

The Texas Commission on Environmental Quality (commission) adopts an amendment to §324.3.

Section 324.3 is adopted *with change* to the proposed text as published in the June 6, 2003 issue of the *Texas Register* (28 TexReg 4395).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

On September 15, 1999, the commission granted a petition for rulemaking by Safety-Kleen Systems, Inc. for amendments to 30 TAC Chapter 312, concerning Sludge Use, Disposal, and Transportation; Chapter 324, concerning Used Oil Standards; and 30 TAC Chapter 330, concerning Municipal Solid Waste. This rulemaking is the result of that petition. The petitioner identified a conflict in commission rules where waste in waste management units containing recyclable used oil could be construed as being jointly regulated under Chapter 324 and Chapters 330 and 312.

On November 14, 2002, an advisory group meeting was held in Austin, Texas, to receive input from the regulated community and other interested entities on the proposed rule language, developed from the petition and the draft rule amendments to Chapters 312, 324, and 330. Entities registered in accordance with the Chapter 312 requirements voiced concern about alternative management of grit trap waste (i.e., the proposal to allow for commingling of grit trap waste regulated under Chapter 312 and used oil regulated under Chapter 324). Many of the advisory group members commented that there is no justification for a change to the current regulations. Advisory group members also commented that grit traps are not designed to accumulate oil and the existence of significant amounts of used oil found in grit traps indicates operational issues at facilities where such grit trap waste is found. The majority of the advisory group and other interested entities recommended changes to clarify that Chapter 312

does not apply to oily water mixtures in waste management units and that oil-water mixtures from waste management units designed for oil-water separation must comply with the requirements found in Chapter 324. The commission identified language modifications that were needed in Chapters 312, 324, and 330 regarding this matter and, therefore, rule language modifications are being adopted concurrently for these chapters.

SECTION DISCUSSION

Adopted §324.3, Applicability, adds new paragraph (5) to indicate that recycling of oily water mixtures contained in waste management units such as tanks, fractionation tanks, and sumps that meet the design requirements of the American Petroleum Institute or have been designed for oil-water separation must be managed solely under this chapter. Other tanks, sumps, and grit trap waste management units that are not designed for oil-water separation and are plumbed directly to a sanitary sewer must comply with the requirements found in Chapters 312 and 330. In §324.3(5), the term “engineered” is replaced with the term “designed” in response to comment. Since proposal, the phrase “to be recycled that are” has been added and the phrase “and are not plumbed to a municipal sanitary sewer system” has been deleted from the first sentence in §324.3(5). Also, the word “directly” has been added after the word “plumbed”; the word “trapping” has been replaced with the word “trap”; and the word municipal has been deleted from the last sentence in §324.3(5).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225

because it does not meet the definition of a "major environmental rule" as defined in that statute. This rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a).

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. This adopted rule amendment does not satisfy the definition of a major environmental rule. This rulemaking adds regulatory language which states that oily water mixtures to be recycled that are contained in waste management units such as tanks, fractionation tanks, and sumps that meet the design requirements of the American Petroleum Institute or have been designed for oil-water separation must be managed under this chapter. Other tanks, sumps, and grit trap waste management units that are plumbed to a sanitary sewer must comply with the requirements found in Chapters 312 and 330. The amendment is not a major environmental rule because it is not expected to 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. This rulemaking does not qualify as a major environmental rule because it does not have as its specific intent the protection of the environment or the reduction of risk to human health from environmental exposure.

In addition, a regulatory impact assessment is not required because this rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). This rulemaking does not exceed a standard set by federal law, but conforms with federal law. This

rulemaking does not exceed an express requirement of state law because it conforms to the requirement under Texas Health and Safety Code (THSC), §371.028, which directs the commission to implement the used oil recycling program by adopting rules, standards, and procedures. This rulemaking 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. This rulemaking does not adopt a rule solely under the general powers of the agency, but also under specific state law, namely THSC, §371.028. Finally, this rulemaking is not adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary analysis for this rulemaking in accordance with Texas Government Code, §2007.043. The specific purpose of this rulemaking is to add regulatory language which states that oily water mixtures to be recycled that are contained in waste management units such as tanks, fractionation tanks, and sumps that meet the design requirements of the American Petroleum Institute or have been designed for oil-water separation must be managed under this chapter. Other tanks, sumps, and grit trap waste management units that are plumbed directly to a sanitary sewer must comply with the requirements found in Chapters 312 and 330. This rulemaking will substantially advance the stated purpose by adding a definition of grit trap in §312.8 and adding language in §312.2(g) specifying that waste in certain waste management units containing recyclable used oil is regulated under Chapter 324 and is not subject to Chapter 312. The promulgation and enforcement of this amended rule will not burden private real property nor adversely affect property values because the adopted rule amendment will explain that certain waste that contains recyclable used oil is being

regulated solely under the used oil rules in Chapter 324. Therefore, this rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking and found that the adoption is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action and/or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6), and will therefore require that applicable goals and policies of the CMP be considered during the rulemaking process.

The commission prepared a consistency determination for the adopted rule under 31 TAC §505.22 and found that this rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking 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 adopted rule include the construction and operation of solid waste treatment, storage, and disposal facilities, and the discharge of municipal and industrial wastewater to coastal waters. Promulgation and enforcement of this rule will not violate (exceed) any standards identified in the applicable CMP goals and policies because the adopted rule changes do not modify or alter standards set forth in existing rules, and do not govern or authorize any actions subject to the CMP. This rulemaking defines grit trap and grit trap waste; indicates that Chapter 312 does not apply to oily water mixtures in waste management units; and indicates that recycling of oil-water mixtures in waste management units designed for oil-water separation must comply with the requirements found in Chapter 324.

PUBLIC COMMENT

A public hearing was not held on this rulemaking and one comment was received from Safety-Kleen Systems, Inc. (SK) during the comment period, which closed July 7, 2003.

RESPONSE TO COMMENT

SK commented that the commission is inconsistent with the federal used oil recycling program and cites to a United States Environmental Protection Agency revision found in the March 4, 1994 issue of the *Federal Register* (59 FR 10550). SK requested that the commission clarify that a decision as to whether used oil and used oil mixtures collected from oil/water separation units may be regulated is not dependent on whether the oil/water separation unit is connected to a municipal sanitary sewer.

The commission partially agrees with this comment. The proposed rules are not in conflict with any existing federal regulations. However, the commission recognizes that oily water mixtures contained in waste management units such as tanks, fractionation tanks, and sumps that meet the design requirements of the American Petroleum Institute for oil-water separation or that have been designed for oil-water separation are sometimes plumbed to a sanitary sewer system. These oily water mixtures may contain recoverable amounts of used oil which if recycled, are subject to Chapter 324. Therefore, the phrase “and are not plumbed to a municipal sanitary sewer” has been deleted from the first sentence in §324.3(5).

SK commented that proposed language in §324.3(5) and similar language proposed simultaneously in Chapters 312 and 330 contain specific design criteria to be used in differentiation between grit traps and

oil/water separators. The commenter expressed concern that these criteria focused too narrowly on theoretical design specifications and could exclude oil-water mixtures from regulation as used oil, even if the mixture was derived from a unit whose purpose was to separate used oil from water. The example of bilge water containing oil was used to demonstrate simpler units which would generate oil-water mixtures eligible for regulation as used oil.

The commission disagrees with this comment. The commission does recognize that oil-water mixtures may be generated in circumstances or units that do not strictly adhere to the design parameters outlined in proposed §324.3(5) and the complementing sections in this rulemaking. However, the intent of this rulemaking is not that design requirements laid out in the rules should function as an exhaustive listing of only the units from which the oil-water mixture can be regulated as used oil. The commission points out that criteria such as those of the American Petroleum Institute are useful in the determination of the regulatory status of the units as grit traps or oil/water separators and addition of the phrase “or have been engineered for oil-water separation” are sufficiently broad in providing a technical basis for this regulatory determination. The commission reiterates that the purpose of these rules is to draw a clear and enforceable distinction between oil/water separators and grit trap units, removing any ambiguity regarding the regulatory status of grit trap waste and mixtures better regulated under the existing used oil regulations.

SK commented about the use of the term "engineered" in §324.3(5) and the use of the term "designed" in other proposed revisions. SK was unclear if these terms were to be used interchangeably and recommended that the commission use one term to preclude any potential confusion.

The commission agrees with this comment. For consistency, the term "engineered" will be replaced with "designed" in §324.3(5). However, the commission notes that equipment manufactured to accomplish separation of oil and water would involve engineering review and would at some point in design or installation require review by a licensed professional engineer.

SK commented that use of the term "must be managed solely under this chapter" in proposed §324.3(5) is not accurate, citing as an example the potential for a handler of an oil-water mixture to dispose of this material rather than recover the hydrocarbon component in compliance with Chapter 324.

The commission disagrees with this comment. While other management alternatives may be encountered for oil-water mixtures other than conventional recycling as used oil, the only other likely scenario is the one discussed by SK, that being disposal. In the event that a mixture derived from an oil/water separator was to be disposed, the commission notes that the proposed change is located within the applicability section regarding the management of used oil. Within this applicability statement is a reference to 40 Code of Federal Regulations Part 279, Subpart B, which would exclude such a mixture from regulation as used oil if disposed; rather the waste would be regulated under other applicable waste disposal provisions. The commission reiterates that the overriding goal of this rulemaking is to clearly differentiate the management standards

for oil-water mixtures and grit trap waste and is avoiding complicating cross-references or linked citations.

SUBCHAPTER A: USED OIL RECYCLING

§324.3

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the code and other laws of the state, and to adopt rules repealing any statement of general applicability that interprets law or policy; Texas Water Code, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; THSC, §361.011, which gives the commission all powers necessary and convenient to carry out its responsibilities concerning the regulation and management of municipal solid waste; THSC, §361.024, which provides the commission with the authority to adopt and promulgate rules consistent with the general intent and purposes of the THSC; and THSC, §371.028, which directs the commission to implement the used oil recycling program by adopting rules, standards, and procedures.

§324.3. Applicability.

Applicability and exemptions from applicability will be as in 40 Code of Federal Regulations (CFR) Part 279, Subpart B, and as clarified here.

(1) A used oil contaminated with a listed hazardous waste must be handled under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste). EPA

Hazardous Waste Number "F002" must be used on used oil that is listed hazardous due to halogenated contaminants.

(2) Used oil can be stored in tanks and containers not meeting 40 CFR Part 264 or 265. The requirement in 40 CFR Part 279 that refers to compliance with Part 264 or 265, Subpart K, on used oil storage applies to used oil stored in surface impoundments. Storage of used oil in lagoons, pits, or surface impoundments is prohibited, unless the generator is storing only wastewater containing de minimis quantities of used oil, or unless the unit is in compliance with 40 CFR Part 264 or 265, Subpart K.

(3) Requirements applicable to mixing hazardous waste with used oil are in 40 CFR §279.10(b) (relating to Mixtures of Used Oil and Hazardous Waste). Mixing of hazardous waste with used oil, by other than generators, in tanks and containers within their applicable accumulation time limit, requires a hazardous waste permit per §335.2 of this title (relating to Permit Required). A waste that is characteristically hazardous for "ignitability only" can be mixed with used oil. However, the resultant mixture cannot exhibit the hazardous ignitability characteristic to manage it under this chapter and 40 CFR Part 279 rather than Chapter 335 of this title. The resultant mixture formed from mixing used oil and a characteristically hazardous waste, other than solely ignitable waste, must be tested for all likely hazardous characteristics. The resultant mixture will be a hazardous waste rather than used oil if it retains a hazardous characteristic, even if the hazardous characteristic is derived from the used oil. Anyone who mixes used oil with another solid waste to produce from used oil, or to make used oil more amenable for production of fuel oils or products is also a processor subject to 40 CFR Part 279,

Subpart F (relating to Standards for Used Oil Processors and Re-refiners) and §324.12 of this title (relating to Processors and Rerefiners).

(4) A used oil shall not be regulated until it is a spent material as defined in 40 CFR §261.1(c)(1) and §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials).

(5) Oily water mixtures to be recycled that are contained in waste management units such as tanks, fractionation tanks, and sumps that meet the design requirements of the American Petroleum Institute for oil-water separation or that have been designed for oil-water separation must be managed under this chapter. Management of wastes from other tanks, sumps, and grit trap waste management units that are plumbed directly to a sanitary sewer must comply with the requirements in Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation) and Chapter 330 of this title (relating to Municipal Solid Waste).