

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts an amendment to §334.560 *without changes* to the proposed text published in the February 11, 2011, issue of the *Texas Register* (36 TexReg 723) and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

On August 4, 2010, the TCEQ received a petition for rulemaking (Project Number 2010-051-PET-NR) from Grissom & Thompson, L.L.P., representing Talon/LPE, Grimes & Associates, and Ranger Environmental Services, Inc. (the Petitioner). At the September 29, 2010, Commissioners' Agenda, the commission directed staff to initiate rulemaking to address the concerns raised by the Petitioner. The Petitioner requested revisions to three reimbursable pay items in §334.560, Reimbursable Cost Specifications, for the Petroleum Storage Tank (PST) Reimbursement Program. The rules set reimbursement rates for expenses associated with corrective action activities conducted at Leaking Petroleum Storage Tank (LPST) sites by eligible owners and operators. The last revision to the reimbursable rates was on November 18, 2004. The Petitioner requested that reimbursable rates be increased for off-site access fees charged by municipalities; waste disposal costs; and per diem costs. The Petitioner indicated that increased market prices for these items have occurred over the last six years resulting in undue financial hardship to eligible owners and operators or their authorized assignees. Amending the reimbursable rates for these items allows eligible LPST owners and operators to receive

reimbursement payments that are more representative of current market rates for these corrective action activities.

Section Discussion

The commission adopts administrative changes throughout the rulemaking to conform to Texas Register requirements.

The commission adopts changes to the municipality fee found in Activity 04: Site Assessments of the figure in §334.560. Municipality or government fees vary significantly throughout the state. The prior rule capped the reimbursement of these fees at \$500.00 per well or boring. The amendment increases the reimbursable unit cost of a well or boring installation on property owned by a municipality or government agency to the actual cost of the permit, rather than being capped at \$500.00. The adopted amendment caps reimbursement of the initial permit costs and annual fees at the rate the municipality or government entity charges upon the effective date of this rule.

The commission adopts the amendment to the waste management costs in §334.560. The revised waste management items are: vacuum truck rental and soil disposal costs. The change increases the reimbursable unit cost for the use of a vacuum truck to dispose of LPST wastes in Activities 02, 03, 04, 06, 07, 09, and 10 of the figure in §334.560 to

\$85.00 per hour. The increase is based on an average of quotes from major vacuum truck rental companies in various areas of the state. Additionally, the reimbursable soil disposal costs referenced in Activity 04 of the figure in §334.560 are also increased. The adopted rate change is \$250.00 base + \$50.00 per drum and \$250.00 base + \$35.00 per cubic yard. The change is based on reviews of quotes from major waste disposal companies throughout the state and in New Mexico.

Revisions to the per diem rates in §334.560 are also adopted. The per diem rates are referenced in Activities 02, 03, 04, 06, 07, 08, 09, 10, and 11 and in Part 4 - Travel Costs of the figure in §334.560. The adopted per diem rate will be consistent with per diem as allowed by the Texas Comptroller of Public Accounts.

Final Regulatory Impact Analysis Determination

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

Regarding the first part of this definition, the specific intent of this rulemaking is to "protect the environment" by increasing certain amounts that would be reimbursed by the PST Reimbursement Program to eligible owners and operators, or their authorized assignees, for performance of corrective action at LPST sites. However, the second part of the definition of a "major environmental rule" is not met: the rule would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The term, "material" means "having real importance or great consequence" in contrast to incidental or insignificant impact. Because the rule increases amounts being reimbursed to eligible owners or operators, and because this rule does not involve any increase in costs being imposed on the public or regulated entities, there is no adverse effect on the state so as to constitute a "major environmental rule."

Further, even if it were considered a "major environmental rule," the rule does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) states: "This section applies only to a major environmental rule adopted by a state agency, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the

state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law." The rule does not meet any of the four applicability requirements and thus, is not subject to the regulatory analysis provisions of the Texas Government Code. Specifically, the rule does not exceed a standard set by federal law; does not exceed an express requirement of state law; does not exceed a requirement of a federal delegation agreement or contract; and is not adopted solely under the general powers of the agency but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY sections of this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the adopted rule and performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rule is to increase certain amounts that would be reimbursed by the PST Reimbursement Program to eligible owners and operators, or their designated assignee contractors, for performance of corrective action at LPST sites. These increases are intended to take into account the rising market prices of performing

certain corrective action activities and associated costs. The adopted rule would substantially advance this stated purpose by amending portions of §334.560 to make reasonable adjustments to reimbursable costs.

The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rule because the adopted rule in total is an action in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. By increasing reimbursable amounts to be in keeping with certain costs in the marketplace, this rulemaking helps ensure that LPST cleanups continue to occur in the PST Reimbursement Program. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The adopted rule is an "action taken in response to a real and substantial threat to public health and safety" in that contamination from releases from underground storage tanks pose a threat to both soils and groundwater with which the public may come into contact. The adopted rule is "designed to significantly advance the health and safety purpose" by helping to ensure that adequate reimbursements are available for the corrective action of this contamination. The adopted rule does not "impose a greater burden than is necessary to achieve the health and safety purpose" because the adopted

rule revisions do not impose a burden, since it represents an increase in reimbursement payments rather than a lessening.

Nevertheless, the commission further performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The adopted rule adjusts the Reimbursable Cost Specifications by increasing amounts eligible owners or operators may receive from the PST Remediation Account for performance of necessary corrective action and related allowable costs. Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the adopted rule does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the adopted rule. There are no burdens imposed on private real property from the adopted rule and the benefits to society are the adopted rule effect of increasing the likelihood that LPST sites will be cleaned up by ensuring that costs of such cleanups are being adequately addressed in the PST Reimbursement Program. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found that it is subject to the Texas

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

CMP goals applicable to the rule include two of the goals listed in 31 TAC §505.12: (1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and (2) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs. Because this rulemaking increases certain amounts that eligible owners or operators may be reimbursed for remediating LPST sites, it will therefore aid in ensuring that releases to the environment continue to be addressed. This rulemaking is consistent with the goals of protecting and preserving coastal environments.

None of the CMP policies stated in 31 TAC §501.13 are relevant to, nor are they adversely affected by, the rulemaking for the reason that there are no substantive changes relating to provision of information, monitoring of compliance, or variances. Additionally, none of the specific policies described in 31 TAC §§501.16 - 501.34 apply to this rulemaking.

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

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Public Comment

A public hearing was held on March 3, 2011 in Austin, Texas. The comment period closed on March 13, 2011. The commission did not receive any comments concerning the proposed rule.

**SUBCHAPTER M: REIMBURSABLE COST SPECIFICATIONS
FOR THE PETROLEUM STORAGE TANK
REIMBURSEMENT PROGRAM**

§334.560

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks; TWC, §26.3573, which states that the commission shall administer the petroleum storage tank remediation account and by rule adopt guidelines and procedures for the use of and eligibility for that account and which states that the commission may by rule adopt: (1) guidelines the commission considers necessary for determining the amounts that may be paid from the petroleum storage tank remediation account; and (2) guidelines concerning reimbursement for expenses incurred by an eligible owner or operator; and TWC, §26.011, which requires the commission to control the quality of water by rule.

The adopted rulemaking implements TWC, §26.3573(h), which requires the commission to administer the petroleum storage tank remediation account and by rule adopt guidelines and procedures for the use of and eligibility for that account.

§334.560. Reimbursable Cost Specifications.

The following Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program are in effect as of June 30, 2011 [November 18, 2004].

Figure: 30 TAC §334.560

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