

The Texas Natural Resource Conservation Commission (commission) proposes amendments to Chapter 334, Subchapter C, Technical Standards, §334.54, Temporary Removal From Service; Subchapter J, Registration of Corrective Action Specialists and Project Managers for Product Storage Tank Remediation Projects, §334.460, Renewal of Certificate of Registration for Corrective Action Project Manager; and Subchapter K, Storage, Treatment, and Reuse Procedures For Petroleum-Substance Contaminated Soil, §334.503, Reuse of Petroleum-Substance Waste.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed rules would correct errors that were made in the major Chapter 334 rulemaking as published in the June 2, 2000 issue of the *Texas Register* (25 TexReg 5152), which culminated in a rule package that went into effect November 23, 2000. The corrections remove internal inconsistencies from each rule section at issue so that they will function as intended and remove confusion concerning the proper requirements under the rules.

SECTION BY SECTION DISCUSSION

Subchapter C. Technical Standards.

Section 334.54, Temporary Removal from Service, is proposed to be amended. At the proposal stage of the recent major Chapter 334 rulemaking, §334.54(d) and (e) was published correctly in the June 2, 2000 issue of the *Texas Register* (25 TexReg 5152). At the adoption stage, no public comment was received on this language and the commission intent was to adopt these rule subsections with the same language as at the proposal stage. While the fact that the language was not meant to change from proposal was reflected in the text of the adoption as published in the November 17, 2000 issue of the

Texas Register (25 TexReg 11442), the actual rule text adopted at the commission's November 1, 2000 agenda was incorrect due to an administrative error. Language in §334.54(d)(1) - (3) that was to be deleted was instead maintained, and the proposed language for that same subsection was deleted. The proposed amendment would correct this error, so §334.54(d)(1) would read "All regulated substances have been removed as completely as possible by the use of commonly-employed and accepted industry procedures." Section 334.54(d)(2) would read "Any residue from stored regulated substances which remains in the system (after the completion of the substance removal procedures under paragraph (1) of this subsection) shall not exceed a depth of 2.5 centimeters at the deepest point and shall not exceed 0.3% by weight of the system at full capacity." Section 334.54(d)(3) would read "The volume or concentration of regulated substances remaining in the system would not pose an unreasonable risk to human health and safety or to the environment if a release occurs during the period when the system is temporarily out of service."

Correcting the errors in §334.54 would restore the provisions which define the term "empty system" as it applies to temporarily out-of-service tanks. This should in turn reduce the likelihood of contamination because, without those provisions, excessive amounts of regulated substances or residues could leak into the environment after being left for extended periods in an unmonitored out-of-service tank. This contamination can have adverse effects on human health and safety through its entrance into public water supplies, private water wells, utility spaces, etc. Making the rule clear and enforceable concerning the term "empty system" should increase the compliance rate with the rule.

Subchapter J. Registration of Corrective Action Specialists and Project Managers for Product Storage Tank Remediation Projects.

Section 334.460, Renewal of Certificate of Registration for Corrective Action Specialist and Corrective Action Project Manager, is proposed to be amended. Among the amendments made to this rule section during the recent Chapter 334 rulemaking were changes concerning a transition from a one-year to a two-year certificate renewal schedule. Section 334.460(a) contained language intended to explain how the transition period would work. Due to ambiguous sentence construction, there has been confusion concerning the last sentence in this subsection. Section 334.460(a) is proposed to be amended so that, in the last sentence, the word “issued” will be changed to “renewed”; the word “subchapter” would be changed to “section”; and the phrase “original date of issuance or two years from the” would be deleted, such that the final sentence would read “Following this designated period, each certificate of registration renewed under this section shall expire two years from the last date of expiration.” This change would greatly clarify the intent of the rule. Section 334.460(f)(2) is proposed to be amended to correct a typographical error in the second sentence in this subparagraph, the number of days has been amended to read “30” rather than “60.” This correction would make the paragraph consistent with the remainder of the rule section and thus clarify the section as a whole. Since the certificate is required by law for certain corrective action activities to be performed, it is vital to these contractors that there be a clear procedure for the timelines associated with license renewal. Correcting the errors will remove the internal inconsistency from the rule and thus ensure a predictable timeline. This also reduces the chances that a member of the public would hire such a contractor, only to find that his certificate was not in effect for part of the corrective action project (which could have implications for monetary reimbursements from the Petroleum Storage Tank Reimbursement Fund for the party hiring the

contractor).

Subchapter K, Storage, Treatment, and Reuse Procedures For Petroleum-Substance Contaminated Soil.

Section 334.503, Reuse of Petroleum-Substance Waste, is proposed to be amended. Section 334.503(c)(3)(E) concerns when it is appropriate for petroleum substance-waste to be used as fill and gives procedures for how this is determined. The current language could be read to give the mistaken impression that the subparagraph is speaking to a status of the waste called “clean” as something separate and apart from the appropriate use of the waste as fill. Consequently, to clarify this rule consistent with its intent, the phrase in the first sentence which reads “will be considered clean, and” is proposed to be deleted. Correcting the error in this rule section should increase the compliance rate with the rule. Exposure to this waste may have adverse impacts on human health and safety, so it is vital that the proper procedures are followed for determining how this waste may be used.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rules are in effect, there will be no fiscal impacts to units of state or local government as a result of implementation of the proposed rules.

This rulemaking is intended to clarify petroleum storage tank (PST) program rules adopted by the commission in November 2000 by correcting several errors that create internal inconsistencies in the rule sections at issue. This proposal is administrative in nature and correcting these errors does not introduce any additional regulatory requirements; therefore, the commission anticipates no fiscal

implications for units of state or local government that own or operate tanks regulated in the PST program.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules would be increased compliance with commission regulations and protection of the environment and human health due to clarification of adopted PST program rules.

This rulemaking is intended to clarify PST program rules adopted by the commission in November 2000 by correcting several errors that create internal inconsistencies in the rule sections at issue. This proposal is administrative in nature and correcting these errors does not introduce any additional regulatory requirements; therefore, the commission anticipates no fiscal implications for individuals and businesses that own or operate tanks regulated in the PST program.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed rules, which are intended to clarify PST program rules adopted by the commission in November 2000 by correcting several errors that create internal inconsistencies in the rule sections at issue. Correcting these errors does not introduce any additional requirements from the rules adopted in November 2000.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and has 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. “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. The proposed rules are not anticipated to 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 because the proposed rules are intended to simply correct errors from the recently completed Chapter 334 rulemaking. Correction of these errors would remove internal inconsistencies from these rule sections and thus make them easier to read and understand.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposal under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rulemaking is simply to correct errors from the recently completed Chapter 334 rulemaking (which became effective November 23, 2000). Correction of these errors would remove internal inconsistencies from these rule sections and thus make them easier to read and understand. This action will not create a burden on private real property, and will not burden, restrict, or limit an owner’s right to property. The corrections in this rulemaking also will not be the cause of a reduction in market

value of private real property, and will not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any Coastal Natural Resource Areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

Comments must be received by 5:00 p.m., May 21, 2001, and should reference Rule Log Number 2001-010-334-WS. For further information, please contact Michael Bame at (512) 239-5658.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission authority 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; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by

rule. The amendment is also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from an UST or aboveground storage tank; and §26.454, which provides the commission authority to adopt rules for the licensing of installers and on-site supervisors, and continuing education requirements for installers and on-site supervisors.

The proposed amendment implements TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

SUBCHAPTER C: TECHNICAL STANDARDS

§334.54

§334.54. Temporary Removal from Service.

(a) - (c) (No change.)

(d) Empty system. For the purposes of this section only, and specifically for the purpose of exempting certain UST systems (when temporarily out of service) from the release detection requirements of this chapter, an UST system shall be considered empty when the following provisions have been met:

(1) All regulated substances have been removed as completely as possible by the use of commonly-employed and accepted industry procedures.

[(1) Time limitation. If due to the phase-in of upgrades and improvements as allowed under §334.47 of this title (relating to Technical Standards for Existing Underground Storage Tank Systems), any existing UST system is not yet adequately protected from corrosion (as provided under subsection (c)(1) of this section) and any existing nonempty UST system is not yet adequately monitored for releases (as provided under subsection (c)(2) of this section), such UST systems cannot remain out of service indefinitely and must meet the following requirements.]

[(A) The UST system shall be operated and maintained in accordance with the provisions of subsection (b) of this section during the time the system is temporarily out of service, which shall not exceed 12 months.]

[(B) Beginning no later than the date on which the UST system has been out of service for a continuous period of 10 months, regardless of whether or not regulated substances remain in the system, the owner or operator shall initiate appropriate activities or procedures to assure that no later than the date on which the system has been out of service for a continuous period of 12 months, the UST system is either:]

[(i) permanently removed from service (by disposal in-place or removal from the ground), in accordance with the applicable provisions of §334.55 of this title (relating to Permanent Removal from Service);]

[(ii) brought back into service in conformance with the requirements in paragraph (3) of this subsection; or]

[(iii) appropriately upgraded such that the UST system is adequately protected from corrosion and adequately monitored for releases of regulated substances in a manner that will allow the system to remain temporarily out of service under the provisions of subsection (c) of this section.]

(2) Any residue from stored regulated substances which remains in the system (after the completion of the substance removal procedures under paragraph (1) of this subsection) shall not exceed a depth of 2.5 centimeters at the deepest point and shall not exceed 0.3% by weight of the system at full capacity.

[(2) Extension of time. For UST systems which are temporarily out of service, and for which the owner or operator determines that conformance with the schedule under paragraph (1)(B) of this subsection would be impractical or unreasonable, the owner or operator must secure prior approval from the executive director for an extension of time subject to the following conditions.]

[(A) Any request for extension of time shall be in conformance with §334.43 of this title (relating to Variances and Alternative Procedures).]

[(B) Any request for extension of time shall be accompanied by written documentation adequate to justify the requested extension and the results of a site assessment conducted in accordance with of §334.55(e) of this title (relating to Permanent Removal from Service).]

(3) The volume or concentration of regulated substances remaining in the system would not pose an unreasonable risk to human health and safety or to the environment if a release occurs during the period when the system is temporarily out of service.

[(3) Returning UST system to service. When an unprotected and unmonitored UST system that has been temporarily out of service for longer than six months is placed back into service, the owner or operator shall:]

[(A) ensure the integrity of the system by the performance of a tank tightness test and piping tightness test that meet the requirements of §334.50(d)(1)(A) and (b)(2)(A)(ii)(I), respectively, of this title (relating to Release Detection) prior to bringing the system back into operation; and]

[(B) ensure that the UST system is brought into compliance with all applicable corrosion protection, release detection, and spill and overfill prevention requirements of §334.49 of this title (relating to Corrosion Protection), §334.50 of this title (relating to Release Detection), and §334.51 of this title (relating to Spill and Overfill Prevention and Control) in accordance with the applicable schedules in §334.44 of this title (relating to Implementation Schedules).]

(e) (No change.)

**SUBCHAPTER J: REGISTRATION OF CORRECTIVE ACTION SPECIALISTS AND
PROJECT MANAGERS FOR PRODUCT STORAGE TANK REMEDIATION PROJECTS**

§334.460

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission authority 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; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amendment is also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from an UST or aboveground storage tank; and §26.454, which provides the commission authority to adopt rules for the licensing of installers and on-site supervisors, and continuing education requirements for installers and on-site supervisors.

The proposed amendment implements TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

§334.460. Renewal of Certificate of Registration for Corrective Action Specialist and Corrective Action Project Manager.

(a) As of the effective date of this rule, the agency will transition to renewal of certificates of registration on a two-year basis. For one year after the effective date of this subsection, existing certificates with even registration numbers will be renewed for one year and certificates with odd registration numbers will be renewed for two years. Following this designated period, each certificate of registration renewed [issued] under this section [subchapter] shall expire two years from the [original date of issuance or two years from the] last date of expiration.

(b) - (e) (No change.)

(f) A properly completed application for renewal (including but not limited to proper payment of renewal fees, certification of adequate financial requirements as prescribed in §334.456(D)(2)(i) of this title, and documentation of completion of required continuing education) shall be submitted to the executive director at least 30 days prior to the expiration date of the certification of registration.

(1) (No change.)

(2) If a complete application for renewal is not filed at least 30 days prior to the expiration date of the current registration and the executive director has not processed the renewal application, the current registration shall expire and will not be considered provisionally renewed. The

registration may be renewed within 30 [60] days of the expiration date. Corrective action services performed after expiration, but before renewal, shall be considered to have been performed without a proper registration under this subchapter.

(g) - (h) (No change.)

**SUBCHAPTER K: STORAGE, TREATMENT, AND REUSE PROCEDURES FOR
PETROLEUM-SUBSTANCE CONTAMINATED SOIL**

§334.503

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission authority 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; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amendment is also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from an UST or aboveground storage tank; and §26.454, which provides the commission authority to adopt rules for the licensing of installers and on-site supervisors, and continuing education requirements for installers and on-site supervisors.

The proposed amendment implements TWC, Chapter 26, Subchapter I, Underground Storage Tanks and Subchapter K, Underground Storage Tank Installers.

§334.503. Reuse of Petroleum-Substance Waste.

(a) - (b) (No change.)

(c) Reuse requirements are as follows.

(1) - (2) (No change.)

(3) Petroleum-substance wastes may be reused under the following conditions.

(A) - (D) (No change.)

(E) For releases reported to the agency on or before August 31, 2003, petroleum-substance wastes [will be considered clean, and] may, if appropriate, be used as fill. To determine if the soil to be reused is appropriate for the application, analysis for contamination must be conducted as specified by this agency. The agency will give written approval for the particular reuse after ensuring that the implementation will, in the opinion of agency staff, adequately protect human health, safety, and the environment. The landowner at the receiving site (if different from the original owner of the petroleum substance contaminated soil) must give written consent for this activity. Fill for tank hold bedding and backfill for tank systems must meet the requirements of §334.46(a)(5) of this title (relating to Installation Standards for New Underground Storage Tank Systems).