

The Texas Commission on Environmental Quality (commission) proposes new §§37.9201, 37.9205, 37.9210, 37.9215, and 37.9220.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to implement House Bill (HB) 1366, 78th Legislature, 2003. HB 1366 amends the Texas Health and Safety Code (THSC) by adding a new Chapter 374. HB 1366 requires rules to be adopted that are necessary to administer and enforce the new chapter. Specifically, these proposed rules set forth procedures for administering and enforcing THSC, §374.105, which requires owners of certain dry cleaning facilities to furnish a bond or other financial assurance to the commission.

A new 30 TAC Chapter 337, Dry Cleaner Environmental Response, is also proposed in this issue of the *Texas Register* to correspond with the proposed changes in this chapter.

SECTION BY SECTION DISCUSSION

The commission proposes new Subchapter W, Financial Assurance for Dry Cleaning Facilities, to establish the procedures to administer and enforce HB 1366.

Proposed new §37.9201, Applicability, states that the subchapter applies to an owner of a dry cleaning facility required to provide evidence of financial assurance under proposed new Chapter 337 and establishes requirements and mechanisms for demonstrating financial assurance for corrective action.

Proposed new §37.9205, Submission of Documents, states that an owner required to provide financial assurance shall submit an originally signed financial assurance mechanism for corrective action with the affidavit of nonparticipation in fund benefits. The signed financial assurance mechanism must be in effect at the time of submission.

Proposed new §37.9210, Financial Assurance Requirements for Corrective Action, sets forth the financial assurance requirements for corrective action at dry cleaning facilities. An owner of a dry cleaning facility shall establish financial assurance for the corrective action of the facility that meets the requirements of the proposed rule, in addition to the requirements specified under Subchapters A, C, and D of this chapter. In addition, an owner may use a fully funded trust, a surety bond guaranteeing payment, an irrevocable standby letter of credit, and insurance as specified in Subchapter C of this chapter to demonstrate financial assurance for corrective action.

Proposed new §37.9215, Continuous Financial Assurance Required, states that the owner of a facility required to provide financial assurance for corrective action shall provide continuous financial assurance until the executive director provides written consent to termination. Upon written request by the owner, the executive director shall provide written consent to termination of a financial assurance mechanism when an owner substitutes and receives approval from the executive director for alternate financial assurance as specified in this chapter or on the second anniversary of the date the facility closes for use as a dry cleaning facility, if the executive director has certified that corrective action is not required at the facility.

Proposed new §37.9220, Drawing on the Financial Assurance Mechanisms, states that the executive director may call on the financial assurance mechanism(s) when an owner who is required to comply with this chapter has failed to perform corrective action, when required; failed to provide an alternate financial assurance mechanism, when required; or failed to provide continuous financial assurance coverage.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed new rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are anticipated for other units of state or local government.

The purpose of the proposed rules is to implement HB 1366, codified as THSC, Chapter 374. The proposed rules require owners of certain dry cleaning facilities to provide financial assurance for corrective action. Under the proposed rules, owners of dry cleaning facilities that have filed the affidavit of nonparticipation (exercising the option to not participate in the benefits of the Dry Cleaning Facility Release Fund) and who began operation on or after September 1, 2003, must furnish to the commission a bond or other financial assurance authorized by the commission in the amount of \$500,000. An option not to participate in fund benefits must have been filed with the commission before January 1, 2004. A facility may be designated as nonparticipating if the owner demonstrates, at the owner's expense, that the owner has never used perchloroethylene and will never use perchloroethylene. An owner would have to comply with the financial assurance requirements only if the owner chooses to be designated as nonparticipating and otherwise meets the statutory requirements.

At this time there are potentially two facilities that would be affected under the proposed financial assurance rules. Costs to the agency to ensure that the facilities comply with the proposed financial assurance requirements are not expected to be significant.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and the protection of the state's groundwater and surface water from potential and actual contamination from certain dry cleaning facilities.

Fiscal implications are expected for businesses and individuals that choose to be designated as nonparticipating and otherwise meet the statutory requirements. Owners of nonparticipating dry cleaning facilities will have to pay for financial assurance for corrective action. However, these facilities will also be exempt from the per-gallon fee on dry cleaning solvents except perchloroethylene. They would also lose the financial benefit of participating in the Dry Cleaning Facility Release Fund, which would cover any corrective action costs at the site.

Currently, there are approximately two facilities that would be affected by the proposed rules. In order to meet the financial assurance requirements, the owners may use a fully funded trust, a surety bond guaranteeing payment, an irrevocable letter of credit, or insurance. Guaranteed surety bond payments or insurance premiums are estimated to cost approximately \$10,000 each year for \$500,000 worth of coverage, but may be higher or lower, depending upon the coverage requirements of the carrier.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for dry cleaning facilities that are small or micro-businesses unless they were designated as a nonparticipatory dry cleaning facility and are a new business as of September 1, 2003. These owners would then be required to obtain financial assurance for corrective action in the amount of \$500,000. Guaranteed surety bond payments or insurance premiums are estimated to cost \$10,000 each year and may be higher or lower, depending upon the coverage requirements of the carrier.

The following is an analysis of the cost per employee for any small or micro-businesses affected by the proposed rules. Small and micro-business are defined as having fewer than 100 or 20 employees respectively. Owners of dry cleaning facilities with 100 or fewer employees could incur additional costs for obtaining financial assurance of up to \$10,000 to comply with the proposed rules or \$100 per employee. A micro-business with 20 or less employees would incur estimated additional costs of \$500 per employee. The projected costs for affected facilities are the same for small businesses as for larger businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

While the specific intent of a major environmental rule is to protect the environment or reduce the risks to human health from environmental exposure, the specific intent of the proposed rules is to provide the framework within which the agency will administer the requirement in THSC, §374.105 for owners of certain dry cleaning facilities to furnish a bond or other financial assurance. Thus, the specific intent of the proposed rules is not to protect the environment nor reduce the risks to human health from environmental exposure. Additionally, the proposed rules do 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.

Furthermore, even if the proposed rules did meet the definition of a major environmental rule, Texas Government Code, §2001.0225 only applies to a major environmental rule if the result of the rule 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. These proposed rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of §2001.0225 even if they did meet the definition of a major environmental law. Specifically, the

proposed rules are required by state law, are not proposed solely under the general powers of the agency, and do not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

The commission invites public comment on this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to implement HB 1366, specifically the requirement in THSC, §374.105 for owners of certain dry cleaning facilities to furnish a bond or other financial assurance to the commission. The proposed rules significantly advance this stated purpose by providing the framework within which the agency will administer this financial assurance requirement.

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.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on December 6, 2004, at 10:00 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 before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

Comments must be received by 5:00 p.m., December 13, 2004, and should reference Rule Project Number 2003-047-337-WS. Copies of the proposed rules can be obtained from the commission's Web site at <http://www.tnrcc.state.tx.us/oprd/rules/propadop.html>. For further information, please contact Michael Bame, Policy and Regulations Division, (512) 239-5658.

SUBCHAPTER W: FINANCIAL ASSURANCE FOR DRY CLEANING FACILITIES

§§37.9201, 37.9205, 37.9210, 37.9215, 37.9220

STATUTORY AUTHORITY

The new sections are proposed under the authority granted to the commission by the Texas Legislature in THSC, Chapter 374. The new sections are also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of TWC and THSC; and HB 1366, 78th Legislature, 2003.

The proposed new sections implement THSC, Chapter 374.

§37.9201. Applicability.

This subchapter applies to an owner of a dry cleaning facility required to provide evidence of financial assurance under §337.60 of this title (relating to Nonparticipating Dry Cleaning Facility Financial Assurance). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for corrective action.

§37.9205. Submission of Documents.

An owner of a dry cleaning facility required by this subchapter to provide financial assurance shall submit an originally signed financial assurance mechanism for corrective action with the affidavit of nonparticipation in fund benefits. The signed financial assurance mechanism must be in effect at the time of submission.

§37.9210. Financial Assurance Requirements for Corrective Action.

(a) An owner of a dry cleaning facility subject to this subchapter shall establish financial assurance for the corrective action of the facility that meets the requirements of this subchapter, in addition to the requirements specified under Subchapters A, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

(b) An owner of a dry cleaning facility subject to this subchapter may use a fully funded trust, a surety bond guaranteeing payment, an irrevocable standby letter of credit, and insurance as specified in Subchapter C of this chapter to demonstrate financial assurance for corrective action.

§37.9215. Continuous Financial Assurance Required.

The owner of a dry cleaning facility required by this subchapter to provide financial assurance for corrective action shall provide continuous financial assurance until the executive director provides written consent to termination. Upon written request by the owner, the executive director shall provide written consent to termination of a financial assurance mechanism when:

(1) an owner substitutes and receives approval from the executive director for alternate financial assurance as specified in this chapter; or

(2) on the second anniversary of the date the facility closes for use as a dry cleaning facility, if the executive director has certified that corrective action is not required at the facility.

§37.9220. Drawing on the Financial Assurance Mechanisms.

The executive director may call on the financial assurance mechanism(s) when an owner of a dry cleaning facility required to comply with this chapter has:

(1) failed to perform corrective action, when required;

(2) failed to provide an alternate financial assurance mechanism, when required; or

(3) failed to provide continuous financial assurance coverage.