

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** October 14, 2011

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 Proposed Rulemaking
Chapter 334, Underground and Aboveground
Storage Tanks
House Bill 2694 (4.16 - 4.19): PST
Project No. 2011-0038-334-WS

Background and reason(s) for the rulemaking:

The TCEQ Sunset legislation, House Bill (HB) 2694, adopted during the 82nd Legislature, 2011, Regular Session and signed by the Governor on June 17, 2011, included statutory changes addressing petroleum storage tank (PST) regulations. This rulemaking would address 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 would amend Chapter 334, Underground and Aboveground Storage Tanks:

- Subchapter A (General Prohibitions): §334.5, General Prohibitions for USTs and UST Systems, would reinstate common carrier liability, and a new §334.19 would decrease 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, would allow 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 proposed changes are specifically required by state statute. Reinstating common carrier liability (HB 2694, §4.16) is necessary to comply with the federal Energy Policy Act of 2005.

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 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 an 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).
- TWC, §26.3574(b-1), which requires the commission to set the amount of the petroleum product delivery fee by rule.

Effect on the:

- (A) **Regulated community:** The regulated community would benefit in that reinstating common carrier liability would 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. Fuel deliverers would have a deterrent to deliver fuel into non-compliant tanks. As required by statute, new §334.19 would ensure that funds are available for the TCEQ State Lead to continue to address corrective action at Leaking Underground Storage Tank sites, and for the administration of the PST regulatory program. The regulated community would 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 (FTEs) will be required as a result of these rule changes.

Stakeholder meetings:

No stakeholder meeting will be held.

Potential controversial concerns and legislative interest:

Since this 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.

None anticipated for the sections of the bill implementing common carriers and the removal of non-compliant tanks. The portions of the bill dealing with the fee may be of interest to those entities currently being assessed the fee.

Will 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 §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 30 TAC §334.5(b) (Delivery Prohibitions) is not amended to include common carriers. No

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other alternatives to §4.18 and §4.19 of the TCEQ Sunset Legislation; they require rulemaking.

Key dates in the proposed rulemaking schedule:

Anticipated proposal date: November 2, 2011
Anticipated *Texas Register* publication date: November 18, 2011
Public hearing date (if any): December 14, 2011
Public comment period: November 18 to December 19, 2011
Anticipated adoption date: March 28, 2012

Agency contacts:

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Attachments

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