

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §§335.341-335.351 and the repeal of §335.352, concerning the assessment and remediation of State Superfund sites that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment.

EXPLANATION OF PROPOSED RULES

The rule changes to these sections are proposed to enhance the implementation of certain provisions of House Bill (HB) 2776 passed by the 75th Texas Legislature, to streamline current assessment and remediation procedures of State Superfund sites, and to ensure consistency with the existing cleanup standards of the Risk Reduction Rules in Chapter 335, Subchapter S. Later this year or early next year, the commission intends to propose repealing the existing Risk Reduction Rules and replacing them with a new set of risk-based corrective action standards referred to as the Texas Risk Reduction Program (TRRP) rules. As the TRRP rules are currently envisioned, the proposed changes to Chapter 335, Subchapter K would be consistent with the new rules; however, a review of the amended Subchapter K rules will be required after adoption of the TRRP rules to determine if any further amendments to sections in Subchapter K are necessary.

Among the proposed changes today are the removal of the "Texas Water Commission" and its acronym "TWC" wherever they appear in the existing Subchapter K sections. Also, the commission is proposing to amend the rules to be consistent with the terms and definitions of 30 TAC Chapter 3, which defines agency, commission, and executive director. Where appropriate, the correct term is being proposed to

replace an incorrect term. As an example, in §335.344(b) the existing rule states that the commission shall hold a public meeting. The proposed change would replace "commission" with "executive director" since the executive director's staff actually schedules and holds the meeting and the commission does not formally act at the public meeting.

The commission proposes to amend §335.341 to recognize the commission's Voluntary Cleanup Program (VCP) as a viable alternative to listing a site on the State Superfund Registry. This change is a result of changes to the Solid Waste Disposal Act, §361.183 and §361.189, in HB 2776. Proposed changes to §335.343 and §335.344 are intended to be consistent with the amendment to §335.341. Under §335.343, a delisted facility that is no longer being adequately addressed in the VCP shall automatically revert to its status prior to deletion from the State Registry. Under §335.344, the executive director shall consider whether a site has been accepted into the VCP when making a determination to delist a facility from the State Registry.

Section 335.342 sets forth the terms and associated definitions specific to the State Superfund program.

The commission is proposing to add, amend, and delete a number of terms and definitions in Subchapter K. The following new terms and definitions are proposed for addition to §335.342: "Feasibility study," "Health and safety plan," "Implementation schedule," "Operation and maintenance plan," "Presumptive remedy," "Quality assurance project plan," "Remedial Action," "Remedial action drawings and specifications," "Remedial design," "Remedial investigation," "Responsible Party," "Sampling and analysis plan," "Settlement offer," "Spill/release contingency plan," and "Unilateral order." Amendment to the definitions for existing terms is being proposed for

"Divisible," "Facility," "Good faith offer," "Hazard ranking system," "Hazardous waste disposal fee fund," "Oversight costs," "Potentially responsible party (PRP)," and "Substantial Change in Use." The terms "Remedial Action Plan," "Remedial investigation/feasibility study" and "State superfund hazard ranking system" are proposed for deletion. Consistent with these changes, other sections of Subchapter K reflect the use of the proposed new terms.

Section 335.343 establishes requirements for the ranking of facilities. The commission proposes to clarify the agency's use of the same Hazardous Ranking System (HRS) as the U.S. Environmental Protection Agency (EPA) for scoring State Superfund sites. The proposed changes would give the agency greater flexibility in establishing priorities for action at listed sites by allowing the agency to prioritize sites based on reasons other than the HRS such as community interests, simplicity, and costs. An updated state registry identifying each facility and relative priority will be published annually.

The commission proposes to amend §335.344 relating to delisting and modifications to delete the language that allowed "any interested person" to request that a facility be delisted from the State Registry, modify the facility's priority ranking, or modify any information regarding the facility. The effect of this proposed change would be that PRPs of a listed facility or the executive director would be the only parties that could request the previously noted actions.

The commission is proposing to amend §335.345 to simplify the agency's process for information requests on listed sites and potentially listed sites. Existing language would be replaced with clear, succinct requirements requiring submission of requested information and documents within 45 days

from the date of request and a statement that the submitted documents are subject to the Public Information Act and its exceptions.

Proposed amendments to §335.346 would provide that the executive director may use money in the Hazardous and Solid Waste Remediation Fee Account to conduct early planned removals at sites to substantially reduce the overall cost of cleaning up the site. The change is being added to be consistent with HB 2776.

The proposed amendments to §335.347 relating to Financial Capability Determinations would clarify the existing requirement that financial statements and income tax information may be requested from PRPs in addition to other financial information. Also, notice to all PRPs of the executive director's determination on financial capability would no longer be required.

The commission proposes several amendments to §335.348 relating to General Requirements for a Remedial Investigation. One proposed change is that a baseline risk assessment will no longer be required as a comparison standard for remedial action alternatives. Instead, a PRP must evaluate health-based and ecological risks, and then calculate cleanup levels to the satisfaction of the executive director before the remedial action is selected. The current rules require a health and safety plan to assure the health and safety of all personnel engaged in implementing the remedial investigation. The proposal extends the scope of the health and safety plan to include all on-site personnel and the general public. Another proposed amendment makes the remedial alternative selection criteria consistent with the Solid Waste Disposal Act. Under the proposal, a PRP may choose a presumptive remedy in lieu of

the feasibility study to expedite the remedial process. Finally, to be consistent with changes to the Texas Engineering Practice Act by the 75th Legislature (Senate Bill 623), all engineering plans and specifications are to be prepared under the supervision of a Licensed Engineer.

In §335.349, the commission proposes to change the current time frames for selecting the proposed remedial action and to add procedures for modifying the proposed remedial action after the date of the initial public meeting. In addition, all documents submitted in connection with the remedial design and remedial action must be sealed by a Licensed Engineer.

Proposed amendments to §335.350 are simple cleanup changes consistent with other changes in the proposed rule.

Proposed amendments to §335.351 would add language that outlines the basis for the executive director's consideration regarding settlement offers.

The commission proposes to repeal §335.352 because the reference to federal Hazard Ranking System is no longer necessary given the amendments to §335.343. The section also refers to an appendix which lists recommended commission and EPA guidance documents. Repealing the section will allow guidance documents to be added or taken off the list administratively instead of having to go through a formal rulemaking.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be an anticipated reduction in costs as a result of streamlining processes and procedures in the state Superfund program. These cost savings are variable and will be realized on a site-by-site basis. While the costs of responding to individual contaminated sites may decrease, total expenditures in the program are not anticipated to be reduced. The total estimated costs of remedial action at all identified state Superfund sites is significantly greater than current appropriations or available fund balances. The cost savings generated by these proposed amendments will enable staff to improve the timeliness of response at contaminated sites and address sites that would not otherwise be addressed within current projected project schedules. These rules also increase incentives for potentially responsible parties to participate in the voluntary cleanup program for site remediation. Parties exercising this option will pay fees to the commission to offset the costs of processing applications, evaluating proposals, and monitoring progress of remedial actions. For sites currently being addressed under the voluntary cleanup program, fees typically range between \$2,000 and \$5,000 for most projects, although costs could be significantly greater for larger projects. The fees received would be to recover actual costs; however, no projection is available of the number of sites for which responsible parties will elect to participate and total revenues to be gained by the state have not been estimated. There are no significant fiscal implications anticipated for local governments, except for those units of local government that may be identified as operators of contaminated sites subject to these proposed rules or potentially responsible parties for contaminated sites.

PUBLIC BENEFIT

Mr. Minick has also determined that, for the first five years the 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 remediation of contaminated sites under the state Superfund program, increased protection of public health and safety, improvements in the recovery of costs from parties responsible for contamination of sites, reduced financial liabilities for lenders with security interests in contaminated properties or potential purchasers, maintenance or enhancement of local government tax bases as a result of restoration of contaminated sites, and increased consistency between federal and state procedures for assessment and ranking of hazards posed by contaminated sites. Generally, the adoption of these proposed rules is anticipated to improve and streamline the process for addressing contaminated sites under the state Superfund program and result in cost savings for parties subject to the rules. These provisions are generally not prescriptive, but rather, represent options for responsible parties in addressing contaminated sites that can result in costs savings. These savings will vary on a case-by-case basis and cannot be determined prospectively. These savings will result from proposed options for selection of presumptive remedies instead of full feasibility studies at sites to be remediated, reduced time periods for initiating and completing remedial actions, and mitigation of potential cleanup costs due to early removal of sources of contamination. While fiscal implications for any individual site are not known and are quite variable, it is anticipated that, for a typical project, the selection of a presumptive remedy could result in costs savings of \$30,000. Potential costs savings due to acceleration of project schedules will generally be proportional to the overall administrative and overhead costs of the project. The opportunity for early removal of contamination could generate costs

savings on a site-by-site basis, but the extent of those cost savings is difficult to quantify until the proposed changes are implemented.

Parties electing to use the voluntary cleanup program as an option under these rules will be liable for the payment of application fees and the commission's oversight and processing costs. The oversight costs are currently billed at \$67 per hour of staff time. These costs for sites which have been addressed under the voluntary cleanup program to date have typically been less than \$5,000, although higher fees are possible for larger and more complex projects. These costs do not include costs of actual site assessment or remedial action. Although no comparisons have been quantified, it is anticipated that cleanup costs through the voluntary cleanup program will be less than cleanup costs under the procedures and requirements of the state Superfund program. Potential costs savings will apply to both small businesses and larger concerns and will be based on the allocation of financial participation by a responsible party in the assessment and remediation of a contaminated property. There are no significant costs anticipated to be imposed on affected persons, including small business, required to comply with the provisions of these sections as proposed.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act, and it does not meet any of the four applicability requirements listed in §2001.0225(a).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to enhance the existing State Superfund program and to implement provisions of HB 2776. The rules will substantially advance this specific purpose by clarifying portions of the rule, by streamlining the assessment and remediation procedures, and by implementing certain provisions in HB 2776 where rulemaking is necessary. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the rules are intended to streamline existing procedures to facilitate removals and remedial actions at affected sites. These streamlining measures should reduce the administrative burden of remediating a site within the State Superfund program while continuing to be protective of human and ecological receptors.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed this rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the rulemaking is consistent with the applicable CMP goals and policies.

SUBMITTAL OF COMMENTS

Written comments may be mailed to Bettie Bell, Texas Natural Resource Conservation Commission, Texas Register Team, MC-205, P.O. Box 13087, Austin, Texas 78711-3087. All comments should reference Rules Tracking Log Number 97155-335-WS. Comments must be received by 5:00 p.m., on February 23, 1998. For further information, please contact Michael A. Bame, C.P.G., Pollution

Cleanup Division (512) 239-5658 or Clark Talkington, Waste Policy and Regulations Division, (512) 239-6731.

STATUTORY AUTHORITY

The repeal and amendments are proposed under the Texas Water Code, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state. The amendments and repeal are also proposed under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017, and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. The Texas Solid Waste Disposal Act, Texas Health and Safety Code, Subchapter F provides additional authority to propose rules specific to the registry and cleanup of certain hazardous waste facilities.

The repeal and amendments affect Health and Safety Code, Chapter 361.

**SUBCHAPTER K : HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND
REMEDATION**

§§335.341-335.351

The amendments are proposed under the Texas Water Code, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state. The amendments are also proposed under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017, and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. The Texas Solid Waste Disposal Act, Texas Health and Safety Code, Subchapter F provides additional authority to propose rules specific to the registry and cleanup of certain hazardous waste facilities.

The amendments affect Health and Safety Code, Chapter 361.

§335.341. Purpose and Scope.

(a) (No change.)

(b) This subsection describes the [Texas Water Commission (TWC)] procedures for identifying, proposing, [and] listing, and delisting facilities on the State Registry.

(1) (No change.)

(2) If the potential endangerment cannot be fully resolved by the present owner or operator, then the executive director shall determine whether the potential endangerment can be resolved by voluntary cooperation of some or all of the potentially responsible parties (PRPs) identified in the Act, §361.271 pursuant to an agreed administrative order issued by the commission or a Voluntary Cleanup Agreement pursuant to Chapter 333 of this title (relating to Voluntary Cleanup Programs). If a facility [it] can be cleaned up pursuant to an agreed administrative order or an executed Voluntary Cleanup Agreement, then it shall not be proposed for listing.

(3) - (5) (No change.)

§335.342. Definitions.

Divisible - [That the] Hazardous substance(s) released or threatened to be released at a facility are capable of being managed separately under a remedial action plan.

Facility - In accordance with the Act, §361.181(c), a facility means:

(A) (No change.)

(B) any site or area where a hazardous substance has been [posted], deposited, stored, disposed of, or placed or otherwise come to be located, but does not include any consumer product in consumer use or any vessel.

Feasibility study (FS) - A study which describes and evaluates a set of remedial action alternatives for effectively mitigating or minimizing damage to, and for providing adequate protection of, the public health and safety and the environment in accordance with the requirements of §335.348 of this title (relating to General Requirements for Remedial Investigations).

Good faith offer - A written proposal by one or more PRPs which is not contingent on participation of other PRPs which, in the judgment of the executive director, will:

(A) in the case of a good faith offer to fund or perform a remedial investigation[/feasibility study or other similar study], fully and effectively determine the nature and extent of the release or threatened release of hazardous substances and its impact on air, soils, groundwater, and surface water, both within and beyond the boundaries of the facility. The executive director will not consider an offer a good faith offer unless it is an offer to fully fund or perform the remedial investigation; or

(B) in the case of a good faith offer to fund or perform a remedial action, fully and effectively mitigate or minimize damage to, and provide adequate protection of, the public health and safety and the environment. The executive director will not consider an offer a good faith offer unless it is an offer to fully fund or perform the remedial action.

[Federal] Hazard ranking system - The method used by the Environmental Protection Agency and the agency to evaluate the relative potential of hazardous substance releases to cause health or safety problems, ecological or environmental damage. The scoring system was developed by the United States Environmental Protection Agency as set out in 40 Code of Federal Regulations Part 300, Appendix A, as amended.

Hazardous and Solid Waste Remediation Fee Account [waste disposal fee fund] - The fund as described in the Act, §361.133.

Health and safety plan - A document that addresses the protection of on-site personnel and the public from potential hazards particular to a facility while implementing the remedial investigation or remedial action. The plan shall conform to applicable Occupational Safety and Health Administrative Rules but not limited to 29 Code of Federal Regulations §1910 and §1926.

Implementation schedule - A document describing the sequence, dependency on other activities, and duration of each activity to be conducted during a remedial investigation or remedial action.

Operation and maintenance plan - A document detailing the necessary operation and maintenance, inspection, and monitoring activities, including schedules, required to maintain the attainment of performance goals after completion of the implementation phase of the remedial action.

Oversight costs - All administrative costs and costs for technical and legal services incurred by the agency [commission personnel], or agents or contractors for the [commission] the agency, incurred in the determination of superfund eligibility, identification of PRPs, oversight of the remedial investigation [RI/FS] and remedial action, plus all such costs incurred in verifying compliance by PRPs with the terms of any agreed order which may be issued and costs incurred by the agency for delisting a site from the State Registry and cost recovery costs.

Potentially responsible party ([or] PRP) - A person potentially responsible for solid waste as defined in the Act §361.271.

Presumptive remedy - A remedy in a commission document titled “Presumptive Remedies” which describes site specific remedial alternatives for a facility in lieu of a full feasibility study as required by §335.348 of this title (relating to General Requirements for Remedial Investigations).

Quality assurance project plan (QAPP) - A document describing in comprehensive detail the necessary quality assurance, quality control, and other technical activities that must be implemented to meet the data quality goals during an investigation or remedial action.

Remedial action (RA) -An action, including remedial design and post-closure care, consistent with a remedy taken instead of or in addition to a removal action in the event of a release or threatened release of hazardous substances into the environment to prevent or minimize the release of a hazardous substance so that the hazardous substance does not migrate to cause an imminent and substantial danger to present or future public health and safety or the environment.

Remedial action drawings and specifications - Documents that include the drawings showing the scope, extent, and character of the work to be performed during the remedial action and the written technical descriptions of materials, equipment, remediation systems, standards and workmanship as applied to the remedial action.

[Remedial action plan - A detailed plan for the design, construction, and long-term operation and maintenance of the remedial action agreed to by the commission.]

Remedial design (RD)- A design consisting of engineering drawings and technical specifications and other documents developed for implementation of the remedial action in accordance with the requirements of §335.349 of this title (relating to General Requirements For Remedial Activities).

[Remedial investigation/feasibility study (or RI/FS) -]

[(A) An investigative study of the entire facility designed to determine the nature and extent of a release or threatened release of hazardous substances and, as appropriate, its impact on air, soils, ground-water, and surface water, both within and beyond the boundaries of the facility in accordance with the requirements of §335.348 of this title (relating to General Requirements for a RI/FS); and

[(B) A study which describes and evaluates a set of remedial action alternatives for effectively mitigating or minimizing damage to, and for providing adequate protection of, the public health and safety or the environment in accordance with the requirements of §335.348 of this subchapter.]

Remedial investigation (RI) - An investigative study, including removals, feasibility study, human health risk assessment, ecological risk assessment, or similar study, designed to adequately determine the nature and extent of a release or threatened release of hazardous substances and, as appropriate, its impact on air, soils, groundwater, and surface water, both within and beyond the boundaries of the facility in accordance with the requirements of §335.348 of this title (relating to General Requirements for Remedial Investigations).

Responsible party (RP) - A person responsible for solid waste as defined in the Act, §361.271 and §361.275(g).

Sampling and analysis plan (SAP) - A document describing the specific sampling and analytical protocols to be implemented during a remedial investigation or remedial action.

[State superfund hazard ranking system - The scoring system used by the executive director for determining the relative priority for an RI/FS or remedial action needed at a facility.]

Settlement offer - A written offer by a potentially responsible party to fund or perform less than a full and complete remedial investigation, and/or remedial action.

Spill/release contingency plan - A document describing the sequences, procedures, and requirements to be implemented to protect both workers at the facility and the public from hazardous exposure to releases or spills resulting from the remedial action.

Substantial change in use - A physical or functional alteration of a facility, the effect of which is to interfere significantly with a proposed or ongoing remedial investigation [RI/FS study or similar study] , proposed, ongoing, or completed remedial action or to expose [the] public health and safety or the environment to a significantly increased threat of harm. The term includes, but is not limited to, actions such as the erection or razing of a building or other structure at the facility, the use of a facility for agricultural production, the paving over of a facility, the creation of a park or other public or private recreational use on the facility, and any other alteration of the site or activity which could interfere with the performance of a remedial investigation [an RI/FS] or remedial action.

Unilateral Order - An order issued by the commission without the consent of the person subject to the order.

§335.343. Ranking of Facilities.

(a) The relative priority for action needed at a facility investigated by the executive director for possible listing on the State Registry may be [is] based on a [State] Superfund Hazard Ranking System (HRS). The [State] Superfund HRS is a methodology designed to determine a numerical score for a

facility based on the judgment of the executive director concerning various factors which may impact the public health and safety or the environment.

(b) Upon appropriate investigation by the executive director, a facility will be assigned a [State] Superfund HRS score. A facility may be proposed for listing on the State Superfund Registry if it is assigned a [state] Superfund HRS score 5.0 or greater.

[(c) Facilities with the highest State Superfund HRS score shall receive the highest priority for remedial action and state-funded cleanup, unless a situation described in the Act, §361.191 warrants more immediate action.]

(c) [(d)] The relative priority for action at facilities listed on the State Registry will be periodically reviewed and revised by the executive director [commission] as necessary to accurately reflect the need for action at the facilities.

(d) The commission shall annually publish an updated state registry identifying each facility and the relative priority for action at each listed facility.

(e) If a facility has been deleted in accordance with §335.344 of this title (relating to Delisting and Modifications) based in whole or part on the facility being addressed pursuant to Chapter 333 of this title (relating to Voluntary Cleanup Programs), and the executive director determines that the facility is no longer being adequately addressed, the facility shall automatically revert to the status the

facility had immediately before the facility was deleted from the Registry in accordance with the Act,

§361.189. No public meeting is required under this subsection.

§335.344. Delisting and Modifications.

(a) Any [Potentially Responsible Party] PRP of a facility listed or proposed for listing on the State Registry [or any interested person] may request the executive director to delete such facility from the Registry, modify the facility's priority ranking within the Registry, or modify any information regarding such facility by submitting a written statement setting forth the grounds of the request. The PRP [or interested person] shall submit to the executive director any information as may be reasonably required to enable the executive director to further evaluate the facility including, but not limited to, information on all factors used to develop a [State] Superfund HRS score and to make a determination on the request. The executive director may initiate the delisting procedures described in this section.

(b) The executive director [commission] shall hold a public meeting to receive comment. This meeting is not a contested case hearing within the meaning of Texas Government Code, Chapter 2001. This meeting shall be held upon requests filed with or initiated by the executive director under subsection (a) of this section. At least 30 days prior to the date set forth for the meeting, notice shall be provided by first class mail to all other PRPs [and other interested persons], and by publication in a newspaper of general circulation in the county where the facility is located. The person submitting the request, if any, shall bear the cost of publication of the notice.

(c) In making a determination under subsection (a) of this section, the executive director [or the commission] will consider the following:

(1) the extent to which the facility has been remediated under the terms of any removals and [the] remedial action [plan] agreed to by the executive director;

(2) - (3) (No change.)

(4) whether, because of the nature of any removals and the remedial action implemented at the facility, it is not yet feasible to make a determination that the remedial action has effectively remediated the release or threatened [threat of] release of hazardous substances; or

(5) whether the site has been accepted [remediated] under the voluntary cleanup program as set out in [30, TAC,] Chapter 333 of this title (relating to Voluntary Cleanup Programs).

(d) With the exception of paragraph (c) (5) of this section, no [No] requests for the delisting of a facility from the State Registry or requests to modify information about a facility eligible for listing on the Registry will be granted unless, at a minimum, the facility has been investigated under the terms of a remedial investigation [an RI/FS or other similar study] approved by the executive director.

§335.345. Requests for Information or Production of Documents.

(a) The executive director may submit requests for information and requests for production of documents as authorized by the Act, §361.182 to any person who has information or documents which in the executive director's opinion are necessary for the adequate investigation or remediation of a facility listed on the Registry or that the executive director has reason to believe should be listed on the State Registry [or proposed for listing on the Registry]. [If] The requested information or documents shall be [are not] produced within forty-five days from the date of request. [in a timely manner, the executive director may petition the commission to issue an order directing compliance with the requests for information or production of documents. The executive director shall serve a copy of the petition on the person to whom the request for information or production of documents was directed at least 20 days prior to the scheduled date of commission action on the petition. The person to whom the request for information or production of documents was directed may appear before the commission and present evidence and argument on the petition or in support of a claim asserted under subsection (b), or the commission may refer the matter to the office of hearings examiners for the taking of evidence.]

(b) Information or documents provided to the executive director in accordance with this section are subject to the Public Information Act and its exceptions. [presumed to be public records except to the extent that a showing satisfactory to the commission is made that the information or documents would divulge trade secrets if made public. The commission shall deem the information or documents to be confidential and not subject to public disclosure if such a showing is made. Upon request, confidential information and documents supplied to the executive director will be returned to the person

supplying the information or documents after it has served the purpose for which it was requested by the executive director.]

§335.346. Removals [Removal Actions] and Preliminary Site Investigations.

(a) For facilities listed on the Registry or proposed for listing on the Registry, no person may perform any partial or total removals [removal activities] at such facility or conduct [on-site sampling, testing, or] preliminary investigations of any type at such facility without the advance written authorization of the executive director after notice and opportunity for comment to all other potentially responsible parties.

(b) To expedite the executive director's consideration of a proposal to conduct removals [removal activities] or preliminary investigations at a facility, the person proposing such actions shall [should] submit to the executive director a workplan describing the [precise nature of the] removal and/or investigation activities proposed, a safety and health plan, a quality assurance project plan, and an implementation schedule [and a quality assurance/quality control plan as well as a schedule] for completing various subtasks identified in the workplan.

(c) Any authorization by the executive director to perform [on-site testing, sampling, or] preliminary investigations, investigation activities, or partial or total removals [removal activities] at a facility does not constitute a finding or determination by the executive director [commission] that such testing, sampling, or preliminary investigation constitutes an approved remedial investigation [remedial

investigation/feasibility study] or that the removal constitutes [activities constitute] the final remedial action. An authorization by the executive director to perform any partial or total removals or investigation activities [removal activities] also does not constitute a determination or finding by the executive director [commission] that any release or threatened release attributed to the removed materials is divisible as defined in the Act, §361.276.

(d) Pursuant to the Act, §361.133(c)(1 - 4) and (g), the executive director may use money in the Hazardous and Solid Waste Remediation Fee Account [Fund] for necessary and appropriate removal and remedial action at sites at which solid waste or hazardous substances have been disposed if funds from a liable party, independent third party, or the federal government are not sufficient for the removal or remedial action. The executive director may also perform removals under the Act, §361.133(c)(5) to protect human health and the environment. [A necessary and appropriate aspect of any such removal or remedial action may be the construction of a fence as necessary to provide site security, and the taking and analysis of samples of potential hazardous substances, and potentially contaminated soils, surface water and groundwater.]

§335.347. Financial Capability Determinations.

[(a)] The executive director may [will] make a determination of whether a potentially responsible party (PRP) is financially capable of participating in a facility investigation or remediation. Such a determination may be based on some or all of the following financial information:

- (1) a PRP's audited financial statements;
- (2) a PRP's federal or state income tax returns;
- (3) - (8) (No change.)

[(b) A determination by the executive director pursuant to this section shall be provided to all PRPs.]

§335.348. General Requirements for Remedial Investigations[/Feasibility Study].

(a) Unless otherwise directed by the commission, a remedial investigation [an RI/FS or other similar study] as approved by the executive director [Texas Water Commission (TWC)] shall be completed before the executive director's selection of the remedial action, except for removals [emergency removal actions] and preliminary site investigations pursuant to §335.346 of this title (relating to Removals [Removal Actions] and Preliminary Site Investigations).

(b) A similar study may be approved by the executive director [TWC] as an appropriate alternative to the performance of a full remedial investigation [RI/FS] when necessary to avoid delay, to make more effective use of resources or when such similar study is sufficient to adequately characterize a site.

(c) The contents of the remedial investigation [RI/FS] as approved by the executive director, [commission] will depend on the particular circumstances of each specific facility. Under any remedial investigation; [RI/FS] however, sufficient information must be collected and evaluated to allow the executive director [commission] to select an appropriate remedial action.

(d) A remedial investigation [An RI/FS] may include the following, as appropriate to a particular facility, for the purpose of allowing the executive director [TWC] to select an appropriate remedial action:

(1) (No change.)

(2) investigations to adequately characterize the nature and extent [vertical and areal distribution and concentrations] of hazardous substances in the soils encompassing the facility. Properties associated with the soils which would influence the type and rate of hazardous substance migration or affect the ability to implement alternative remedial actions shall be characterized.

(3) investigations of hydrogeology and geology to adequately characterize the nature and extent [horizontal and vertical distribution and concentrations] of hazardous substances in the ground water and the features which affect the fate and transport of those hazardous substances. This should include, but is not limited to, the physical properties and distribution of bedrock and unconsolidated materials, groundwater flow rate and gradient for contaminated and potentially contaminated aquifers, groundwater divides, areas of groundwater recharge and discharge, and location of public and private groundwater wells.

(4) - (5) (No change.)

(6) descriptions of the location, quantity, horizontal and vertical extent, concentrations and sources of hazardous substances[in disposal areas]. Information on the physical and chemical characteristics and the toxicological effects of hazardous substances shall be provided, if available.

[(e) In order to identify possible health problems associated with the "no action" remedial action alternative, a baseline public health evaluation will be conducted in accordance with the Environmental Protection Agency's Risk Assessment Guidance for Superfund - Volume 1: Human Health Evaluation Manual or other equivalent EPA guidance document. The evaluation may not be required when the executive director determines that remediation standards are apparent and undisputed and adequately protective of human health and the environment.]

[(f) The number and types of remedial action alternatives to be evaluated shall take into consideration the particular characteristics and complexities of the facility. Development of remedial action alternatives shall include, at a minimum, the following:

[(1) an alternative which involves the treatment of hazardous substances to health-based levels or the level of Best Demonstrated Available Technology (BDAT).

[(2) an alternative consisting of containment of all hazardous substances either on-site or off-site.

[(3) an alternative consisting of a combination of on-site and off-site containment.

[(4) no remedial action.]

[(g) At a minimum, the following criteria will be used to evaluate each remedial action alternative:

[(1) the extent to which the alternative mitigates long-term exposure of any residual contamination;

[(2) the extent to which the alternative achieves remediation standards and complies with applicable federal, state and local regulations;

[(3) the extent to which the alternative permanently and significantly reduces the volume, toxicity, and mobility of hazardous substances;

[(4) the present value cost including the total costs of implementation and annual operation and maintenance costs;

[(5) the extent to which local community concerns are addressed and whether implementation of the alternative would result in other adverse effects on the local community;

[(6) other significant impacts on human health and the environment resulting from implementation of the remedial action alternative; and

[(7) the technical merits of each remedial alternative relative to the other.]

(e) [(h)] A workplan for a remedial investigation [an RI/FS] shall be submitted to the executive director for final review and possible modifications and shall include the following:

(1) a sampling and analysis plan covering all sampling activities to be undertaken pursuant to the remedial investigation [RI/FS];

(2) a quality assurance project plan [quality assurance/quality control plan] to assure the integrity of all samples taken pursuant to the remedial investigation [RI/FS]; and

(3) a health and safety plan to describe steps to be taken to assure the health and safety of all personnel engaged in implementing the remedial investigation [RI/FS]; and

(4) an implementation schedule [a schedule of implementation] for all aspects of the remedial investigation [RI/FS].

(f) A health based risk assessment or similar study and an ecological risk assessment shall be completed before the executive director's selection of the proposed remedial action. The evaluation is not required when the executive director determines that remediation standards are apparent and undisputed and adequately protective of human health and the environment.

(g) For the purpose of conducting an ecological risk assessment, any ecological risk assessment guidance material may be used as long as the material has credible authority.

(h) [(i)] Treatability studies may be required as necessary to provide information to evaluate remedial action alternatives.

(i) In evaluating the acceptability of a remedial investigation, the executive director may require the utilization of published agency and EPA technical guidance documents.

(j) A health and safety plan shall be prepared that addresses the protection of on-site personnel and the public from potential hazards particular to a facility while implementing the remedial

investigation. [A report shall be prepared at the completion of the remedial investigation/feasibility study and submitted to the executive director for review, possible modification and final approval.]

(k) A report shall be prepared at the completion of the remedial investigation and submitted to the executive director for review, possible modification and final approval. [In evaluating the acceptability of a RI/FS or similar study, the executive director may utilize published TWC and EPA technical guidance documents including, but not limited to, the documents set forth in Appendix II.]

(l) The selection of the remedial alternative shall be made according to the process outlined in the guidance document “Presumptive Remedies for Soils at Texas State Superfund Sites” or other applicable presumptive remedy documents, unless the executive director determines that a feasibility study must be conducted.

(m) The remedial action for a particular facility shall be selected based on the remedial alternative that the executive director determines to be the lowest cost alternative which is technologically feasible and reliable, effectively mitigates and minimizes damage to the environment, and provides adequate protection of the public health and safety and the environment.

(n) All engineering evaluations, plans, and specifications included in the feasibility study or similar study must be prepared under the supervision of and sealed by a Licensed Engineer, currently licensed in accordance with the provisions of The Texas Engineering Practice Act.

§335.349. General Requirements For [a] Remedial Activities [Action].

(a) Based on the proposals set forth in the feasibility study, the presumptive remedy, or other similar study, elements from different remedial action alternatives as proposed in a remedial investigation as well as any other information available to the executive director, the executive director shall select a proposed remedial action. After the selection of the proposed remedial action, the executive director shall hold a public meeting to discuss the proposed action, as required by the Act, §361.187. This meeting is not a contested case hearing within the meaning of Texas Government Code, Chapter 2001. Persons desiring to submit comments are encouraged to do so prior to the public meeting. Written comments should be submitted to the executive director at least 5 days prior to the date set for public meeting. All other comments shall be presented in the public meeting. [The selection of the remedial action shall be based on relevant information collected during the remedial investigation/feasibility study (RI/FS), or other approved study, as well as any other information available to the commission. The commission may select a final remedial action which incorporates elements from different remedial action alternatives as proposed in an RI/FS.]

(b) This subsection describes the administrative procedures for modifying the proposed remedial action after the date of the initial public meeting to discuss the remedial action for the site.

(1) A minor change in the proposed remedial action is one that does not significantly affect the scope, performance, or cost of the proposed remedial action. The executive director will document minor changes in the project records without the necessity of another public meeting.

(2) A significant change in the proposed remedial action is one that materially affects the scope, performance, or cost of the proposed remedial action, but uses the same approach and results in a remedial action as least as protective as originally proposed. For significant changes, the executive director shall notify the PRPs by certified mail of the changes and issue a public notice in the Texas Register and in a newspaper of general circulation in the county in which the facility is located. The notice shall provide information regarding the significant changes in the proposed remedial action; however, a public meeting or opportunity for public comment is not required. If the commission has not entered into an administrative order to perform the remedial action, a significant change will extend the schedules provided in the Act, §361.187(d).

(3) A fundamental change in the proposed remedial action is one that uses a different approach to achieve the remedial action goals, or one that uses the same approach, but results in a remedial action that is less protective than that originally proposed. A major change in technology to address the contamination is a fundamental change. For fundamental changes, the executive director shall hold another public meeting to discuss the proposed changes in accordance with the Act, §361.187, and as described in subsection (a) of this section. This newly proposed remedial action shall supersede the remedial action originally proposed in the initial public meeting.

(c) [(b)] Engineering documents submitted in connection with the remedial action must be approved by the executive director and must [will be required to] demonstrate compliance with relevant cleanup standards, except as provided in the Act, §361.193. The scope of these documents will depend

on the nature and complexity of the proposed remedial action and may vary from facility to facility [site to site].

[(c) A remedial action plan shall consider the following factors if relevant to a particular facility. but shall not be limited to those factors, as follows:

[(1) a design engineering report to include information for the development and review of construction plans and specifications;

[(2) construction plans and specifications describing in detail the cleanup actions to be performed and prepared in conformance with currently acceptable engineering techniques and practices; and

[(3) an operation and maintenance plan to assure effective and environmentally safe operations under normal and emergency situations.]

(d) The executive director shall establish the minimum requirements for the remedial design, based on the specific characteristics of the facility and the remedial action. If appropriate, the executive director may waive any of the requirements in this subsection for a particular facility. Typical remedial design requirements include, but are not limited to:

(1) remedial action drawings and specifications;

(2) quality assurance project plan;

(3) sampling and analysis plan;

(4) spill/release contingency plan;

(5) implementation schedule; and

(6) an operations and maintenance plan.

(e) A health and safety plan shall be prepared that addresses the protection of on-site personnel and the public from potential hazards particular to a facility while implementing the remedial action.

(f) All engineering plans and specifications included in remedial activities must be prepared under the supervision of and sealed by a Licensed Engineer licensed in accordance with the Texas Engineering Practice Act.

§335.350. Defense to Liability and Claims of Divisibility.

(a) The burden of establishing that a PRP [potentially responsible party (PRP)] qualifies for any defenses to liability set forth in the Act, §361.275 or that a release is divisible as set forth in the Act, §361.276 lies with the PRP asserting such claim.

(b) A PRP must demonstrate to the executive director its entitlement to a defense or claim under the Act, §361.275 or §361.276. The determination by the executive director of a PRP's request for limitation of liability under these sections of the Act is a discretionary act which does not entitle the PRP to an appeal to the commission or an adjudicatory hearing on such determination.

(c) The executive director will not consider claims of divisibility until a site has been adequately characterized by a remedial investigation [an RI/FS or other approved study].

(d) A determination by the executive director on a defense or claim asserted under the Act, §361.275 or §361.276 shall have no res judicata or collateral estoppel effect on a PRP's ultimate liability for remediation of a facility as determined in subsequent commission proceedings or in district court.

§335.351. Settlement Agreements.

(a) General purpose. The commission [Texas Water Commission (TWC)] encourages PRPs [potentially responsible parties (PRP)] to enter into negotiated settlement agreements which shall include an agreed administrative order with the commission so that an effective remedial investigation and remedial action [cleanup] of a [state superfund] facility can be quickly implemented while at the same time resolving PRP's apparent liability for the facility. The goal of the executive director in negotiating PRP settlements is to obtain a complete remedial investigation and remedial action [cleanup] of the facility by PRPs, or to collect from PRPs 100% of the agency's [commission's] cost of

performing a complete remedial investigation and remedial action [cleanup] of the facility. PRPs shall have 60 days after the end of the good faith offer period to negotiate a settlement/final administrative order. Settlement negotiations shall run concurrently with agreed order negotiations.

(b) Remedial investigation settlement. In the case of an offer which is less than a good faith offer to fund or perform a remedial investigation, the executive director's consideration of the offer shall be based on a party's ability to pay. [Partial settlements. The commission may consider a settlement proposal for cleanup of less than 100% of a facility's cleanup remedial activities or cleanup costs. Upon settling with cooperative parties, the commission will vigorously seek all remaining relief, including full cost recovery of monies expended from the Hazardous Waste Remediation Fee Fund, including penalties, damages, and interest where appropriate, as well as TWC oversight costs, from parties whose non-cooperation prevented the achievement of a complete settlement.]

(c) Remedial action settlement.

(1) In the case of an offer which is less than a good faith offer to fund or perform a remedial action, the executive director's consideration of the offer may be based on:

(A) the relationship between the parties' actions in storing, processing, and disposing of hazardous substances and the remedial action required to eliminate the release or threatened release;

(B) the volume of hazardous substances each party is responsible for at the site to the extent that the costs of the remedial action are based on the volume of waste present;

(C) consideration of toxicity or other waste characteristics if those characteristics affect the cost to eliminate the release or threatened release;

(D) a party's cooperation with state agencies, its cooperation or noncooperation with the pending efforts to eliminate the release or threatened release, or a party's actions concerning storing, processing, or disposing of hazardous substances, as well as the degree of care that the party exercised; and

(E) a party's ability to pay.

(2) The commission may consider a settlement proposal for remedial action of less than 100% of a facility's remedial activities or remedial action costs. Upon settling with cooperative parties, the commission will vigorously seek all remaining relief, including full cost recovery of monies expended from the Hazardous and Solid Waste Remediation Fee Account, including penalties, damages, and interest where appropriate, as well as the agency's oversight costs, from parties whose non-cooperation prevented the achievement of a complete settlement.

(d) [(c)] Mixed funding. Mixed Funding means use of funds from federal, state, and private party sources, or any combination of those sources, to fund a timely remedial [response] action.

Mixed funding may be used in the following circumstances.

(1) In order to achieve an expeditious remedial action [cleanup] of a facility listed on the Registry, the commission may agree to reimburse parties to a settlement agreement from the Hazardous and Solid Waste Remediation Fee Account [Hazardous Waste Disposal Fee Fund] with interest, for certain costs incurred as a result of the timely implementation of the remedial action plan that the parties agree to perform but which the commission agrees to finance in whole or in part. The commission may agree to utilize funds from whatever other federal or state sources are available to the commission for the funding of a facility remediation.

(2) Mixed funding shall be provided only to PRPs whom the commission has found to be eligible and who have entered into an agreed administrative order with the commission [TWC]. The agreed administrative order shall identify remedial action tasks to be addressed by the mixed funding, costs to be borne by the Hazardous and Solid Waste Remediation Fee Account [Hazardous Waste Disposal Fee Fund] and the terms of agreement.

(3) A PRP must submit sufficient documentation, as requested by the executive director, to support its request for mixed funding.

(4) The commission's granting of a request for mixed funding does not diminish or alter the standard and scope of liability as set out in the Act. The commission will not approve mixed funding based solely on the grounds that a share of wastes at a site may be attributable to an unknown or financially nonviable party. In addition, the availability or the amount of any fund-financing for a particular site will not be dependent on consistency with any volumetric allocation.

(5) Good faith negotiations and early cooperation of settlers will be considered in mixed funding requests. The executive director shall only consider mixed funding for remedial action if the PRP meets the following conditions: [Mixed funding for remedial actions would not be appropriate where the executive director did not receive a good faith offer for the participation of the PRPs in the completion of the remedial investigation/feasibility study.]

(A) the PRP participated in the remedial investigation; or

(B) the PRP agreed to reimburse all agency expenses associated with the remedial investigation, if the PRP did not participate in the remedial investigation.

(6) If a PRP is found to be eligible for mixed funding, the executive

director shall make an initial determination regarding the amount of funding to be provided. This determination is solely within the discretion of the executive director and is not subject to adjudication in an administrative hearing or appeal to the commission. A determination of eligibility is not a funding commitment as actual funding will depend on availability of funds and approval of the commission

(7) Where a remedial action has been completed at a facility pursuant to a mixed funding agreement, the Hazardous and Solid Waste Remediation Fee Account [hazardous and waste disposal fee fund (the fund)] shall be subject to an obligation for subsequent remedial actions at the same facility only to the extent that such subsequent actions are necessary by reason of failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the fund for the original remedial action. The fund's obligation for such future remedial action may be met through fund expenditures, or through payment by parties who were not signatories to the original agreement.

(e) [(d)] De minimis settlements. The commission may reach a final settlement with a PRP for only a minor portion of the response costs at a facility if the conditions in either of the following subparagraphs (1) or (2) of this subsection are met.

(1) A PRP can demonstrate the following:

(A) the amount of the hazardous substances contributed by a particular PRP is minimal in comparison to the amounts of other hazardous substances at the facility; or

(B) the toxicity or other hazardous effects of the hazardous substances contributed by a particular PRP are minimal in comparison to the toxicity or other hazardous effects of other hazardous substances at the facility.

(2) The PRP can demonstrate that it:

(A) is the owner of the real property on or in which the facility is located;

(B) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(C) did not contribute to the release or threatened [threat of] release of a hazardous substance at the facility through any action or omission.

(3) Paragraph (2) of this subsection does not apply if the PRP purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(f) [(e)] Covenants not to sue.

(1) The commission may, in its discretion, provide any PRP with a covenant not to sue concerning any existing or future liability resulting from a release or threatened release of a hazardous substance addressed by a remedial action if each of the following conditions is met:

(A) the covenant not to sue is in the public interest as determined by criteria set forth in paragraph (2) of this subsection;

(B) the granting of the covenant not to sue would expedite a remedial action approved by the commission; and

(C) the PRP is in full compliance with the terms of any order issued by the commission for response to the release or threatened release for the facility concerned.

(2) In assessing the appropriateness of granting a covenant not to sue and in determining the appropriate legal scope of such a covenant, the commission shall consider whether the covenant is in the public interest on the basis of such factors as the following:

(A) the effectiveness and reliability of the remedial action, in light of other alternative remedies considered for the facility concerned;

(B) the nature of the environmental risks remaining at the facility;

(C) the extent to which performance standards are included in the order or decree;

(D) the extent to which the response [action] provides a complete remedial action [remedy] for the facility, including a reduction in the hazardous nature of the substances at the facility;

(E) the extent to which the technology used in the remedial [response] action is demonstrated to be effective;

(F) whether the Hazardous and Solid Waste Remediation Fee Account [Hazardous Waste Disposal Fee Fund] or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility; and

(G) whether the remedial action will be carried out, in whole or in significant part, by the PRPs themselves.

(3) A covenant not to sue shall be subject to the satisfactory performance by the PRP of its obligations under any order issued by the commission for [response of] remedial actions to

address the release or threatened release of a hazardous substance at the facility. A covenant not to sue concerning future liability for remediation of the facility shall not take effect until the executive director certifies that the remedial action has been completed or the ordered action has been performed in accordance with any such order issued by the commission.

(4) A covenant not to sue a PRP concerning future liability for remediation of a facility may include an exception to the covenant that allows the commission to sue such person where such liability arises out of conditions which are unknown to the executive director at the time he certifies under paragraph (3) of this subsection that the remedial action has been completed at the facility. A covenant not to sue may provide that such future liability may be limited to the same proportion as that established in the original settlement agreement or order issued by the commission.

~~(g)~~ [(f)] Discharge of liability for other PRPs. Any settlement agreement with the commission which resolves a PRP's liability for remediation of a facility does not discharge the liability of any other PRP unless its terms so provide, but it reduces the potential liability of the other PRPs by the amount of the settlement. A PRP will be afforded the opportunity to comment on any settlement agreement with the commission to which it is not a party.

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

Issued in Austin, Texas, on

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §335.352, concerning the assessment and remediation of State Superfund sites that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment.

EXPLANATION OF PROPOSED RULES

The commission proposes to repeal §335.352 because the reference to federal Hazard Ranking System is no longer necessary given the amendments to §335.343. The section also refers to an appendix which lists recommended commission and EPA guidance documents. Repealing the section will allow guidance documents to be added or taken off the list administratively instead of having to go through a formal rulemaking.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be an anticipated reduction in costs as a result of streamlining processes and procedures in the state Superfund program. These cost savings are variable and will be realized on a site-by-site basis. While the costs of responding to individual contaminated sites may decrease, total expenditures in the program are not anticipated to be reduced. The total estimated costs of remedial action at all identified state Superfund sites is significantly greater than current appropriations or available fund balances. The cost savings

generated by these proposed amendments will enable staff to improve the timeliness of response at contaminated sites and address sites that would not otherwise be addressed within current projected project schedules. These rules also increase incentives for potentially responsible parties to participate in the voluntary cleanup program for site remediation. Parties exercising this option will pay fees to the commission to offset the costs of processing applications, evaluating proposals, and monitoring progress of remedial actions. For sites currently being addressed under the voluntary cleanup program, fees typically range between \$2,000 and \$5,000 for most projects, although costs could be significantly greater for larger projects. The fees received would be to recover actual costs; however, no projection is available of the number of sites for which responsible parties will elect to participate and total revenues to be gained by the state have not been estimated. There are no significant fiscal implications anticipated for local governments, except for those units of local government that may be identified as operators of contaminated sites subject to these proposed rules or potentially responsible parties for contaminated sites.

PUBLIC BENEFIT

Mr. Minick has also determined that, for the first five years the 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 remediation of contaminated sites under the state Superfund program, increased protection of public health and safety, improvements in the recovery of costs from parties responsible for contamination of sites, reduced financial liabilities for lenders with security interests in contaminated properties or potential purchasers, maintenance or enhancement of local government tax bases as a result of restoration of contaminated sites, and increased consistency between federal and state

procedures for assessment and ranking of hazards posed by contaminated sites. Generally, the adoption of these proposed rules is anticipated to improve and streamline the process for addressing contaminated sites under the state Superfund program and result in cost savings for parties subject to the rules. These provisions are generally not prescriptive, but rather, represent options for responsible parties in addressing contaminated sites that can result in costs savings. These savings will vary on a case-by-case basis and cannot be determined prospectively. These savings will result from proposed options for selection of presumptive remedies instead of full feasibility studies at sites to be remediated, reduced time periods for initiating and completing remedial actions, and mitigation of potential cleanup costs due to early removal of sources of contamination. While fiscal implications for any individual site are not known and are quite variable, it is anticipated that, for a typical project, the selection of a presumptive remedy could result in costs savings of \$30,000. Potential costs savings due to acceleration of project schedules will generally be proportional to the overall administrative and overhead costs of the project. The opportunity for early removal of contamination could generate costs savings on a site-by-site basis, but the extent of those cost savings is difficult to quantify until the proposed changes are implemented.

Parties electing to use the voluntary cleanup program as an option under these rules will be liable for the payment of application fees and the commission's oversight and processing costs. The oversight costs are currently billed at \$67 per hour of staff time. These costs for sites which have been addressed under the voluntary cleanup program to date have typically been less than \$5,000, although higher fees are possible for larger and more complex projects. These costs do not include costs of actual site assessment or remedial action. Although no comparisons have been quantified, it is anticipated that

cleanup costs through the voluntary cleanup program will be less than cleanup costs under the procedures and requirements of the state Superfund program. Potential costs savings will apply to both small businesses and larger concerns and will be based on the allocation of financial participation by a responsible party in the assessment and remediation of a contaminated property. There are no significant costs anticipated to be imposed on affected persons, including small business, required to comply with the provisions of these sections as proposed.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act, and it does not meet any of the four applicability requirements listed in §2001.0225(a).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to enhance the existing State Superfund program and to implement provisions of HB 2776. The rules will substantially advance this specific purpose by clarifying portions of the rule, by streamlining the assessment and remediation procedures, and by implementing certain provisions in HB 2776 where rulemaking is necessary. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the rules are intended to streamline existing procedures to facilitate removals and remedial actions at affected sites. These

streamlining measures should reduce the administrative burden of remediating a site within the State Superfund program while continuing to be protective of human and ecological receptors.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed this rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the rulemaking is consistent with the applicable CMP goals and policies.

SUBMITTAL OF COMMENTS

Written comments may be mailed to Bettie Bell, Texas Natural Resource Conservation Commission, Texas Register Team, MC-205, P.O. Box 13087, Austin, Texas 78711-3087. All comments should reference Rules Tracking Log Number 97155-335-WS. Comments must be received by 5:00 p.m., on February 23, 1998. For further information, please contact Michael A. Bame, C.P.G., Pollution Cleanup Division (512) 239-5658 or Clark Talkington, Waste Policy and Regulations Division, (512) 239-6731.

STATUTORY AUTHORITY

The repeal and amendments are proposed under the Texas Water Code, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state. The amendments and repeal are also proposed under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017, and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes

and all other powers necessary or convenient to carry out its responsibilities. The Texas Solid Waste Disposal Act, Texas Health and Safety Code, Subchapter F provides additional authority to propose rules specific to the registry and cleanup of certain hazardous waste facilities.

The repeal and amendments affect Health and Safety Code, Chapter 361.

**SUBCHAPTER K : HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND
REMEDATION**

§335.352

§335.352. Adoption of Appendices by Reference.

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

Issued in Austin, Texas, on