analysis plan must be developed in accordance with the applicable sections of the "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (SW-846). The plan must be followed and retained at the facility excluding the waste. At a minimum, the plan must specify: the parameters for which each hazardous waste will be analyzed and the rationale for the selection of those parameters; the test methods which will be used to test for these parameters; the sampling method which will be used to obtain a representative sample of the waste to be analyzed; the frequency with which the initial analysis of the waste will be reviewed or repeated to ensure that the analysis is accurate and up-to-date; and if process knowledge is used in the waste determination, any information prepared by the generator in making such determination. The waste analysis plan must also contain records of the following: the dates and times waste samples were obtained, and the dates the samples were analyzed; the names and qualifications of the person(s) who obtained the samples; a description of the temporal and spatial locations of the samples; the name and address of the laboratory facility at which analyses of the samples were performed; a description of the analytical methods used, including any cleanup and sample preparation methods; all quantification limits achieved and all other quality control results for the analysis (including method blanks, duplicate analyses, matrix spikes, etc.), laboratory quality assurance data, and description of any deviations from analytical methods written in the plan or from any other activity written in the plan which occurred; all laboratory results demonstrating that the exclusion specifications have been met for the waste; and all laboratory documentation that support the analytical results, unless a contract between the claimant and the laboratory provides for the documentation to be maintained by the laboratory for the period specified in 40 CFR §261.38(c)(11) and also provides for the availability of the documentation to the claimant upon request. Syngas fuel generators must submit for approval, prior to performing sampling, analysis, or

any management of a syngas fuel as an excluded waste, a waste analysis plan containing the elements of 40 CFR §261.38(c)(7)(i) to the executive director. The approval of waste analysis plans must be stated in writing and received by the facility prior to sampling and analysis to demonstrate the exclusion of a syngas. The approval of the waste analysis plan may contain such provisions and conditions as the executive director deems appropriate.

Under 40 CFR §261.38(c)(8), for each waste for which an exclusion is claimed, the generator of the hazardous waste must test for all the constituents on Appendix VIII to 40 CFR Part 261, except those that the generator determines, based on testing or knowledge, should not be present in the waste. The generator is required to document the basis of each determination that a constituent should not be present. The generator may not determine that any of the following categories of constituents should not be present: a constituent that triggered the toxicity characteristic for the waste constituents that were the basis of the listing of the waste stream, or constituents for which there is a treatment standard for the waste code in 40 CFR §268.40; a constituent detected in previous analysis of the waste; constituents introduced into the process that generates the waste; or constituents that are byproducts or side reactions to the process that generates the waste. Any claim under 40 CFR §261.38(c)(8) must be valid and accurate for all hazardous constituents. Furthermore, a determination not to test for a hazardous constituent will not shield a generator from liability should that constituent later be found in the waste above the exclusion specifications. For each waste for which the exclusion is claimed where the generator of the comparable/syngas fuel is not the original generator of the hazardous waste, the generator of the comparable/syngas fuel may not use process knowledge pursuant to 40 CFR §261.38(c)(8)(i) and must test to determine that all of the constituent specifications of 40 CFR

§261.38(a)(2) and (b) have been met. The comparable/syngas fuel generator may use any reliable analytical method to demonstrate that no constituent of concern is present at concentrations above the specification levels. It is the responsibility of the generator to ensure that the sampling and analysis are unbiased, precise, and representative of the waste. For the waste to be eligible for exclusion, a generator must demonstrate that each constituent of concern is not present in the waste above the specification level at the 95% upper confidence limit around the mean, and a generator must demonstrate that the analysis could have detected the presence of the constituent at or below the specification level at the 95% upper confidence limit around the mean. Nothing in 40 CFR §261.38(c)(8) preempts, overrides or otherwise negates the provision in 30 TAC §335.62 which requires any person who generates a solid waste to determine if that waste is a hazardous waste. In an enforcement action, the burden of proof to establish conformance with the exclusion specification must be on the generator claiming the exclusion. The generator must conduct sampling and analysis in accordance with its waste analysis plan developed under 40 CFR §261.38(c)(7). Syngas fuel and comparable fuel that has not been blended in order to meet the kinematic viscosity specifications must be analyzed as generated. If a comparable fuel is blended in order to meet the kinematic viscosity specifications, the generator must analyze the fuel as generated to ensure that it meets the constituent and heating value specifications, and the generator must, after blending, analyze the fuel again to ensure that the blended fuel continues to meet all comparable/syngas fuel specifications. Excluded comparable/syngas fuel must be re-tested, at a minimum, annually and must be retested after a process change that could change the chemical or physical properties of the waste.

Under 40 CFR §261.38(c)(9), any persons handling a comparable/syngas fuel are subject to the speculative accumulation test under 30 TAC 335.1(119)(D)(iv).

Under 40 CFR §261.38(c)(10), the generator must maintain records of the following information on-site: all information required to be submitted to the executive director as part of the notification of the claim, including the owner/operator name, address, and RCRA facility ID number of the person claiming the exclusion, the applicable EPA Hazardous Waste Codes for each hazardous waste excluded as a fuel, and the certification signed by the person claiming the exclusion or his authorized representative; a brief description of the process that generated the hazardous waste and the process that generated the excluded fuel, if not the same; an estimate of the average and maximum monthly and annual quantities of each waste claimed to be excluded; documentation for any claim that a constituent is not present in the hazardous waste as required under 40 CFR §261.38(c)(8)(i); the results of all analyses and all detection limits achieved as required under 40 CFR §261.38(c)(8); if the excluded waste was generated through treatment or blending, documentation as required under 40 CFR §261.38(c)(3) or (4); if the waste is to be shipped off-site, a certification from the burner as required under 40 CFR §261.38(c)(12); a waste analysis plan and the results of the sampling and analysis that includes the dates and times waste samples were obtained, and the dates the samples were analyzed, the names and qualifications of the person(s) who obtained the samples, a description of the temporal and spatial locations of the samples, the name and address of the laboratory facility at which analyses of the samples were performed, a description of the analytical methods used, including any cleanup and sample preparation methods, all quantitation limits achieved and all other quality control results for the analysis (including method blanks, duplicate analyses, matrix spikes, etc.), laboratory quality assurance

data, and description of any deviations from analytical methods written in the plan or from any other activity written in the plan which occurred, all laboratory analytical results demonstrating that the exclusion specifications have been met for the waste, and all laboratory documentation that support the analytical results, unless a contract between the claimant and the laboratory provides for the documentation to be maintained by the laboratory for the period specified in 40 CFR §261.38(c)(11) and also provides for the availability of the documentation to the claimant upon request; and if the generator ships comparable/syngas fuel off-site for burning, the generator must retain on-site for each shipment the name and address of the facility receiving the comparable/syngas fuel for burning, the quantity of comparable/syngas fuel shipped and delivered, the date of shipment or delivery, a cross-reference to the record of comparable/syngas fuel analysis or other information used to make the determination that the comparable/syngas fuel meets the specifications as required under 40 CFR §261.38(c)(8), and a one-time certification by the burner as required under 40 CFR §261.38(c)(12).

Under 40 CFR §261.38(c)(11), records must be maintained for the period of at least three years. A generator must maintain a current waste analysis plan during that minimum three-year period.

Under 40 CFR §261.38(c)(12), prior to submitting a notification to the executive director, a comparable/syngas fuel generator who intends to ship its fuel off-site for burning must obtain a one-time written, signed statement from the burner: certifying that the comparable/syngas fuel will only be burned in an industrial furnace or boiler, utility boiler, or hazardous waste incinerator, as required under 40 CFR §261.38(c)(2); identifying the name and address of the units that will burn the

comparable/syngas fuel; and certifying that the state in which the burner is located is authorized to exclude wastes as comparable/syngas fuel under the provisions of 40 CFR §261.38.

Under 40 CFR §261.38(c)(13), wastes that are listed because of presence of dioxins or furans, as set out in 40 CFR Part 261, Appendix VII, are not eligible for this exclusion, and any fuel produced from or otherwise containing these wastes remains a hazardous waste subject to full RCRA hazardous waste management requirements.

FISCAL NOTE

Bob Orozco, Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments to Chapter 335 are in effect, there will be no significant fiscal implications for state government or units of local government as a result of administration or enforcement of the proposed amendments. The proposed amendments revise state rules to conform with federal regulations regarding the exclusion of certain comparable fuels from the definition of “solid waste” and revise the definition of “manifest.”

Federal regulations exclude from the regulatory definition of “solid waste” hazardous waste-derived fuels that meet specification levels comparable to fossil fuels for concentrations of hazardous constituents and for physical properties that affect burning. Waste materials are not considered solid wastes if they meet certain comparable fuel or syngas fuel specifications and certain implementation requirements. For example, the exclusion for comparable syngas fuel that is generated from hazardous waste requires that the fuel must have a minimum BTU value of 100 BTU per standard cubic foot;

contain less than 1 part per million by volume (ppmv) of total halogen; contain less than 300 ppmv of total nitrogen other than diatomic nitrogen (N₂); contain less than 200 ppmv of hydrogen sulfide; and contain less than one ppmv of each hazardous constituent in the target list contained in federal regulations. Implementation of the exclusion from solid waste for comparable fuel or comparable syngas fuel requires that certain requirements be met, including requirements relating to notice, burning, blending, treatment, generation, dilution, waste analysis plans, sampling, analysis, speculative accumulation, records, certification, and ineligible hazardous wastes. The proposed amendments would incorporate the exclusion from the definition of "solid waste" found in federal regulations for comparable fuels and comparable syngas fuels as promulgated by the EPA on June 19, 1998. The proposed amendments would also amend the definition of "manifest" to replace the Texas Water Commission form numbers with new Texas Natural Resource Conservation Commission (TNRCC) form number for the Uniform Hazardous Waste Manifest. In the proposed definition, the meaning is more fully described and the proposed amendment contains instructions for obtaining or printing the form.

PUBLIC BENEFIT

Mr. Orozco has also determined that for each year of the first five years the proposed amendments to Chapter 335 are in effect, the public benefit anticipated from enforcement of and compliance with these rules will be enhanced consistency between state and federal hazardous waste regulatory requirements, simplification of existing regulations, more cost-effective regulation of waste management activities, and improvements in the management of hazardous waste and hazardous waste facilities. The proposed amendments generally incorporate existing federal regulations regarding hazardous waste-derived fuels

that meet federal specification levels comparable to fossil fuels and revise the definition of “manifest.”

The fiscal implications to individuals and small business are contained in the Small Business Analysis section of this preamble.

SMALL BUSINESS ANALYSIS

The major purpose of the proposed amendments to Chapter 335 is to revise current rules so they conform to the requirements of certain federal regulations. On June 19, 1998, EPA promulgated regulations which excludes from the definition of “solid waste” found in federal regulations, certain comparable fuels and syngas fuels defined by EPA. If an owner or operator of a hazardous waste management facility wishes to qualify for the exclusion contained in the proposed changes, a set of standards must be met relating to physical and chemical specifications, notices, burning, blending, treatment, generation, dilution, waste analysis plans, sampling, analysis, speculative accumulation, records, certification, and ineligible hazardous wastes. It is anticipated that this rule will primarily impact larger businesses. However, if small businesses wished to qualify for the exclusion from the definition of “solid waste” contained in the proposed amendments, a small business would realize comparable savings on a per-unit volume or weight basis as a large business. Compliance with the terms of the exclusion from the definition of “solid waste” is voluntary. There are no significant economic costs anticipated to any person, including small businesses, required to comply with the proposed amendments to these rules.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed 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." Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). Although this rule is proposed to protect the environment and reduce the risk to human health from environmental exposure, this is not a major environmental rule because it 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.

The rule will not adversely affect in a material way the aforementioned aspects of the state because the rule updates the state's hazardous waste regulations, which in turn provides an overall benefit, as explained below. This overall benefit from updating the hazardous waste regulations is derived, for example, from proposing to adopt more recent federal hazardous waste regulations relating to an exclusion from the definition of solid waste for certain types of material which are comparable to fuels. Under this exclusion, environmentally sound management of this comparable fuel material would be encouraged, thus beneficially affecting the environment and public health and safety.

The new exclusion from the definition of solid waste provides a benefit to the economy, sectors of the economy, productivity, competition, and jobs by lessening industrial solid and hazardous waste regulatory requirements, thus costing the industrial solid and hazardous waste industry less, and by providing for enhanced consistency between federal and state waste regulatory requirements, which

leads to more cost-effective regulation of waste management activities. An analysis of the specific regulations under this proposal shows that the rule will not adversely affect in a material way the aforementioned aspects of the state because either the regulation is less stringent than current rules, or the regulation is a revision to more fully and more correctly define “manifest.” The reason there is no adverse effect in a material way on the environment or the public health and safety of the state or a sector of the state is because these proposed rules provide benefit to these aspects of the state by providing for enhanced consistency between federal and state waste regulatory requirements, which leads to improvements in the management of hazardous waste and hazardous waste facilities, and because these proposed rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state.

In addition, this proposed rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This proposal does not exceed a standard set by federal law because the main purpose of this proposal is to adopt state rules which are equivalent to the corresponding federal regulations. This proposal does not exceed an express requirement of state law because either there are no express requirements in state law under which these rules are proposed or because the express requirements of state law are being matched in this proposal (e.g., the definition of “solid waste” under proposed §335.119(A)(iv)). This proposal does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the EPA has encouraged states to adopt the comparable fuels exclusion as quickly as their legislative and regulatory processes will allow (see 63

FedReg 33818). This proposal does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024). Finally, this rulemaking is not being proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these proposed rules pursuant to Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The specific purpose of the proposed amendments is to revise the state rules to conform to certain federal regulations regarding an exclusion from the definition of “solid waste” for comparable fuels, and to revise the definition of “manifest.” The proposed rules would substantially advance this stated purpose by adopting federal regulations or by introducing language intended to ensure that state rules are equivalent to the corresponding federal regulations, and by amending the definition of “manifest.” Promulgation and enforcement of these proposed rules would not affect private real property which is the subject of the rules because the proposed rule language consists of updates to bring certain state hazardous waste regulations into equivalence with more recent federal regulations, and because the revisions to the definition of “manifest” are nonsubstantial. There is no burden on private real property because either the regulation is less stringent than current rules, or the regulation is a revision to more fully and more correctly define “manifest.” The subject proposed regulations do not affect a landowner’s rights in private real property because this rulemaking does not restrict or limit the owner’s right to property that would otherwise exist in the absence of the regulations. That is, a property owner may continue to use the property for the management of hazardous waste. In other words, since these rules merely revise

the definition of manifest and provide a new exclusion from the definition of solid waste, they do not restrict the owner's right to property.

COASTAL MANAGEMENT PROGRAM

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 subject to the CMP and must be 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 rulemaking would revise the commission rules to conform to certain federal regulations regarding an exclusion from the definition of "solid waste" for comparable fuels and revise the definition of "manifest." The commission has also determined that the proposed rule will not have a direct and significant adverse effect on Coastal Natural Resource Areas (CNRAs) identified in the applicable CMP policies. For example, the proposed rules would update and enhance the commission's rules concerning hazardous and industrial solid waste, thereby serving to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also thereby serving 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, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. The commission invites public comment on the applicability of the CMP and on the consistency determination of the proposed rule.

SUBMITTAL OF COMMENTS

Written comments may be submitted by mail to Bettie Bell, Office of Environmental Policy, Analysis, and Assessment, MC-205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808.

All comments must be received by July 19, 1999, and should reference Rule Log No. 98080-335-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 Ray Henry Austin at (512) 239-6814.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state; and under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

The proposed amendments and new language implement Texas Health and Safety Code Chapter 361.

**SUBCHAPTER A : INDUSTRIAL SOLID WASTE AND
MUNICIPAL HAZARDOUS WASTE IN GENERAL**

§335.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly requires otherwise.

(1) - (79) (No change.)

(80) **Manifest** - The waste shipping document which accompanies and is used for tracking the transportation, disposal, treatment, storage, or recycling of shipments of hazardous wastes or Class 1 industrial solid wastes. The form used for this purpose is TNRCC-0311 (Uniform Hazardous Waste Manifest) which is furnished by the executive director or may be printed through the agency's "Print Your Own Manifest Program." [The uniform hazardous waste manifest form, Form TWC-0311, and, if necessary, TWC-0311B, furnished by the executive director to accompany shipments of municipal hazardous waste or Class I industrial solid waste.]

(81) - (118) (No change.)

(119) **Solid Waste** -

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued pursuant to the Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased,

or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation), prior to sale or other conveyance of the property;

(iii) waste materials which result from activities associated with the exploration, development, or production of oil or gas or geothermal resources, as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas pursuant to the Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code §6901 et seq., as amended; or

(iv) a material excluded by 40 Code of Federal Regulations (CFR) §261.4(a)(1) - (14), as amended through August 6, 1998, at 63 FedReg 42110, by 40 CFR §261.4(a)(16), as amended [through] May 26, 1998 at 63 FedReg 28556, by 40 CFR §261.4(a)(16), as amended June 19, 1998 at 63 FedReg 33782, subject to the changes in this clause, by 40 CFR §261.4(a)(18) - (19), as amended through August 6, 1998, at 63 FedReg 42110, or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the

purposes of the exclusion under 40 CFR §261.4(a)(16), as amended June 19, 1998 at 63 FedReg 33782, 40 CFR §261.38 is revised as follows, with “30 TAC §335.1(119)(A)(iv)” meaning “§335.1(119)(A)(iv) of this title (relating to Definitions)”:

(I) in the certification statement under 40 CFR §261.38(c)(1)(i)(C)(4), the reference to “40 CFR §261.38” is changed to “40 CFR §261.38, as revised under 30 TAC §335.1(119)(A)(iv),” and the reference to “40 CFR §261.28(c)(10)” is changed to “40 CFR §261.38(c)(10)”;

(II) in 40 CFR §261.38(c)(2), the references to “§260.10 of this chapter” are changed to “§335.1 of this title (relating to Definitions),” and the reference to “parts 264 or 265 of this chapter” is changed to “Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) or Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities)”;

(III) in 40 CFR §261.38(c)(3), (4), and (5), the references to “parts 264 and 265, or §262.34 of this chapter” are changed to “Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), or §335.69 of this title (relating to Accumulation Time)”;

(IV) in 40 CFR §261.38(c)(5), the reference to “§261.6(c) of this chapter” is changed to “§335.24(e) and (f) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)”;

(V) in 40 CFR §261.38(c)(7), the references to “appropriate regulatory authority” and “regulatory authority” are changed to “executive director”;

(VI) in 40 CFR §261.38(c)(8), the reference to “§262.11 of this chapter” is changed to “§335.62 of this title (relating to Hazardous Waste Determination and Waste Classification)”;

(VII) in 40 CFR §261.38(c)(9), the reference to “§261.2(c)(4) of this chapter” is changed to “§335.1(119)(D)(iv) of this title (relating to Definitions)”; and

(VIII) in 40 CFR §261.38(c)(10), the reference to “implementing authority” is changed to “executive director.”

(B) A discarded material is any material which is:

(i) abandoned, as explained in subparagraph (C) of this paragraph;

(ii) recycled, as explained in subparagraph (D) of this paragraph; or

(iii) considered inherently waste-like, as explained in subparagraph (E) of this paragraph.

(C) Materials are solid wastes if they are abandoned by being:

(i) disposed of;

(ii) burned or incinerated; or

(iii) accumulated, stored, or processed (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(D) Materials are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) Used in a manner constituting disposal. Materials noted with an asterisk in Column 1 of Table 1 are solid wastes when they are:

(I) applied to or placed on the land in a manner that constitutes disposal; or

(II) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste). However, commercial chemical products listed in 40 CFR §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(ii) Burning for energy recovery. Materials noted with an asterisk in Column 2 of Table 1 are solid wastes when they are:

(I) burned to recover energy; or

(II) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, commercial chemical products, which are listed in 40 CFR §261.33, not listed in §261.33 but that exhibit one or more of the hazardous waste characteristics, or would be considered nonhazardous waste if disposed, are not solid wastes if they are fuels themselves and burned for energy recovery.

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(16)). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(16)).

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.

Figure 1: 30 TAC §335.1(D)(iv)

(E) Materials that are identified by the administrator of the EPA as inherently waste-like materials under 40 CFR §261.2(d) are solid wastes when they are recycled in any manner.

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products; or

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(16) apply rather than this provision.

(iv) secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(I) only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(II) reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(III) the secondary materials are never accumulated in such tanks for over twelve months without being reclaimed; and

(IV) the reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(G) The following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials deemed to be inherently waste-like by the administrator of the Environmental Protection Agency, as described in 40 CFR §261.2(d)(1) - §261.2(d)(2).

(H) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(I) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(J) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Materials).

(120) - (149) (No change.)