

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §328.71, Closure Cost Estimate for Financial Assurance. The commission adopts this revision to Chapter 328, Waste Minimization and Recycling; Subchapter F, Closure Cost Estimate for Financial Assurance, in order to complete cross-references regarding financial assurance requirements for scrap tire sites. Section 328.71 is adopted *without changes* as published in the December 1, 2000 issue of the *Texas Register* (25 TexReg 11887) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The cross-references in Chapter 328 to §37.3001 and §37.3011 need to be replaced by a reference to Chapter 37, Subchapter M, Financial Assurance Requirements for Scrap Tire Sites.

On February 24, 2000, the Chapter 37 financial assurance rule consolidation package was adopted. This package attempted to correct a cross-reference concerning financial assurance requirements for waste tire sites in Chapter 330. However, the Chapter 330 waste tire subchapters were being repealed and placed into Chapter 328 during the time that Chapter 37 was processed. Changes to Chapter 328 were not made because the Chapter 37 project team did not conceptualize opening Chapter 328. The cross-reference correction is needed to direct entities that manage used or scrap tires to the location of the financial assurance requirements.

SECTION BY SECTION DISCUSSION

The rule amends cross-references in §328.71(g) by deleting the specific previous cross-references to §37.3001 and §37.3011 and adding the appropriate cross-reference to Chapter 37, Subchapter M,

Financial Assurance Requirements for Scrap Tire Sites, to specify all sections. These sections include: §37.3001, Applicability; §37.3003, Definitions; §37.3011, Financial Assurance Requirements; §37.3021, Financial Assurance Mechanisms; and §37.3031, Submission of Documents.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and 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 Texas Government Code. Although the intent of the amendment is to protect the environment or reduce risks to human health from environmental exposure, the rulemaking does not have an adverse material impact because the amendment corrects a cross-reference and does not change regulatory requirements, and therefore does not meet the definition of a “major environmental rule.” Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). No comments on the regulatory impact analysis determination were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether the amendment constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that evaluation and assessment. The specific purpose of the adopted amendment is to clarify the location of rules relating to financial assurance for scrap tire facilities. Entities that manage used scrap tires will benefit from knowing the appropriate location for information relating to the financial assurance requirements.

Adoption and enforcement of the amendment is neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rule does not affect a landowner's rights in private real property because the rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which otherwise exist in the absence of the regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation rules, 31 TAC §505.11. Therefore, the amendment is not subject to the CMP.

HEARING AND COMMENTORS

No public hearing was held for this rulemaking. The preamble to the proposed rule that was published in the December 1, 2000 issue of the *Texas Register* (25 TexReg 11887) incorrectly stated that comments must be received by December 18, 2000, when it should have stated by January 2, 2001. For this reason, an extension of the deadline for written comments was published in the January 19, 2001 issue of the *Texas Register* (26 TexReg 839). The public comment period was extended for an additional 14 days and closed on February 2, 2001. No comments were received during the initial or extended comment period.

STATUTORY AUTHORITY

The amendment is adopted 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 laws of this state. The amendment is also adopted under the Texas Health and Safety Code (THSC), §361.011, which provides the commission with the authority to adopt rules and to establish standards of operation for the management of solid waste; and THSC, §361.085, which provides the commission with the authority to require financial demonstrations for permitted solid waste and hazardous waste facilities. In addition, THSC, §361.112, provides the commission with the authority to adopt by rule application forms and procedures for the registration and permitting process (of which financial assurance is a part) for the storage, transportation, and disposal of used or scrap tires. The commission may not register or issue a permit to a facility required to provide evidence of financial responsibility unless the facility has complied with this financial assurance requirement.

CHAPTER 328: WASTE MINIMIZATION AND RECYCLING

SUBCHAPTER F: MANAGEMENT OF USED OR SCRAP TIRES

§328.71

§328.71. Closure Cost Estimate for Financial Assurance.

(a) As part of a facility's registration application, an owner or operator of a scrap tire storage site must prepare a written estimate, certified by a professional engineer, in current dollars, of the cost of hiring a third party to close the facility(ies). The closure cost for scrap tire storage sites is determined by the sum of paragraphs (1) and (2) of this subsection:

(1) The estimated cost for a third party to transport and dispose of the maximum site capacity of used or scrap tires and tire pieces as depicted by the site layout plan. The estimate shall include equipment and operator time for loading tires and disposal costs.

(2) The estimated cost for a third party to complete cleanup of the site of any and all debris, as well as dismantling any equipment used in the processing of whole tires into shreds or used to recycle whole tires or shredded tires into manufactured products, securing the site, and preventing access to the equipment or removing it from the site to a location acceptable to the executive director; or the amount of \$3,000, whichever is greater.

(b) The closure cost estimate must equal the cost of closing the facility based on the maximum

number of whole tires stored at the facility, the maximum volume of tire pieces, and disabling any equipment as disclosed in the facility's registration application. The executive director shall evaluate and determine the amount for which evidence of financial assurance is required. The closure cost estimate provided by the owner or operator may be amended by the executive director. In some cases, the closure cost estimate may not be sufficient which means that the owner or operator remains responsible for the entire costs to close the site.

(c) Any amendment application shall include a recalculation of the closure cost estimate based on any requested volume increases. Facilities shall not increase the volume of whole tires or tire pieces generated from out of state and stored at the facility until the registration amendment has been approved by the executive director. Only upon approval of the executive director will the amended registration closure cost estimate be the basis for determining the amount of financial assurance required.

(d) The quantities of scrap tires reported on the registration application form and used in the calculation of financial assurance shall be obtained from the site layout plan volumes by using the following conversion factors:

(1) a typical whole tire shall be considered to occupy four cubic feet unless an exact count of all whole tires is to be maintained by an operator and shall be considered to weigh 20 pounds; and

(2) a cubic yard of tire shreds or pieces shall be considered to weigh no more than 950

pounds; however, other verifiable data may be used if accepted and approved by the executive director.

(e) The calculated capacity of a site as calculated for closure may not be exceeded without the submission and approval of an amended registration application specifically including, but not limited to, new site layout plans to substantiate the revised capacity and new closure calculations based upon the depicted volumetric capacity converted to weights, posting of the revised financial assurance and written approval for the amended registration. The owner or operator is also responsible for submitting a registration amendment to revise the closure cost estimate whenever requested to do so by the executive director. Registration amendments with revised closure cost estimates shall be submitted to the executive director within 15 days of the executive director's written request to revise the closure cost estimate.

(f) The owner or operator must keep at the facility during the operating life of the facility a copy of the latest approved closure cost estimate and a copy of the current financial assurance mechanism.

(g) Financial assurance required under this section shall be provided in accordance with Chapter 37, Subchapter M of this title (relating to Financial Assurance Requirements for Scrap Tire Sites).

(h) Closure will begin when:

(1) the executive director deems the facility abandoned; or

(2) the registration expires, is terminated, or revoked or a new or renewal registration is denied; or

(3) closure is ordered by the Texas Natural Resource Conservation Commission or a United States District Court or other court of competent jurisdiction.

(i) Following a determination that the owner or operator has failed to perform closure in accordance with the registration requirements when required to do so or when closure begins under the circumstances outlined in subsection (h) of this section, the executive director may terminate or revoke the registration and draw on the financial assurance funds.