

The commission proposes new §§37.2001, 37.2011, and 37.2021, concerning Financial Assurance.

EXPLANATION OF PROPOSED RULE

The primary purpose of the proposed sections, which compose a new Subchapter L (relating to Financial Responsibility for Used Oil Recycling), is to address the statutory requirements of Texas Health and Safety Code Section 371.026(a)(4), effective September 1, 1997. This statutory section requires the commission to adopt rules that require used oil handlers other than generators to “provide proof of liability insurance or other evidence of financial responsibility for any liability that may be incurred in handling used oil.” The section further states that it does not apply to a used oil handler which is owned or otherwise effectively controlled by the owners or operators where the used oil is generated.

Proposed new §37.2001 (relating to Applicability) states that this subchapter applies to used oil transporters required to provide evidence of financial responsibility under §324.22(a) of this title (relating to Financial Responsibility Technical Requirements) on used oil. Section 37.2001 also states that this subchapter applies to “used oil handlers” which are required to provide evidence of financial responsibility under §324.22(c) or (d) of this title and states that such “used oil handlers” are owners and operators of used oil transfer, processing, rerefining, and off-specification used oil burning facilities.

Proposed new §37.2011 relates to financial responsibility requirements for used oil handlers.

Proposed new §37.2011(a) calls attention to the federal aboveground tank closure requirements for used oil processors and rerefiners already adopted by reference in Chapter 324, concerning Used Oil Recycling. This subsection references the requirements of 40 Code of Federal Regulations (CFR) §279.54(h)(1) with regard to processor or rerefiner closure of aboveground storage tanks. In accordance with §279.54(h)(1)(ii), if all used oil contaminated soil cannot be removed or decontaminated, closure and post-closure care is required as for hazardous waste landfills and 40 CFR §265.310 is cross referenced for these requirements. Section 265.310 requires covering of the contaminated soils and compliance with the post-closure care requirements of 40 CFR §§265.117-265.120. Section 265.117(a)(1) requires post-closure care for 30 years. The last sentence of §265.120 states: "Documentation supporting the independent registered professional engineer's certification must be furnished to the Regional Administrator upon request until he releases the owner or operator from the financial assurance requirements for post-closure care under §265.145(h)." Section 265.145 is a section titled "Financial assurance for post-closure care," and its subsection (h) is titled "Release of the owner or operator from the requirements of this section." Therefore, a processor or a rerefiner that closes an aboveground storage tank and has any used oil contaminated soil from that tank that he cannot remove or decontaminate will have to cover the soil, perform post-closure care, and provide post-closure care financial assurance in accordance with the federal requirements.

Proposed new §37.2011(b) states that used oil handlers who must demonstrate financial assurance for soil remediation must do so in an amount as specified in 30 TAC §324.22(c) or (d), relating to Financial Responsibility Technical Requirements for used oil. These used oil handlers must meet the

requirements of §37.2011 and requirements specified in Subchapters A, B, C, and D of Chapter 37, except that wherever the term “Closure” is cited it is to be replaced with the term “Soil Remediation.”

Proposed new §37.2011(c) cites the financial assurance mechanism options, requires submission of the original financial assurance mechanism selected, and annual adjustment for inflation.

Proposed new §37.2021 requires used oil transporters to show proof of insurance to the commission in the forms and levels prescribed by the Texas Department of Transportation or the U.S. Department of Transportation. If not registered with either of these agencies, proof of insurance is required in levels sufficient to pay for bodily injury and property damage liability that could be caused by used oil.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five years these sections as proposed are in effect, there will be fiscal implications as a result of enforcement and administration of these sections. The fiscal implications of these rules are attributed to the state statutory requirement for financial responsibility in Health and Safety Code §371.026(a)(1)(C).

Businesses that have not already obtained financial assurance for closure to comply with the existing statutory requirement for financial responsibility or already meet the alternate facility requirements that can substitute for financial assurance will have some increased cost to come into compliance.

Businesses that already have financial assurance for closure have some chance of experiencing a small increase or a large decrease in cost to meet the specific new rule requirements on financial assurance for soil remediation.

Used oil handlers will benefit by having more specific financial responsibility requirements. The financial effect of compliance with the rule requirements on financial assurance for small businesses that have not yet obtained financial assurance to comply with the statutory requirement for financial responsibility may be relatively significant.

PUBLIC BENEFIT

Mr. Minick also has determined that for the first five years these sections as proposed are in effect the public benefit anticipated as a result of enforcement of and compliance with the sections will be more cost-effective regulation of used oil recycling. There are no anticipated costs to persons to comply with these sections as proposed other than those described previously.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed new sections is to bring 30 TAC Chapter 324 on Used Oil into compliance with Health and Safety Code Chapter 371, Section 371.026, Registration and Reporting Requirements of Used Oil Handlers Other Than Generators. The rule new sections substantially advance the stated purpose by implementing in rule the state statutory requirement for financial responsibility. Promulgation and enforcement of these rules will not create a new burden on private real property which is the subject of the rule amendments because financial responsibility was already required by state statute but not federal rule, and the new state rule financial assurance requirements do not affect property values; they just provide funds for cleanup of contamination, if any, at site closure.

COASTAL MANAGEMENT PROGRAM

The Executive Director has reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the Coastal Management Program.

SUBMITTAL OF COMMENTS

Written comments on the proposal may be mailed to Bettie Bell, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments must be received by 5:00 p.m., 30 days from the date of publication of this proposal in the *Texas Register* and should reference Rule Log No. 97141-324-WS. For further information, please contact Debbie Bohl, Municipal Solid Waste Division, (512) 239-0044; Tooran Khosh, Municipal Solid Waste Division, (512) 239-2580; or Hygie Reynolds, Waste Policy & Regulations Division, (512) 239-6825.

STATUTORY AUTHORITY

The new sections are proposed under Texas Health and Safety Code, Chapter 371, §371.026, which provides the commission with the authority to establish rules on Registration and Reporting

Requirements of Used Oil Handlers Other Than Generators. The new sections are also proposed under Texas Water Code, §§5.103, 5.105, and 26.011, which provide the commission the authority to adopt rules necessary to carry out its powers, duties, and policies and to protect water quality in the state.

The proposed new sections implement Texas Health and Safety Code, Chapter 371.

SUBCHAPTER L : FINANCIAL RESPONSIBILITY FOR USED OIL RECYCLING

§§37.2001, 37.2011, 37.2021

§37.2001. Applicability.

This subchapter applies to used oil transporters required to provide evidence of financial responsibility under §324.22(a) of this title (relating to Financial Responsibility Technical Requirements). This subchapter also applies to owners and operators of used oil transfer, processing, rerefining, and off-specification used oil burning facilities, hereinafter referred to as “used oil handlers,” which are required to provide evidence of financial responsibility under §324.22(c) or (d) of this title.

§37.2011. Financial Responsibility Requirements for Used Oil Handlers.

(a) Processors or rerefiners who store or process used oil in aboveground tanks must, at closure of a tank system, demonstrate financial responsibility if necessary to comply with the closure requirements of 40 CFR §279.54(h)(1)(i). If the used oil handler cannot demonstrate that all contaminated soils are removed or decontaminated as required in 40 CFR §279.54(h)(1)(ii), then the used oil handler must further demonstrate financial responsibility by covering the soil and performing post-closure care in accordance with the closure and post-closure care requirements that apply to hazardous waste landfills under 40 CFR §§265.310, 265.117-265.120 and 265.145.

(b) Used oil handlers who must demonstrate financial assurance for soil remediation must do so in an amount as specified in §324.22(c) or (d) of this title (relating to Financial Responsibility Technical Requirements). These used oil handlers shall meet the financial responsibility requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter, except that wherever the term “Closure” is cited it will need to be replaced with the term “Soil Remediation”.

(c) An owner or operator subject to this subchapter may utilize any of the mechanisms specified paragraphs (1)-(7) of this subsection. The original mechanism is required to be submitted to the Financial Assurance Section of the commission; and the amount specified for financial assurance will need to be adjusted annually for inflation as specified under §37.131 of the title (related to Annual Inflation Adjustments to Closure Cost Estimates).

- (1) fully-funded trust;
- (2) surety bond guaranteeing payment;
- (3) surety bond guaranteeing performance;
- (4) irrevocable standby letter of credit;
- (5) insurance;

(6) financial test; or

(7) corporate guarantee.

§37.2021. Financial Responsibility Requirements for Transporters of Used Oil.

A used oil transporter must show proof of insurance to the commission in the forms and levels as prescribed by the Texas Department of Transportation (Texas Civil Statutes, Articles 6675c, 6675c-1, 911m, and 6687-9a) or the U.S. Department of Transportation (49 U.S.C. §11506). If a used oil transporter is not required to be registered as a motor carrier with either of these agencies, then proof of insurance in the form of an original signed certificate of insurance and in levels sufficient to pay for bodily injury and property damage liability caused by the used oil must be submitted to the commission directly by an insurance agent. In all cases, the name of the used oil transporter must be identical to the party named on the applicable insurance form.

The agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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