

**SUBCHAPTER V: STANDARDS FOR RECLAMATION OF HAZARDOUS
SECONDARY MATERIALS
§§335.701 - 335.706
Effective June 16, 2016**

§335.701. Purpose and Applicability.

(a) The purpose of this subchapter is to establish minimum standards for the management of hazardous secondary materials excluded under 40 Code of Federal Regulations (CFR) §261.4(a)(23), (24), and (27) (Exclusions).

(b) This subchapter applies to persons managing hazardous secondary materials excluded under 40 CFR §261.4(a)(23), (24), and (27).

Adopted May 25, 2016

Effective June 16, 2016

§335.702. Standards

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 261 (including all appendices to 40 CFR Part 261) are adopted by reference as amended and adopted in the CFR through January 13, 2015 (80 FR 1694) and as further amended and adopted as indicated in each paragraph of this subsection:

- (1) 40 CFR Part 261, Subpart I--Use and Management of Containers;
- (2) 40 CFR Part 261, Subpart J--Tank Systems;
- (3) 40 CFR Part 261, Subpart M--Emergency Preparedness and Response for Management of Excluded Hazardous Secondary Materials;
- (4) 40 CFR Part 261, Subpart AA--Air Emission Standards for Process Vents;
- (5) 40 CFR Part 261, Subpart BB--Air Emission Standards for Equipment Leaks; and
- (6) 40 CFR Part 261, Subpart CC--Air Emission Standards for Tanks and Containers.

(b) The regulations of the United States Environmental Protection Agency (EPA) that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Commission on Environmental Quality, consistent with the organization of the commission as set out in Texas Water Code, Chapter 5, Subchapter B;

(2) 40 CFR §260.10 is changed to §335.1 of this chapter (relating to Definitions);

(3) The terms "EPA" and "Environmental Protection Agency" are changed to "Texas Commission on Environmental Quality."

Adopted May 25, 2016

Effective June 16, 2016

§335.703. Financial Assurance Requirements.

(a) Applicability.

(1) The requirements of this section apply to owners or operators of reclamation facilities and intermediate facilities managing hazardous secondary materials excluded under 40 Code of Federal Regulations (CFR) §261.4(a)(24), except:

(2) States and the Federal government are exempt from the financial assurance requirements of this section.

(b) When used in this section, the following words and terms shall have the same meanings as the definitions in §37.11 and §335.1 of this title (relating to Definitions) except:

(1) Closure--Includes the activities under §335.8 of this title (relating to Closure and Remediation) and applicable closure requirements of 40 CFR Parts 264 and 265.

(2) Closure plan--Includes the removal and decontamination plan for release as set out in §335.705 of this title (relating to Removal and Decontamination Plan for Release).

(c) Owners and operators of a reclamation facility or an intermediate facility required by 40 CFR §261.4(a)(24) to provide financial assurance, shall establish and maintain financial assurance for removal and decontamination and corrective action as a condition of the exclusion under 40 CFR §261.4(a)(24) and comply with Chapter 37, Subchapters A and B of this title (relating to General Financial Assurance Requirements; and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action) except:

(1) an owner or operator must submit an acceptable originally signed mechanism to the executive director prior to receiving a variance for the management of hazardous secondary materials under the exclusion in 40 CFR §261.4(a)(24);

(2) in addition to the reasons to draw specified in §37.101 of this title (relating to Drawing on the Financial Assurance Mechanisms), the executive director may draw on the financial assurance mechanism(s) following a determination by the executive director that the hazardous secondary materials do not meet the conditions of the exclusion under 40 CFR §261.4(a)(24).

(d) Owners or operators of a reclamation facility or intermediate facility required by 40 CFR §261.4(a)(24) to provide financial assurance must comply with Chapter 37, Subchapter C of this title (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action), by establishing financial assurance for removal and decontamination and corrective action using any of the following mechanisms as specified in Chapter 37, Subchapter C of this title:

(1) Trust fund (fully funded), except reimbursements to the owner or operator as specified under §37.201(j) of this title (relating to Trust Fund) may only be made if the owner or operator begins final closure under the applicable requirements of 40 CFR Part 264 or 265;

(2) Surety bond guaranteeing payment, except:

(A) the bond must guarantee that the owner or operator will fund the standby trust fund in an amount equal to the penal sum of the bond before the loss of the exclusion under 40 CFR §261.4(a)(24) rather than the criteria set out in §37.211(d) of this title (relating to Surety Bond Guaranteeing Payment); and

(B) the alternate financial assurance to be provided by the Principal must meet the requirements specified in this section;

(3) Irrevocable standby letter of credit, except:

(A) the executive director may draw pursuant to subsection (c)(2) of this section in addition to §37.231 of this title (relating to Irrevocable Standby Letter of Credit); and

(B) alternate financial assurance must meet the requirements specified in this section;

(4) Financial test, except:

(A) the financial assurance amounts required by this section, for hazardous secondary materials must be included as an additional environmental obligation when determining eligibility for the financial test in accordance with §37.251 of this title (relating to Financial Test); and

(B) alternate financial assurance must meet the requirements of this section;

(5) Corporate guarantee except:

(A) the terms of the guarantee specified in §37.261(e)(1) of this title (relating to Corporate Guarantee), shall provide that following a determination by the executive director that the hazardous secondary materials at the owner or operator's facility covered by this guarantee do not meet the requirements of the exclusion under 40 CFR §261.4(a)(24) the guarantor will dispose of any hazardous secondary material as hazardous waste and close the facility in accordance with the applicable closure requirements of 40 CFR Part 264 or 265, or establish a trust fund as specified in this section, in the name of the owner or operator in the amount of the current cost estimate; and

(B) the terms of the guarantee requiring alternate financial assurance in §37.261(e)(3) of this title must meet the requirements of this section.

(e) Owners or operators of a reclamation facility or intermediate facility required by 40 CFR §261.4(a)(24) to provide financial assurance for removal and decontamination and corrective action shall comply with the wording requirements of Chapter 37, Subchapter D of this title (relating to Wording of the Mechanisms for Closure, Post Closure and Corrective Action) for the mechanisms indicated in subsection (d) of this section except:

(1) the phrases in the Payment Bond under §37.311 of this title (relating to Payment Bond) shall be revised by:

(A) replacing the following language identified here by quotation marks "Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully, before the beginning of final closure of, or corrective action at, each facility identified above, fund into the standby trust fund the amount(s) identified above for the facility," with the following language identified here by quotation marks "Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully, before the beginning of final closure of, or corrective action at, each facility identified above, fund into the standby trust fund the amount(s) identified above for the facility; or, if the Principal shall satisfy all the requirements for exclusion of hazardous secondary materials from classification as solid waste under

40 CFR §261.4(a)(24) and be released from the financial assurance requirements by the executive director"; and

(B) replacing the following language identified here by quotation marks "Or, if the Principal shall provide alternate financial assurance, as specified in 30 Texas Administrative Code, Chapter 37 (relating to Financial Assurance)" with the following language set off here by quotation marks "Or, if the Principal shall provide alternate financial assurance, as specified in 30 Texas Administrative Code, §335.703 (relating to Financial Assurance Requirements)"; and

(C) replacing the certification statement at the end of the Payment Bond with the following statement identified by quotation marks "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 30 Texas Administrative Code §37.311 (relating to Payment Bond), as modified by 30 Texas Administrative Code §335.703 (relating to Financial Assurance Requirements), as such regulations were constituted on the date the bond was executed.";

(2) The Chief Financial Officer's letter associated with the financial test specified in §37.351 of this title (relating to Financial Test), shall include the environmental obligations associated with the exclusion in paragraph 5(f) of the Chief Financial Officer's Letter in Figure: 30 TAC §37.351;

(3) The wording of the Corporate Guarantee required by §37.361 of this title (relating to Corporate Guarantee) shall be revised by:

(A) replacing Recital number 4 with "For value received from (owner or operator) (describe consideration and dollar amount), guarantor guarantees to the TCEQ that in the event of a determination by the executive director that the hazardous secondary materials at the owner or operator's facility covered by this guarantee do not meet the conditions of the exclusion under 40 CFR §261.4(a)(24), the guarantor will dispose of any hazardous secondary material as hazardous waste, and close the facility in accordance with the applicable closure requirements of 40 CFR Part 264 or 265, or establish a trust fund as specified in 30 Texas Administrative Code §335.703 (relating to Financial Assurance Requirements) in the name of the (owner or operator) in the amount of the current cost estimate";

(B) replacing Recital number 5 with "Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the TCEQ executive director and to (owner or operator) that the guarantor intends to provide alternate financial assurance as specified in 30 Texas

Administrative Code §335.703 (relating to Financial Assurance Requirements), as applicable, in the name of (owner or operator). Within 120 days after the end of such fiscal year, the guarantor shall establish such financial assurance unless (owner or operator) has done so";

(C) replacing Recital number 7 with "Guarantor agrees that within 30 days after being notified by the TCEQ executive director of a determination that guarantor no longer meets the financial test criteria or is disallowed from continuing as a guarantor of (closure, post closure, or corrective action), guarantor shall establish alternate financial assurance as specified in 30 Texas Administrative Code §335.703 (relating to Financial Assurance Requirements) in the name of (owner or operator) unless (owner or operator) has done so";

(D) replacing Recital number 11 with "Guarantor agrees that if (owner or operator) fails to provide alternate financial assurance as specified in 30 Texas Administrative Code §335.703 (relating to Financial Assurance Requirements), and obtain written approval of alternate financial assurance from the TCEQ executive director within 90 days after a notice of termination by the guarantor is received by the TCEQ executive director from guarantor, guarantor shall provide such alternate financial assurance in the name of the (owner or operator)"; and

(E) The wording of the certification statement at the end of the Corporate Guarantee shall be replaced with the following language identified by quotation marks "I hereby certify that the wording of this guarantee is identical to the wording specified in 30 Texas Administrative Code §37.361 (relating to Corporate Guarantee) as modified by 30 Texas Administrative Code §335.703 (relating to Financial Assurance Requirements) as such regulations were constituted on the date first above written."

(f) An owner or operator of a reclamation or intermediate facility, or a group of facilities, subject to financial assurance requirements under 40 CFR §261.4(a)(24) shall establish and maintain financial assurance for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs.

(g) An owner or operator of a reclamation or intermediate facility, or group of facilities, with a land-based unit as defined in §335.1 of this title shall establish and maintain financial assurance for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility

or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs.

(h) An owner or operator who must meet the requirements of subsections (f) and (g) of this section may combine the required per-occurrence coverage levels for sudden and non-sudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate level. Owners or operators who combine coverage levels for sudden and non-sudden accidental occurrences must maintain liability coverage in the amount of \$4 million per occurrence and \$8 million annual aggregate.

(i) Owners or operators of a reclamation facility or intermediate facility, or a group of facilities, subject to financial assurance requirements under 40 CFR §261.4(a)(24) must also comply with Chapter 37, Subchapters A and E of this title (relating to General Financial Assurance Requirements; and Financial Assurance Requirements for Liability Coverage) and shall use any of the mechanisms specified in Chapter 37, Subchapter F of this title (relating to Financial Assurance Mechanisms for Liability) to meet the liability requirements of this section except:

(1) liability insurance may only be demonstrated by providing an Endorsement for Liability as specified in §37.641 of this title (relating to Endorsement for Liability); and

(2) when using the financial test in accordance with §37.541 of this title (relating to Financial Test for Liability) the financial assurance amounts required by of this section, for hazardous secondary materials excluded under 40 CFR §261.4(a)(24) must be included as an additional environmental obligation.

(j) An owner or operator of a reclamation facility, an intermediate facility, or a group of facilities required by 40 CFR §261.4(a)(24) to provide financial assurance demonstrating liability coverage shall comply with the requirements of Chapter 37, Subchapter G of this title (relating to Wording of the Mechanisms for Liability) for the mechanisms required by subsection (i) of this section except The Chief Financial Officer's letter associated with the financial test for liability specified in §37.651 of this title (relating to Financial Test for Liability), must include the financial assurance amounts required by this section, for hazardous secondary materials excluded under 40 CFR §261.4(a)(24) as an additional environmental obligation in paragraph 5(f) of the Chief Financial Officer's Letter in Figure: 30 TAC §37.351.

(k) If the state of Texas either assumes legal responsibility for an owner's or operator's compliance with the closure, post closure, corrective action, or liability

requirements of this chapter, or assures that funds will be available from state sources to cover those requirements, the owner or operator will be in compliance with the requirements of this chapter if the executive director determines that the state's assumption of responsibility is at least equivalent to the financial mechanisms specified in this chapter. The executive director will evaluate the equivalency of state guarantees principally in terms of certainty of the availability of funds for the required closure, post closure, or corrective action activities, or liability coverage; and the amount of funds that will be made available. The executive director may also consider other factors as the executive director deems appropriate. The owner or operator must submit to the executive director a letter from the State of Texas describing the nature of the state's assumption of responsibility together with a letter from the owner or operator requesting that the state's assumption of responsibility be considered acceptable for meeting the requirements of this chapter. The letter from the state must include the following information: the facility's permit number and/or solid waste registration number, name, physical and mailing addresses, and the amount of funds for closure, post closure, or corrective action or liability coverage that are guaranteed by the state. The executive director will notify the owner or operator of the determination regarding the acceptability of the state's guarantee in lieu of financial mechanisms specified in this chapter. The executive director may require the owner or operator to submit additional information as is deemed necessary to make this determination. Upon approval by the executive director, the owner or operator will be deemed to be in compliance with the requirements of this chapter. If the State of Texas' assumption of responsibility is found acceptable as specified in this section except for the amount of funds available, the owner or operator may satisfy the requirements of this chapter by use of both the state's assurance and additional financial mechanisms as specified in this chapter. The amount of funds available through the state and the owner or operator's mechanisms shall equal at least the required amount.

Adopted May 25, 2016

Effective June 16, 2016

§335.704. Cost Estimate.

(a) The requirements of this section apply to owners or operators of reclamation and intermediate facilities managing hazardous secondary materials excluded under 40 Code of Federal Regulations (CFR) §261.4(a)(24).

(b) The owner or operator must submit to the executive director a detailed written estimate, in current dollars, of the cost of disposing of any hazardous secondary material as listed or characteristic hazardous waste, and the potential cost of closing the facility as a treatment, storage, and disposal facility. The estimate must meet the following requirements:

(1) the estimate must equal the cost of conducting the activities described in this subsection at the point when the extent and manner of the facility's operation would make these activities the most expensive; and

(2) the cost estimate must be based on the costs to the owner or operator of hiring a third party to conduct these activities. A third party is a party who is neither a parent nor a subsidiary of the owner or operator (See definition of "Parent corporation" in 40 CFR §265.141(d)). The owner or operator may use costs for on-site disposal in accordance with applicable requirements if the owner or operator can demonstrate that on-site disposal capacity will exist at all times over the life of the facility.

(3) The cost estimate may not incorporate any salvage value that may be realized with the sale of hazardous secondary materials, or hazardous or non-hazardous wastes if applicable under 40 CFR §265.113(d), facility structures or equipment, land, or other assets associated with the facility.

(4) The owner or operator may not incorporate a zero cost for hazardous secondary materials, or hazardous or non-hazardous wastes if applicable under 40 CFR §265.113(d) that might have economic value.

(c) During the active life of the facility, the owner or operator must adjust the cost estimate for inflation in accordance with the requirements of §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates).

(d) During the active life of the facility, the owner or operator must submit to the executive director a revised cost estimate no later than 30 days after a change in a facility's operating plan or design that would increase the costs of conducting the activities described in subsection (b) of this section or no later than 60 days after an unexpected event which increases the cost of conducting the activities described in subsection (b) of this section. The revised cost estimate must be adjusted for inflation as specified in subsection (c) of this section.

(e) The owner or operator must keep the following at the facility during the operating life of the facility:

(1) the latest cost estimate prepared in accordance with subsections (b) and (d) of this section; and

(2) when this estimate has been adjusted in accordance with subsection (c) of this section, the latest adjusted cost estimate.

§335.705. Removal and Decontamination Plan for Release.

(a) An owner or operator of a reclamation facility or an intermediate facility who wishes to be released from his financial assurance obligations under 40 Code of Federal Regulations (CFR) §261.4(a)(24) shall submit a plan for removing all hazardous secondary material residues to the executive director at least 180 days prior to the date on which the owner or operator expects to cease to operate under the exclusion.

(b) The plan shall include, at a minimum:

(1) for each hazardous secondary materials storage unit subject to financial assurance requirements under 40 CFR §261.4(a)(24), a description of how all excluded hazardous secondary materials will be recycled or sent for recycling, and how all residues, contaminated containment systems (liners, etc.), contaminated soils, subsoils, structures, and equipment will be removed or decontaminated as necessary to protect human health and the environment;

(2) a detailed description of the steps necessary to remove or decontaminate all hazardous secondary material residues and contaminated containment system components, equipment, structures, and soils including, but not limited to, procedures for cleaning equipment and removing contaminated soils, methods for sampling and testing surrounding soils, and criteria for determining the extent of decontamination necessary to protect human health and the environment;

(3) a detailed description of any other activities necessary to protect human health and the environment during this timeframe, including, but not limited to, leachate collection, run-on and run-off control; and

(4) a schedule for conducting the activities described which, at a minimum, includes the total time required to remove all excluded hazardous secondary materials for recycling and decontaminate all units subject to financial assurance under 40 CFR §261.4(a)(24)(vi)(F), and the time required for intervening activities which will allow tracking of the progress of decontamination.

(c) The executive director will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit comments on the plan and request modifications to the plan no later than 30 days from the date of the notice. The executive director in response to a request or at his discretion may hold a public meeting whenever such a public meeting might clarify one or more issues concerning the plan. The executive director will give public notice of the public meeting at least 30 days before it occurs. (Public notice of the public meeting may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The executive director

will approve, modify, or disapprove the plan within 90 days of its receipt. If the executive director does not approve the plan, the executive director shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within 30 days after receiving such written statement. The executive director will approve or modify this plan in writing within 60 days. If the executive director modifies the plan, this modified plan becomes the approved plan. The executive director must assure that the approved plan is consistent with subsection (b) of this section. A copy of the modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(d) Within 60 days of completion of the activities described in the plan for each hazardous secondary materials management unit, the owner or operator must submit to the executive director, by certified United States mail, a certification that all hazardous secondary materials have been removed from the unit and the unit has been decontaminated in accordance with the specifications in the approved plan. The certification must be signed by the owner or operator and signed and sealed by a Texas licensed professional engineer. Documentation supporting the professional engineer's certification must be furnished to the executive director, upon request, until the executive director releases the owner or operator from the financial assurance requirements for 40 CFR §261.4(a)(24).

Adopted May 25, 2016

Effective June 16, 2016

§335.706. Release of the Owner or Operator from the Requirements of this Subchapter.

Within 60 days after receiving certifications from the owner or operator and a Texas licensed professional engineer that all hazardous secondary materials have been removed from the facility or a unit at the facility and that the facility or a unit has been decontaminated in accordance with the approved plan in accordance with §335.705 of this title (relating to Removal and Decontamination Plan for Release), the executive director will notify the owner or operator in writing that the owner or operator is no longer required to maintain financial assurance under 40 Code of Federal Regulations §261.4(a)(24) for that facility or a unit at the facility, unless the executive director has reason to believe that all hazardous secondary materials have not been removed from the facility or unit at a facility or that the facility or unit has not been decontaminated in accordance with the approved plan. The executive director shall provide the owner or operator a detailed written statement of any such reason to believe that all hazardous secondary materials have not been removed from the facility or unit or that the facility or unit has not been decontaminated in accordance with the approved plan.

Adopted May 25, 2016

Effective June 16, 2016