

Questions and Answers Regarding Development of Land Over Closed Municipal Solid Waste Landfills

What is 30 TAC Chapter 330, Subchapter T?

Title 30 Texas Administrative Code (30 TAC), Chapter 330, Subchapter T contains rules for development over closed municipal solid waste landfills. The rules were proposed on November 18, 1994 (Texas Register, volume 19, page 9124), and published as final rules on May 2, 1995 (Texas Register, volume 20, page 3241). The rules became effective on May 17, 1995.

What statute provides the specific authority for these rules?

The Health and Safety Code, Chapter 361, Subchapter R provides the specific authority for these rules. Subchapter R was passed by the 73rd Legislature in 1993 and took effect on September 1, 1993. It is more commonly referred to as House Bill (HB) 2537.

Why should we be concerned about developing over old landfills?

Municipal landfills produce methane gas, a non-toxic but explosive gas. The gas is not a problem in open-air situations, however, it can reach explosive concentrations in enclosed structures. The impetus for the bill was the evacuation of an apartment complex in Austin in 1992 and a school in Galveston County in which the structures had elevated levels of methane gas from landfills.

What type of development is subject to the rules?

Any enclosed structure that is built over a waste disposal area must be permitted (structures developed on or after September 1, 1993), or registered (structures that existed or began development before September 1, 1993). The rules exempt owners of single family homes and duplexes, but **do** apply to developers of subdivisions. In addition, any other activity or development (including borings, fenceposts, piers, foundations, recreational facilities, etc.) that would disturb the final cover of a closed municipal solid waste landfill must have prior written approval from the executive director of the TCEQ.

What are the relevant points of the rules that I need to be concerned with?

The most notable aspects of the rules relate to the soil test requirement, the permit or registration for structures over closed landfills, and the notification provisions.

What is the soil test requirement?

A registered professional engineer must conduct a soil test prior to the development of any tract of land greater than one acre. The one acre threshold applies to the land and not the area underneath the roof of the building to be built. The rules allow a great deal of latitude by providing the engineer to choose one of three tests:

1. Soil Test 1 – Observe all soil disturbances at the site and report closed landfills if any are found;
2. Soil Test 2 – Perform soil borings or excavations (e.g., using backhoe) to a minimum depth of 10 feet. The professional engineer determines the adequate number of borings/excavations; or
3. Soil Test 3 – Utilize preexisting reports such as geotechnical studies, environmental subsurface investigations, HUD reports, etc.

Are non-invasive technologies acceptable?

No. TCEQ staff reviewed several non-invasive technologies during the development of the rule, and does not believe they are as accurate as the invasive methods outlined in the rule. However, should a non-invasive technology prove accurate in the future, the rule will likely be amended to allow for such technologies.

Why one acre, and why does a professional engineer have to perform the test?

Both requirements are prescribed by HB 2537. The TCEQ understands that it is not practicable for a professional engineer to perform the test every time. The TCEQ expects the professional engineer to have ultimate responsibility, but realizes that in most cases those performing the test will be usually be doing so under the supervision of a professional engineer.

What exactly are we looking for?

The soil test is intended as a preliminary measure to provide everyone notice if a landfill is discovered. Under these rules, the engineer should be looking for evidence of household waste such as newspapers, plastic, glass, cans, food, etc. If any waste is discovered, the next step is to determine whether the waste is incidental, or from a very small local dump, or from a closed landfill. The TCEQ is concerned about closed landfills.

If I cannot determine whether the waste I have uncovered is a landfill, can I consult with TCEQ?

Yes, the TCEQ has been contacted in the past by engineers regarding this determination. In most cases, the engineers have discovered incidental waste rather than a landfill, and development proceeded as normal. In one case, the TCEQ determined that a landfill did exist and the developer was required to obtain a registration and deed-record the property.

By performing a soil test, are we claiming that no landfill exists on the property if waste is not discovered as a result of the soil test?

No. The soil test is stating that no evidence of waste was discovered. It is virtually impossible to prove a landfill does not exist without removing the top ten feet of soil from the entire expanse of the tract.

If waste is discovered, who must be notified?

The owner of the property, the TCEQ, the local council of governments, and a local city or county official responsible for planning or building permits.

Should all soil tests be sent to the agency?

No. The TCEQ only wants to see soil tests that discover a landfill. It is strongly recommended that developers keep all soil tests on record, though, in case disputes arise in the future with TCEQ or other persons.

Is a permit required when the structure is located on the same tract of land as a landfill, but away from the waste disposal area?

No. A permit is only necessary when the enclosed structure is to be located over the waste deposit.

What is the difference between a registration and a permit?

Except as noted previously, the statute requires a permit prior to the development of an enclosed structure after September 1, 1993. The statute also requires that structures existing prior to September 1, 1993, undertake certain measures to mitigate methane gas migration in those structures. The TCEQ believes a registration process will ensure compliance with the statutory mandates for sites existing before September 1993. In practical terms, the registration is a less complicated, simpler document to prepare and does not require a public hearing.

What if development was occurring at the time the statute took effect?

Development that began prior to September 1, 1993, would only require registration. Section 481.143(a) of the Texas Government Code relieves those developments from the burden of permitting.

How does the agency interpret the phrase “began development?”

The statutory definition of development is so broadly defined that the agency considers the commencement of development to occur when construction and planning drawings bearing a professional engineer’s signature and seal are completed.

Does a permit under 30 TAC 330, Subchapter T cover development over landfills that are in post-closure care under Chapter 330, Subchapter J?

No. Closed landfills that are in post-closure care are still considered to be under a permit. Any activity on those closed landfills is governed by the requirements in 30 TAC §330.957(b)(2). Any change to a municipal solid waste facility still under permit requires a modification or amendment to the permit in accordance with 30 TAC Chapter 305. The post-closure care period for landfills ranges from 5 years to 30 years. The Subchapter T rules are intended to affect pre-permit landfills, unauthorized disposal sites, and permitted landfills that are beyond post-closure care.

What are the major components of the permit application?

Overall, the permit application should be relatively easy to put together. Most of the items either are simple documents to prepare or should have already been prepared for the development of the site. The major components to the application are the professional engineer's certification and the gas management plan for the structure. In the application, the professional engineer is required to sign and seal a certification stating that the proposed development is necessary to reduce a threat to human health and the environment, or will not increase or create a threat to human health and the environment.

The certification sounds stringent. Is it necessary?

The certification is explicitly required by HB 2537.

What is the process, once the application is submitted?

The TCEQ will acknowledge receipt of the application, and then will have 30 days from receipt of the application to conduct a public hearing in the area of the planned development. Within five days of the public hearing, the executive director of TCEQ will issue or deny the permit. The applicant or interested persons may file a petition for review of the executive director's decision within 10 days after the executive director issues the decision. Filing a motion will cause the permit to be sent to the commission for a decision. The commission will review the motion within 35 days of the executive director's order.

Overall, how long will the process take?

In a worst case scenario, it will probably take 70 days from the date of application to the date of issuance. In a best case scenario, it will only require 35 days. **Applicants should work closely with staff before submitting an application. The 30-day time frame does not afford time for Notices of Deficiency. If there is anything missing from the application, it will be rejected.**

Is there an application fee?

Yes. The statute directs TCEQ to charge a permit application fee sufficient to recuperate its *actual* costs in granting the permit. The rule requires an initial application fee of \$2500. Following the

executive director's decision, the agency will calculate the time spent on the project, and refund any overcharges or send an invoice for any balance above \$2500. **If funds are owed to the agency, TCEQ will not release the permit until payment has been received.**

Does this replace my local building permit?

No. The TCEQ development permit is separate and distinct from any local permits required. Some cities, such as Austin, require the TCEQ permit before the local permit will be issued.

What is the public hearing, and how will it be conducted?

The public hearing is required by HB2537, however, for purposes of this program the hearing is really a public meeting. In most cases, the hearing will probably last two to three hours. The applicant will make a short presentation of their application, TCEQ staff will describe the permit, and public comment will be accepted.

Will the TCEQ accept any comments related to the development?

No. TCEQ is only concerned about comments that relate specifically to the application. Issues such as traffic, compatible land use, etc. are not considered in the decision to grant a permit, and therefore should not be presented at the public hearing. The local permitting process is the arena for these types of issues.

What notice provisions exist in the rule and the statute?

Owners of property overlying a closed municipal landfill must file a written notice to include in the deed record for that property stating that the property contains a closed landfill. Additionally, any lessees, buyers, and occupants on land overlying the closed landfill must be notified of the landfill's existence.

Do the rules include industrial landfills?

No. The Subchapter T rules address only municipal landfills, those accepting municipal waste. HB 2537 does not provide authority over a landfill that was permitted as either an industrial landfill or that can be shown to have accepted only industrial waste before permitting began. The only exception would be dedicated industrial cells at permitted municipal landfills. Those dedicated cells would be subject to the rules. Also, industrial and municipal wastes were often co-disposed before permitting of municipal and industrial landfills began in the 1970's. Except as noted, co-disposal landfills would be considered municipal landfills and be subject to the Subchapter T rules.