

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new Chapter 37, Subchapter I, Financial Assurance for Petroleum Underground Storage Tank Systems, §§37.801 - 37.802, 37.815, 37.820, 37.825, 37.830, 37.835, 37.840, 37.845, 37.850, 37.855, 37.860, 37.865, 37.870, 37.875, 37.880, 37.885, 37.890, and 37.895. Sections 37.825, 37.835, 37.840, and 37.875 are adopted *with changes* to the proposed text as published in the June 2, 2000, issue of the *Texas Register* (25 TexReg 5128). The remaining sections are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Adopted new Subchapter I has been added to Chapter 37, as the result of ongoing efforts by the agency at regulatory reform. Chapter 37 consolidates all of the agency's financial assurance requirements, eliminates redundancy and improves the clarity and readability of these rules. Financial assurance requirements for petroleum underground storage tanks (USTs) formerly existed in Chapter 334, Subchapter E, Financial Responsibility. These requirements have been repealed in Chapter 334 and the Subchapter E language is adopted and transferred to Chapter 37, Subchapter I, with amendments. The adopted new Subchapter I sections were drafted in a two-step process. The first step involved making changes to existing financial assurance requirements for petroleum USTs based on House Bill (HB) 2815, 76th Legislature, 1999, and its amendments to the Texas Water Code (TWC). The second step made changes to eliminate redundant requirements, to clarify wording and improve readability, to properly reflect federal requirements concerning local governments, and to consolidate provisions, whenever possible.

Under this adoption, and the concurrent Chapter 334 adoption, the latter chapter recites the general requirement to have financial assurance, and refers the reader to Subchapter I for the specific requirements.

A common change made throughout the adopted subchapter included the use of “financial assurance” instead of the previously used “financial responsibility.” The adopted new Subchapter I title is, “Financial Assurance for Petroleum Underground Storage Tank Systems.” “Financial Assurance” is used in the subchapter title instead of “Financial Responsibility,” which was used in Chapter 334, Subchapter E, to more accurately reflect the subject matter and to be compatible with the rest of Chapter 37. Another change made throughout the adopted subchapter included the use of “agency” instead of “executive director” or “commission” in certain places to be consistent with the agency general definitions in Chapter 3 of this title.

Some requirements of the adopted Subchapter I are included for compatibility with federal regulations. Also, adopted Subchapter I will be used in conjunction with Chapter 334. Adopted Subchapter I has been modified to reflect the HB 2815 requirement for the creation of a compliance self-certification program. The previous wording used for financial assurance certification formerly found in §334.105 is no longer applicable. Instead, an owner and/or operator will look to adopted Chapter 334, §334.8(b) for the requirements of financial assurance certification.

SECTION BY SECTION DISCUSSION

Unless otherwise noted, all the federal citations have been adopted as they currently exist, as well as prospectively amended by the United States Environmental Protection Agency (EPA).

Adopted §37.801, Applicability, was derived from §334.91. Section 37.801(a) has been amended to read: “This subchapter applies to an owner and operator of a petroleum underground storage tank (UST) system required to provide financial assurance under Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for corrective action and third party liability.” This amendment clarifies who is required to provide which types of financial assurance. Section 334.91(b), the second sentence of §334.91(e), and §334.92 have been omitted in the transfer to adopted Subchapter I because the referenced USTs must now be in compliance with financial assurance requirements. Section 334.91(d) was not included in the move because references to general petroleum UST program exclusions and exemptions would be duplicative of requirements in Chapter 334.

Adopted §37.802, Definitions, consolidates all financial assurance definitions pertaining to the petroleum UST program in this new subchapter. The definitions of “Accidental release,” “Bodily injury,” “Controlling interest,” “Financial reporting year,” “Legal defense cost,” “Property damage,” and “Provider of financial assurance” have been moved from §334.2, Definitions, to this chapter because the terms only apply to financial assurance matters. The remaining definitions are new, and are adopted to better implement both existing and new financial assurance requirements.

Adopted §37.815, Amount and Scope of Required Financial Assurance, was derived from repealed §334.93, Amount and Scope of Required Financial Responsibility. In the new section title, “Financial Responsibility” has been changed to “Financial Assurance” for consistency with the rest of Chapter 37. In §37.815(f) and (g), “financial” has been added in front of “assurance” wherever it appears. In §37.815(f), “owned or operated by that person” has been added for greater clarity.

Adopted §37.820, Allowable Mechanisms and Combinations of Mechanisms, was derived from §334.94. In §37.820(a)(1), the references to “§334.95 - 334.101” have been updated to “§37.825 - 37.855”; “petroleum underground storage tanks” has been changed to “petroleum underground storage tank (UST) systems” for greater clarity; and “including a local government owner or operator” has been added to clarify that local government owners and operators may use the mechanisms in subsection (a)(1) and (2). Section 37.820(a)(2) has been added to contain local government financial assurance mechanisms required under 40 Code of Federal Regulations (CFR), Part 280, Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (UST), and Part 281, Approval of State UST Programs, to achieve state equivalency with federal requirements. In addition, §37.820(b), “financial responsibility” has been changed to “financial assurance” for consistency with the rest of Chapter 37; and “commission” has been changed to “agency.”

Adopted §37.825, Financial Test of Self-Insurance, was derived from §334.95, with changes and reorganization. This test requires an owner, operator, or guarantor using the financial test for multiple facilities or multiple programs to include all costs assured through a financial test when calculating its

obligations. The test is intended to assist the owner, operator, or guarantor in identifying all of the environmental obligations assured under a financial test. In each instance in this section where the phrase "owner or operator, and/or guarantor" was originally in §334.95, and that section is being carried over to §37.825, the phrase has been punctuated as "owner, operator, and/or guarantor" to improve readability and be consistent with other subchapters in Chapter 37. In §37.825(a), the reference to "§334.93" has been changed to "§37.815;" and the reference to subsection "(g)" has been updated to "(c)" due to the reorganization of the section language. Adopted §37.825(b), with a new heading, was drafted from Subchapter E, §334.95(b) - (f). The language of adopted §37.825(b)(1) was derived from former subsection (b). The language in adopted §37.825(b)(1)(A) was derived from former subsection (b)(1), with the reference to "§334.93" updated to "§37.815;" and "commission" changed to "agency." The language in adopted §37.825(b)(1)(B) was derived from former subsection (b)(2), with "commission" changed to "agency;" and "40 Code of Federal Regulations (CFR) Parts 264, 265, or state equivalent" added to make the requirement sufficiently broad. The language in adopted §37.825(b)(1)(C) was derived from former subsection (b)(3), with "commission" changed to "agency" and the reference to "§331.46 of this title (relating to Plugging and Abandonment)" changed to "Chapter 331 of this title (relating to Underground Injection Control)" and "40 CFR Part 144" to make the requirement sufficiently broad. Adopted §37.825(b)(1)(D) - (F) were written to ensure that all financial assurance met through a self-insurance mechanism is included in the financial test information. Adopted §37.825(b)(1)(F) was revised to clarify that self-insured owners/operators are required to deduct from net worth only those environmental obligations or liabilities that are covered by self-insurance. This is consistent with the other subchapters in Chapter 37. Adopted §37.825(b)(2) was derived from former subsection (c), with "The owner or operator, and/or guarantor, must" deleted

because it was no longer needed due to the section's reorganization. Adopted §37.825(b)(3) was derived from former subsection (d), with "The owner or operator, and/or guarantor, must" deleted because it was no longer needed due to the section's reorganization; and the reference to "subsection (l)" changed to "subsection (d) of this section" due to the reorganization. Adopted §37.825(b)(4) was derived from former subsection (e), with "The owner or operator, and/or guarantor, must" deleted because it was no longer needed due to the section's reorganization. Adopted §37.825(b)(5) was derived from former subsection (f), without change. Adopted subsection (c), with a new heading, was drafted from subsections (g) - (l). Adopted §37.825(c)(1) was derived from former subsection (g), with the references to "40 CFR §264.147(f)(1) as adopted by paragraph of §335.152(a)(6) of this title (relating to Standards)" and "§334.93" updated to "§37.541(a) and (b) (relating to Financial Test for Liability)" and "§37.815," respectively. Adopted §37.825(c)(2) language was derived from former subsections (h) - (j), with the reference to "subsection (l)" updated to "subsection (d) of this section." Adopted §37.825(c)(3) was derived from former subsection (k); however, the language in §37.825(c)(3)(A) and (B) is new, and was written to further clarify the independent public accountant audit requirements. Adopted §37.825(d) was derived from former subsection (l), with the following changes to its figure: at the end of the second paragraph, "Title 31" was updated to "Title 30"; the third paragraph has been deleted because it was duplicative of language adopted following the original paragraph concerning "other EPA, state equivalent, or agency regulations" (this new paragraph also provides information on each facility covered), the former table describing financial assurance obligations under Texas Water Commission regulations has been deleted and replaced with a table that encompasses environmental obligations for which financial assurance is provided through self-insurance under federal, state, or state equivalent regulations; in the last paragraph prior to Alternative I,

references to “§334.95(b)” and “§334.95(g)” are updated to “§37.825(b)” and “§37.825(c);” the Alternative I dollar amount listing, item 2 contains new language to refer back to the “(a) - (e) total” in the previous dollar amount listing, and in item 12, an update was made in the reference to Dun and Bradstreet’s financial strength rating from “(e)(1) or (k)(1)” to “4A or 5A”; and in the Alternative II dollar amount listing, item 2 contains new language to refer back to the “(a) - (e) total” (the total of the dollars individually shown in paragraphs a through e) in the dollar amount listing just prior to the Alternative I and II dollar amount listings. There are corrections adopted to typographical errors in Alternative II, Items 6, 15, 18, and 19. “New” was changed to “net;” “lines” was changed to “line;” “or” was changed to “of;” and “from” was changed to “for;” respectively. Near the end of the Alternative II listing, the reference to §334.95 was updated to §37.825, and again “Title 31” was updated to “Title 30.” In adopted §37.825(d), the figure has been corrected for a typographical error made in the proposal. An unnecessary parenthetical at the beginning of the item at section (b) of the figure was deleted. Adopted §37.825(e) was derived from former subsection (m), without change. Adopted §37.825(f) was derived from former subsection (n), with “executive director” changed to “agency.” Adopted §37.825(g) was derived from former subsection (o), with the adopted addition of the word “financial” to “assurance” for clarity.

Adopted §37.830, Guarantee, was derived from §334.96. The language has been amended throughout to update all references to Chapter 334, Subchapter E sections, as well as updating “Title 31” to “Title 30.” In addition, the reference in §37.830(b) to “executive director” has been changed to “agency.” Also, in the figure contained in §37.830(c), “Texas Water Commission” has been updated to “Texas Natural Resource Conservation Commission (TNRCC)” in its first usage and subsequently to

“TNRCC.” Also in this figure, to be consistent with other guarantor requirements already in Chapter 37, “on behalf of our affiliate” and its parenthetical phrase were removed from the guarantee item 3 language, and in item 5, “and the Executive Director of the TNRCC” has been added so that this agency would also receive a copy of a guarantor notice of bankruptcy.

Adopted §37.835, Insurance and Risk Retention Group Coverage, was derived from §334.94. All references to Subchapter E sections have been updated, and Title “31” has been updated to Title “30.” In addition, this section was adopted to correctly reference the Texas Natural Resource Conservation Commission. The following new language has been added to update both the certificate of insurance and the endorsement for changes to the federal financial assurance mechanisms. In item 1 after the description of the types of releases covered, the phrase “in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy;” has been added. In item 2d., after “...(insert: “Insurer” or “Group”) the phrase “, except for non-payment of premium or misrepresentation by the insured,” has been added. At the end of item 2d., the phrase “Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured.” has been added. Finally, item 2e, has been deleted and replaced with the following text: “The insurance covers claims otherwise covered by the policy that are reported to the (insert “Insurer” or “Group”) within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date.

Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.)” Also, a typographical error was made in the proposed figure contained in §37.835(b)(1)--in the second paragraph under Endorsement No. 1, seven lines down, it should read “in accordance with and subject to the limits” (changing “the” to “and” in the sentence). That error has been corrected at adoption. In addition, a typographical error was made in the proposed figure contained in §37.835(b)(2)--between “(d)” and “(e)” should be a line that says “(Insert for claims-made policies:”, with no closed parenthetical, since it is picked up later in the text of “(e).” That error has been corrected at adoption.

Adopted §37.840, Surety Bond, was derived from §334.98. All references to Subchapter E have been updated, with a further update of changing Title “31” to Title “30.” In addition, this section has been amended to correctly reference the Texas Natural Resource Conservation Commission. The figure in adopted §37.840(b) has been corrected for a typographical error made in the proposal of §37.840(b). The paragraph that begins “Now, therefore, the conditions of the obligation are that if the....”, fifth line down, should read “compensate injured third parties for bodily injury and property damage caused by” either “sudden” or....”

Adopted §37.845, Letter of Credit, was derived from §334.99, Letter of Credit. All references to Subchapter E sections have been updated, with a further update of changing Title “31” to Title “30.” In addition, this section has been amended to correctly reference the Texas Natural Resource Conservation Commission. A correction to §334.99(a) was made to change “letter-of-credit” to “letter of credit” to properly refer to the mechanism. In the figure, the word “of” has been deleted from the

fourth line of paragraph three to correct a typographical error. Typographical errors in the figure are adopted for correction in paragraphs six and seven -- the words "from" and "use" have been changed to "for" and "us," respectively.

Adopted §37.850, Trust Fund, was derived from §334.100, Trust Fund. All references to Subchapter E sections have been updated. The word "subpart" in §37.850(e) has been changed to "subchapter" for proper reference.

Adopted §37.855, Standby Trust Fund, was derived from §334.101. All references to Subchapter E sections have been updated, as well changing Title "31" to Title "30." Also, in the figure, "Texas Water Commission" has been replaced with "Texas Natural Resource Conservation Commission (TNRCC)" the first time, and "TNRCC" subsequently, to update the name of the agency; and to amend the word, "through" to "though" to correct a typographical error. An additional reference in §37.855(a) to "§37.840 of this title (relating to Surety Bond)" was adopted. The reference was inadvertently omitted from §334.101 and is necessary to be consistent with federal rules and the corresponding requirements in §37.840. Corrections to typographical errors in the figure are adopted. The word "schedule" should have be capitalized in paragraph two; "therefor" should be "therefore" in paragraph four; and "instrumentally" in Section 8c. should have been "instrumentality." The paragraph preceding Section 5 was adopted to include the phrase "In addition, the Trustee shall refund to the Grantor such amounts as the Executive Director specifies in writing." to provide clarity and conform with federal requirements.

Adopted §37.860, Substitution of Financial Assurance Mechanisms by Owner or Operator, was derived from §334.102, with the §37.860(a) cross reference to “§334.93” updated to “§37.815.”

Adopted §37.865, Cancellation or Non-renewal by a Provider of Financial Assurance, was derived from §334.103. “A local government guarantee,” has been added to §37.865(b) to conform to federal requirements and the addition of local government mechanisms to this subchapter. Adopted §37.865(c) includes additional language to conform to federal requirements which allows a cancellation notice of ten days for non-payment of premium or misrepresentation by the insured. In §37.865(d), “financial responsibility” has been changed to “financial assurance” for consistency with the rest of Chapter 37; and the cross references to “§334.104” and “§334.105” have been updated to “§37.870” and “§37.875,” respectively.

Adopted §37.870, Reporting, Registration and Certification, was derived from §334.104, Reporting by Owner or Operator. The section title has been changed to reflect new registration language added to §37.870(b). The adopted subsections are reorganized for greater clarity and readability. The cross reference to “§334.105” has been updated to “§37.875;” and the word “evidence” has been changed to “proof” for greater clarity and enforceability. In §37.870(a)(1), the reference to Subchapter D has been updated; the phrase “current financial assurance documentation is already” has been added for greater clarity; and “commission” has been changed to “agency.” In §37.870(a)(2), the references to “§334.95” and “§334.103” have been updated to “§37.825” and “§37.865,” respectively; and §37.870(4) was adopted to require current proof of financial responsibility “when requested by the agency” to facilitate a check of adequate financial assurance by the agency at any time. Adopted

§37.870(b) contains a cross-reference to registration requirements in §334.7, and provides the regulatory authority for certain financial assurance information required on the new UST Registration and Self-Certification Form. Adopted §37.870(c) contains a cross-reference to compliance certification requirements of §334.8.

Adopted §37.875, Financial Assurance Recordkeeping, was derived from §334.105. In §37.875(a), the reference to “§334.107” has been updated to “§37.885.” At adoption, the word “evidence” was changed to “proof” for greater clarity and enforceability. The phrase “in a timely manner” has been added to describe the time frame in which records are required to be made available to the agency, and “executive director” has been changed to “agency.” In §37.875(b), “financial responsibility” has been changed to “financial assurance” to be consistent with the rest of Chapter 37. In §37.875(b)(1), the reference to “§§334.95 - 334.99” has been updated to “§§37.825 - 37.855.” including a reference to standby trust funds for proper cross-reference. In addition, federal regulations in 40 CFR §§280.104 - 280.107 (relating to Local Government Bond Rating Test, Local Government Financial Test, Local Government Guarantee, and Local Government Fund, respectively) concerning local government mechanisms are adopted to be incorporated as acceptable demonstrations of financial assurance which are required to be maintained by the owner or operator who qualifies for these options. In §37.875(b)(2), the following changes are adopted. A reference to the local government test or local government guarantee has been added to conform to federal requirements. The words “Such evidence” have been changed to “This documentation” for greater accuracy and readability. In subsection (b), former paragraph (5) and its related “Certification of Financial Responsibility” have been deleted because the owner or operator will now be required to complete the required financial assurance

information on the registration form provided by the agency. The new paragraph (5) was adopted to reference federal recordkeeping requirements applicable to the addition of local government mechanisms to this subchapter that also directs the reader to the federal rules.

Adopted §37.880, Drawing on Financial Assurance Mechanisms, was derived from §334.106. Section 37.880(a)(2) has been amended to change “executive director” to “agency,” and to change “of this chapter” in the reference to Chapter 334, Subchapter D to “of this title” because this language is no longer within the same chapter. Section 37.880(b)(1) has been amended to change “executive director” to “agency,” and to change “of this chapter” in the reference to Chapter 334, Subchapter D to “of this title” because this language is no longer within the same chapter. In §37.880(b)’s figure, “executive director” has been changed to “agency.” In adopted §37.880(b)(2)(A) at the proposal stage of this rulemaking, the Texas Register printed “; or” after (A) but before the figure, which arguably made it appear that the figure is either another option under the rule or is part of the second option at (B)--neither of which is true. The semi-colon and the word “or” should be after the figure, to properly denote that the figure is part of option (A).

Adopted §37.885, Release from the Requirements, was derived from §334.107. The term “financial responsibility” has been changed to “financial assurance” for consistency with the rest of Chapter 37, “properly closed” and “closed” have been changed to “removed from service” to more accurately reflect the rule requirement, and “this chapter” has been changed to “§334.55 of this title (relating to Permanent Removal from Service)” because the financial assurance subchapter has now been moved to Chapter 37 and to provide a more specific reference.

Adopted §37.890, Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance, was derived from §334.108. The wording, “as specified in this subchapter” has been added to clarify how the owner or operator should notify the executive director.

Adopted §37.895, Replenishment of Guarantees, Letters of Credit, or Surety Bonds, was derived from §334.109. The phrase “...local government guarantee with standby trust,” has been added to conform to federal requirements and provide an appropriate reference to an allowed mechanism that like these other examples, requires a standby trust.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the 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 that statute.

“Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted 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 because the adopted rules do not implement any requirements substantially greater than those in concurrently repealed Chapter 334, Subchapter E, except those required to implement HB 2815 regarding compliance self-certification and those to properly reflect federal requirements for financial assurance for local governments. These

changes are anticipated to cause an insignificant increase in cost to affected facilities and will have no negative impacts on the environment or public health and safety. In addition, the adopted rules are not a “major environmental rule” because they do not meet the applicability requirements of a “major environmental rule” that are specified in Texas Government Code, §2001.0225. The adopted rules do not exceed a standard set by federal law, exceed an express requirement of state law, nor conflict with a requirement of a delegation agreement.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The primary purpose of the rulemaking was to consolidate the financial assurance requirements in repealed Chapter 334, Subchapter E into new Chapter 37, Subchapter I, as part of an ongoing effort to consolidate all agency financial assurance requirements into one rule chapter. Some changes have been made to these rules to improve clarity and readability, to reorder requirements into a new sequence, to correct cross-references, to implement HB 2815 (which necessitates changes to existing financial assurance certification procedures), and to comply with federal requirements concerning financial assurance mechanisms for local governments. Promulgation and enforcement of these rules will not burden private real property because it is not the subject of these rules. Any costs associated with obtaining financial assurance are not costs associated with these adopted rules, because existing rules already require financial assurance.

While maintaining that this rulemaking does not create a burden on, or restrict or limit, private real property, the agency believes that an exemption under Texas Government Code, §2007.003(b), describes a situation which could be said to be applicable to the rulemaking. Regarding an action reasonably taken to fulfill an obligation mandated by federal law, a portion of this rulemaking concerns ensuring that financial assurance mechanisms for local government comply with federal requirements per 40 CFR Part 280, Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (USTs).

The rules adopted as part of the commissioner's regulatory reform also do not create a burden on, or restrict or limit, private real property, because they are written to streamline and to clarify existing rules. Further, this rulemaking will not be the cause of a reduction in market value of real property. This action does not create a burden on private real property and will not constitute a takings under the Texas Government Code, §2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The executive director has reviewed this rulemaking pursuant to 31 TAC §505.22 and found that the rules are not subject to the Texas Coastal Management Program (CMP). The rulemaking package concerning Chapter 334, which is concurrently being adopted, has been found to be subject to the CMP. Part of that package concerns implementing the compliance self-certification program required under HB 2815. The rule language that has been moved to Chapter 37 in the subject rulemaking contains alterations to existing certification requirements, taking into account the new certification program created by HB 2815 and written into the Chapter 334 proposal. The changes to the

certification language in the Chapter 37 proposal concern the procedures to be used when certifying compliance with financial assurance requirements, and these changes in and of themselves do not trigger applicability under the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held in Austin on July 25, 2000, at 10:00 a.m. in Building E, Room 201S at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. No individuals presented oral statements during the public hearing. The comment period closed on Aug 1, 2000.

A total of 4 commenters provided both general and specific comments on the proposed rules. The following commented on the proposal: Industry Council on the Environment (ICE); 7-Eleven, Inc.; Texas Petroleum Marketers and Convenience Store Association (TPCA); and TXU Business Services.

ANALYSIS OF TESTIMONY

SPECIFIC COMMENTS

In §37.802, Definitions, TPCA commented that the definition for “Accidental release” is “Any sudden or nonsudden release from an UST that results in a need for corrective action and/or compensation for bodily injury or property damage neither expected nor intended by the tank owner or operator.” TPCA also stated that the definition of “Accidental release” is critical for insurance coverage and arguably sets the scope of coverage required by the rules. Commenter states that insurers will attempt to limit the scope of coverage in ways that should not be acceptable to the TNRCC or to TPCA members. TPCA

provided the example that insurers will argue that releases from piping close to the surface or dispensers and pumps at the surface are not releases from a UST within the scope of the insurance coverage. TPCA suggested that the definition be “clarified” to include “Any sudden or nonsudden, surface or subsurface release from an UST system...” TPCA added the clause “surface or subsurface” and the word “system” to the definition.

The commission responds that TPCA’s proposal is a major change to the rule which would impact other stakeholders than those impacted by the proposed rules, and would increase impacts on those affected by the proposed rules, which is a type of change that cannot legally be made at this stage of the rulemaking process. TPCA can file a subsequent rulemaking petition. The insurance industry as issuers of policies should have the ability to participate in any changes to such an important definition. The proposed changes would likely impact the cost of the policy and the availability which would impact the regulated community; therefore, the regulated community should be able to comment. The Texas Department of Insurance as the state regulatory body for insurance and as the statutorily identified “consultant” to the TNRCC on UST insurance (per TWC, §26.352) should have the ability to comment. The EPA should be able to comment since the proposed changes could be said to conflict with federal regulations concerning PST program delegation.

Additionally, TWC, §26.352(a), Financial Responsibility, refers only to an “UST” and not to an UST system. The statute reads: “The commission by rule shall adopt requirements for maintaining evidence of financial responsibility for taking corrective action and compensating

third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank.” It is possible that legislative changes to the TWC would be necessary to affect the changes sought by TPCA.

TPCA comments that the definition for “Bodily injury” is “The meaning given this term by applicable state law; however, this term shall not include those liabilities which, consistent with standard insurance practices, are excluded from coverage in liability policies for bodily injury.” TPCA states that the term “Bodily injury” is not typically used in third party claims for injuries to individuals in Texas courts, and that the term typically used for injuries to individuals in Texas courts is “personal injury.” TPCA further states that “TPCA believes that this definition of bodily injury should be tied to Texas law.” TPCA refers to Chapter 8, Personal Injury Damages, Chapter 9, Wrongful Death Damages, and Chapter 10, Survival Damages, in the Texas Pattern Jury Charges, General Negligence (1998 Edition) as a demonstration of the basic instructions, questions, definitions, and legal commentary used in Texas courts whenever a person is injured or killed as a result of negligence. TPCA also states that the same definitions are included in the Texas Pattern Jury Charges, Product Liability (1998 Edition). TPCA comments that the definition of bodily injury “should leave no room for confusion concerning the types of damage awards to which UST insurance must respond.” TPCA suggests that the definition for bodily injury include “the meaning given this term for personal injury, wrongful death, and survival damages in the courts of the state of Texas....”

TPCA’s proposal is a major change to the rule which would impact other stakeholders than those impacted by the proposed rules, and would increase impacts on those affected by the proposed

rules, which is a type of change that cannot legally be made at this stage of the rulemaking process. TPCA can file a subsequent rulemaking petition. The insurance industry as issuers of policies should have the ability to participate in any changes to such an important definition. The proposed changes would likely impact the cost of the policy and the availability which would impact the regulated community; therefore, the regulated community should be able to comment. The Texas Department of Insurance as the state regulatory body for insurance and as the statutorily identified “consultant” to the TNRCC on UST insurance (per TWC, §26.352) should have the ability to comment. The EPA should be able to comment since the proposed changes could be said to conflict with federal regulations concerning PST program delegation.

TPCA commented that the definition for “Property damage” is “The meaning given to this term by applicable state law. This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, exclusions for property damages shall not include corrective action associated with releases from tanks where covered by the policy.” TPCA states that the definition of “Property damage” should also be tied to Texas state law. TPCA states that Texas courts use this term, which is defined in Chapter 11 of the General Negligence volume of the Texas Pattern Jury Charges. TPCA suggest that the definition for “property damage” include “the meaning given this term in the courts of the state of Texas....” TPCA further states that the definition should be clarified to include “releases from UST systems” rather than just “releases from tanks.”

TPCA's proposal is a major change to the rule which would impact other stakeholders than those impacted by the proposed rules, and would increase impacts on those affected by the proposed rules, which is a type of change that cannot legally be made at this stage of the rulemaking process. The commenter can file a subsequent rulemaking petition. The insurance industry as issuers of policies should have the ability to participate in any changes to such an important definition. The proposed changes would likely impact the cost of the policy and the availability which would impact the regulated community; therefore, the regulated community should be able to comment. The Texas Department of Insurance as the state regulatory body for insurance and as the statutorily identified "consultant" to the TNRCC on UST insurance (per TWC, §26.352) should have the ability to comment. The EPA should be able to be able to comment since the proposed changes could be said to conflict with federal regulations concerning PST program delegation.

Additionally, TWC, §26.352(a), Financial Responsibility, refers only to an "UST" and not to an UST system. The statute reads: "The commission by rule shall adopt requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank." It is possible that legislative changes to the TWC would be necessary to affect the changes sought by the TPCA.

In §37.815, Amount and Scope of Required Financial Assurance, TPCA commented that this section establishes the amount and scope of required financial assurance. TPCA states that subsection (a)

should clearly reference UST systems because the proposed rule is arguably limited to accidental releases from tanks. TPCA suggests that subsection (a) be revised to include "...accidental releases from the operation of petroleum UST systems...." to clearly state that accidental releases from the complete UST system are covered.

TPCA's proposal is a major change to the rule which would impact other stakeholders than those impacted by the proposed rules, and would increase impacts on those affected by the proposed rules, which is a type of change that cannot legally be made at this stage of the rulemaking process. TPCA can file a subsequent rulemaking petition. The insurance industry as issuers of policies should have the ability to participate in any changes to the scope of coverage. The proposed changes would likely impact the cost of the policy and the availability which would impact the regulated community; therefore, the regulated community should be able to comment. The Texas Department of Insurance as the state regulatory body for insurance and as the statutorily identified "consultant" to the TNRCC on UST insurance (per TWC, §26.352) should have the ability to comment. The EPA should be able to comment since the proposed changes could be said to conflict with federal regulations concerning PST program delegation.

Additionally, TWC, §26.352(a), Financial Responsibility, refers only to an "UST" and not to an UST system. The statute reads: "The commission by rule shall adopt requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental

releases arising from operating an underground storage tank.” It is possible that legislative changes to the TWC would be necessary to affect the changes sought by the TPCA.

In §37.825(b)(1)(F), Financial Test of Self-Insurance, I.C.E. and 7-Eleven, Inc. suggested that the regulation should be revised to make clear that self-insured owners/operators are required to deduct from net worth only those environmental obligations or liabilities that are specifically covered by self-insurance and as such, may decrease the owner/operator’s ability to satisfy financial assurance provisions through self-insurance. I.C.E. and 7-Eleven, Inc. added that the provision as drafted requires the owner/operator to deduct from net worth “the sum of additional environmental liabilities not identified above.” I.C.E. and 7-Eleven, Inc. also state that this language would appear to include liabilities or obligations which are insured against by third parties, such as guarantees, letters of credit, or other insurance. The commenters recommend the following revision: “(F) the sum of additional environmental obligations not identified above and for which a financial test or other form of self-insurance is used to meet an enforceable legal obligation to demonstrate financial assurances by the owner/operator.”

The commission agrees with the comments and intended that §37.825(b)(1)(F) reflect this very concept as is already found in §37.825(b). The commission will adopt the concept, but will revise the language to be compatible with §37.825(b).

In the figures contained in §37.830(c), Guarantee, §37.840(b) Performance Bond; and §37.855(b), Trust Agreement; TPCA commented that these figures for the guarantee, performance bond, and letter

of credit “all contain similar limitations on the financial obligation for the following types of accidental releases from UST systems: “Bodily injury or property damage arising from the ownership, maintenance, use or entrustment to others of any aircraft, motor vehicle, or watercraft.” TPCA states that this quoted limitation is a serious gap in protection of TPCA members and the public. TPCA also states that the limitation is contrary to the purposes of both the federal and state laws which govern the operation of a tank and require an acceptable mechanism to provide financial responsibility. TPCA further states that the language is a typical exclusion found in a general liability policy and forces a business to resort to its automobile liability insurance. The commenter adds that many of TPCA’s members do not have automobile liability insurance, and that many automobile liability policies do not cover or exclude pollution or environmental risks. In conclusion, TPCA states that these limitations should be eliminated from every financial mechanism.

TPCA’s proposal is a major change to the rule which would impact other stakeholders than those impacted by the proposed rules, and would increase impacts on those affected by the proposed rules, which is a type of change that cannot legally be made at this stage of the rulemaking process. The commenter can file a subsequent rulemaking petition. The insurance industry as issuers of policies should have the ability to participate in any changes to the scope of coverage. The proposed changes would likely impact the cost of the policy and the availability which would impact the regulated community; therefore, the regulated community should be able to comment. The Texas Department of Insurance as the state regulatory body for insurance and as the statutorily identified “consultant” to the TNRCC on UST insurance (per TWC, §26.352) should

have the ability to comment. The EPA should be able to comment since the proposed changes could be said to conflict with federal regulations concerning PST program delegation.

In the figure contained in §37.835(b)(1), Endorsement, and in §37.835(b)(2), Certificate of Insurance, TPCA commented that these figures for the endorsement and certificate of insurance do not provide adequate protection from policy provisions which void or narrow the minimum insurance coverage required by Chapter 37. TPCA adds that what TNRCC requires on one hand is taken away by policy language inserted by insurers in the form of exclusions or limitations on the coverage. TPCA said that the problem has been faced in Texas courts in the context of the financial responsibility statute governing automobile liability insurance. TPCA refers to a case heard by the Texas Supreme Court which invalidated an exclusion which voided the coverage intended by the Texas Motor Vehicle Safety-Responsibility Act. TPCA requests that “because the TNRCC cannot write the basic UST insurance policy, it should incorporate the basic principal of Texas law established by National County Mutual into the endorsement and certificate of insurance.” Consequently, TPCA proposed a new paragraph 3 to the certificate and endorsement to read: “Policy provisions which void or narrow the scope and the minimum limits of insurance coverage for accidental releases from UST systems required by Title 30, TAC, Section 37.815, are ineffective and unenforceable.”

TPCA’s proposal is a major change to the rule which would impact other stakeholders than those impacted by the proposed rules, and would increase impacts on those affected by the proposed rules, which is a type of change that cannot legally be made at this stage of the rulemaking process. The commenter can file a subsequent rulemaking petition. The insurance industry as

issuers of policies should have the ability to participate in any changes to the scope of coverage.

The proposed changes would likely impact the cost of the policy and the availability which would impact the regulated community; therefore, the regulated community should be able to comment.

The Texas Department of Insurance as the state regulatory body for insurance and as the statutorily identified “consultant” to the TNRCC on UST insurance (per TWC, §26.352) should have the ability to comment. The EPA should be able to comment since the proposed changes could be said to conflict with federal regulations concerning PST program delegation.

Additionally, TWC, §26.352(a), Financial Responsibility, refers only to an “UST” and not to an UST system. The statute reads: “The commission by rule shall adopt requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank.” It is possible that legislative changes to the TWC would be necessary to affect the changes sought by the commenter.

In §37.875(a), Financial Assurance Recordkeeping, 7-Eleven, Inc. suggested that the term “proof” should replace “evidence.”

The commission agrees that “proof” is a more accurate and definitive clarification of the rule’s intent, and has revised the subsection.

TXU Business Services suggested that the “Underground Storage Tank (UST) Registration and Self-Certification Form” be integrated with the financial assurance submission in order to streamline the compliance certification process.

Under the adopted rules, financial assurance compliance certification is accomplished under the authority of §334.8(c) using a portion of the Registration and Self-Certification form. TXU Business Services’ request for “integration” is achieved in the adopted rules and no further change is required.

In the Chapter 37 title, TPCA commented that because federal rules use the term “financial responsibility” and the Texas Supreme Court opinion construes the motor vehicle financial responsibility statute, that Chapter 37 should be retitled from “Financial Assurance” to “Financial Responsibility.” TPCA argues that this would be more consistent and clear and that consistency and clarity are imperative to avoid coverage disputes and litigation.

The title to Chapter 37 is not open in this rulemaking. The commission agrees that consistency and clarity are imperative in regulations and Chapter 37 includes a definition in §37.11 for “Financial responsibility” which states that the term shall be used interchangeably with financial assurance. Therefore, no change is necessary. If TPCA is referring specifically to the title for Subchapter I of Chapter 37, then to change the title to Subchapter I to “Financial Responsibility” would make that subchapter inconsistent with the use of “Financial Assurance” used in every other subchapter in Chapter 37 as well as the general title of Chapter 37.

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The new sections are also adopted under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding UST and aboveground storage tanks; and §26.352, which requires the commission to adopt by rule requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an UST.

SUBCHAPTER I: Financial Assurance for Petroleum Underground Storage Tank Systems

**§§37.801, 37.802, 37.815, 37.820, 37.825, 37.830, 37.835, 37.840, 37.845, 37.850, 37.855, 37.860,
37.865, 37.870, 37.875, 37.880, 37.885, 37.890, 37.895**

§37.801. Applicability.

(a) This subchapter applies to an owner and operator of a petroleum underground storage tank (UST) system required to provide financial assurance under Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for corrective action and third party liability.

(b) State and federal governmental entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of this subchapter.

(c) If the owner and operator of a petroleum UST are separate persons, only one person is required to demonstrate financial assurance; however, both parties are liable in the event of noncompliance.

§37.802. Definitions.

General agency terms are defined in Chapter 3 of this title (relating to Definitions). Definitions for financial assurance terms that appear throughout this subchapter may alternatively be found in

§37.11 of this title (relating to Definitions) or in §37.402 of this title (relating to Definitions).

Petroleum UST specific terms may be found in Chapter 334, Subchapter A, §334.2 of this title (relating to Definitions). When used in this subchapter, the following terms shall have the meanings given below, unless otherwise specified.

(1) **Accidental release** - Any sudden or nonsudden release of petroleum from an UST that results in a need for corrective action and/or compensation for bodily injury or property damage neither expected nor intended by the tank owner or operator.

(2) **Bodily injury** - The meaning given to this term by applicable state law; however, this term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.

(3) **Chief financial officer** - In the case of local government owners and operators, the individual with the overall authority and responsibility for the collection, disbursement, and use of funds by the local government.

(4) **Controlling interest** - Direct ownership of at least 50% of the voting stock of another entity.

(5) **Financial reporting year** - The latest consecutive twelve-month period for which any of the following reports used to support a financial test is prepared:

(A) a 10-K report submitted to the United States Securities and Exchange Commission;

(B) an annual report of tangible net worth submitted to Dun and Bradstreet; or

(C) annual reports submitted to the Energy Information Administration or the Rural Electrification Administration. Financial reporting year may thus comprise a fiscal or calendar year period.

(6) **Legal defense cost** - any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought:

(A) by United States Environmental Protection Agency or a state to require corrective action or to recover the costs of corrective action;

(B) by or on behalf of a third party for bodily injury or property damage caused by an accidental release; or

(C) by any person to enforce the terms of a financial assurance mechanism.

(7) **Local government** - The meaning given this term by applicable state law. The term includes:

(A) counties, municipalities, townships, separately chartered and operated special districts (including local government public transit systems and redevelopment authorities), and independent school districts authorized as governmental bodies by state charter or constitution; and

(B) special districts and independent school districts established by counties, municipalities, townships, and other general purpose governments to provide essential services.

(8) **Occurrence** - An accident, including continuous or repeated exposure to conditions, which result in a release from an UST.

(9) **Property damage** - The meaning given this term by applicable state law. This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, exclusions for property damage shall not include corrective action associated with releases from tanks where covered by the policy.

(10) **Provider of financial assurance** - An entity that provides financial assurance to an owner or operator of an UST through one of the approved mechanisms.

(11) **Substantial governmental relationship** - The extent of a governmental relationship necessary under applicable state law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if

it arises from a clear commonality of interest in the event of an UST release such as coterminous boundaries, overlapping constituencies, common ground-water aquifer, or other relationship other than monetary compensation that provides a motivation for the guarantor to provide a guarantee.

§37.815. Amount and Scope of Required Financial Assurance.

(a) Owners or operators of petroleum underground storage tanks (USTs) must demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs in at least the following per-occurrence amounts:

(1) for owners or operators of petroleum USTs that are located at petroleum marketing facilities, or that handle an average of more than 10,000 gallons of petroleum per month based on annual throughput for the previous calendar year, \$1 million; or

(2) for all other owners or operators of petroleum USTs; \$500,000.

(b) Owners or operators of petroleum USTs must demonstrate financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs in at least the following annual aggregate amounts:

(1) for owners or operators of 1 to 100 petroleum USTs within the United States, \$1 million; and

(2) for owners or operators of 101 or more petroleum USTs within the United States, \$2 million.

(c) For the purposes of subsections (b) and (f) of this section only, petroleum UST means a single containment unit and does not mean combinations of single containment units.

(d) Except as provided in subsection (e) of this section, the amount of assurance provided by each mechanism or combination of mechanisms must be in the full amount specified in subsections (a) and (b) of this section, if the owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial assurance for:

(1) taking corrective action;

(2) compensating third parties for bodily injury and property damage caused by sudden accidental releases; or

(3) compensating third parties for bodily injury and property damage caused by nonsudden accidental releases.

(e) If the owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial assurance for different petroleum USTs, the annual aggregate required shall be based on the number of tanks covered by each separate mechanism or combination of mechanisms.

(f) Owners or operators shall review the amount of aggregate financial assurance provided whenever additional petroleum USTs are acquired or installed. If the number of petroleum USTs within the United States owned or operated by that person for which financial assurance must be provided exceeds 100, the owner or operator shall demonstrate financial assurance in the amount of at least \$2 million of annual aggregate by the anniversary of the date on which the mechanism demonstrating financial assurance became effective. If financial assurance is being demonstrated by a combination of mechanisms, the owner or operator shall demonstrate financial assurance in the amount of at least \$2 million of annual aggregate by the first-occurring effective date anniversary of any one of the mechanisms combined (other than a financial test or guarantee) to provide financial assurance.

(g) The amounts of financial assurance required under this section exclude legal defense costs.

(h) The required per-occurrence and annual aggregate coverage amounts do not in any way limit the liability of the owner or operator.

§37.820. Allowable Mechanisms and Combinations of Mechanisms.

(a) Subject to the limitations of subsections (b) and (c) of this section:

(1) an owner or operator, including a local government owner or operator, may use any one or combination of the mechanisms listed in §37.825 of this title (relating to Financial Test of Self-Insurance), §37.830 of this title (relating to Guarantee), §37.835 of this title (relating to Insurance and Risk Retention Group Coverage), §37.840 of this title (relating to Surety Bond), §37.845 of this title (relating to Letter of Credit), §37.850 of this title (relating to Trust Fund), and §37.855 of this title (relating to Standby Trust Fund) to demonstrate financial assurance under this subchapter for one or more underground storage tank (UST) systems; and

(2) A local government owner or operator may use any one or a combination of the mechanisms listed in 40 Code of Federal Regulations §§280.104 - 280.107 (relating to Local Government Bond Rating Test, Local Government Financial Test, Local Government Guarantee, Local Government Fund, respectively) to demonstrate financial assurance under this subchapter for one or more USTs.

(b) An owner or operator may use a guarantee or surety bond to establish financial assurance only if the Attorney General of Texas has submitted a written statement to the agency that a guarantee or surety bond executed as described in this section is a legally valid and enforceable obligation in the state.

(c) An owner or operator may use self-insurance in combination with a guarantee only if, for the purpose of meeting the requirements of the financial test under this rule, the financial statements of the owner or operator are not consolidated with the financial statements of the guarantor.

§37.825. Financial Test of Self-Insurance.

(a) An owner, operator, and/or guarantor, may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Assurance) by passing a financial test as specified in this section. To pass the financial test of self-insurance, the owner, operator, and/or guarantor must meet the criteria of subsections (b) or (c) of this section based on year-end financial statements for the latest completed fiscal year.

(b) The owner, operator, and/or guarantor must meet the requirements of this subsection referred to as Alternative 1. The owner, operator, and/or guarantor must:

(1) Have a tangible net worth of at least ten times:

(A) the total of the applicable aggregate amount required by §37.815 of this title based on the number of underground storage tanks for which a financial test is used to demonstrate financial assurance to the agency under this section;

(B) the sum of the corrective action cost estimates, the current closure and post-closure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial assurance to the agency under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), 40 Code of Federal Regulations (CFR) Parts 264, 265, or state equivalent;

(C) the sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial assurance to the agency under Chapter 331 of this title (relating to Underground Injection Control), 40 CFR Part 144 or state equivalent;

(D) the sum of municipal solid waste cost estimates for which a financial test is used to demonstrate financial assurance to the agency under Chapter 330 (relating to Municipal Solid Waste), 40 CFR Part 258 or state equivalent;

(E) the sum of current polychlorinated biphenyl (PCB) cost estimates for which a financial test is used to demonstrate financial assurance to the United States Environmental Protection Agency (EPA) under 40 CFR Part 761; and

(F) the sum of additional financial assurance obligations not identified in subparagraphs (A) - (E) of this paragraph and for which a financial test or other form of self-insurance is used to meet financial assurance obligations under the commission or other federal or state environmental regulations.

(2) Have a tangible net worth of at least \$10 million.

(3) Have a letter signed by the chief financial officer as specified in subsection (d) of this section.

(4) Either:

(A) file financial statements annually with the United States Securities and Exchange Commission (SEC), the Energy Information Administration, or the Rural Electrification Administration; or

(B) report annually the firm's tangible net worth to Dun and Bradstreet, and Dun and Bradstreet must have assigned the firm a financial strength rating of 4A or 5A.

(5) The firm's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(c) The owner, operator, and/or guarantor must meet the requirements of this subsection referred to as Alternative 2.

(1) The owner, operator, and/or guarantor must meet the financial test requirements of §37.541(a) and (b) of this title (relating to Financial Test for Liability), substituting the appropriate amounts specified in §37.815(b)(1) and (2) of this title for the "amount of liability coverage" each time specified in that section.

(2) The fiscal year-end financial statements of the owner or operator, and/or guarantor, must be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination.

(A) The firm's year-end financial statements cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(B) The owner, operator, and/or guarantor, must have a letter signed by the chief financial officer as specified in subsection (d) of this section.

(3) If the financial statements of the owner, operator, and/or guarantor, are not submitted annually to the SEC, the Energy Information Administration or the Rural Electrification Administration, the owner, operator, and/or guarantor, must obtain a special report by an independent certified public accountant stating that:

(A) the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the independent certified public accountant which indicated that the specified data should be adjusted.

(d) To demonstrate that it meets the financial test under subsection (b) or (c) of this section, the chief financial officer of the owner, operator, and/or guarantor, must sign, within 120 days of the close of each financial reporting year, as defined by the 12-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in parentheses are to be replaced by the relevant information and the parentheses deleted.

Figure: 30 TAC §37.825(d)

Figure: 30 TAC §37.825(d)

LETTER FROM CHIEF FINANCIAL OFFICER

I am the chief financial officer of (insert: name and address of the owner, operator, or guarantor). This letter is in support of the use of (insert: "the financial test of self-insurance," and/or "guarantee") to demonstrate financial assurance for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage") caused by (insert: "sudden accidental releases" and/or "nonsudden accidental releases") in the amount of at least (insert: dollar amount) annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this (insert: "owner or operator," and/or "guarantor"): (List for each facility: the name and address of the facility where tanks assured by this financial test are located. Alternatively, if the number of tanks which a firm owns or operates in the United States exceeds 20, and all of these tanks are being covered by the same guarantee, state the exact location where the information relating to the number of tanks at each facility and the names and addresses of the facilities where the tanks are located can be found. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the registration information submitted under Title 30, Texas Administrative Code (TAC), §334.7 (relating to Registration for USTs).)

This firm is the owner, operator, or guarantor of the following facilities for which financial assurance is being demonstrated under other TNRCC, EPA regulations, or state program authorized by

EPA through a financial test or guarantee. (For each program area identify: the facility name, physical and mailing addresses, federal or state equivalent regulations, permit number, current cost estimate, and liability coverage. Identify for each current cost estimate the amount designated for closure, post closure, corrective action, or liability coverage.)

- (a) Municipal solid waste management facilities under 30 TAC Chapter 330, 40 CFR part 258 or equivalent \$ _____
 - (b) Underground injection control facilities under 30 TAC Chapter 331, 40 CFR part 144 or equivalent \$ _____
 - (c) PCB storage facilities under 40 CFR part 761 or equivalent \$ _____
 - (d) Hazardous waste treatment, storage, and disposal facilities under 30 TAC Chapter 335, 40 CFR parts 264 and 265 or equivalent \$ _____
 - (e) Additional environmental obligations not shown above \$ _____
- Total (a)-(e) \$ _____

This (insert "owner or operator," or "guarantor") has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on its financial statements for the latest completed fiscal year.

(Fill in the information for Alternative I if the criteria of §37.825(b) of this title (relating to Financial Test of Self-Insurance) are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of §37.825(c) of this title are being used to demonstrate compliance with the financial test requirements.)

ALTERNATIVE I

- 1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee \$ _____
 - 2. Sum of current cost estimates for closure, post closure, corrective action, and liability coverage (total of (a)-(e) directly above) \$ _____
 - 3. Sum of lines 1 and 2 \$ _____
 - 4. Total tangible assets \$ _____
 - 5. Total liabilities (if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6) \$ _____
 - 6. Tangible net worth (subtract line 5 from line 4) \$ _____
- Yes No
- 7. Is line 6 at least \$10 million? _____ _____
 - 8. Is line 6 at least 10 times line 3? _____ _____
 - 9. Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission? _____ _____
 - 10. Have financial statements for the latest fiscal year been filed with

- the Energy Information Administration? _____
- 11. Have financial statements for the latest fiscal year been filed with the Rural Electrification Administration? _____
- 12. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating of 4A or 5A? (Answer "Yes" only if both criteria have been met.) _____

ALTERNATIVE II

- 1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee _____
- 2. Sum of current cost estimates for closure, post closure, corrective action and liability coverage (total of (a)-(e) directly above) _____
- 3. Sum of lines 1 and 2 _____
- 4. Total tangible assets _____
- 5. Total liabilities (if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6) _____
- 6. Tangible net worth (subtract line 5 from line 4) _____
- 7. Total assets in the U.S. (required only if less than 90 percent of assets are located in the U.S.) _____
- 8. Is line 6 at least \$10 million? _____
- 9. Is line 6 at least 6 times line 3? _____
- 10. Are at least 90 percent of assets located in the U.S.? (If "No," complete line 11.) _____
- 11. Is line 7 at least 6 times line 3? _____ (Fill in either lines 12-15 or lines 16-18)
- 12. Current assets _____
- 13. Current liabilities _____
- 14. Net working capital (subtract line 13 from 12) _____
- 15. Is line 14 at least 6 times line 3? _____
- 16. Current bond rating of most recent bond issue _____
- 17. Name of rating service _____
- 18. Date of maturity of bond _____
- 19. Have financial statements for the latest fiscal year been filed with the SEC, the Energy Information Administration, or the Rural Electrification Administration? _____

(If "No," please attach a report from an independent certified public accountant certifying that there are no material differences between the data as reported in lines 4-18 above and the financial statements for the latest fiscal year.)

(For both Alternative I and Alternative II complete the certification with this statement.)

I hereby certify that the wording of this letter is identical to the wording specified in Title 30, TAC, §37.825, as this regulation was constituted on the date shown immediately below.

(Insert signature)
(Insert name)
(Insert title)
(Insert date)

(e) If an owner or operator using the test to provide financial assurance finds that he or she no longer meets the requirements of the financial test based on the year-end financial statements, the owner or operator must obtain alternative coverage within 150 days of the end of the year for which financial statements have been prepared.

(f) The agency may require reports of financial condition at any time from the owner, operator, and/or guarantor. If the agency finds, on the basis of these reports or other information, that the owner, operator, and/or guarantor, no longer meets the financial test requirements of subsections (b) or (c) and (d) of this section, the owner or operator must obtain alternative coverage within 30 days after notification of this finding.

(g) If the owner or operator fails to obtain alternate financial assurance within 150 days of finding that he or she no longer meets the requirements of the financial test based on the year-end financial statements, or within 30 days of notification by the executive director that he or she no longer meets the requirements of the financial test, the owner or operator must notify the executive director of this failure within ten days.

§37.830. Guarantee.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be:

(1) a firm that:

(A) possesses a controlling interest in the owner or operator;

(B) possesses a controlling interest in a firm described under subparagraph (A) of this paragraph; or

(C) is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or

(2) a firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship.

(b) Within 120 days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of §37.825 of this title (relating to Financial Test of Self-Insurance) based on year-end financial statements for the latest completed financial reporting year

by completing the letter from the chief financial officer described in §37.825(d) of this title and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within 120 days of the end of that financial reporting year the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. If the agency notifies the guarantor that he or she no longer meets the requirements of the financial test of §37.825(b) or (c) and (d) of this title the guarantor must notify the owner or operator within ten days of receiving this notification from the agency. In both cases, the guarantee will terminate no less than 120 days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternate coverage as specified in §37.890(c) of this title (relating to Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance).

(c) The guarantee must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.830(c)

Figure: 30 TAC §37.830(c)

GUARANTEE

Guarantee made this (insert date) by (insert name of guaranteeing entity), a business entity organized under the laws of the state of (insert name of state), herein referred to as guarantor, to the Texas Natural Resource Conservation Commission (TNRCC) and to any and all third parties, and obligees, on behalf of (insert owner or operator) of (insert business address).

Recitals

1. Guarantor meets or exceeds the financial test criteria of Title 30, Texas Administrative Code (TAC), §37.825(b) or (c) and (d) and agrees to comply with the requirements for guarantors as specified in Title 30, TAC, §37.830(b).

2. (Insert owner or operator) owns or operates the following underground storage tank(s) covered by this guarantee: (List the number of tanks at each facility and the names(s) and address(es) of the facility(ies) where the tanks are located. Alternatively, if the number of tanks which a firm owns or operates in the United States exceeds 20, and all of these tanks are being covered by the same guarantee, state the exact location where the information relating to the number of tanks at each facility and the names and addresses of the facilities where the tanks are located can be found. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under Title 30, TAC, §334.7 (relating to Registration for USTs), and the name and address of the facility.) This guarantee satisfies Title 30, TAC, Chapter 37, Subchapter I (relating to Financial Assurance for Petroleum Underground Storage Tank Systems) requirements for assuring funding for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "nonsudden accidental releases" or "accidental release"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the above-identified underground storage tank(s) in the amount of (insert dollar amount) per occurrence and (insert dollar amount) annual aggregate.

3. (Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator) or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)) (insert owner or operator), guarantor guarantees to the TNRCC and to any and all third parties that:

In the event that (insert owner or operator) fails to provide alternate coverage within 60 days after receipt of a notice of cancellation of this guarantee and the Executive Director of the TNRCC has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the Executive Director of the TNRCC, shall fund a standby trust fund in accordance with the provisions of Title 30, TAC, of §37.880 (relating to Drawing on Financial Assurance Mechanisms), in an amount not to exceed the coverage limits specified above.

In the event that the Executive Director of the TNRCC determines that (insert owner or operator) has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with Title 30, TAC, Chapter 334, Subchapter D (relating to Release Reporting and Corrective Action) of the guarantor upon written instructions from the executive director of the TNRCC shall fund a standby trust in accordance with the provisions of Title 30, TAC, §37.880, in an amount not to exceed the coverage limits specified above.

If (insert owner or operator) fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by (insert "sudden" and/or "nonsudden") accidental releases arising from the operation of the above-identified tank(s), or fails to

pay an amount agreed to in settlement of a claim arising from or alleged to arise from injury or damage, the guarantor, upon written instructions from the Executive Director of the TNRCC, shall fund a standby trust in accordance with the provisions of Title 30, TAC, §37.880 to satisfy these judgement(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

4. Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of Title 30, TAC, §37.825(b) or (c) and (d), the guarantor shall send within 120 days of this failure, by certified mail, notice to (insert owner or operator). The guarantee will terminate 120 days from the date of receipt of the notice by (insert owner or operator), as evidenced by the return receipt.

5. Guarantor agrees to notify (insert owner or operator) and the Executive Director of the TNRCC by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

6. Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of (insert owner or operator) under Title 30, TAC, Chapter 334 (relating to Underground and Aboveground Storage Tanks).

7. Guarantor agrees to remain bound under this guarantee for so long as (insert owner or operator) must comply with the applicable financial responsibility requirements of Title 30, TAC, Chapter 37, Subchapter I for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to (insert owner or operator), this cancellation to become effective no earlier than 120 days after receipt of the notice by (insert owner or operator), as evidenced by the return receipt.

8. The guarantor's obligation does not apply to any of the following:

a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);

c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank;

e. Bodily damage or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of Title 30, TAC, §37.815.

9. Guarantor expressly waived notice of acceptance of this guarantee by the TNRCC, by any or all third parties, or by (insert owner or operator).

I hereby certify that the wording of this guarantee is identical to the wording specified in Title 30, TAC, §37.830(c), as this regulation was constituted on the effective date shown immediately below.

Effective date: _____

(Insert name of guarantor)
(Insert authorized signature for guarantor)
(Insert name of person signing)
(Insert title of person signing)

Signature of witness or notary: _____

(d) An owner or operator who uses a guarantee to satisfy the requirements of §37.815 of this title must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the executive director under §37.880 of this title. This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

§37.835. Insurance and Risk Retention Group Coverage.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. This insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.

(b) Each insurance policy must be amended by an endorsement as specified in paragraph (1) of this subsection or evidenced by a certificate of insurance as specified in paragraph (2) of this subsection, except that instructions in parentheses must be replaced with the relevant information and the parentheses deleted.

(1) Endorsement.

Figure: 30 TAC §37.835(b)(1)

Figure: 30 TAC §37.835(b)(1)

ENDORSEMENT

Name: (Insert name of each covered location)

Address: (Insert address of each covered location)

Policy Number:

Period of Coverage: (Insert current policy period)

Name of Insurer or Risk Retention Group:

Address of Insurer or Risk Retention Group:

Name of Insured:

Address of Insured:

Endorsement:

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

(List the number of tanks at each facility and the names(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under Title 30, Texas Administrative Code (TAC), §334.7, (relating to Registration for USTs), and the name and address of the facility.) for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the underground storage tank(s) identified in this paragraph.

The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location), exclusive of legal defense costs. This coverage is provided under (insert policy number). The effective date of said policy is (insert date).

2. The insurance afforded with respect to these occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subparagraphs (a) through (e) of this paragraph are to be amended to conform with these subparagraphs:

a. Bankruptcy or insolvency of the insured shall not relieve the (insert "Insurer" or "Group") of its obligations under the policy to which this endorsement is attached.

b. The (insert "Insurer" or "Group") is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any payment made by the (insert "Insurer" or "Group"). This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in Title 30, TAC, §37.825 of this title (relating to Financial Test of Self-Insurance), §37.830 of this title (relating to Guarantee), §37.835 of this title (relating to Insurance and Risk Retention Group Coverage), §37.840 of this title (relating to Surety Bond), §37.845 of this title (relating to Letter of Credit), and §37.850 of this title (relating to Trust Fund).

c. Whenever requested by the Executive Director of the Texas Natural Resource Conservation Commission (TNRCC), the (insert "Insurer" or "Group") agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the (insert "Insurer" or "Group"), except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of this written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

(Insert for claims-made policies:

e. The insurance covers claims otherwise covered by the policy that are reported to the (insert "Insurer" or "Group") within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.)

I hereby certify that the wording of this instrument is identical to the wording in Title 30, TAC, §37.835(b)(1) (relating to Insurance and Risk Retention Group Coverage) and that the (insert "Insurer" or "Group") is (insert "licensed to transact the business of insurance" or "eligible to provide insurance as an excess or surplus lines insurer") in Texas.

(Insert signature of authorized representative of Insurer or Risk Retention Group)

(Insert name of person signing)

(Insert title of person signing), Authorized Representative of (Insert name of Insurer or Risk Retention Group)

(Insert address of Representative)

(2) Certificate of Insurance.

Figure: 30 TAC §37.835(b)(2)

Figure: 30 TAC §37.835(b)(2)

CERTIFICATE OF INSURANCE

Name: (Insert name of each covered location)

Address: (Insert address of each covered location)

Policy Number:

Endorsement (if applicable):

Period of Coverage: (Insert current policy period)

Name of Insurer or Risk Retention Group:

Address of Insurer or Risk Retention Group:

Name of Insured:

Address of Insured:

Certification:

1. (Insert name of Insurer or Risk Retention Group), (insert the "Insurer" or "Group"), as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

(List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under Title 30, Texas Administrative Code, §334.7 (relating to Registration for USTs), and the name and address of the facility.) for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the underground storage tank(s) identified above.

The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location), exclusive of legal defense costs. This coverage is provided under (insert policy number). The effective date of said policy is (insert date).

2. The (insert "Insurer" or "Group") further certifies the following with respect to the insurance described in paragraph 1:

a. Bankruptcy or insolvency of the insured shall not relieve the (insert "Insurer" or "Group") of its obligations under the policy to which this certificate applies.

b. The (insert "Insurer" or "Group") is liable for the payment of amounts within any deductible applicable to the policy, to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any payment made by the (insert "Insurer" or "Group"). This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in Title 30, TAC, §37.825 of this title (relating to Financial Test of Self-Insurance), §37.830 of this title (relating to Guarantee), §37.835 of this title (relating to Insurance and Risk Retention Group Coverage), §37.840 of this title (relating to Surety Bond), §37.845 of this title (relating to Letter of Credit), and §37.850 of this title (relating to Trust Fund).

c. Whenever requested by the Executive Director of the TNRCC, the (insert "Insurer" or "Group") agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the (insert "Insurer" or "Group"), except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of this written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

(Insert for claims-made policies:

e. The insurance covers claims otherwise covered by the policy that are reported to the (insert "Insurer" or "Group") within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.)

I hereby certify that the wording of this instrument is identical to the wording in Title 30, Texas Administrative Code, §37.835(b)(2), and that the (insert "Insurer" or "Group") is (insert "licensed to transact the business of insurance" or "eligible to provide insurance as an excess or surplus lines insurer") in Texas.

(Insert signature of authorized representative of Insurer)

(Type name)

(Insert title), Authorized Representative of (insert name of Insurer or Risk Retention Group)

(Insert address of representative)

(c) Each insurance policy must be issued by an insurer or a risk retention group that, at a minimum, is licensed to transact the business of insurance or is eligible to provide insurance as an excess or surplus lines insurer in Texas.

§37.840. Surety Bond.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining a surety bond that conforms to the requirements of this section. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the United States Department of the Treasury.

(b) The surety bond must be worded as follows, except that instructions in parentheses must be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.840(b)

Figure: 30 TAC §37.840(b)

PERFORMANCE BOND

Date bond executed: _____

Period of coverage: _____

Principal: (insert legal name and business address of owner or operator)

Type of organization: (insert "individual," "joint venture," "partnership," or "corporation")

State of incorporation (if applicable): _____

Surety(ies): (insert name(s) and business address(es))

Scope of Coverage: (List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the name and address of the facility and the tank identification number provided in the registration information submitted under Title 30, Texas Administrative Code (TAC), §334.7 (relating to Registration for USTs). List the coverage guaranteed by the bond: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" arising from operating the underground storage tank.")

Penal sums of bond: Per occurrence \$ _____
Annual aggregate \$ _____

Surety's bond number: _____

Know All Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to the Texas Natural Resource Conservation Commission in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in these sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of these sums only as is set forth opposite the name of this Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under Texas Water Code, Chapter 26, Subchapter I, as amended, to provide financial assurance for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the underground storage tanks identified above; and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide this financial assurance;

Now, therefore, the conditions of the obligation are that if the Principal shall faithfully (insert "take corrective action, in accordance with Title 30, TAC, Chapter 334, Subchapter D (relating to Release Reporting and Corrective Action) and the Executive Director of the Texas Natural Resource Conservation Commission's (TNRCC's) instructions for," and/or "compensate injured third parties for bodily injury and property damage caused by" either "sudden" or "nonsudden" or "sudden and nonsudden") accidental releases arising from operating the tank(s) identified above, or if the Principal shall provide alternate financial assurance, as specified in Title 30, TAC, Chapter 37, Subchapter I (relating to Financial Assurance for Petroleum Underground Storage Tank Systems) within 120 days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

This obligation does not apply to any of the following:

- a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);
- c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or
- e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of Title 30, TAC, §37.815.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the Executive Director of the TNRCC that the Principal has failed to (insert "take corrective action, in accordance with Title 30, TAC, Chapter 334, Subchapter D and the executive director's instructions," and/or "compensate injured third parties") as guaranteed by this bond, the Surety(ies) shall either perform (insert "corrective action in accordance with Title 30, TAC, Chapter 334, Subchapter D and the executive director's instructions," and/or "third-party liability compensation") or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by the Executive Director of the TNRCC under Title 30, TAC, §37.880 (relating to Drawing on Financial Assurance Mechanisms).

Upon notification by the TNRCC Executive Director that the Principal has failed to provide alternate financial assurance within 60 days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that the executive director has determined or suspects that a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by the executive director under Title 30, TAC, §37.880.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until this payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in Title 30, TAC, §37.840(b) (relating to Surety Bond), as this regulation was constituted on the date this bond was executed.

PRINCIPAL

(Insert signature(s))
(Insert name(s))
(Insert title(s))
(Insert corporate seal)

CORPORATE SURETY(IES)

(Insert name and address)
State of Incorporation: _____
Liability limit: \$ _____
(Insert signature(s))
(Insert name(s) and titles(s))
(Insert corporate seal)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

Bond premium: \$ _____

(c) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums.

(d) The owner or operator who uses a surety bond to satisfy the requirements of §37.815 of this title must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the executive director under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

§37.845. Letter of Credit.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section. The issuing institution must be an entity that has the authority to issue letters of credit in Texas and whose letter of credit operations are regulated and examined by a federal or state agency.

(b) The letter of credit must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.845(b)

Figure: 30 TAC §37.845(b)

IRREVOCABLE STANDBY LETTER OF CREDIT

(Insert name and address of issuing institution)

(Insert name and address of Executive Director of the Texas Natural Resource Conservation Commission)

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the account of (insert owner or operator name) of (insert address) up to the aggregate amount of (insert in words) U.S. dollars (\$(insert dollar amount)), available upon presentation of:

1. your sight draft, bearing reference to this letter of credit, No. _____; and
2. your signed statement reading as follows: "I certify that the amount of the draft is payable under regulations issued under authority of Texas Water Code, Chapter 26, Subchapter I, as amended".

This letter of credit may be drawn on to cover (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases") arising from operating the underground storage tank(s) identified below in the amount of (insert in words), \$(insert dollar amount), per occurrence and (insert in words), \$(insert dollar amount), annual aggregate:

(List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the name and address of the facility and the tank identification number provided in the registration information submitted under Title 30, TAC, §334.7 (relating to Registration for USTs).)

The letter of credit may not be drawn on to cover any of the following:

- a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);

c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or

e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of Title 30, TAC, §37.815 (relating to Amount and Scope of Required Financial Responsibility).

This letter of credit is effective as of (insert date) and shall expire on (insert date), but this expiration date shall be automatically extended for a period of (insert at least the length of the original term) on (insert expiration date) and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify (insert owner or operator) by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event the (insert owner or operator) is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by (insert owner or operator), as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor this draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of (insert owner or operator) in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in Title 30, TAC, §37.845(b) (relating to Letter of Credit) as this regulation was constituted on the date shown immediately below.

(Insert signature(s) and title(s) of official(s) of issuing institution)
(Insert date)

This credit is subject to (insert " the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code").

(c) An owner or operator who uses a letter of credit to satisfy the requirements of §37.815 of this title must also establish a standby trust fund when the letter of credit is acquired. Under the terms

of the letter of credit, all amounts paid under a draft by the executive director will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the executive director under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

(d) The letter of credit must be irrevocable with a term specified by the issuing institution. The letter of credit must provide that credit be automatically renewed for the same term as the original term, unless, at least 120 days before the current expiration date, the issuing institution notifies the owner or operator by certified mail of its decision not to renew the letter of credit. Under the terms of the letter of credit, the 120 days will begin on the date when the owner or operator receives the notice, as evidenced by the return receipt.

§37.850. Trust Fund.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Assurance) by establishing a trust fund that conforms to the requirements of this section. The trustee must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the State of Texas.

(b) The wording of the trust agreement must be identical to the wording specified in §37.855(b) of this title (relating to Standby Trust Fund), and must be accompanied by a formal certification of acknowledgment as specified in §37.855(c) of this title.

(c) The trust fund, when established, must be funded for the full required amount of coverage, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining required coverage.

(d) If the value of the trust fund is greater than the required amount of coverage, the owner or operator may submit a written request to the executive director for release of the excess.

(e) If other financial assurance as specified in this subchapter is substituted for all or part of the trust fund, the owner or operator may submit a written request to the executive director for release of the excess.

(f) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsections (d) or (e) of this section, the executive director will instruct the trustee to release to the owner or operator such funds as the executive director specifies in writing.

§37.855. Standby Trust Fund.

(a) An owner or operator using any one of the mechanisms authorized by §37.830 of this title (relating to Guarantee), §37.840 of this title (relating to Surety Bond), or §37.845 of this title (relating to Letter of Credit) must establish a standby trust fund when the mechanism is acquired. The trustee of the standby trust fund must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the State of Texas.

(b) The standby trust agreement or trust agreement must be worded as follows, except the instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.855(b)

Figure: 30 TAC §37.855(b)

TRUST AGREEMENT

Trust agreement, the "Agreement," entered into as of (insert date) by and between (insert name of the owner or operator), a (insert name of state) (insert "corporation," "partnership," "association," or "proprietorship"), the "Grantor," and (insert name of corporate trustee), (insert "Incorporated in the state of _____" or "a national bank"), the "Trustee."

Whereas, the Texas Natural Resource Conservation Commission (TNRCC) has established certain regulations applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed or corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached Schedule A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the standby trust agreement;

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee.

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

- a. The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.
- b. The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.
- c. The term "Executive Director" means the Executive Director of the TNRCC.

Section 2. Identification of the Financial Assurance Mechanism. This Agreement pertains to the (insert the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments). (This paragraph is only applicable to the standby trust agreement.)

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the TNRCC. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. (Note: The Fund is established initially as a standby to receive payments and shall not consist of any property.) Payments made by the provider of financial assurance under the Executive Director's instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee under this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the TNRCC.

Section 4. Payment for (insert "Corrective Action" and/or "Third-Party Liability Claims"). The Trustee shall make payments from the Fund as the Executive Director shall direct, in writing, to provide for the payment of the costs of (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "accidental releases") arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

- a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);
- c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or water craft;

d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or

e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of Title 30, Texas Administrative Code (TAC), §37.815 (relating to Amount and Scope of Required Financial Assurance).

The Trustee shall reimburse the Grantor, or other persons as specified by the Executive Director, from the Fund for corrective action expenditures and/or third-party liability claims in amounts as the Executive Director specifies in writing. In addition, the Trustee shall refund to the Grantor such amounts as the Executive Director specifies in writing. Upon refund, these funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with these matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

a. Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80A-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;

b. The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and

c. The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

a. To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate,

subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

b. To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 USC 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote these shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

a. To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any sale or other disposition;

b. To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

c. To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing these securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of these securities in a qualified central depository even though, when so deposited, these securities may be merged and held in bulk in the name of the nominee of this depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all these securities are part of the Fund;

d. To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and

e. To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 11. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 12. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but this resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee and this successor accepts the appointment. The successor Trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor Trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of successor Trustee or for instructions. The successor Trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by certified mail 10 days before this change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 13. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by persons as are designated in the attached Schedule B or other designees as the Grantor may designate by amendment to Schedule B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Executive Director, and the Trustee shall act and shall be fully protected in acting in accordance with these orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Executive Director hereunder has occurred. The Trustee shall have no duty to act in the absence of these orders, requests, and instructions from the Grantor and/or the Executive Director, except as provided for herein.

Section 14. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and the Executive Director if the Grantor ceases to exist.

Section 15. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the Executive Director, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 16. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in

carrying out any directions by the Grantor or the Executive Director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide this defense.

Section 17. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the state of Texas, or the Comptroller of the Currency in the case of National Association banks.

Section 18. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in Title 30, TAC, §37.855(b) (relating to Standby Trust Fund), as this regulation was constituted on the date written above.

(Insert signature of grantor)
(Insert name of the grantor)
(Insert title)

Attest:

(Insert signature of trustee)
(Insert name of the trustee)
(Insert title)
(Insert seal)

Attest:

(Insert signature of witness)
(Insert name of witness)
(Insert title)
(Insert seal)

(c) The standby trust agreement or trust agreement must be accompanied by a formal certification of acknowledgment similar to the following:

Figure: 30 TAC §37.855(c)

Figure: 30 TAC §37.855(c)

CERTIFICATION

State of _____
County of _____

On this (insert date), before me personally came (insert owner or operator) to me known, who, being by me duly sworn, did depose and say that she/he resides at (insert address), that she/he is (insert title) of (insert corporation), the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to this instrument is this corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that she/he signed her/his name thereto by like order.

(Insert signature of Notary Public)
(Insert name of Notary Public)

(d) The executive director will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the executive director determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.

(e) An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this rule.

§37.860. Substitution of Financial Assurance Mechanisms by Owner or Operator.

(a) An owner or operator may substitute any alternate financial assurance mechanisms as specified in this subchapter provided that at all times he or she maintains an effective financial

assurance mechanism or combination of mechanisms that satisfies the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility).

(b) After obtaining alternate financial assurance as specified in this subchapter, an owner or operator may cancel a financial assurance mechanism by providing notice to the provider of financial assurance.

§37.865. Cancellation or Non-renewal by a Provider of Financial Assurance.

(a) Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator.

(b) Termination of a guarantee, a local government guarantee, a surety bond, or a letter of credit may not occur until 120 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

(c) Termination of insurance or risk retention group coverage, except for non-payment or misrepresentation by the insured, or state-funded assurance may not occur until 60 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt. Termination for non-payment of premium or misrepresentation by the insured may not occur until a minimum of ten days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

(d) If a provider of financial assurance cancels or fails to renew for reasons other than incapacity of the provider as specified in §37.870 of this title (relating to Reporting, Registration, and Certification), the owner or operator must obtain alternate coverage as specified in this section within 60 days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within 60 days after receipt of the notice of termination, the owner or operator must notify the executive director of this failure and submit:

(1) the name and address of the provider of financial assurance;

(2) the effective date of termination; and

(3) the evidence of the financial assurance mechanism subject to the termination maintained in accordance with §37.875(b) of this title (relating to Financial Assurance Recordkeeping).

§37.870. Reporting, Registration, and Certification.

(a) Reporting. An owner or operator must submit the appropriate forms listed in §37.875(b) of this title (relating to Financial Assurance Recordkeeping) documenting current proof of financial assurance to the executive director:

(1) within 30 days after the owner or operator identifies a release from an underground storage tank (UST) required to be reported under Chapter 334, Subchapter D of this title (relating to

Release Reporting and Corrective Action), unless current financial assurance documentation is already on file with the agency;

(2) if the owner or operator fails to obtain alternate coverage as required by this subchapter, within 30 days after the owner or operator receives notice of:

(A) commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming a provider of financial assurance as a debtor;

(B) suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism;

(C) failure of a guarantor to meet the requirements of the financial test; or

(D) other incapacity of a provider of financial assurance;

(3) as required by §37.825 of this title (relating to Financial Test of Self Insurance) and §37.865 of this title (relating to Cancellation or Non-renewal by a Provider of Financial Assurance); or

(4) when requested by the agency.

(b) Registration. An owner or operator must register and update the registration whenever there is a change in the financial assurance mechanism or coverage amount, as specified in §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST systems). The owner or operator must identify, in the appropriate space on the authorized agency form, the financial assurance mechanisms used to demonstrate compliance with corrective action and third party liability as described in this subchapter.

(c) For certification requirements for petroleum USTs, refer to §334.8(b) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST systems).

§37.875. Financial Assurance Recordkeeping.

(a) Owners or operators must maintain proof of all financial assurance mechanisms used to demonstrate financial assurance under this subchapter for a petroleum underground storage tank (UST) until released from the requirements of this subchapter under §37.885 of this title (relating to Release from the Requirements). An owner or operator must maintain this evidence at the UST site or the owner's or operator's place of business. Records maintained off-site must be made available in a timely manner upon request of the agency.

(b) An owner or operator must maintain the following types of evidence of financial assurance.

(1) An owner or operator using a financial assurance mechanism specified in §37.825 of this title (relating to Financial Test of Self-Insurance), §37.830 of this title (relating to Guarantee), §37.835 of this title (relating to Insurance and Risk Retention Group Coverage), §37.840 of this title (relating to Surety Bond), §37.845 of this title (relating to Letter of Credit), §37.850 of this title (relating to Trust Fund), §37.855 of this title (relating to Standby Trust Fund), and 40 Code of Federal Regulations §§280.104 - 280.107 (relating to Local Government Bond Rating Test, Local Government Financial Test, Local Government Guarantee, and Local Government Fund, respectively) must maintain a copy of the instrument worded as specified.

(2) An owner or operator using a financial test or guarantee, or a local government financial test, or a local government guarantee supported by the local government financial test must maintain a copy of the chief financial officer's letter based on year-end financial statements for the most recent completed financial reporting year. This documentation must be on file no later than 120 days after the close of the financial reporting year.

(3) An owner or operator using a guarantee, surety bond, or letter of credit must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement.

(4) An owner or operator using an insurance policy or risk retention group coverage must maintain a copy of the signed insurance policy or risk retention group coverage policy, with the endorsement or certificate of insurance and any amendments to the agreements.

(5) A local government owner or operator must comply with the recordkeeping requirements of 40 CFR §280.111(b)(4) - (6) and (9) - (10) as applicable to the local government mechanism used to demonstrate financial assurance.

§37.880. Drawing on Financial Assurance Mechanisms.

(a) The executive director shall require the guarantor, surety, or institution issuing a letter of credit to place the amount of funds stipulated by the executive director, up to the limit of funds provided by the financial assurance mechanism, into the standby trust if:

(1) the owner or operator fails to establish alternate financial assurance within 60 days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or, as applicable, other financial assurance mechanism; and

(2) the agency determines or suspects that a release from an underground storage tank (UST) covered by the mechanism has occurred and so notifies the owner or operator or the owner or operator has notified the executive director under Chapter 334, Subchapter D of this title (relating to Release Reporting and Corrective Action) of a release from an UST covered by the mechanism; or

(3) the conditions of subsections (b)(1) or (2)(A) or (B) of this section are satisfied.

(b) The executive director may draw on a standby trust fund when:

(1) the agency makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrective action as required under Chapter 334, Subchapter D of this title; or

(2) the executive director has received either:

(A) certification from the owner or operator and the third-party liability claimant(s) and from attorneys representing the owner or operator and the third-party liability claimant(s) that the third-party liability claim should be paid. The certification must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted:

Figure 30 TAC §37.880(b)(2)(A)

Figure 30 TAC §37.880(b)(2)(A)

CERTIFICATION OF VALID CLAIM

The undersigned, as principals and as legal representatives of (insert owner or operator) and (insert name and address of third-party claimant), hereby certify that the claim of bodily injury (insert and/or) property damage caused by an accidental release arising from operating (insert owner's or operator's) underground storage tank should be paid in the amount of \$ {_____}.

(Insert signatures)
(Insert owner or operator)
(Insert attorney for owner or operator)

(Insert signature(s))
(Insert claimant(s))
(Insert attorney(s) for claimant(s))

(Insert notary) (Insert date)

(Insert notary) (Insert date)

; or

(B) a valid final court order establishing a judgment against the owner or operator for bodily injury or property damage caused by an accidental release from an UST covered by financial assurance under this subchapter and the agency determines that the owner or operator has not satisfied the judgment.

(c) If the agency determines that the amount of corrective action costs and third-party liability claims eligible for payment under subsection (b) of this section may exceed the balance of the standby trust fund and the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment. The executive director shall pay third-party liability claims in the order in which the executive director receives certifications under subsection (b)(2)(A) of this section and valid court orders under subsection (b)(2)(B) of this section.

§37.885. Release from the Requirements.

An owner or operator is no longer required to maintain financial assurance under this subchapter for an underground storage tank after the tank has been removed from service or, if corrective action is required, after corrective action has been completed and the tank has been properly removed from service in accordance with the requirements of §334.55 of this title (relating to Permanent Removal from Service).

§37.890. Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance.

(a) Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming an owner or operator as debtor, the owner or operator must notify the executive director by certified mail of this commencement and submit the appropriate forms listed in §37.875 of this title (relating to Financial Assurance Recordkeeping) documenting current financial responsibility.

(b) Within ten days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming a guarantor providing financial assurance as debtor, this guarantor must notify the owner or operator by certified mail of this commencement as required under §37.830 of this title (relating to Guarantee).

(c) An owner or operator who obtains financial assurance by a mechanism other than the financial test of self-insurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, letter of credit, or state-required mechanism. The owner or operator must obtain alternate financial assurance as specified in this subchapter within 30 days after receiving notice of this event. If the owner or operator does not obtain alternate coverage within 30 days after this notification, he or she must notify the executive director as specified in this subchapter.

§37.895. Replenishment of Guarantees, Letters of Credit, or Surety Bonds.

(a) If at any time after a standby trust is funded upon the instruction of the executive director with funds drawn from a guarantee, local government guarantee with standby trust, letter of credit, or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner or operator shall by the anniversary date of the financial mechanism from which the funds were drawn:

(1) replenish the value of financial assurance to equal the full amount of coverage required; or

(2) acquire another financial assurance mechanism for the amount by which funds in the standby trust have been reduced.

(b) For purposes of this section, the full amount of coverage required is the amount of coverage specified in §37.815 of this title (relating to Amount and Scope of Required Financial Assurance). If a combination of mechanisms was used to provide the assurance funds which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms.