

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §334.560.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

On August 4, 2010, the Texas Commission on Environmental Quality received a petition for rulemaking 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 current 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 requests 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 would allow eligible LPST owners and operators to receive reimbursement payments that are more representative of current

market rates for these corrective action activities.

SECTION DISCUSSION

Throughout this rulemaking package, administrative changes are proposed in accordance with Texas Register requirements.

This rulemaking proposes to amend 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 current rule caps the reimbursement of these fees at \$500.00 per well or boring. Some municipalities do not charge a fee and some municipalities currently charge as much as \$1,500.00. The proposed amendment would increase 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. This rulemaking proposes to cap 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.

This rulemaking proposes to amend waste management costs in §334.560. The waste management items are: vacuum truck rental, liquid disposal, and soil disposal costs. The proposed rule change would increase the reimbursable unit cost for the use of a vacuum truck to dispose of LPST wastes from the existing \$70.00 per hour referenced 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. Current liquid disposal costs referenced in Activities 02, 03, 04, 06, 07, 09, and 10 of the figure in §334.560 are consistent with current market prices based on quotes obtained from major waste disposal companies in various areas of the state. Therefore, the existing reimbursable rate of \$.40 per gallon in the figure in §334.560 is proposed to remain at the same rate.

Reimbursable soil disposal costs referenced in Activity 04 of the figure in §334.560 are currently \$250.00 base + \$45.00 per drum or \$250.00 base + \$10.50 per cubic yard. The Petitioner requests that this reimbursable cost be raised to \$250.00 base + \$50.00 per drum and \$250.00 base + \$35.00 per cubic yard. Based on reviews of quotes from major waste disposal companies throughout the State and in New Mexico, and to address the Petitioner's concerns, revisions to the soil disposal costs are proposed to reflect this increased rate.

Revisions to the per diem rates in §334.560 are also proposed. The current per diem reimbursable rate is \$90.00 per day per person. 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. It is proposed that the per diem rate be changed to be consistent with per diem as allowed by the Texas Comptroller of Public Accounts. This change would result

in an estimated increase of \$31.00 - \$104.00 per day.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency. Other units of state or local government may see a benefit as a result of administration or enforcement of the proposed rule, but any benefit is not expected to have a significant fiscal impact.

The proposed rule is in response to a petition received by the agency to align PST Reimbursement Program reimbursement rates for off-site access fees charged by municipalities, waste disposal costs, and per diem costs more closely with actual prices currently experienced by owners and operators of tanks at reimbursement eligible LPST sites. The proposed rule amends Chapter 334 to allow for an increase in these rates. The last revision to reimbursable rates was in 2004. Current market rates for off-site access fees charged by municipalities, costs for waste disposal, and costs for per diem have exceeded amounts allowed under current rule in some cases.

Agency Impact

The proposed rule is not expected to have a significant fiscal impact on the agency since currently available funds and resources will be used to implement the rule's provisions. However, the proposed rule may represent as much as a 10% increase in funds expended

out of existing Account 655 - Petroleum Storage Tank Remediation (PSTR) Account appropriation authority. Reimbursement costs for any one site are capped at one million dollars. The PST Reimbursement Program is set to expire on September 1, 2012, with the last day to perform reimbursable corrective action being August 30, 2011. Staff estimates that implementation of the proposed rule would only be in effect two to three months and that the increase in reimbursement rates for this time period would not exceed one million dollars statewide.

Impact on Local Government and Other State Agencies

Agency records indicate there may be as many as 38 local governments that own or operate eligible LPST sites. These sites are located mainly at maintenance facilities or gas refueling facilities. Of these sites, eight are owned by counties, nine are owned by other state agencies, 20 are municipalities, and one is a federal facility. Most remediation work at LPST sites are done by registered contractors. If these contractors incur higher costs for off-site access, waste disposal and per diem, the proposed rule may allow a governmental entity to receive higher reimbursement payments with PSTR funds than allowed by current rule. However, the proposed increase in these reimbursement rates is not expected to be significant and will depend on the circumstances of each site.

Off-site Access Fees

The proposed rule would increase the maximum reimbursement rate allowed for off-site

access fees charged by municipalities or government agencies. There is little consistency statewide in the way municipalities and government agencies determine off-site access fees. Fees vary widely, and the current rule caps the reimbursement for a monitoring well or soil boring at a maximum of \$500 per well or boring. Permit costs for monitoring wells are estimated to range from \$350 per well to \$1,500 per site per year. The proposed rate would be the actual cost per well as specified in the permit issued by the municipality or government agency, but it will be capped at the rate existing on the effective date of the proposed rule. Some, but not all, municipalities and government agencies charge additional annual fees as part of off-site access fees. Current rule does not allow for reimbursement of this type of cost. The proposed rule allows for reimbursement of annual fees, if already in existence on the effective date of this rule. However, any reimbursement of these annual fees would be capped at the rate the municipality or government entity charges upon the effective date of this rule.

Waste Disposal Costs

These costs include expenses for vacuum truck rental, liquid disposal, and soil disposal. The proposed rule would increase the reimbursable rate for the use of a vacuum truck from \$70 per hour to \$85 per hour. The \$15 increase is based on an average of quotes from vacuum truck rental companies in various areas of the state. The proposed rule would also increase the reimbursable rate for soil disposal costs. Currently soil disposal costs are reimbursed at a maximum \$250 base rate plus a unit cost of \$45 per drum or a

unit cost of \$10.50 per cubic yard. Under the proposed rule, base rates would remain \$250 but reimbursement for a drum would increase \$10 per drum to total \$50 per drum, and the reimbursement for a cubic yard would increase by \$24.50 to total \$35 per cubic yard. Reimbursement rates for liquid disposal were found to be in line with current rates, and the proposed rule would not increase reimbursement for liquid disposal.

Per Diem Costs

Current rules allow per diem to be reimbursed at a maximum of \$90 per day. The proposed rule would allow per diem to be reimbursed at the same rate paid by the Comptroller of Public Accounts. Per Diem rates vary depending on the location, but the default rate is currently \$121 (\$85 for lodging and \$36 for meals). The highest rate is currently \$194. The increase in per diem under the proposed rules is estimated to range from \$31 to \$104.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule would be fair reimbursement of costs which encourages continued remediation of LPST sites and movement toward site closure.

Most LPST sites are retail gasoline facilities. The proposed rule would not have a

significant fiscal impact on individual consumers. However, large companies that own LPST sites may benefit by the increase in reimbursable rates for off-site access fees, waste disposal costs, and per diem costs allowed under the proposed rule. There are approximately 129 eligible sites owned by large businesses statewide. The fiscal impact of increased reimbursement is not expected to be significant for a large business. Large businesses would be allowed to apply for reimbursement of off-site access fees, waste disposal costs, and per diem costs at the same rates as allowed for a governmental entity or a small business.

Most remediation work at LPST sites is done by hiring a registered contractor. For purposes of this fiscal note, most of these contractors are assumed to be a small business. The analysis of the fiscal impact of the proposed rule on contractors can be found in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT of this fiscal note.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. There are approximately 449 small businesses that own or operate eligible LPST sites in the state. Most of these small businesses own or operate a retail gas facility, and most remediation at these sites is done by registered contractors who, for purposes of this fiscal note, are assumed to be small businesses. The proposed rule

would increase the maximum rates allowed for reimbursement of off-site access fees, waste disposal costs, and per diem costs. The proposed rate for off-site access fees would include the actual cost per well as specified in the permit issued by a municipality or government agency, but it would be capped at the rate existing on the effective date of the proposed rule. Some, but not all, municipalities and government agencies charge annual fees as part of off-site access fees. Current rule does not allow for reimbursement of this type of cost. The proposed rule allows for reimbursement of annual fees if they exist at the time of the effective date of this rule. However, any reimbursement of these additional fees would be capped at the rate existing on the effective date of the rule. With regards to waste disposal costs, the proposed rule would increase the reimbursable rate for the use of a vacuum truck from \$70 per hour to \$85 per hour. For soil disposal costs, the proposed rule would increase the unit cost reimbursement for a drum by \$10 per drum and for a cubic yard by \$24.50 per cubic yard. The proposed rule would allow per diem to be reimbursed at the same rate paid by the Comptroller of Public Accounts instead of a maximum of \$90.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT 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 proposed rules 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 proposal proposes to increase 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 proposal 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 proposed rules 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 proposed rule does not exceed a standard set by federal law; does 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.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed 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 proposed 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 proposed rule because the proposed 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 proposed rule is an "action taken in response to a real and substantial threat to public health and safety" in that contamination from releases from USTs pose a threat to both soils and groundwater with which the public may come into contact. The proposed 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 proposed rule does not "impose a greater burden than is necessary to achieve the health and safety purpose" because the proposed 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 proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The proposed rule adjusts the Reimbursable Cost Specifications by increasing amounts eligible owners or operators may receive from the PSTR Account for performance of necessary corrective action and related allowable costs. Promulgation and enforcement of the

proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed 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 proposed rule. There are no burdens imposed on private real property from the proposed rule and the benefits to society are the proposed 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 proposed rulemaking and found that the proposal 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 proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed 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 operator 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 proposed rule 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 proposed rule 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 3, 2011, at 10:00 am in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-004-334-CE. The comment period closes March 13, 2011.

Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Jonathan Walling, Petroleum Storage Tank/Dry Cleaner Remediation Section, 512-239-2295.

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

§334.560

STATUTORY AUTHORITY

The amendment is proposed 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 proposed 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

[Figure: 30 TAC §334.560]