

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: March 9, 2012

Thru: Bridget C. Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Brent Wade, Deputy Director
Office of Waste

Docket No.: 2011-1261-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 334, Underground and Aboveground Storage Tanks
House Bill 2694 (4.16-4.19): PST
Rule Project No. 2011-038-334-WS

Background and reason(s) for the rulemaking:

The TCEQ Sunset Legislation, House Bill 2694, adopted during the 82nd Legislature, 2011 and signed by the Governor on June 17, 2011, included statutory changes addressing petroleum storage tank (PST) regulations. This rulemaking is required to address several of those changes: underground storage tank (UST) delivery prohibition; state lead tank removal authorization; and the setting of the PST delivery fee.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

This rulemaking is necessary to implement these sections of the bill. The rulemaking amends Chapter 334, Underground and Aboveground Storage Tanks. More specifically this rulemaking makes changes to the following:

- Subchapter A (General Prohibitions): §334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems, reinstates common carrier liability, and adds new §334.19, which decreases the fee on delivery of petroleum products beginning July 1, 2012.
- Subchapter D (Release Reporting and Corrective Action): §334.84, Corrective Action by the Agency, allows the TCEQ to remove non-compliant USTs and Aboveground Storage Tanks (ASTs) that pose a risk of contamination and are owned by financially unable persons or entities.

B.) Scope required by federal regulations or state statutes:

The changes are specifically required by state statute. Reinstating common carrier liability (HB 2694, §4.16, which amended TWC, §26.3467) complies with the federal Energy Policy Act of 2005.

Re: Docket No. 2011-1261-RUL

C.) Additional staff recommendations that are not required by federal rule or state statute:

There are no additional recommendations.

Statutory authority:

- 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, §5.105, which directs the commission to establish and approve all general policy of the commission by rule;
- TWC, §26.011, which requires the commission to control the quality of water by rule;
- TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding USTs;
- TWC, §26.3467 (d), which requires the commission to adopt rules as necessary to enforce delivery prohibition;
- TWC, §26.351(c-2), which requires the commission to adopt rules to implement the TCEQ's authority to undertake corrective action to remove USTs in certain circumstances;
- TWC, §26.352, which directs the commission to adopt rules establishing the requirements for maintaining evidence of financial responsibility for taking corrective action in response to a release from a UST;
- TWC, §26.3573(d)(5), which authorizes the commission to use the petroleum storage tank remediation (PSTR) account to pay expenses associated with tank removals as described in TWC, §26.351(c-2); and
- TWC, §26.3574(b-1), which requires the commission to set the amount of the petroleum product delivery fee by rule.

Effect on the:

Re: Docket No. 2011-1261-RUL

A.) Regulated community: The regulated community will benefit in that reinstating common carrier liability will enhance compliance with UST delivery prohibition. Under current law only the owner or operator of the USTs commits an offense when a regulated substance is delivered into non-compliant tanks. As required by statute, new §334.19 ensures that funds are available for the TCEQ State Lead program to continue to address corrective action at Leaking Underground Storage Tank sites, and for the administration of the PST regulatory program. The regulated community will also benefit from paying a reduced fee.

B.) Public: The public will benefit from the removal of non-compliant tanks where the owner or operator is financially unable and there is a risk of contamination.

C.) Agency programs: No new full time employees will be required as a result of these changes.

Stakeholder meetings:

A public hearing was held on December 14, 2011. In attendance was a representative of the Texas Petroleum Marketers and Convenience Store Association (TPCA). TPCA offered overall support of the rule as proposed while expressing some concern over application of the penalty policy to common carrier violations. No changes to the rule were made in response to TPCA's concerns.

Public comment:

Comments were received from one party, the TPCA. Relating to the amendment to §334.5, TPCA stated that its concern was "the degree and the manner in which penalties are calculated and imposed moving forward based on the historical penalty policy used until such time as carriers were removed from the statute and regulation." TPCA further commented that it believed that "administrative penalties for violations of the regulation by supplier/carriers of fuel should be based on the seriousness of the violation as it relates to potential harm to the environment or whether the violation is considered a 'programmatic' violation under the current TCEQ penalty policy." TPCA did not recommend specific changes to the proposed rule text, but rather stated that it "would welcome the opportunity to discuss this issue in more detail with the appropriate TCEQ staff since this issue falls into the realm of a policy matter." Enforcement Division staff met with TPCA on January 5, 2012. Because the enforcement penalty policy is not in TCEQ rules, staff did not make changes to the rulemaking to address this issue.

Relating to proposed new §334.19, TPCA commented that it is in support of the proposed rule "since it does conform to statutory language found in HB 2694 as passed by the 82nd Texas Legislature." TPCA also made verbal comments during the public hearing supporting §334.19 as drafted, including a specific mention of support for the rule's allowing the commission to publish fee adjustments in the *Texas Register*.

Re: Docket No. 2011-1261-RUL

Relating to the proposed change to §334.84, TPCA stated that it "neither supports nor opposes the proposed amendment as written." Accordingly, TCEQ has not made any changes to the proposed text based on these comments.

Significant changes from proposal:

One minor change is being made to proposed language in §334.5(b)(1)(C)(i): the word "current" is being added after the word "valid" so that the sentence now reads: "***It is an affirmative defense to the imposition of an administrative penalty for a violation of subparagraph (A) of this paragraph that the person delivering a regulated substance into a UST relied on: (i) a valid, current paper delivery certificate presented by the owner or operator of the UST or displayed at the facility associated with the UST.***" The addition of the word "current" makes the sentence more consistent with other parts of the rules, which refer to "valid, current" delivery certificates. This change is intended for clarification only, and is not considered to be substantively different from the statute, for the reason that an expired certificate would not be "valid" in any case. However, to avoid confusion it is important that people not misunderstand there to be an affirmative defense for a common carrier who relies on a certificate that was expired at that time.

Potential controversial concerns and legislative interest:

Since the rule addresses language in the TCEQ Sunset Legislation, the agency's efforts to implement will be of interest to the legislature, as well as the Sunset Advisory Commission.

Does this rulemaking affect any current policies or require development of new policies?

No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

Although HB 2694, §4.16 of the TCEQ Sunset Legislation, reinstating common carrier liability, only requires rules "as necessary," there may be confusion between the statute and the rule if §334.5(b) is not amended to include common carriers. There are no other alternatives to HB 2694, §4.18 and §4.19 of the TCEQ Sunset Legislation; they require rulemaking.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: November 18, 2011

Anticipated Texas Register publication date: April 13, 2012

Anticipated effective date: April 19, 2012

Six-month Texas Register filing deadline: May 18, 2012

Commissioners

Page 5

March 9, 2012

Re: Docket No. 2011-1261-RUL

Agency contacts:

Jonathan Walling, Rule Project Manager, 239-2295, Remediation Division

Cullen McMorrow, Staff Attorney, 239-0607, Litigation Division

Charlotte Horn, Texas Register Coordinator, 239-0779, General Law Division

Attachments

None

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Jonathan Walling
Cullen McMorrow
Charlotte Horn