

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** November 2, 2011

**DATE OF REQUEST:** October 14, 2011

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Charlotte Horn, (512) 239-0779

**CAPTION: Docket No. 2011-1261-RUL.** Consideration for publication of, and hearing on, proposed amended Sections 334.5(b), and 334.84, and new Section 334.19, of 30 TAC Chapter 334, Underground and Aboveground Storage Tanks.

The proposed rulemaking would implement House Bill 2694, TCEQ Sunset Legislation, from the 82th Legislature, 2011, Regular Session, pertaining to Petroleum Storage Tank regulation. (Jonathan Walling, Cullen McMorrow) (Rule Project No. 2011-038-334-WS)

Brent Wade  
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**Deputy Director**

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**Agenda Coordinator**

**Copy to CCC Secretary? NO YES X**

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** October 14, 2011

**Thru:** Bridget C. Bohac, Chief Clerk  
Mark R. Vickery, P.G. Executive Director

**From:** Brent Wade, Deputy Director  
Office of Waste

**Docket No.:** 2011-1261-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 334, Underground and Aboveground  
Storage Tanks  
House Bill 2694 (4.16 - 4.19): PST  
Project No. 2011-0038-334-WS

### **Background and reason(s) for the rulemaking:**

The TCEQ Sunset legislation, House Bill (HB) 2694, adopted during the 82nd Legislature, 2011, Regular Session and signed by the Governor on June 17, 2011, included statutory changes addressing petroleum storage tank (PST) regulations. This rulemaking would address those changes: underground storage tank (UST) delivery prohibition; state lead tank removal authorization; and the setting of the PST delivery fee.

### **Scope of the rulemaking:**

#### **A) Summary of what the rulemaking will do:**

This rulemaking would amend Chapter 334, Underground and Aboveground Storage Tanks:

- Subchapter A (General Prohibitions): §334.5, General Prohibitions for USTs and UST Systems, would reinstate common carrier liability, and a new §334.19 would decrease the fee on delivery of petroleum products beginning July 1, 2012.
- Subchapter D (Release Reporting and Corrective Action): §334.84, Corrective Action by the Agency, would allow the TCEQ to remove non-compliant USTs and Aboveground Storage Tanks (ASTs) that pose a risk of contamination, and are owned by financially unable persons or entities.

#### **B) Scope required by federal regulations or state statutes:**

The proposed changes are specifically required by state statute. Reinstating common carrier liability (HB 2694, §4.16) is necessary to comply with the federal Energy Policy Act of 2005.

**C) Additional staff recommendations that are not required by federal rule or state statute:**

There are no additional recommendations.

**Statutory authority:**

- Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment.
- TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy.
- TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule.
- TWC, §26.011, which requires the commission to control the quality of water by rule.
- TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding USTs.
- TWC, §26.3467(d), which requires the commission to adopt rules as necessary to enforce delivery prohibition.
- TWC, §26.351(c-2), which requires the commission to adopt rules to implement TCEQ's authority to undertake corrective action to remove USTs in certain circumstances.
- TWC, §26.352, which directs the commission to adopt rules establishing the requirements for maintaining evidence of financial responsibility for taking corrective action in response to a release from an UST.
- TWC, §26.3573(d)(5), which authorizes the commission to use the petroleum storage tank remediation (PSTR) account to pay expenses associated with tank removals as described in TWC, §26.351(c-2).
- TWC, §26.3574(b-1), which requires the commission to set the amount of the petroleum product delivery fee by rule.

**Effect on the:**

- (A) **Regulated community:** The regulated community would benefit in that reinstating common carrier liability would enhance compliance with UST delivery prohibition. Under current law only the owner or operator of the USTs commits an offense when a regulated substance is delivered into non-compliant tanks. Fuel deliverers would have a deterrent to deliver fuel into non-compliant tanks. As required by statute, new §334.19 would ensure that funds are available for the TCEQ State Lead to continue to address corrective action at Leaking Underground Storage Tank sites, and for the administration of the PST regulatory program. The regulated community would benefit from paying a reduced fee.
- (B) **Public:** The public will benefit from the removal of non-compliant tanks where the owner or operator is financially unable and there is a risk of contamination.
- (C) **Agency Programs:** No new full time employees (FTEs) will be required as a result of these rule changes.

**Stakeholder meetings:**

No stakeholder meeting will be held.

**Potential controversial concerns and legislative interest:**

Since this rule addresses language in the TCEQ Sunset Legislation, the agency's efforts to implement will be of interest to the legislature, as well as the Sunset Advisory Commission.

None anticipated for the sections of the bill implementing common carriers and the removal of non-compliant tanks. The portions of the bill dealing with the fee may be of interest to those entities currently being assessed the fee.

**Will this rulemaking affect any current policies or require development of new policies:**

No.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

Although §4.16 of the TCEQ Sunset Legislation, reinstating common carrier liability, only requires rules "as necessary," there may be confusion between the statute and the rule if 30 TAC §334.5(b) (Delivery Prohibitions) is not amended to include common carriers. No

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other alternatives to §4.18 and §4.19 of the TCEQ Sunset Legislation; they require rulemaking.

**Key dates in the proposed rulemaking schedule:**

**Anticipated proposal date:** November 2, 2011  
**Anticipated *Texas Register* publication date:** November 18, 2011  
**Public hearing date (if any):** December 14, 2011  
**Public comment period:** November 18 to December 19, 2011  
**Anticipated adoption date:** March 28, 2012

**Agency contacts:**

Jonathan Walling, Rule Project Manager, 239-2295, Remediation Division  
Cullen McMorrow, Staff Attorney, 239-0607, Litigation Division  
Charlotte Horn, Texas Register Coordinator, 239-0779, General Law Division

**Attachments**

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Susana M. Hildebrand, P.E.  
Anne Idsal  
Curtis Seaton  
Ashley Morgan  
Office of General Counsel  
Jonathan Walling  
Cullen McMorrow  
Charlotte Horn

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §334.5 and §334.84; and proposes new §334.19.

### **Background and Summary of the Factual Basis for the Proposed Rules**

The TCEQ Sunset legislation, House Bill (HB) 2694, was adopted during the 82nd Legislature, 2011, and signed by the Governor on June 17, 2011. Included in the legislation were statutory changes addressing petroleum storage tank (PST) regulation. This rulemaking is required to address several of the statutory changes: underground storage tank (UST) delivery prohibition; State Lead tank removal authorization; and the setting of the PST delivery fee.

### **Section by Section Discussion**

#### *§334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems*

The commission proposes to amend §334.5(b). The term, "delivery prohibition" refers to the prohibition of persons making deliveries of fuel or other regulated substances into USTs that have not been issued a delivery certificate. A delivery certificate is issued when a tank owner or operator submits a registration and self-certification form to the TCEQ attesting to compliance with administrative and technical requirements for their tanks. Rulemaking on this issue is required to bring Texas into compliance with the federal Energy Policy Act of 2005 (Pub.L. 109-58, August 8, 2005, 119 Stat. 294,

codified at 42 United States Code, §15801) (Energy Act). The Energy Act states:  
"Beginning 2 years after the date of enactment of this section, it shall be unlawful to deliver to, deposit into, or accept a regulated substance into an underground storage tank at a facility which has been identified by the Administrator or a State implementing agency to be ineligible for such delivery, deposit, or acceptance." Since Texas has a federally approved state PST program, it is required to implement delivery prohibition. Assessment of administrative penalties against persons for unlawful deliveries is expected to deter fuel deliveries to out-of-compliance PST facilities.

Delivery prohibition, also referred to as common carrier liability, is not new for Texas, which began January 1, 1990. Although common carrier liability was removed from statute with Texas Senate Bill 485 (79th Legislature, 2005) and from rules on June 2, 2006 (see 31 TexReg 4529), the recent TCEQ Sunset legislation effectively reinstated it. However, the TCEQ Sunset legislation did not replace language removed by Senate Bill 485 in 2005 in Texas Water Code (TWC), §7.156, relating to criminal liability, which had made unauthorized delivery a Class A misdemeanor. Therefore, this proposal reinstates administrative liability for common carriers and does not address criminal or misdemeanor liability.

Although the proposed changes to §334.5 regarding delivery prohibition deletes the term, "owner or operator" and inserts the term, "common carrier " the substantive effect

of this proposed change is not to remove owner/operator liability because existing §334.8(c)(5)(A) states that the owner or operator must make available a valid delivery certificate to a common carrier before delivery of a regulated substance may be accepted. Thus, within Subchapter A, §334.5, actions or obligations of a common carrier with regard to making deliveries are addressed, while §334.8 continues to address owners' and operators' obligations with regard to delivery certificates and acceptance of deliveries. Both aspects of delivery prohibition (delivery and acceptance) are required under the Energy Act.

*§334.19, Fee on Delivery of Petroleum Product*

The commission proposes new §334.19, relating to the setting of the PST delivery fee. Revenue from this fee is deposited to the Petroleum Storage Tank Remediation (PSTR) Account 655, described in TWC, §26.3574. Under that section, a fee is imposed on the delivery of a petroleum product that has been removed from a bulk facility storage tank for delivery directly into a cargo tank or a barge to be transported to another location for distribution or sale in the state. The fee amounts were set as specific dollar amounts in statute to correspond with cargo tank capacity. For example, the current statutory fees are \$3.75 for each delivery into a cargo tank having a capacity of less than 2,500 gallons; \$7.50 for 2,500 to 5,000 gallons; \$11.75 for 5,000 to 8,000 gallons; \$15.00 for 8,000 to 10,000 gallons; and \$7.50 for each increment of 5,000 gallons delivered into a cargo tank having a capacity of more than 10,000 gallons. These fee amounts were adjusted

by statutory changes in prior legislation.

However, in HB 2694, the TCEQ Sunset legislation amended the statutory fees to caps (i.e., *not more than* \$3.75) and directed the commission by rule to, "set the fee in an amount not to exceed the amount necessary to cover the agency's costs of administering this subchapter, as indicated by the amount appropriated by the legislature from the petroleum storage tank remediation account for that purpose." In the past, the TCEQ was not required to state the PST delivery fee in rule. However, the Texas Comptroller of Public Accounts' (Comptroller's) rules on this subject did state the statutorily-set fee amounts (see 34 TAC §3.151, "Imposition, Collection, and Bonds or Other Security of the Fee"). The TCEQ Sunset legislation directed the TCEQ to set the amount of the fee, with the Comptroller continuing to collect it.

Since the statute requires the TCEQ to set the fees in an amount not to exceed the amount necessary to cover costs of administering the program, the TCEQ must adjust the fee rate on an ongoing basis, as appropriate, to comply with this statutory requirement. Therefore, in this rulemaking, the TCEQ is proposing to set the fee at an amount to secure sufficient revenue to support the current appropriations and other fund obligations, while allowing for the fee to be adjusted based on relevant factors such as anticipated future costs, appropriations, and fund obligations. To account for the expedited timeframe necessary for future fee adjustments within the statutory cap and based on appropriations, the proposed rules would allow the fee to be adjusted in future

years without initiating rulemaking by the TCEQ. Rather, the proposed rule would allow for a process including but not limited to notification in the *Texas Register* with receipt of public comment. In this manner, the Comptroller would be able to rely on an official statement by the TCEQ of the fee amount necessary to achieve the required revenue based on the legislature's appropriation. The TCEQ solicits specific comment on the amount of the fee, and in particular on the proposal reflected in the rule that the agency would adjust the fee as necessary to comply with the statutory requirement through notification in the *Texas Register* and not through a full rulemaking process.

*§334.84, Corrective Action by the Agency*

The commission proposes to amend §334.84, relating to State Lead authorization for removal of UST systems at facilities which meet certain criteria, including a determination of financial inability of the tank owner or operator to remove the tank and the assessment of the potential risk of contamination from the site. This change is being made to implement HB 2694, §4.17 and §4.18. The statutory change to TWC, §26.351 was intended to clarify that section of the statute. Under that section, the commission was clearly authorized to undertake corrective action "in response to a release or a threatened release" under certain conditions. The conditions were: if the owner or operator "is unwilling," "cannot be found," "is unable" or "more expeditious corrective action is necessary." However, the term "threatened release," was not defined. In addition, TWC, §26.351(a), the subsection defining corrective action to

include tank removal, referred only to corrective action being done "in response to a release." This subsection did not mention "threatened release." One interpretation was that the TCEQ State Lead program was authorized to remove tanks only as part of corrective action where a release had already been confirmed (by another party). However, additional ambiguity existed since the statute already defined, "risk-based corrective action" in TWC, §26.342(15) as including "*site assessment* or site remediation (emphasis added)." Thus, it was questionable whether "corrective action" by State Lead could include "assessment" to determine whether tanks had leaked. The TCEQ Sunset legislation clarified the authorization for the TCEQ to undertake corrective action to remove an underground or aboveground storage tank.

In accordance with the legislation, rules will authorize tank system removal when the tank: 1) is not in compliance with the requirements of this chapter; 2) is temporarily out of service or out of operation; 3) presents a contamination risk; and 4) is owned or operated by a person who is financially unable to remove the tank. The proposed rules describe the factors for determining financial inability and for the assessment of the potential risk of contamination from the site. Also, the term, "out of service" in the statute is being clarified in the rule as referring to "temporarily out of service as described in 30 TAC §334.54(a) or out of operation as defined in 30 TAC §334.2(71)." This language is intended to avoid confusion because the phrase "out of service" is not defined; however, commission rules already have several defined terms relating to tank

status, such as "in operation," "in service," "out of operation," "temporary removal from service," and "permanent removal from service."

**Fiscal Note: Costs to State and Local Government**

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency as a result of the administration or enforcement of the proposed rules. The proposed rules implement certain provisions of HB 2694 including the reauthorization of the PST Delivery Fee, which was scheduled to expire August 31, 2011. Other state agencies and units of local government that own or operate PSTs are expected to pay lower PST delivery fees than in previous years as a result of the proposed rules.

This rulemaking would implement HB 2694, §§4.16 - 4.19, 82nd Legislature, by amending Chapter 334. The changes would reinstate common carrier liability; allow the removal of underground or aboveground storage tanks under certain circumstances; set the PST delivery fee; and allow for a process to revise the fee as needed. The proposed rules concerning common carrier liability are required to comply with the federal Energy Policy Act of 2005, and they prohibit the delivery of regulated substances to out of compliance PST facilities.

*PST Delivery Fee*

The PST delivery fee had been set to expire on August 31, 2011. HB 2694 reauthorized the collection of the fee in Account 655 - Petroleum Storage Tank Remediation, and required the agency to set the rates in rule so that revenue collected covers the cost of administering the program. Rates under agency rule could not exceed the maximum rates found in TWC, §23.3574. PST delivery fee rates will continue to correspond to cargo tank capacity as was done in the past, but the rates will be set to only allow the agency to recoup the cost of administering the program, including fund obligations, as well as, the Comptroller's cost of collection. Revenue will be collected by the Comptroller. The rates charged under the proposed rules are expected to be approximately 27% less for the next five years than current rates.

As a result of the proposed rate structure, agency revenue in Account 655 is estimated to be \$28.3 million in Fiscal Year 2012, \$22.4 million in Fiscal Year 2013, \$22.7 million in Fiscal Year 2014, and \$23.1 million in Fiscal Year 2015. Revenue collected under the proposed rules will be less than would have been collected under the previous rate structure. However, since the proposed rules continue the collection of the PST delivery fee, the agency will be able to continue to administer the PST program. In addition, the agency will be allowed to remove non-compliant USTs through the State Lead program since the proposed rules expand the scope of activity for which the PST delivery fee can be used.

### Administrative Penalties

The proposed rules reinstate common carrier liability and authorize the agency to assess administrative penalties for violations if regulated substances are delivered to out of compliance PST facilities. Federal regulations require the agency to prohibit these types of deliveries. Penalties for violations are set in the agency's penalty policy, and the amount of a penalty depends on the type of violation.

### Impact on Other State Agencies and Units of Local Government

The agency estimates that there are 1,200 storage tanks owned or operated by other state agencies and 4,800 owned or operated by units of local government. USTs owned by governmental entities would include those used in operating and maintaining vehicle fleets. Under the proposed rules, these governmental entities will continue to pay the PST delivery fee. However, the rates of the delivery fee set in the proposed rules are an estimated 27% lower than the fees established in prior years. The exact amount of reduction in the PST delivery fee for each governmental entity will depend on the cargo tank capacity of the USTs owned or operated. Cumulatively, state agencies are expected to pay \$500,000 less per year under the proposed rate structure, and the statewide reduction in PST delivery fee revenue for units of local government is expected to be \$2 million less once the proposed rates are in effect.

### **Public Benefits and Costs**

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be continued protection of the environment and public health and safety through continued removal of non-compliant USTs and prevention of releases of regulated substances to the environment since owners and operators of PSTs will be required to comply with technical standards in order to receive fuel deliveries.

The proposed rules are not expected to have a fiscal impact on most individuals, but individuals that own or operate PSTs should expect to experience the same fiscal impacts as those experienced by large and small businesses.

The agency estimates that there could be as many as 9,900 USTs owned or operated by large businesses. These large businesses may be affected by the proposed rules to the extent that the PST delivery fee is paid by them. However, the PST delivery fee will be assessed at rates that are approximately 27% lower than rates charged in prior years.

The proposed PST delivery fee imposed on large businesses will depend on cargo tank capacity. Statewide rates for large businesses are expected to be \$4 million less per year once the proposed rates are in effect.

The proposed rules will also benefit owners or operators of non-compliant USTs who are

financially unable to remove them. The proposed rules will allow the PST delivery fee revenues, as appropriated, to be used to remove USTs through the State Lead program if non-compliant owners are financially unable to remove these USTs and there is a risk of contamination.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses under the proposed rules. Approximately 2,030 storage tanks are thought to be owned by small or micro-businesses. Small businesses will continue to pay the PST delivery fee under the proposed rules, but statewide, small businesses are expected to pay \$900,000 less per year than they paid in previous years once the proposed rates are in effect.

### **Small Business Regulatory Flexibility Analysis**

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to protect the environment, comply with federal regulations, and implement state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

### **Local Employment Impact Statement**

The commission has reviewed this proposed rulemaking and determined that a local

employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule intended 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.

Regarding the first part of that definition, the specific intent of this rulemaking is to "protect the environment or reduce risks to human health from environmental exposure": 1) by ensuring that unauthorized USTs (i.e., tanks which have not been issued a delivery certificate by the TCEQ based on a self-certification of compliance with administrative and technical tank rules) do not receive deliveries of regulated substances by reinstating liability of persons who make deliveries to such tanks; 2) by implementing the petroleum products delivery fee which funds the PSTR account, pursuant to TWC,

§26.3573 and §26.3574, to support the agency's PST regulatory program, whose purpose is to both prevent and remediate releases from USTs into the environment; and 3) by clarifying the agency's authority to address existing releases or prevent future releases by removing out-of service USTs where there is a contamination risk and the tanks are owned or operated by a person who is financially unable.

However, the second part of the definition of a "major environmental rule" is not met: the proposed rules would 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 term, "material" means "having real importance or great consequence" in contrast to incidental or insignificant impact.

With regard to delivery prohibition, the proposed rules do not have an adverse effect, as described, for the reason that no additional cost is imposed on common carriers when they ascertain whether a PST facility has a valid, current delivery certificate. They may view paper copies of the delivery certificate or view the agency's Web site to determine whether a site has a delivery certificate. PST facility owners and operators are already required to ensure that a delivery certificate is made available for the common carrier to view. Thus, there are no costs associated with common carrier compliance with delivery prohibition.

With regard to the setting of the petroleum product delivery fee, there are no adverse effects as described above for the reason that the amount of the fee is being reduced. This reduction will likely benefit the economy, productivity, competition, and jobs, without adversely affecting the environment or public health, since the fee is being continued at a rate sufficient to meet the central PST Program functions of preventing and addressing releases. Under language in the TCEQ Sunset legislation, TWC, §26.3574 (b-1) states that the commission by rule shall set the amount of the fee in an amount not to exceed the amount necessary to cover the agency's costs of administering this subchapter, as indicated by the amount appropriated by the legislature from the PST remediation account for that purpose. Because the legislative intent is that the fee no longer brings in more revenue than is needed to support appropriations and fund obligations, economic savings or benefits will be seen by the payers of the fee, and possibly indirectly by other consumers if savings are passed on.

Lastly, regarding the clarifying of the TCEQ's authority to remove out-of-service USTs when there is a contamination risk and an owner/operator is financially unable, there are no adverse impacts on 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 TCEQ Sunset legislation added new subsection TWC, §26.351 (c-1), which clarified that the commission may undertake corrective action to remove an underground or aboveground storage tank that: 1) is not in compliance with the

requirements of this chapter; 2) is out of service; 3) presents a contamination risk; and 4) is owned or operated by a person who is financially unable to remove the tank.

Because funding for this authority comes from the appropriation from the PSTR account, no additional or different funds will be required above existing appropriations. Therefore, this aspect of the rule will not cause a material adverse effect on 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. Rather, the removal of non-compliant tanks which pose a risk has a direct beneficial effect on the environment and public health and safety, while indirectly having a possible benefit on the economy by returning properties with potential environmental hazards to productive use.

Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: " 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) 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; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law." None of these four elements

is applicable; the proposed rule package does not exceed any federal or state requirements, nor exceed delegation agreements or contracts. The proposed rules are made to implement specific statutory amendments made during the recent TCEQ Sunset legislation and are not proposed solely under the general powers of the agency.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated the proposed rules and performed an assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007.

The specific purpose of the proposed rules is to implement statutory changes relating to PSTs made with the recent TCEQ Sunset legislation. More specifically, the rule proposal has the purposes of: 1) ensuring that unauthorized USTs (i.e., tanks which have not been issued a delivery certificate by the TCEQ based on a self-certification of compliance with administrative and technical tank rules) do not receive deliveries of regulated substances by reinstating liability of persons who make deliveries to such tanks; 2) implementing the petroleum products delivery fee which funds the PSTR account, pursuant to TWC, §26.3573 and §26.3574, and which is used to support the agency's PST regulatory program, whose purpose is to both prevent and remediate releases from USTs into the

environment; and 3) clarifying the agency's authority to address existing releases or prevent future releases by removing out of service USTs where there is a contamination risk and the tanks are owned or operated by a person who is financially unable. The proposed rules would substantially advance these stated purposes by amending and adding to rule sections to: 1) allow for administrative penalties against persons who deliver to unauthorized tanks; 2) continue the petroleum products delivery fee at appropriate amounts; and 3) allow the agency to remove USTs under the appropriate circumstances.

The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because the proposed rules in total are a government action which: is taken in response to a real and substantial threat to public health and safety; is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose.

Regarding the first criterion, the rules are taken in response to a real and substantial threat to public health and safety. First, the storage of regulated substances in USTs poses a potential threat to the environment that must be regulated, and the regulatory changes being proposed in this rulemaking address that potential threat by prohibiting persons from delivering to unauthorized tanks. Second, implementing the statutory

continuation of the petroleum products delivery fee at appropriate amounts is necessary to support the regulatory program that remediates and prevents UST contamination.

Third, the rules implement the statutory authority for the agency to remove USTs when a threat is being posed by a non-compliant, out of service tank whose owner or operator is financially unable.

Regarding the second criterion, the proposed rules are designed to significantly advance the health and safety purpose by creating disincentives for persons making deliveries to unauthorized tanks; by continuing to fund a program which both prevents and cleans up releases; and by allowing for direct action by the commission to remove USTs under certain critical circumstances. Regarding the third criterion, the proposed rules do not impose a greater burden than is necessary to achieve the health and safety purpose because: 1) there is no significant burden to common carriers to check delivery certificate status before making deliveries; 2) there is no burden associated with the measured and carefully tailored reduction of the petroleum products delivery fee; and 3) there is no burden associated with the TCEQ taking direct action to remove tanks under circumstances when private parties are financially unable to do so. In summary, this action is exempt under Texas Government Code, §2007.003(b)(13).

Nevertheless, the commission further performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The

proposed rules implement statutory changes made by the TCEQ Sunset legislation by reinstating the PST delivery prohibition, extending the petroleum products delivery fee, and clarifying the agency's authority to remove non-compliant and out of service USTs which pose a contamination risk and are owned or operated by persons who are financially unable. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed rules. There are no burdens imposed on private real property from these proposed rules and the benefits to society of implementing the proposed rules are: 1) the effect of decreasing the likelihood of regulated substances being delivered to USTs which may cause releases; 2) the effect of continuing the fee which funds the PST program whose goal is to prevent and remediate releases from tank systems; and 3) the effect of allowing certain USTs which pose a threat to be removed by the commission. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

### **Consistency with the Coastal Management Program**

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the

Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include two of the goals listed in 31 TAC §505.12: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs. Because this rulemaking: a) prevents deliveries to unauthorized tanks; b) continues the fee to fund the PST program to prevent and remediate releases from PSTs and; c) allows direct action by the commission to remove USTs which pose a risk in appropriate circumstances, it will therefore aid in ensuring that releases to the environment continue to be addressed. This rulemaking is consistent with the goals of protecting and preserving coastal environments.

None of the CMP policies stated in 31 TAC §501.13 are relevant to, nor are they adversely affected by, the proposed rules for the reason that there are no substantive changes relating to provision of information, monitoring of compliance, or variances.

Additionally, none of the specific policies described in 31 TAC §§501.16 - 501.34 apply to

this rulemaking.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, and because these rules do not create or have a direct or significant adverse effect on any CNRAs.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on Wednesday, December 14, 2011 at 9:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are

planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-038-334-WS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Jonathan Walling, Petroleum Storage Tank and Dry Cleaner Remediation Program Section, (512) 239-2295.

**SUBCHAPTER A: GENERAL PROVISIONS**  
**§334.5, §334.19**

**Statutory Authority**

The amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks; TWC, §26.3467(d), which requires the commission to make rules relating to the duty to ensure certification of a tank before delivery; and TWC, §26.3574(b-1), which requires the commission to set the amount of the petroleum products delivery fee.

The proposed amendments implement changes in laws of this state made during the 82nd Legislature, 2011, with the passage of the TCEQ Sunset legislation, House Bill 2694, in particular changes made to TWC, §26.3467 and §26.3574.

**§334.5. General Prohibitions for Underground Storage Tanks (USTs) and UST Systems.**

(a) Design prohibitions. On or after September 1, 1987, no person may install or have installed an underground storage tank (UST) system for the purpose of storing or otherwise containing regulated substances unless such UST system, whether of single-wall or double-wall construction, meets the following standards.

(1) The UST system must prevent releases due to corrosion or structural failure for the operational life of the UST system.

(2) All components of the UST system must be either cathodically protected against corrosion, constructed of noncorrodible material, constructed of a steel material which has been clad with a noncorrodible material, or must be otherwise designed and constructed in a manner that prevents the release of any stored substances.

(3) The UST system must be constructed of, or lined with, a material that is compatible with the stored substance.

(b) Delivery prohibitions.

(1) Concerning UST systems which the tank owner or operator must self-certify under §334.8(c) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems), the following applies.

(A) Except as provided under subparagraphs (B) and (C) of this paragraph, no common carrier (as defined in §334.2 of this title (relating to Definitions)) shall deposit any regulated substance into [owner or operator of] a UST system regulated under this chapter [shall allow the deposit of any regulated substance into that UST system] unless that owner or operator has a valid, current delivery certificate issued by the agency covering that UST system.

(B) For new or replacement UST systems, only during the initial period ending 90 days after the date that a regulated substance is first deposited into the new or replacement system(s), a common carrier may accept, as adequate to meet the requirements of subparagraph (A) of this paragraph documentation that the owner or operator has a "temporary delivery authorization," as defined in §334.8(c)(5)(D) of this title, issued by the agency for the facility at which the new or replacement UST system(s) exist. [will be considered adequate to meet the requirements of subparagraph (A) of this paragraph.]

(C) It is an affirmative defense to the imposition of an administrative penalty for a violation of subparagraph (A) of this paragraph that the person delivering a regulated substance into an UST relied on:

(i) a valid paper delivery certificate presented by the owner or operator of the UST or displayed at the facility associated with the UST;

(ii) a temporary delivery authorization presented by the owner or operator of the UST or displayed at the facility associated with the UST; or

(iii) registration and self-certification information for the UST obtained from the commission's Internet Web site not more than 30 days before the date of delivery.

(2) Concerning UST systems which are not required to be self-certified compliant at a given time under §334.8(c) of this title, but which are required to be registered under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems), the following applies.

(A) Except as provided under subparagraph (B) of this paragraph, no [owner or operator of a] person (as defined in §334.2 of this title) shall deposit any

regulated substance into a UST system regulated under this chapter [shall allow the deposit of any regulated substance into that UST system] unless that owner or operator has a valid, current registration certificate issued by the agency covering that UST system.

(B) The prohibition referenced in subparagraph (A) of this paragraph is not applicable to deliveries into a new or replacement UST system occurring within 30 days of the first deposit of regulated substances.

(3) Concerning both types of delivery prohibition referenced in this subsection, the following documentation is considered adequate:

(A) the original valid, current document issued by the agency; or

(B) a legible copy of the valid, current document issued by the agency.

**§334.19. Fee on Delivery of Petroleum Product.**

(a) A fee is imposed on the delivery of a petroleum product on withdrawal from bulk of that product as provided by this subsection and pursuant to Texas Water Code,

§26.3573. "Withdrawal from bulk means" the removal of a petroleum product from a bulk facility storage tank for delivery directly into a cargo tank or a barge to be transported to another location other than another bulk facility for distribution or sale in this state. Each operator of a bulk facility on withdrawal from bulk of a petroleum product shall collect from the person who orders the withdrawal a fee in an amount determined as follows, subject to future adjustments made under subsection (b) of this section:

(1) \$2.75 for each delivery made after June 30, 2012 into a cargo tank having a capacity of less than 2,500 gallons.

(2) \$5.50 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 2,500 gallons or more but less than 5,000 gallons.

(3) \$8.65 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 5,000 gallons or more but less than 8,000 gallons.

(4) \$11.00 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 8,000 gallons or more but less than 10,000 gallons and;

(5) \$5.50 for each increment of 5,000 gallons or any part thereof delivered after June 30, 2012 into a cargo tank having a capacity of 10,000 gallons or more.

(b) TCEQ may adjust the fee rates in subsection (a) of this section through an appropriate notification process, such as but not limited to *Texas Register* publication with public comment, based on the agency's cost of administering this chapter, but not to exceed the maximum rates set by Texas Water Code, §26.3574. The projected rates will account for the biennial appropriations to the agency from the Petroleum Storage Tank Remediation Account Number 655, as well as fund obligations for Account Number 655, with projected revenue from the fee based on such factors as estimated fuel sales, population growth, consumer price index, and gas production.

**SUBCHAPTER D: RELEASE REPORTING AND CORRECTIVE ACTION**  
**§334.84**

**Statutory Authority**

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.352, which directs the commission to adopt rules establishing the requirements for maintaining evidence of financial responsibility for taking corrective action in response to a release from a UST; and TWC, §26.351(c-2), which requires the commission to adopt rules to implement rules regarding the commission's undertaking of corrective action to remove a UST.

The proposed amendment implements changes in laws of this state made during the 82nd Legislature, 2011, with the passage of the Sunset Legislation in House Bill 2694, in

particular changes made to TWC, §26.351 and §26.3573.

**§334.84. Corrective Action by the Agency.**

(a) The agency may undertake corrective action in response to a release or a threatened release if:

(1) the owner or operator of the aboveground storage tank (AST) or underground storage tank (UST) is unwilling to take appropriate corrective action;

(2) the owner or operator of the AST or UST cannot be found;

(3) the owner or operator of the AST or UST, in the opinion of the agency, is unable to take the corrective action necessary to protect the public health and safety and/or the environment;

(4) the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571; has been granted such extension by the executive director; has applied to the agency in writing on an agency application form not later than July 1, 2011, to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program administered by the commission; and has

agreed on the application form to allow access to that site to state personnel and state contractors. Once the executive director places such a site in the state lead program, the eligible owner or operator of that site is not liable to the commission for any corrective action costs incurred by the state lead program with regard to the site, unless the statutorily allowable maximum cost per site is exceeded; or

(5) notwithstanding any other provision of this subchapter, the executive director determines that more expeditious corrective action than is provided by this subchapter is necessary to protect the public health and safety or the environment.

(b) The agency may retain agents to perform corrective action it considers necessary to carry out the provisions of this chapter. The agents shall operate under the direction of the executive director.

(c) The agency shall generate a written response either accepting or denying the application of an eligible owner or operator, who has applied to the agency in accordance with the requirements of subsection (a)(4) of this section to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program, within 30 calendar days, as practicable, of the date that application is received by the agency's state lead program.

(d) The commission may undertake corrective action to remove a UST or AST that:

(1) is not in compliance with the requirements of this chapter;

(2) is temporarily out of service as described in §334.54(a) of this title (relating to Temporary Removal from Service) or out of operation as defined in §334.2(71) of this title (relating to Definitions);

(3) presents a contamination risk. A determination of the potential risk of contamination from a site may be made by the executive director based on such factors including, but not limited to, estimated age of the tank system; status as secured or non-secured; presence, absence, whether known or unknown, of regulated substances in the tank system; length of time the tank system has been out of service; location, including proximity to sensitive receptors; and any other relevant information regarding the UST system; and

(4) is owned or operated by a person who is financially unable to remove the tank. A determination of financial inability under this section may be made by the executive director based on such factors including, but not limited to, a tank owner or operator's financial statements; federal or state income tax returns; gross and

net income for each of the three preceding years; net worth for each of the three preceding years; current cash flow position; long-term liabilities; the liquidity of assets; and any other data requested by the executive director, which in the opinion of the executive director is relevant to a determination of the ability of the tank owner or operator to fund proper removal of UST systems from service pursuant to §334.55 of this title (relating to Permanent Removal from Service).

1 waste, the commission shall consider the compliance history of the  
2 applicant and its operator under the method for using [~~evaluating~~]  
3 compliance history developed by the commission under Section 5.754.  
4 In considering an applicant's compliance history under this  
5 subsection, the commission shall consider as evidence of compliance  
6 information regarding the applicant's implementation of an  
7 environmental management system at the facility for which the  
8 permit, permit amendment, or permit renewal is sought. In this  
9 section, "environmental management system" has the meaning  
10 assigned by Section 5.127.

11 SECTION 4.15. Section 26.040(h), Water Code, is amended to  
12 read as follows:

13 (h) Notwithstanding other provisions of this chapter, the  
14 commission, after hearing, shall deny or suspend a discharger's  
15 authority to discharge under a general permit if the commission  
16 determines that the discharger's compliance history is classified  
17 as unsatisfactory according to commission standards [~~in the lowest~~  
18 ~~classification~~] under Sections 5.753 and 5.754 and rules adopted  
19 and procedures developed under those sections. A hearing under this  
20 subsection is not subject to Chapter 2001, Government Code.

21 SECTION 4.16. Section 26.3467, Water Code, is amended by  
22 adding Subsections (d) and (e) to read as follows:

23 (d) A person may not deliver any regulated substance into an  
24 underground storage tank regulated under this chapter unless the  
25 underground storage tank has been issued a valid, current  
26 underground storage tank registration and certificate of  
27 compliance under Section 26.346. The commission may impose an

1 administrative penalty against a person who violates this  
2 subsection. The commission shall adopt rules as necessary to  
3 enforce this subsection.

4 (e) It is an affirmative defense to the imposition of an  
5 administrative penalty for a violation of Subsection (d) that the  
6 person delivering a regulated substance into an underground storage  
7 tank relied on:

8 (1) a valid paper delivery certificate presented by  
9 the owner or operator of the underground storage tank or displayed  
10 at the facility associated with the underground storage tank;

11 (2) a temporary delivery authorization presented by  
12 the owner or operator of the underground storage tank or displayed  
13 at the facility associated with the underground storage tank; or

14 (3) registration and self-certification information  
15 for the underground storage tank obtained from the commission's  
16 Internet website not more than 30 days before the date of delivery.

17 **SECTION 4.17. Section 26.351, Water Code, is amended by**  
18 **adding Subsections (c-1) and (c-2) to read as follows:**

19 (c-1) The commission may undertake corrective action to  
20 remove an underground or aboveground storage tank that:

21 (1) is not in compliance with the requirements of this  
22 chapter;

23 (2) is out of service;

24 (3) presents a contamination risk; and

25 (4) is owned or operated by a person who is financially  
26 unable to remove the tank.

27 (c-2) The commission shall adopt rules to implement

1 Subsection (c-1), including rules regarding:

2 (1) the determination of the financial ability of the  
3 tank owner or operator to remove the tank; and

4 (2) the assessment of the potential risk of  
5 contamination from the site.

6 SECTION 4.18. Section 26.3573(d), Water Code, is amended to  
7 read as follows:

8 (d) The commission may use the money in the petroleum  
9 storage tank remediation account to pay:

10 (1) necessary expenses associated with the  
11 administration of the petroleum storage tank remediation account  
12 and the groundwater protection cleanup program;

13 (2) expenses associated with investigation, cleanup,  
14 or corrective action measures performed in response to a release or  
15 threatened release from a petroleum storage tank, whether those  
16 expenses are incurred by the commission or pursuant to a contract  
17 between a contractor and an eligible owner or operator as  
18 authorized by this subchapter;

19 (3) subject to the conditions of Subsection (f),  
20 expenses associated with investigation, cleanup, or corrective  
21 action measures performed in response to a release or threatened  
22 release of hydraulic fluid or spent oil from hydraulic lift systems  
23 or tanks located at a vehicle service and fueling facility and used  
24 as part of the operations of that facility; ~~and~~

25 (4) expenses associated with assuring compliance with  
26 the commission's applicable underground or aboveground storage  
27 tank administrative and technical requirements, including

1 technical assistance and support, inspections, enforcement, and  
2 the provision of matching funds for grants; and

3 (5) expenses associated with investigation, cleanup,  
4 or corrective action measures performed under Section 26.351(c-1).

5 SECTION 4.19. Section 26.3574, Water Code, is amended by  
6 amending Subsection (b) and adding Subsection (b-1) to read as  
7 follows:

8 (b) A fee is imposed on the delivery of a petroleum product  
9 on withdrawal from bulk of that product as provided by this  
10 subsection. Each operator of a bulk facility on withdrawal from  
11 bulk of a petroleum product shall collect from the person who orders  
12 the withdrawal a fee in an amount determined as follows:

13 (1) not more than \$3.75 for each delivery into a cargo  
14 tank having a capacity of less than 2,500 gallons [~~for the state~~  
15 ~~fiscal year beginning September 1, 2007, through the state fiscal~~  
16 ~~year ending August 31, 2011]~~;

17 (2) not more than \$7.50 for each delivery into a cargo  
18 tank having a capacity of 2,500 gallons or more but less than 5,000  
19 gallons [~~for the state fiscal year beginning September 1, 2007,~~  
20 ~~through the state fiscal year ending August 31, 2011]~~;

21 (3) not more than \$11.75 for each delivery into a cargo  
22 tank having a capacity of 5,000 gallons or more but less than 8,000  
23 gallons [~~for the state fiscal year beginning September 1, 2007,~~  
24 ~~through the state fiscal year ending August 31, 2011]~~;

25 (4) not more than \$15.00 for each delivery into a cargo  
26 tank having a capacity of 8,000 gallons or more but less than 10,000  
27 gallons [~~for the state fiscal year beginning September 1, 2007,~~

1 ~~through the state fiscal year ending August 31, 2011~~]; and

2 (5) not more than \$7.50 for each increment of 5,000  
3 gallons or any part thereof delivered into a cargo tank having a  
4 capacity of 10,000 gallons or more [~~for the state fiscal year~~  
5 ~~beginning September 1, 2007, through the state fiscal year ending~~  
6 ~~August 31, 2011~~].

7 (b-1) The commission by rule shall set the amount of the fee  
8 in Subsection (b) in an amount not to exceed the amount necessary to  
9 cover the agency's costs of administering this subchapter, as  
10 indicated by the amount appropriated by the legislature from the  
11 petroleum storage tank remediation account for that purpose.

12 SECTION 4.20. Section 27.025(g), Water Code, is amended to  
13 read as follows:

14 (g) Notwithstanding the other provisions of this chapter,  
15 the commission, after hearing, shall deny or suspend authorization  
16 for the use of an injection well under a general permit if the  
17 commission determines that the owner's compliance history is  
18 classified as unsatisfactory according to commission standards [~~in~~  
19 ~~the lowest classification~~] under Sections 5.753 and 5.754 and rules  
20 adopted and procedures developed under those sections. A hearing  
21 under this subsection is not subject to the requirements relating  
22 to a contested case hearing under Chapter 2001, Government Code.

23 SECTION 4.21. Section 27.051(d), Water Code, is amended to  
24 read as follows:

25 (d) The commission, in determining if the use or  
26 installation of an injection well is in the public interest under  
27 Subsection (a)(1), shall consider, but shall not be limited to the

1 consideration of:

2 (1) compliance history of the applicant and related  
3 entities under the method for using [~~evaluating~~] compliance history  
4 developed by the commission under Section 5.754 and in accordance  
5 with the provisions of Subsection (e);

6 (2) whether there is a practical, economic, and  
7 feasible alternative to an injection well reasonably available; and

8 (3) if the injection well will be used for the disposal  
9 of hazardous waste, whether the applicant will maintain sufficient  
10 public liability insurance for bodily injury and property damage to  
11 third parties that is caused by sudden and non-sudden accidents or  
12 will otherwise demonstrate financial responsibility in a manner  
13 adopted by the commission in lieu of public liability insurance. A  
14 liability insurance policy which satisfies the policy limits  
15 required by the hazardous waste management regulations of the  
16 commission for the applicant's proposed pre-injection facilities  
17 shall be deemed "sufficient" under this subdivision if the policy:

18 (A) covers the injection well; and

19 (B) is issued by a company that is authorized to  
20 do business and to write that kind of insurance in this state and is  
21 solvent and not currently under supervision or in conservatorship  
22 or receivership in this state or any other state.

23 SECTION 4.22. Section 32.101(c), Water Code, is amended to  
24 read as follows:

25 (c) The commission, in determining if the use or  
26 installation of a subsurface area drip dispersal system is in the  
27 public interest under Subsection (a)(1), shall consider:

1           (1) compliance history of the applicant and related  
2 entities under the method for using ~~[evaluating]~~ compliance history  
3 developed by the commission under Section 5.754 and in accordance  
4 with the provisions of Subsection (d) of this section;

5           (2) whether there is a practical, economic, and  
6 feasible alternative to a subsurface area drip dispersal system  
7 reasonably available; and

8           (3) any other factor the commission considers  
9 relevant.

10          SECTION 4.23. Section 49.198(a), Water Code, is amended to  
11 read as follows:

12          (a) A district may elect to file annual financial reports  
13 with the executive director in lieu of the district's compliance  
14 with Section 49.191 provided:

15           (1) the district had no bonds or other long-term (more  
16 than one year) liabilities outstanding during the fiscal period;

17           (2) the district did not have gross receipts from  
18 operations, loans, taxes, or contributions in excess of \$250,000  
19 [~~\$100,000~~] during the fiscal period; and

20           (3) the district's cash and temporary investments were  
21 not in excess of \$100,000 at any time during the fiscal period.

22          SECTION 4.24. Sections 361.089(a), (e), and (f), Health and  
23 Safety Code, are amended to read as follows:

24          (a) The commission may, for good cause, deny or amend a  
25 permit it issues or has authority to issue for reasons pertaining to  
26 public health, air or water pollution, or land use, or for having a  
27 compliance history that is classified as unsatisfactory according

1 to commission standards [~~in the lowest classification~~] under  
2 Sections 5.753 and 5.754, Water Code, and rules adopted and  
3 procedures developed under those sections.

4 (e) The commission may deny an original or renewal permit if  
5 it is found, after notice and hearing, that:

6 (1) the applicant or permit holder has a compliance  
7 history that is classified as unsatisfactory according to  
8 commission standards [~~in the lowest classification~~] under Sections  
9 5.753 and 5.754, Water Code, and rules adopted and procedures  
10 developed under those sections;

11 (2) the permit holder or applicant made a false or  
12 misleading statement in connection with an original or renewal  
13 application, either in the formal application or in any other  
14 written instrument relating to the application submitted to the  
15 commission, its officers, or its employees;

16 (3) the permit holder or applicant is indebted to the  
17 state for fees, payment of penalties, or taxes imposed by this title  
18 or by a rule of the commission; or

19 (4) the permit holder or applicant is unable to ensure  
20 that the management of the hazardous waste management facility  
21 conforms or will conform to this title and the rules of the  
22 commission.

23 (f) Before denying a permit under this section, the  
24 commission must find:

25 (1) that the applicant or permit holder has a  
26 compliance history that is classified as unsatisfactory according  
27 to commission standards [~~in the lowest classification~~] under

1 Sections 5.753 and 5.754, Water Code, and rules adopted and  
2 procedures developed under those sections; or

3 (2) that the permit holder or applicant is indebted to  
4 the state for fees, payment of penalties, or taxes imposed by this  
5 title or by a rule of the commission.

6 SECTION 4.25. Section 382.0518(c), Health and Safety Code,  
7 is amended to read as follows:

8 (c) In considering the issuance, amendment, or renewal of a  
9 permit, the commission may consider the applicant's compliance  
10 history in accordance with the method for using [~~evaluating~~]  
11 compliance history developed by the commission under Section 5.754,  
12 Water Code. In considering an applicant's compliance history under  
13 this subsection, the commission shall consider as evidence of  
14 compliance information regarding the applicant's implementation of  
15 an environmental management system at the facility for which the  
16 permit, permit amendment, or permit renewal is sought. In this  
17 subsection, "environmental management system" has the meaning  
18 assigned by Section 5.127, Water Code.

19 SECTION 4.26. Section 382.056(o), Health and Safety Code,  
20 is amended to read as follows:

21 (o) Notwithstanding other provisions of this chapter, the  
22 commission may hold a hearing on a permit amendment, modification,  
23 or renewal if the commission determines that the application  
24 involves a facility for which the applicant's compliance history is  
25 classified as unsatisfactory according to commission standards [~~in~~  
26 ~~the lowest classification~~] under Sections 5.753 and 5.754, Water  
27 Code, and rules adopted and procedures developed under those

1 sections.

2 SECTION 4.27. Subchapter C, Chapter 382, Health and Safety  
3 Code, is amended by adding Section 382.059 to read as follows:

4 Sec. 382.059. HEARING AND DECISION ON PERMIT AMENDMENT  
5 APPLICATION OF CERTAIN ELECTRIC GENERATING FACILITIES. (a) This  
6 section applies to a permit amendment application submitted solely  
7 to allow an electric generating facility to reduce emissions and  
8 comply with a requirement imposed by Section 112 of the federal  
9 Clean Air Act (42 U.S.C. Section 7412) to use applicable maximum  
10 achievable control technology. A permit amendment application  
11 shall include a condition that the applicant is required to  
12 complete the actions needed for compliance by the time allowed  
13 under Section 112 of the federal Clean Air Act (42 U.S.C. Section  
14 7412).

15 (b) The commission shall provide an opportunity for a public  
16 hearing and the submission of public comment on the application in  
17 the manner provided by Section 382.0561.

18 (c) Not later than the 45th day after the date the  
19 application is received, the executive director shall issue a draft  
20 permit.

21 (d) Not later than the 30th day after the date of issuance of  
22 the draft permit under Subsection (c), parties may submit to the  
23 commission any legitimate issues of material fact regarding whether  
24 the choice of technology approved in the draft permit is the maximum  
25 achievable control technology required under Section 112 of the  
26 federal Clean Air Act (42 U.S.C. Section 7412) and may request a  
27 contested case hearing before the commission. If a party requests a

1 contested case hearing under this subsection, the commission shall  
2 conduct a contested case hearing and issue a final order issuing or  
3 denying the permit amendment not later than the 120th day after the  
4 date of issuance of the draft permit under Subsection (c).

5 (e) The commission shall send notice of a decision on an  
6 application for a permit amendment under this section in the manner  
7 provided by Section 382.0562.

8 (f) A person affected by a decision of the commission to  
9 issue or deny a permit amendment may move for rehearing and is  
10 entitled to judicial review under Section 382.032.

11 (g) This section expires on the sixth anniversary of the  
12 date the administrator adopts standards for existing electric  
13 generating facilities under Section 112 of the federal Clean Air  
14 Act (42 U.S.C. Section 7412), unless a stay of the rules is granted.

15 (h) The commission shall adopt rules to implement this  
16 section.

17 SECTION 4.28. Section 401.110(a), Health and Safety Code,  
18 is amended to read as follows:

19 (a) In making a determination whether to grant, deny, amend,  
20 renew, revoke, suspend, or restrict a license or registration, the  
21 commission may consider an applicant's or license holder's  
22 technical competence, financial qualifications, and compliance  
23 history under the method for using [~~evaluation of~~] compliance  
24 history developed by the commission under Section 5.754, Water  
25 Code.

26 SECTION 4.29. Section 401.112(a), Health and Safety Code,  
27 is amended to read as follows:

1           (a) The commission, in making a licensing decision on a  
2 specific license application to process or dispose of low-level  
3 radioactive waste from other persons, shall consider:

4                 (1) site suitability, geological, hydrological, and  
5 meteorological factors, and natural hazards;

6                 (2) compatibility with present uses of land near the  
7 site;

8                 (3) socioeconomic effects on surrounding communities  
9 of operation of the licensed activity and of associated  
10 transportation of low-level radioactive waste;

11                (4) the need for and alternatives to the proposed  
12 activity, including an alternative siting analysis prepared by the  
13 applicant;

14                (5) the applicant's qualifications, including:

15                         (A) financial and technical qualifications and  
16 compliance history under the method for using [~~evaluation of~~]  
17 compliance history developed by the commission under Section 5.754,  
18 Water Code, for an application to the commission; and

19                         (B) the demonstration of financial  
20 qualifications under Section 401.108;

21                (6) background monitoring plans for the proposed site;

22                (7) suitability of facilities associated with the  
23 proposed activities;

24                (8) chemical, radiological, and biological  
25 characteristics of the low-level radioactive waste and waste  
26 classification under Section 401.053;

27                (9) adequate insurance of the applicant to cover

1 potential injury to any property or person, including potential  
2 injury from risks relating to transportation;

3 (10) training programs for the applicant's employees;

4 (11) a monitoring, record-keeping, and reporting  
5 program;

6 (12) spill detection and cleanup plans for the  
7 licensed site and related to associated transportation of low-level  
8 radioactive waste;

9 (13) decommissioning and postclosure care plans;

10 (14) security plans;

11 (15) worker monitoring and protection plans;

12 (16) emergency plans; and

13 (17) a monitoring program for applicants that includes  
14 prelicense and postlicense monitoring of background radioactive  
15 and chemical characteristics of the soils, groundwater, and  
16 vegetation.

17 SECTION 4.30. Not later than the 180th day after the  
18 effective date of this Act, the Texas Commission on Environmental  
19 Quality shall adopt rules to implement Section 382.059, Health and  
20 Safety Code, as added by this article.

21 SECTION 4.31. (a) Not later than September 1, 2012, the  
22 Texas Commission on Environmental Quality by rule shall establish  
23 the method for evaluating compliance history as required by Section  
24 5.753(a), Water Code, as amended by this article. Until the  
25 commission adopts that method, the commission shall continue in  
26 effect its current standard for evaluating compliance history.

27 (b) The changes in law made by Sections 7.052 and 13.4151,

1 Water Code, as amended by this article, apply only to a violation  
2 that occurs on or after the effective date of this Act. For  
3 purposes of this section, a violation occurs before the effective  
4 date of this Act if any element of the violation occurs before that  
5 date. A violation that occurs before the effective date of this Act  
6 is covered by the law in effect on the date the violation occurred,  
7 and the former law is continued in effect for that purpose.

8 (c) The change in law made by Section 26.3467(d), Water  
9 Code, as added by this article, applies only to a delivery of a  
10 regulated substance to an underground storage tank made on or after  
11 the effective date of this Act.

12 (d) The fee applicable to a delivery in Section 26.3574(b),  
13 Water Code, as that subsection existed immediately before the  
14 effective date of this Act, remains in effect until the Texas  
15 Commission on Environmental Quality adopts and implements a fee  
16 applicable to that delivery under Section 26.3574(b-1), Water Code,  
17 as added by this article.

18 SECTION 4.32. Section 49.198(a), Water Code, as amended by  
19 this article, applies to a district that files its annual financial  
20 report on or after the effective date of this Act. A district that  
21 files its annual financial report before the effective date of this  
22 Act is governed by the law in effect on the date the report is filed,  
23 and that law is continued in effect for that purpose.

24 ARTICLE 5. WATER RIGHTS

25 SECTION 5.01. Section 11.002(12), Water Code, is amended to  
26 read as follows:

27 (12) "Agriculture" means any of the following

1 activities:

2 (A) cultivating the soil to produce crops for  
3 human food, animal feed, or planting seed or for the production of  
4 fibers;

5 (B) the practice of floriculture, viticulture,  
6 silviculture, and horticulture, including the cultivation of  
7 plants in containers or nonsoil media, by a nursery grower;

8 (C) raising, feeding, or keeping animals for  
9 breeding purposes or for the production of food or fiber, leather,  
10 pelts, or other tangible products having a commercial value;

11 (D) raising or keeping equine animals;

12 (E) wildlife management; [~~and~~]

13 (F) planting cover crops, including cover crops  
14 cultivated for transplantation, or leaving land idle for the  
15 purpose of participating in any governmental program or normal crop  
16 or livestock rotation procedure; and

17 (G) aquaculture, as defined by Section 134.001,  
18 Agriculture Code.

19 SECTION 5.02. Section 11.031, Water Code, is amended by  
20 adding Subsections (d), (e), and (f) to read as follows:

21 (d) Each person who has a water right issued by the  
22 commission or who impounds, diverts, or otherwise uses state water  
23 shall maintain water use information required under Subsection (a)  
24 on a monthly basis during the months a water rights holder uses  
25 permitted water. The person shall make the information available  
26 to the commission on the commission's request.

27 (e) Except as provided by Subsection (a), the commission may

1 request information maintained under Subsection (d) only during a  
2 drought or other emergency shortage of water or in response to a  
3 complaint.

4 (f) Subsection (e) does not affect the authority of a  
5 watermaster to obtain water use information under other law.

6 SECTION 5.03. Subchapter B, Chapter 11, Water Code, is  
7 amended by adding Section 11.053 to read as follows:

8 Sec. 11.053. EMERGENCY ORDER CONCERNING WATER RIGHTS. (a)  
9 During a period of drought or other emergency shortage of water, as  
10 defined by commission rule, the executive director by order may, in  
11 accordance with the priority of water rights established by Section  
12 11.027:

13 (1) temporarily suspend the right of any person who  
14 holds a water right to use the water; and

15 (2) temporarily adjust the diversions of water by  
16 water rights holders.

17 (b) The executive director in ordering a suspension or  
18 adjustment under this section shall ensure that an action taken:

19 (1) maximizes the beneficial use of water;

20 (2) minimizes the impact on water rights holders;

21 (3) prevents the waste of water;

22 (4) takes into consideration the efforts of the  
23 affected water rights holders to develop and implement the water  
24 conservation plans and drought contingency plans required by this  
25 chapter;

26 (5) to the greatest extent practicable, conforms to  
27 the order of preferences established by Section 11.024; and

1           (6) does not require the release of water that, at the  
2 time the order is issued, is lawfully stored in a reservoir under  
3 water rights associated with that reservoir.

4           (c) The commission shall adopt rules to implement this  
5 section, including rules:

6           (1) defining a drought or other emergency shortage of  
7 water for purposes of this section; and

8           (2) specifying the:

9           (A) conditions under which the executive  
10 director may issue an order under this section;

11           (B) terms of an order issued under this section,  
12 including the maximum duration of a temporary suspension or  
13 adjustment under this section; and

14           (C) procedures for notice of, an opportunity for  
15 a hearing on, and the appeal to the commission of an order issued  
16 under this section.

17           SECTION 5.04. Subchapter D, Chapter 11, Water Code, is  
18 amended by adding Section 11.1273 to read as follows:

19           Sec. 11.1273. ADDITIONAL REQUIREMENT: REVIEW OF AMENDMENTS  
20 TO CERTAIN WATER MANAGEMENT PLANS. (a) This section applies only  
21 to a water management plan consisting of a reservoir operation plan  
22 for the operation of two water supply reservoirs that was  
23 originally required by a court order adjudicating the water rights  
24 for those reservoirs.

25           (b) Not later than the first anniversary of the date the  
26 executive director determines that an application to amend a water  
27 management plan is administratively complete, the executive

1 director shall complete a technical review of the plan.

2 (c) If the executive director submits a written request for  
3 additional information to the applicant, the applicant shall submit  
4 the requested information to the executive director not later than  
5 the 30th day after the date the applicant receives the request or  
6 not later than the deadline agreed to by the executive director and  
7 the applicant, if applicable. The review period required by  
8 Subsection (b) for completing the technical review is tolled until  
9 the date the executive director receives the requested information  
10 from the applicant.

11 (d) The commission shall provide an opportunity for public  
12 comment and a public hearing on the application, consistent with  
13 the process for other water rights applications.

14 (e) If the commission receives a request for a hearing  
15 before the period for submitting public comments and requesting a  
16 hearing expires, the commission shall act on the request for a  
17 hearing and, if the request is denied, act on the application not  
18 later than the 60th day after the date the period expires. If a  
19 request for a hearing is not submitted before the period expires,  
20 the executive director may act on the application.

21 SECTION 5.05. Section 11.326, Water Code, is amended by  
22 adding Subsections (g) and (h) to read as follows:

23 (g) For a water basin in which a watermaster is not  
24 appointed, the executive director shall:

25 (1) evaluate the water basin at least once every five  
26 years to determine whether a watermaster should be appointed; and

27 (2) report the findings and make recommendations to

1 the commission.

2 (h) The commission shall:

3 (1) determine the criteria or risk factors to be  
4 considered in an evaluation under Subsection (g); and

5 (2) include the findings and recommendations under  
6 Subsection (g) in the commission's biennial report to the  
7 legislature.

8 ARTICLE 6. FUNDING

9 SECTION 6.01. Section 401.246(a), Health and Safety Code,  
10 is amended to read as follows:

11 (a) Compact waste disposal fees adopted by the commission  
12 must be sufficient to:

13 (1) allow the compact waste facility license holder to  
14 recover costs of operating and maintaining the compact waste  
15 disposal facility and a reasonable profit on the operation of that  
16 facility;

17 (2) provide an amount necessary to meet future costs  
18 of decommissioning, closing, and postclosure maintenance and  
19 surveillance of the compact waste disposal facility and the compact  
20 waste disposal facility portion of the disposal facility site;

21 (3) provide an amount to fund local public projects  
22 under Section 401.244;

23 (4) provide a reasonable rate of return on capital  
24 investment in the facilities used for management or disposal of  
25 compact waste at the compact waste disposal facility; ~~and~~

26 (5) provide an amount necessary to pay compact waste  
27 disposal facility licensing fees, to pay compact waste disposal

1 facility fees set by rule or statute, and to provide security for  
2 the compact waste disposal facility as required by the commission  
3 under law and commission rules; and

4 (6) provide an amount necessary to support the  
5 activities of the Texas Low-Level Radioactive Waste Disposal  
6 Compact Commission.

7 SECTION 6.02. Subchapter F, Chapter 401, Health and Safety  
8 Code, is amended by adding Section 401.251 to read as follows:

9 Sec. 401.251. LOW-LEVEL RADIOACTIVE WASTE DISPOSAL COMPACT  
10 COMMISSION ACCOUNT. (a) The low-level radioactive waste disposal  
11 compact commission account is an account in the general revenue  
12 fund.

13 (b) The commission shall deposit in the account the portion  
14 of the fee collected under Section 401.245 that is calculated to  
15 support the activities of the Texas Low-Level Radioactive Waste  
16 Disposal Compact Commission as required by Section 4.04(4), Texas  
17 Low-Level Radioactive Waste Disposal Compact (Section 403.006 of  
18 this code).

19 (c) Money in the account may be appropriated only to support  
20 the operations of the Texas Low-Level Radioactive Waste Disposal  
21 Compact Commission.

22 SECTION 6.03. Sections 5.701(n) and (p), Water Code, are  
23 amended to read as follows:

24 (n)(1) Each provider of potable water or sewer utility  
25 service shall collect a regulatory assessment from each retail  
26 customer as follows:

27 (A) A public utility as defined in Section 13.002

1 ~~[of this code]~~ shall collect from each retail customer a regulatory  
2 assessment equal to one percent of the charge for retail water or  
3 sewer service.

4 (B) A water supply or sewer service corporation  
5 as defined in Section 13.002 ~~[of this code]~~ shall collect from each  
6 retail customer a regulatory assessment equal to one-half of one  
7 percent of the charge for retail water or sewer service.

8 (C) A district as defined in Section 49.001 ~~[of~~  
9 ~~this code]~~ that provides potable water or sewer utility service to  
10 retail customers shall collect from each retail customer a  
11 regulatory assessment equal to one-half of one percent of the  
12 charge for retail water or sewer service.

13 (2) The regulatory assessment may be listed on the  
14 customer's bill as a separate item and shall be collected in  
15 addition to other charges for utility services.

16 (3) The ~~[commission shall use the]~~ assessments  
17 collected under this subsection may be appropriated by a rider to  
18 the General Appropriations Act to an agency with duties related to  
19 water and sewer utility regulation or representation of residential  
20 and small commercial consumers of water and sewer utility services  
21 solely to pay costs and expenses incurred by the agency  
22 ~~[commission]~~ in the regulation of districts, water supply or sewer  
23 service corporations, and public utilities under Chapter 13~~[, Water~~  
24 ~~Code]~~.

25 (4) The commission shall annually use a portion of the  
26 assessments to provide on-site technical assistance and training to  
27 public utilities, water supply or sewer service corporations, and

1 districts. The commission shall contract with others to provide  
2 the services.

3 (5) The commission by rule may establish due dates,  
4 collection procedures, and penalties for late payment related to  
5 regulatory assessments under this subsection. The executive  
6 director shall collect all assessments from the utility service  
7 providers.

8 (6) The commission shall assess a penalty against a  
9 municipality with a population of more than 1.5 million that does  
10 not provide municipal water and sewer services in an annexed area in  
11 accordance with Section 43.0565, Local Government Code. A penalty  
12 assessed under this paragraph shall be not more than \$1,000 for each  
13 day the services are not provided after March 1, 1998, for areas  
14 annexed before January 1, 1993, or not provided within 4-1/2 years  
15 after the effective date of the annexation for areas annexed on or  
16 after January 1, 1993. A penalty collected under this paragraph  
17 shall be deposited to the credit of the water resource management  
18 account to be used to provide water and sewer service to residents  
19 of the city.

20 (7) The regulatory assessment does not apply to water  
21 that has not been treated for the purpose of human consumption.

22 (p) Notwithstanding any other law, fees collected for  
23 deposit to the water resource management account under the  
24 following statutes may be appropriated and used to protect water  
25 resources in this state, including assessment of water quality,  
26 reasonably related to the activities of any of the persons required  
27 to pay a fee under:



1 CHAPTER 367. ON-SITE WASTEWATER TREATMENT RESEARCH [~~COUNCIL~~]

2 SECTION 8.02. Section 367.001, Health and Safety Code, is  
3 amended to read as follows:

4 Sec. 367.001. DEFINITIONS. In this chapter:

5 (1) "Commission" means the Texas Commission on  
6 Environmental Quality [~~Natural Resource Conservation Commission~~].

7 (2) [~~"Council" means the On-site Wastewater Treatment~~  
8 ~~Research Council.~~

9 [(3)] "On-site wastewater treatment system" means a  
10 system of treatment devices or disposal facilities that:

11 (A) is used for the disposal of domestic sewage,  
12 excluding liquid waste resulting from the processes used in  
13 industrial and commercial establishments;

14 (B) is located on the site where the sewage is  
15 produced; and

16 (C) produces not more than 5,000 gallons of waste  
17 a day.

18 SECTION 8.03. Section 367.007, Health and Safety Code, is  
19 amended to read as follows:

20 Sec. 367.007. ADMINISTRATION. (a) [~~The council is not an~~  
21 ~~advisory body to the commission. The commission, at the direction~~  
22 ~~of the council, shall implement council decisions.~~

23 [(b)] ~~The council may enter into an interagency contract with~~  
24 ~~the commission to provide staff and other administrative support as~~  
25 ~~required to improve the quality of wastewater treatment and reduce~~  
26 ~~the cost of providing wastewater treatment to consumers.~~

27 [(c)] The commission [~~council~~] may accept grants and

1 donations from other sources to supplement the fees collected under  
2 Section 367.010. Grants and donations shall be deposited to the  
3 credit of the water resource management [~~on-site wastewater~~  
4 ~~treatment research~~] account and may be disbursed as the commission  
5 [~~council~~] directs and in accordance with Section 367.008.

6 (b) [~~d~~] Administrative and facilities support costs are  
7 payable from the water resources management [~~on-site wastewater~~  
8 ~~treatment research~~] account.

9 [~~e~~ The council may award grants and enter into contracts  
10 in its own name and on its own behalf.]

11 SECTION 8.04. Section 367.008, Health and Safety Code, is  
12 amended to read as follows:

13 Sec. 367.008. AWARD OF COMPETITIVE GRANTS. (a) The  
14 commission [~~council~~] shall establish procedures for awarding  
15 competitive grants and disbursing grant money.

16 (b) The commission [~~council~~] may award competitive grants  
17 to:

18 (1) support applied research and demonstration  
19 projects by accredited colleges and universities in this state, by  
20 other governmental entities, or by acceptable public or private  
21 research centers regarding on-site wastewater treatment technology  
22 and systems applicable to this state that are directed toward  
23 improving the quality of wastewater treatment and reducing the cost  
24 of providing wastewater treatment to consumers; and

25 (2) enhance technology transfer regarding on-site  
26 wastewater treatment by using educational courses, seminars,  
27 symposia, publications, and other forms of information

1 dissemination.

2 (c) The commission shall seek the advice of relevant experts  
3 when choosing research topics, awarding grants, and holding  
4 educational conferences associated with activities under this  
5 chapter. [~~The council may award grants or make other expenditures~~  
6 ~~authorized under this chapter only after the comptroller certifies~~  
7 ~~that the on-site wastewater treatment research account contains~~  
8 ~~enough money to pay for those expenditures.~~]

9 SECTION 8.05. Section 367.009, Health and Safety Code, is  
10 amended to read as follows:

11 Sec. 367.009. APPROPRIATIONS. Money collected and  
12 appropriated for the purposes of this chapter shall be disbursed as  
13 the commission [~~council~~] directs and in accordance with Section  
14 367.008.

15 SECTION 8.06. Section 367.010(d), Health and Safety Code,  
16 is amended to read as follows:

17 (d) The fee proceeds shall be deposited to the credit of the  
18 water resources management [~~on-site wastewater treatment research~~]  
19 account.

20 SECTION 8.07. Sections 367.002, 367.003, 367.004, 367.005,  
21 367.006, and 367.011, Health and Safety Code, are repealed.

22 SECTION 8.08. (a) On the effective date of this Act, the  
23 Texas Commission on Environmental Quality shall assume the  
24 administration of all grants of the On-site Wastewater Treatment  
25 Research Council in existence on that date.

26 (b) The Texas Commission on Environmental Quality shall  
27 assume all contracts held by the On-site Wastewater Treatment

1 Research Council on the effective date of this Act, including all  
2 rights and obligations associated with the contracts.

3 ARTICLE 9. RATE NOTIFICATION

4 SECTION 9.01. Section 13.043(i), Water Code, is amended to  
5 read as follows:

6 (i) The governing body of a municipally owned utility or a  
7 political subdivision, within 60 [~~30~~] days after the date of a final  
8 decision on a rate change, shall provide individual written notice  
9 to each ratepayer eligible to appeal who resides outside the  
10 boundaries of the municipality or the political subdivision. The  
11 notice must include, at a minimum, the effective date of the new  
12 rates, the new rates, and the location where additional information  
13 on rates can be obtained. The governing body of a municipally owned  
14 utility or a political subdivision may provide the notice  
15 electronically if the utility or political subdivision has access  
16 to a ratepayer's e-mail address.

17 SECTION 9.02. Section 13.187(b), Water Code, is amended to  
18 read as follows:

19 (b) A copy of the statement of intent shall be mailed, sent  
20 by e-mail, or delivered to the appropriate offices of each affected  
21 municipality, and to any other affected persons as required by the  
22 regulatory authority's rules.

23 ARTICLE 10. CONTESTED CASE HEARINGS

24 SECTION 10.01. Section 5.115(b), Water Code, is amended to  
25 read as follows:

26 (b) At the time an application for a permit or license under  
27 this code is filed with the executive director and is

1 administratively complete, the commission shall give notice of the  
2 application to any person who may be affected by the granting of the  
3 permit or license. A state agency that receives notice under this  
4 subsection may submit comments to the commission in response to the  
5 notice but may not contest the issuance of a permit or license by  
6 the commission. For the purposes of this subsection, "state  
7 agency" does not include a river authority.

8 SECTION 10.02. Sections 5.228(c) and (d), Water Code, are  
9 amended to read as follows:

10 (c) The executive director shall [~~may~~] participate as a  
11 party in contested case permit hearings before the commission or  
12 the State Office of Administrative Hearings to:

13 (1) provide information [~~for the sole purpose of~~  
14 ~~providing information~~] to complete the administrative record; and

15 (2) support the executive director's position  
16 developed in the underlying proceeding. [~~The commission by rule~~  
17 ~~shall specify the factors the executive director must consider in~~  
18 ~~determining, case by case, whether to participate as a party in a~~  
19 ~~contested case permit hearing. In developing the rules under this~~  
20 ~~subsection the commission shall consider, among other factors:~~

21 [~~(1) the technical, legal, and financial capacity of~~  
22 ~~the parties to the proceeding,~~

23 [~~(2) whether the parties to the proceeding have~~  
24 ~~participated in a previous contested case hearing,~~

25 [~~(3) the complexity of the issues presented, and~~

26 [~~(4) the available resources of commission staff.]~~

27 (d) In a contested case hearing relating to a permit

1 application, the executive director or the executive director's  
2 designated representative may not rehabilitate the testimony of a  
3 witness unless the witness is a commission employee [~~testifying for~~  
4 ~~the sole purpose of providing information to complete the~~  
5 ~~administrative record~~].

6 SECTION 10.03. Subchapter H, Chapter 5, Water Code, is  
7 amended by adding Section 5.315 to read as follows:

8 Sec. 5.315. DISCOVERY IN CASES USING PREFILED WRITTEN  
9 TESTIMONY. In a contested case hearing delegated by the commission  
10 to the State Office of Administrative Hearings that uses prefiled  
11 written testimony, all discovery must be completed before the  
12 deadline for the submission of that testimony, except for water and  
13 sewer ratemaking proceedings.

14 SECTION 10.04. Section 5.228(e), Water Code, is repealed.

15 SECTION 10.05. (a) Section 5.115(b), Water Code, as  
16 amended by this article, applies only to an application for the  
17 issuance, amendment, extension, or renewal of a permit or license  
18 that is received by the Texas Commission on Environmental Quality  
19 on or after the effective date of this Act. An application that is  
20 received before that date is governed by the law in effect at the  
21 time the application is received, and the former law is continued in  
22 effect for that purpose.

23 (b) The changes in law made by this article apply to a  
24 proceeding before the State Office of Administrative Hearings that  
25 is pending or filed on or after September 1, 2011.

26 ARTICLE 11. EFFECTIVE DATE

27 SECTION 11.01. This Act takes effect September 1, 2011.

David Dewhurst

President of the Senate

Joe Straus

Speaker of the House

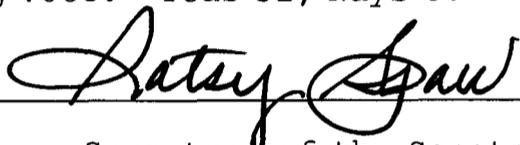
I certify that H.B. No. 2694 was passed by the House on April 20, 2011, by the following vote: Yeas 109, Nays 40, 1 present, not voting; that the House refused to concur in Senate amendments to H.B. No. 2694 on May 17, 2011, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 2694 on May 28, 2011, by the following vote: Yeas 147, Nays 0, 1 present, not voting.

Robert Haney

Chief Clerk of the House

H.B. No. 2694

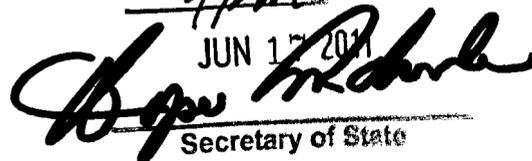
I certify that H.B. No. 2694 was passed by the Senate, with amendments, on May 12, 2011, by the following vote: Yeas 31, Nays 0; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 2694 on May 28, 2011, by the following vote: Yeas 31, Nays 0.

  
Secretary of the Senate

APPROVED: 17 JUN '11

Date

  
Governor

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE  
\* 4:20 O'CLOCK  
JUN 17 2011  
  
Secretary of State