

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §334.2, Definitions; §334.3, Exemption for Underground Storage Tanks (USTs) and UST Systems; §334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems; §334.6, Construction Notification for Underground Storage Tanks (USTs) and UST Systems; §334.8, Certification for Underground Storage Tanks (USTs) and UST Systems; §334.12, Other General Provisions; §334.45 Technical Standards for New Underground Storage Tank Systems; §334.47, Technical Standards for Existing Underground Storage Tank Systems; §334.50, Release Detection; §334.54, Temporary Removal from Service; §334.71, Applicability; §334.82, Public Participation; §334.201, Purpose and Applicability; §334.301, Applicability of this Subchapter; §334.302, General Conditions and Limitations Regarding Reimbursement; §334.303, When to File Application; §334.310, Requirements for Eligibility; §334.313, Review of Application; and §334.322, Subchapter H Definitions.

#### **BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES**

The proposed rules implement the provisions of House Bill (HB) 2687 and duplicative provisions in TNRCC Sunset legislation in HB 2912, Article 14. These statutory provisions cover several areas that require rulemaking: the definition of a tank “owner” in the petroleum storage tank (PST) program was clarified; the scope of compliance self-certification (established by HB 2815 in the previous legislative session) was prospectively narrowed to exclude tanks containing regulated substances that are not motor fuels; specific deadlines were attached to the existing general obligations that tank owners and operators have to perform corrective action activities at leaking petroleum storage tank (LPST) sites, with loss of reimbursement eligibility stemming from missed deadlines that are the fault of the tank owner or

operator (or their agents, etc.); the long-standing legal fact that a person's liability to perform corrective action at LPST sites is unrelated to any possible reimbursements that person may be eligible for was reiterated and emphasized in new statutory provisions; and the Petroleum Storage Tank Reimbursement (PSTR) Account was extended through September 1, 2006. Other elements of the new legislation (e.g., fee schedules) do not require rulemaking, and are not included in this proposal. A minor amount of regulatory reform is also contained in this package. For example, amendments are proposed to facilitate owner/operators of tanks temporarily out-of-service (under §334.54) who wish to bring those tanks back into service without violating compliance self-certification regulations in §334.8(c). Typographical errors in the rules are also proposed to be corrected.

## SECTION BY SECTION DISCUSSION

### *Subchapter A - General Provisions*

Several of the new legislative provisions (concerning the clarified tank owner definition, and the prospective narrowing of the scope of the compliance self-certification program require changes to the regulations in this subchapter. Also, regulatory reform changes are proposed here concerning how tanks that are temporarily out-of-service in §334.54 may be brought back into service without violating compliance self-certification requirements. Also, some typographical errors in the subchapter were corrected.

Section 334.2, Definitions, is proposed to be amended. Paragraph (27)(C) is proposed to be amended by correcting the spelling of the word "tester." The definition of "owner" in §334.2(72) is proposed to be amended to match the clarified definition of the term contained in legislation being implemented

by this proposed rulemaking.

Section 334.3, Exemptions from Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.3(a)(10)(A) is proposed to be amended to correct the spelling of the word “pipeline.”

Section 334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. The text of subsection (b)(1)(C) is proposed to be deleted, because the new legislation prospectively narrows the scope of the compliance self-certification program such that there will no longer be a phase-in concerning regulated substances that are not motor fuels, with the old subsection (b)(1)(D) language now becoming (b)(1)(C) (and including a correction of the spelling of the phrase *prima facie*). Section 334.5(b)(2) is proposed to be amended by deletion of the parenthetical, because the new legislation narrows the scope of the compliance self-certification program such that there will no longer be a phase-in concerning regulated substances that are not motor fuels.

Section 334.6, Construction Notification for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.6(b)(1)(C) is proposed to be added to require that when a UST system has been taken temporarily out-of-service under §334.54 of this chapter, the owner or operator must first submit a construction notification form before returning the UST system to service. This change is being proposed because, under existing compliance self-certification rules in §334.8(c), owners/operators may experience difficulty in bringing these tanks back into service without violating those compliance self-certification requirements. Under the current self-certification regulatory

scheme, new and replacement tanks may receive a “temporary delivery authorization” from the commission under §334.8(c)(5)(D) once a construction notification form is received under this section. This temporary authorization functions as the required delivery certificate while preliminary testing is done on the tank systems (which includes placing motor fuels into them). The proposed amendment would plug the temporarily out-of-service tanks into this system as well such that, once the construction notification form is received, the owner/operator may perform the testing, etc. necessary to bring such a tank back into service prior to getting his standard delivery certificate as discussed in this portion of the Section by Section Discussion of this preamble. Concurrent changes to §334.8(c) and §334.54 are being proposed to implement this change.

Section 334.8, Certification for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.8(c)(1)(A)(i) is proposed to be amended by deleting the word “and” at the end of the provision, and the period at the end of §334.8(c)(1)(A)(iii) is changed to a semi-colon, since new items are being added to the list. Section 334.8(c)(1)(A)(iv), reading “USTs used for storing regulated substances that are not motor fuels (as defined in this subchapter); and,” is proposed to be added because new legislative provisions narrow the scope of the compliance self-certification program to exclude regulated substances that are not motor fuels. Section 334.8(c)(1)(A)(v), reading “USTs temporarily out-of-service under §334.54 of this title,” is proposed to be added to clarify compliance self-certification requirements for this class of tanks. Section 334.8(c) is proposed to be reorganized so that existing §334.8(c)(1)(B) language becomes §334.8(c)(2) language (with necessary cross-reference changes), while current §334.8(c)(2)(B) language becomes new §334.8(c)(1)(B) language. Existing language in §334.8(c)(2) and §334.8(c)(B) is proposed to be deleted. This reorganization of language is

proposed because new legislative provisions narrow the scope of the compliance self-certification program to exclude regulated substances that are not motor fuels. For this reason, there will no longer be a phase-in of the program for those substances that occurs in November of 2002. Section 334.8(c)(3)(B) is proposed to be amended to correct the spelling of the phrase “self-certification.” The phrase “To ensure timely initial issuance by the agency of the UST delivery certificate,” is proposed to be deleted from §334.8(c)(4)(A)(vi) as superfluous language. Section 334.8(c)(5)(D) is proposed to be amended to facilitate tanks that are temporarily out-of-service under §334.54 being brought back into service without violating compliance self-certification requirements. These tanks are added to the list in §334.8(c)(5)(D)(i), and changes to clauses (ii) and (iii) are proposed to acknowledge this new item on the list (see full discussion in this preamble in the proposed amendments to §334.6).

Section 334.12, Other General Provision, is proposed to be amended. Section 334.12(a)(2) is proposed to be deleted, because the statutory language can stand alone on these points. Section 334.12(a)(1) has been renumbered to (a) and a cross-reference in (a)(1) was deleted.

#### *Subchapter C - Technical Standards*

There are three categories of amendments proposed for this subchapter: changes which serve to cross-reference new legislative special requirements for tank owners and operators with tanks located in areas containing certain aquifers, the specifics which will be contained in a separate rulemaking (Rule Log Number 2001-100-214-WS); changes to remove uncertainty in technical standards caused by HB 2912 language invalidating certain existing and prospective local ordinances; and changes to facilitate owner/operators of tanks temporarily out-of-service (under §334.54 of this subchapter) who wish to

bring those tanks back into service without violating compliance self-certification regulations in §334.8(c).

Section 334.45, Technical Standards for New Underground Storage Tank Systems, is proposed to be amended. Section 334.45(d)(1)(C) is proposed to be amended by inserting the following new language: “An UST system, at a minimum, shall incorporate secondary containment as specified in Texas Water Code, §26.3476, if the UST system is located in an area described in that provision.” The current language in subparagraph (C) would become a new subparagraph (D). These changes are to cross-reference new requirements for tanks located near certain aquifers that are contained in HB 2912, Article 13.

Section 334.47, Technical Standards for Existing Underground Storage Tank Systems, is proposed to be amended. Section 334.47(d) is proposed to be amended by inserting the following new language: “An UST system, at a minimum, shall incorporate secondary containment as specified in TWC, §26.3476, if the UST system is located in an area described in that chapter.” The current language in subsection (d) would become a new subsection (e). These changes are to cross-reference new requirements for tanks located near certain aquifers that are contained in HB 2912, Article 13.

Section 334.50, Release Detection, is proposed to be amended. Section 334.50(d)(1)(B)(iii)(III) is proposed to be amended by deleting the phrase “the local standards for meter calibration or within” and inserting the phrase “or less” after the word “six” to remove uncertainty caused by the new HB 2912, Article 14.10 which invalidates certain local ordinances, replacing it with a technically appropriate

standard not dependant on local laws.

Section 334.54, Temporary Removal From Service, is proposed to be amended. Section 334.54(c)(3)(B) is proposed to amend the period at the end of the sentence to “; and” to reflect a new item on the list. Section 334.54(c)(3)(C) is proposed as new language reading “Before any UST system is returned to service under this subsection, the owner or operator must first submit a construction notification form as specified under §334.6(b) of this chapter” to facilitate tanks that are temporarily out-of-service under this section being brought back into service without violating compliance self-certification regulations in §334.8(c) (see full discussion in §334.6 of this preamble).

#### *Subchapter D - Release Reporting and Corrective Action*

For many years, TWC, Chapter 26, generally, and Subchapter I specifically, have required tank owners and operators to perform corrective action activities concerning releases from their facilities.

Assessment and necessary clean-up at the LPST site must be timely and properly performed until the commission is satisfied that the site can be closed. Current wording in this subchapter and Subchapter G reiterates this statutory obligation, and provides the details on how it is to be accomplished.

New legislative language assigns specific calendar deadlines to corrective action milestones, and provides that missing one of these deadlines removes eligibility for reimbursement for those and future corrective action activities at that LPST site from the PSTR Account. The new TWC provisions go on to say that eligibility is only lost if the missed deadline is the fault of the tank owner or operator, or his agent, or contractor. The amendments to this rule subchapter are primarily designed to reflect these

new specific deadlines which have been overlaid on the existing assessment/cleanup obligations, as well as to reference the reimbursement consequences for missing a deadline. In addition, amendments are also proposed to memorialize commission practice of having the owner or operator provide the required notice to persons affected by a contamination release, as opposed to having a regulatory option that the commission may choose to make the notification itself.

Section 334.71, Applicability, is proposed to be amended. The title of this section is proposed to be amended to “Applicability and Deadlines,” to reflect the insertion of the new legislative deadlines in this section. Language in §334.71 is proposed to be renamed as §334.71(a), since other subsections are proposed for this section. New §334.71(b) is proposed to be added to reflect the new corrective action milestone deadlines contained in HB 2687 and HB 2912, Article 14.03. New §334.71(c) is proposed to be added to reflect the new legislative requirements concerning PSTR Account reimbursement consequences of missing a deadline, and to provide a cross-reference to Subchapter H where rules containing more detail on the matter are proposed.

Section 334.82, Public Participation, is proposed to be amended. The existing rule language provides that either the owner or operator, or the agency (at its discretion), will provide the required notice to “those members of the public directly affected by the release and the planned corrective action.” In practice, the agency, with its limited resources, has consistently directed the owner/operator to make these notifications. Because the commission wishes to continue this practice, amendments are proposed to §334.82(a) and (b) to regulatorily state that it will be the owner or operator that will always have this burden (unless the LPST site is being handled by the commission’s State-Lead Program). To this end,

§334.82(a) is proposed to be amended by substituting the phrase “owner or operator must” for the phrase “agency shall” in the first sentence. In the same subsection in the last sentence, the word “certified” is proposed to be inserted to require that notification letters be sent certified mail, when that is the option of notification chosen by the owner or operator. Also, the phrase “or businesses” is proposed to be inserted after the word “households” in the last sentence of the subsection to acknowledge that affected persons may sometimes be in a business as opposed to a residence. In §334.82(b), the phrase “executive director may require” is proposed to be deleted to, as discussed in the rationale for amendments to subsection (a), reflect that it will always be the owner or operator who will make the required notification. The phrase “must submit proof of the notification required under subsection (a) of this section to the commission within 30 days of the confirmation of the release” is proposed to replace the phrase “to perform or implement the public notices in this section and to verify that such activity has been satisfactorily completed” as clarification to provide an actual deadline in every case by which the owner or operator must prove to agency staff that the required notification has been made. In §334.82(c), the phrase “executive director” is proposed to be replaced with the more general “agency,” per definitions in Chapter 3 of this title. Also in this subsection, the phrase “When corrective action is performed by the commission, the commission will provide the notification referenced in subsection (a) of this section” is proposed to be added to reflect the fact that some LPST sites are handled in the commission’s State-Lead program.

*Subchapter G - Target Concentration Criteria*

For many years, TWC, Chapter 26, generally, and Subchapter I specifically, have required tank owners and operators to perform corrective action activities concerning releases from their facilities.

Assessment and necessary clean-up at the LPST site must be timely and properly performed until the commission is satisfied that the site can be closed. Current wording in this subchapter and Subchapter D reiterates this statutory obligation, and provides the details on how it is to be accomplished.

New legislative language assigns specific calendar deadlines to corrective action milestones, and provides that missing one of these deadlines removes eligibility for reimbursement for those and future corrective action activities at that LPST site from the PSTR Account. The new TWC provisions go on to say that eligibility is only lost if the missed deadline is the fault of the tank owner or operator, or his agent or contractor. The amendments to this rule subchapter are designed to reflect these new legislative requirements, and to provide a statement of applicability and a cross-reference to Subchapter D.

Section 334.201, Purpose and Applicability, is proposed to be amended. The title of this section is proposed to be amended to “Purpose, Applicability, and Deadlines” to reflect the addition of a new subsection concerning the new legislative deadlines for corrective action activities (see full discussion in this preamble in §334.71). New §334.201(c) is proposed to be added to reflect the applicability of the new deadlines, and provide a cross-reference to the Subchapter D where those deadlines are set out.

#### *Subchapter H - Reimbursement Program*

New legislation necessitates that three areas of amendments be proposed in this subchapter: HB 2687 and HB 2912, Article 14 extended the sunset date for the PSTR Account through September 1, 2006, and new deadlines were created concerning applications for reimbursement from that fund; the same

legislation provided specific deadlines associated with existing corrective action duties for owners and operators, with missed deadlines affecting reimbursement eligibility; and the same legislation provided a clarified definition for “owner,” which necessitates matching amendments to the “eligible owner” definition in this subchapter. Also, a small number of regulator reform amendments are proposed to clarify the subchapter.

Section 334.301, Applicability of this Subchapter, is proposed to be amended. Section 334.301(c) is proposed to be amended by adding the phrase “No expenses for corrective action performed after September 1, 2005 will be reimbursed. No reimbursements will be made for corrective action expenses sought in claims submitted to the agency after March 1, 2006. Under no circumstances will any reimbursements be made” (on or after September 1) “2006,” with a deletion of “2003,” to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14.

Section 334.302, General Conditions and Limitations Regarding Reimbursement, is proposed to be amended. Language in §334.302(c)(5) is proposed to be deleted and replaced with “any expenses related to corrective action performed after September 1, 2005”; to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14. A new §334.302(c)(6), reading “any expenses related to corrective action contained in a reimbursement claim filed with the agency after March 1, 2006; and/or,” is proposed to be added to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14. A new §334.302(c)(7), reading “on or after September 1, 2006,” is proposed to be added to reflect the new

dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14.

Section 334.303, When to File Application, is proposed to be amended. Section 334.303(a) is proposed to be amended to insert the phrase “not after,” delete the phrase “prior to,” add the word “March,” delete the word “June,” add the year “2006,” and delete the year “2003,” such that the provision reads “An application for reimbursement under this subchapter must be filed on or after January 17, 1990, but not after March 1, 2006,” to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14.

Section 334.310, Requirements for Eligibility, is proposed to be amended. Section 334.310(a)(1) is proposed to be amended to insert the parenthetical “(including, but not limited to, the restrictions under §334.302 of this title (relating to General Conditions and Limitations Regarding Reimbursement))” to provide a cross-reference to regulations where new language is proposed to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14 (see full discussion in this preamble in §334.302). Section 334.310(a)(1)(E) is proposed to be amended to insert the phrase “on or receives an assignment or deed in lieu of foreclosure” to more accurately reflect the requirements of TWC, §26.3571(b)(1)(C). Language in §334.310(b) is proposed to be deleted and replaced with “If an otherwise eligible owner or operator misses a deadline under §334.71(b) of this title (relating to Applicability), and that missed deadline is the fault of that person, his agent or contractor, then that person shall no longer be eligible for reimbursement for those and future corrective action expenses at that site” to reflect the additional PSTR Account reimbursement eligibility requirements imposed by HB 2687 and HB 2912, Article 14 and to provide a cross-reference to rules

where proposed amendments give more details on the specific corrective action deadlines required under the new statutory provisions (see discussion in this preamble in §334.71).

Section 334.313, Review of Application, is proposed to be amended. Section 334.313(a)(1)(F) is proposed to be amended to add the parenthetical “(though no reimbursement applications may be filed after March 1, 2006)” to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14. Section 334.313(b) is proposed to be amended by changing the date “June 1, 2003” to read “March 1, 2006” to reflect the new dates and restrictions concerning the PSTR Account contained in HB 2687 and HB 2912, Article 14. Section 334.313(d) is proposed to be amended to insert the clarifying phrase “either, at the executive director’s discretion” to reflect that the executive director must take one of the two actions listed, and to make the point that which of the two actions is taken on a particular application is at the discretion of the executive director.

Section 334.322, Subchapter H Definitions, is proposed to be amended. Section 334.322(9) is proposed to be amended so that the definition of “eligible owner” properly reflects the amendment to the tank “owner” definition contained in HB 2687 and HB 2912, Article 14.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five years the proposed rules are in effect, no fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. No fiscal implications are anticipated for those units of state and local government that do not own or operate LPSTs. However, those units of state

and local government that do own or operate LPSTs will benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to apply for reimbursements for much longer than they could have under the previous provisions resulting in significant cost savings.

The proposed rules implement provisions in HB 2687 (relating to the program for the regulation and remediation of underground and aboveground storage tanks) 77th Legislature, 2001, and certain provisions in HB 2912 (relating to the continuation and functions of the commission; providing penalties).

The proposed rules implement new legislative requirements which, for the most part, relate to the operation of the PSTR Account. This account was created in 1987 to provide eligible PST owners and operators reimbursement for certain expenses associated with corrective action they perform at LPST sites. Revenues to the account are derived from a fee assessed on the bulk delivery of motor fuel.

This account was to expire on September 1, 2003. In addition, the petroleum product delivery fee had been suspended according to statute, until the unobligated account balance reached \$25 million.

To address concerns that remediation projects eligible for reimbursement for corrective action expenses may not be completed by the 2003 deadline, and that the unobligated account balance would reach \$25 million by December of 2001, the legislature passed HB 2687 and HB 2912. These bills provide for the continuation of the PSTR Account until September 1, 2006, reduce the petroleum product delivery

fees on a graduated scale, and a graduated increase in the percentage of fees that can be spent on the administrative costs of the program by the agency. The proposed rules do not address the revised fee schedules or administrative costs as they do not require rulemaking.

The proposed rules: clarify the definition of a tank owner; exclude tanks containing regulated substances that are not motor fuels from self certification requirements; attach specific calendar deadlines for tank owners and operators to perform corrective action activities at LPST sites and to bring those sites to closure, with loss of reimbursement eligibility stemming from missed deadlines that are the fault of the owner, operator or their agents; provide that a person's liability to perform corrective action at LPST sites is unrelated to any possible reimbursements that the person may be eligible for; and continue the PSTR Account through September 1, 2006 and create new deadlines for applications for reimbursement from the account.

The proposed rules provide that no reimbursement can be received for corrective action performed after September 1, 2005 and no claim received after March 1, 2006 may be reimbursed by the agency. Further, the proposed rules require sites where a confirmed release was initially discovered and reported to the agency on or before December 22, 1998 to complete site and risk assessments which must be received by the agency by September 1, 2002. Corrective action plans (or the alternative allowed demonstrations) for these sites must be received by September 1, 2003, action plans must be initiated by March 1, 2004 and all requests for closure of sites not requiring a corrective action plan must be received by September 1, 2005. The specific deadlines in these provisions reflect legislative requirements in HB 2912 and HB 2687 and would allow the PSTR Account to meet the new sunset date

of September 1, 2006. The General Appropriations Act, 77th Legislature, 2001, appropriated the agency \$110,581,103 in Fiscal Year (FY) 2002 and \$93,308,741 in FY 2003 for the PST cleanup program and to provide reimbursement to contractors and owners for the cost of remediating sites contaminated by leaking storage tanks. Estimated funding for this portion of the PST program is estimated to remain at \$93,308,741 for FY 2004, then drop to \$67,173,831 in FY 2005 and \$48,103,617 in FY 2006.

No fiscal implications are expected for units of state and local government that do not own or operate LPSTs. Units of state and local government that do own or operate LPSTs and fail to meet the new deadlines may lose reimbursement eligibility and encounter possible future enforcement action by the agency. Units of state and local governments that operate or own LPSTs will also benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to continue to apply for reimbursements for much longer than they could have under the previous provisions. Out of the estimated 6,292 LPSTs sites currently eligible for reimbursement, there are an estimated 500 sites that are owned or operated by units of state and local government. Although costs for PST cleanups vary widely, based upon an estimated average cleanup cost of \$50,000 to \$60,000 per site, units of state and local government that meet the new deadlines will be able to apply for reimbursement for three years longer than they would have, resulting in potential savings of an estimated \$25 to \$30 million.

No fiscal implications are anticipated to the agency or other units of state and local government to implement the other provisions in the proposed rulemaking as these provisions do not add additional

regulatory requirements, but clarify existing rules and practices.

#### PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the enforcement and compliance with these proposed rules will be the expedited completion of LPSTs cleanups and closures around the state thus protecting the state's groundwater resources, and the continuation of reimbursements to PST owners and operators for remediation costs until 2006.

There are no fiscal implications to businesses and individuals that do not own or operate LPSTs. However, those eligible businesses and individuals that do own LPSTs will benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to continue to apply for reimbursements for much longer than they could have under the previous provisions, resulting in significant cost savings.

The proposed rules implement new legislative requirements which, for the most part, relate to the operation of the PSTR Account. This account was created in 1987 to provide eligible PST owners and operators reimbursement for certain expenses associated with corrective action they perform at LPST sites. Revenue to the account is derived from a fee assessed on the bulk delivery of motor fuel.

This account was to expire on September 1, 2003. In addition, the petroleum product delivery fee had been suspended according to statute, until the unobligated account balance reached \$25 million.

To address concerns that remediation projects eligible for reimbursement for corrective action expenses may not be completed by the 2003 deadline, and that the unobligated account balance would reach \$25 million by December of 2001, the legislature passed HB 2687 and HB 2912. These bills provide for the continuation of the PSTR Account until September 1, 2006, reduce the petroleum product delivery fees, and increase the amount of fees that can be spent on the administrative costs of the program by the agency. The proposed rules do not address the revised fee schedules or administrative costs as they do not require rulemaking.

The proposed rules: clarify the definition of a tank owner; exclude tanks containing regulated substances that are not motor fuels from self certification requirements; attach specific calendar deadlines for tank owners and operators to perform corrective action activities at LPST sites and to bring those sites to closure, with loss of reimbursement eligibility stemming from missed deadlines that are the fault of the owner, operator or their agents; provide that a person's liability to perform corrective action at LPST sites is unrelated to any possible reimbursements that the person may be eligible for; and continue the PSTR Account through September 1, 2006 and create new deadlines for applications for reimbursement from the account.

The proposed rules provide that no reimbursement can be received for corrective action performed after September 1, 2005 and no claim received after March 1, 2006 may be reimbursed by the agency. Further, the proposed rules require sites where a confirmed release was initially discovered and reported to the agency on or before December 22, 1998 to complete site and risk assessments which must be received by the agency by September 1, 2002. Corrective action plans for these sites must be

received by September 1, 2003, action plans must be initiated by March 1, 2004 and all requests for closure of sites not requiring a corrective action plan must be received by September 1, 2005. The specific deadlines in these provisions reflect legislative requirements in HB 2912 and HB 2687 and would allow the PSTR Account to meet the new sunset date of September 1, 2006. Senate Bill 1, 77th Legislature, 2001, appropriated the agency \$110,581,103 in FY 2002 and \$93,308,741 in FY 2003 for the PST cleanup program and to provide reimbursement to contractors and owners for the cost of remediating sites contaminated by leaking storage tanks. Estimated funding for this portion of the PST program is estimated to remain at \$93,308,741 for FY 2004, then drop to \$67,173,831 in FY 2005 and \$48,103,617 in FY 2006.

No fiscal implications are anticipated to individuals and businesses that do not own or operate LPSTs. Businesses and individuals that do own or operate LPSTs and miss the new deadlines would lose reimbursement eligibility and encounter possible future enforcement action by the agency. Eligible businesses or individuals that operate or own LPSTs will also benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to apply for reimbursements for much longer than they could have under the previous provisions. Out of the estimated 6,292 LPST sites currently eligible for reimbursement, there are an estimated 1,000 sites that have not reported any information to the agency regarding their remediation efforts. It could be assumed that these sites will miss the new deadlines for obtaining reimbursement. Although costs for PST cleanup costs vary widely, it is estimated that an average cleanup may cost between \$50,000 and \$60,000 per site. However, for those sites that meet the deadlines, they will be able to apply for reimbursement for three years longer than they would have,

thus resulting in potential savings of between \$264,600,000 and \$317,520,000.

No fiscal implications are anticipated to individuals or businesses to implement the other provisions in the proposed rulemaking as these provisions do not add additional regulatory requirements, but clarify existing rules and practices.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for any small or micro-businesses as a result of implementing the proposed rules. Those eligible small or micro-businesses that own LPSTs will benefit from the extension of the sunset date for the PSTR Account for three additional years. Because of this extension, eligible owners and operators will be able to apply for reimbursements for much longer than they could have under the previous provisions. It is not known how many of the currently estimated 6,292 LPST sites currently eligible for reimbursement are small or micro-businesses. However, assuming that there are an estimated 1,000 sites that have not reported required information to the agency regarding their remediation efforts, it could be assumed that these sites will miss the new deadlines for obtaining reimbursement.

Although costs for PST cleanup costs vary widely, it is estimated that an average cleanup may cost between \$50,000 and \$60,000 per site. However, for those sites that meet the deadlines, they will be able to apply for reimbursement for three years longer than they would have, thus resulting in potential savings of between \$264,600,000 and \$317,520,000.

No fiscal implications are anticipated to small or micro-businesses to implement the other provisions in the proposed rulemaking as these provisions do not add additional regulatory requirements, but clarify existing rules and practices.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### 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 the 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. Further, it does not meet any of the four applicability requirements listed in §2001.0225(a).

The vast majority of these proposed rule amendments reflect the new dates and restrictions concerning the PSTR Fund contained in HB 2687 and HB 2912, Article 14, rather than being specifically intended to protect the environment or reduce risks to human health from environmental exposure. The PSTR

Fund was created many years ago by TWC, Chapter 26, Subchapter I, to provide a fee-driven pool of monies from which eligible owners and operators may apply for reimbursement for certain expenses associated with corrective action they are required to perform at LPST sites (the agency is also authorized to use the fund for certain expenses associated with the PST program). The new legislation attaches specific calendar deadlines to existing general obligations that tank owners and operators have under TWC, Chapter 26, Subchapter I and Subchapters D and G of this rule chapter to perform corrective action activities at LPST sites and bring those sites to closure, with loss of reimbursement eligibility stemming from missed deadlines that are the fault of the tank owner or operator (or their agents, etc.). The specific deadlines in the new statutory provisions are part of a legislative effort to wind down the PSTR Fund by its new sunset date of September 1, 2006. As the new statutory language reiterates, "a person's liability to perform corrective action under this chapter is unrelated to any possible reimbursements the person may be eligible for under Section 26.3571" of the TWC. That general liability predates the new legislation.

In addition, the proposed regulatory "owner" definition revision, also required in the new statutory provisions, is intended as a clarification to better explain this important term and how the agency makes ownership determinations.

The exclusion of regulated substances that are not motor fuels from the compliance self-certification program was written into the new statutory provisions to narrow the prospective program scope. The self-certification program was created by HB 2815 in 1999, and following that session there was some question concerning legislative intent about the scope of the program. In implementing HB 2815, rules

were promulgated in §334.8(c)(2) of this chapter that would not phase the substances in question into the self-certification scheme until 2002. This was specifically done to allow the legislature, if it chose to, to address the applicability issue concerning these substances in the following session, which was done in HB 2687 and HB 2912, Article 14. With the applicability change, the "phase in" period for these substances to enter the compliance self-certification program, scheduled for 2002, will not take place. It should be noted that only a very small number of facilities would have been included in that phase-in group.

Also, the regulatory reform amendments in this proposed rulemaking are intended to clarify rule requirements, rather than introduce new concepts. The amendments concerning the mechanics of how a tank that has been temporarily out-of-service under §334.54 can be brought back into service without violating the self-certification rules in §334.8(c) is essentially administrative in nature.

Any potential adverse economic affect caused by these proposed rules (specifically the specific calendar deadlines placed on corrective action milestones, and their resulting effect on reimbursement eligibility) should be offset by the extension in HB 2687 and HB 2912, Article 14 of the PSTR Fund sunset date for three additional years. Because of this extension, owners and operators will be able to apply for reimbursements for much longer that they could have under existing law and thus face fewer out-of-pocket expenses when assessing and remediating LPST sites.

In addition, even if a proposed rule was to be considered a "major environmental rule," a draft regulatory impact assessment is not required because the rules do not exceed a standard set by federal

law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency.

This proposal does not exceed a standard set by federal law. This proposal also does not exceed an express requirement of state law because almost all of the amendments proposed in this rulemaking are required by new legislation, and those amendments do not exceed the scope of those new statutory provisions. The regulatory reform amendments are either clarifications of existing rules or corrections of typographical errors. This proposed rulemaking is authorized as described in the "Statutory Authority" section of this preamble. This proposal does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of federal government to implement a state federal program. One of the central elements of federal approval of the Texas PST program is the existence in state law of requirements concerning timely and proper assessment and clean-up of contaminated LPST sites (see 40 Code of Federal Regulations §281.35). A substantial part of the proposed rulemaking reflects HB 2687/HB2912, Article 14 requirements establishing specific calendar deadlines for assessment and clean-up of these sites. When the Texas program was approved, it already contained regulations concerning the duty for timely and proper LPST site corrective action. The new state legislation only places specific calendar deadlines on existing general obligations tank owners and operators have to perform corrective action activities at these sites. Also, the proposed rules are not proposed to be adopted solely under the general powers of the agency, but rather under specific state law.

#### 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 proposed rulemaking is to implement HB 2687 and HB 2912, Article 14 (with a small number of clarifying regulatory reform amendments proposed). This action will not create a burden on private real property. Most of the legislatively-driven changes relate to the operation of the PSTR Account. This fund was created many years ago by TWC, Chapter 26, Subchapter I, to provide a pool of monies from which eligible owners and operators may apply for reimbursement for certain expenses associated with corrective action they perform at LPST sites (the commission is also authorized to use the fund for certain expenses associated with the PST program). The existence of this fund facilitates timely and proper assessment and remediation of LPST sites by tank owners and operators. The new legislation extends the sunset date of the fund for three additional years. Consequently, this may increase the pace of clean-ups and closures at contaminated sites around the state. The small number of rules proposed as part of the commission's regulatory reform effort also do not create a burden on private real property, since they are written to clarify existing rules. As a whole, this rulemaking will not be the cause of a reduction in market value of private real property, and does not create a burden on private real property and will not constitute a takings under the Texas Government Code, §2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has prepared a consistency determination for the proposed rules pursuant to 31 TAC §505.22, and has found that the proposed rulemaking is consistent with the applicable Texas Coastal Management Program (CMP) goals and policies. The rulemaking is subject to the CMP and must be

consistent with applicable goals and policies which are found in 31 TAC §501.12 and §501.14. The CMP goal applicable to the rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of Coastal Natural Resource Areas (CNRAs). This proposed rulemaking implements HB 2687 and HB 2912, Article 14, and also includes a small number of regulatory reform changes. Most of the legislatively-driven changes relate to the operation of the PSTR Account. This fund was created many years ago by TWC, Chapter 26, Subchapter I, to provide a pool of monies from which eligible owners and operators may apply for reimbursement for certain expenses associated with corrective action they perform at LPST sites (the commission is also authorized to use the fund for certain expenses associated with the PST program). The existence of this fund facilitates timely and proper assessment and remediation of LPST sites by tank owners and operators. The new legislation extends the sunset date of the fund for three additional years. Consequently, this may increase the pace of clean-ups and closures at contaminated sites around the state. The new legislation also adds specific deadlines for corrective action milestones that owners and operators must follow in cleaning up LPST sites on the way to site closure. A missed deadline, which is the fault of the owner or operator (or agent, etc.), leads to a loss of reimbursement eligibility from the PSTR Fund, thus acting as an inducement for the deadlines to be met, which in turn expedites timely and proper assessment and remediation of contaminated sites. The proposed regulatory reform amendments clarify existing rules, or correct typographical errors. No CMP policies are applicable to this proposed rulemaking.

For these reasons, the commission has determined that this proposed rulemaking is consistent with the applicable CMP goal and will not have an adverse effect on the CNRAs. Interested persons may

submit comments on the consistency of the proposed rules with the CMP during the public comment period.

#### 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 by fax at (512) 239-4808. All comments must be received on December 10, 2001, and should reference Rule Log No. 2001-039-334-WS. Comments received by 5:00 p.m. on that date will be considered by the commission before any final action on the proposal. For further information, please contact Michael Bame at (512) 239-5658.

#### STATUTORY AUTHORITY

The amendments are proposed under 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 amended sections are also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendments implement TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

**SUBCHAPTER A: GENERAL PROVISIONS**

**§§334.2, 334.3, 334.5, 334.6, 334.8, 334.12**

**§334.2. Definitions.**

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) - (26) (No change.)

(27) **Corrosion technician** - A person who can demonstrate an understanding of the principals of soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements as relate to corrosion protection and control on buried or submerged metal tanks and metal piping systems; who is qualified by appropriate training and experience to engage in the practice of inspection and testing for corrosion protection and control on such systems, including the inspection and testing of all common types of cathodic protection systems; and who either:

(A) - (B) (No change.)

(C) has been officially qualified as a cathodic protection tester [testor], in strict accordance with the assessment and examination procedures prescribed by NACE International.

(28) - (71) (No change.)

(72) **Owner** - Any person who [currently] holds legal possession or ownership of an [a total or partial] interest in an UST system or an AST. For the purposes of this chapter, if [where] the actual ownership of an UST system or an AST is [either] uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which [where] the UST system or the AST is located is [shall be] considered the UST system or AST owner[,], unless that person [the owner of the surface estate] can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, [(deed reservation, invoice, bill of sale, etc.)] or by other legally-acceptable means that the UST system or AST is owned by another person [others]. A person that has registered as an owner of an UST system or AST with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration. This definition is subject to the limitations found in Texas Water Code, §26.3514, Limits on Liability of Lender; §26.3515, Limits on Liability of Corporate Fiduciary; and §25.3516, Limits on Liability of Taxing Unit. [Except as otherwise provided by the Texas Water Code, §§26.3514 - 26.3516, owner does not include a person who holds an interest in an UST system or AST solely for financial security purposes unless, through foreclosure or other related actions, the holder of such security interest has taken legal possession of the UST system or AST.]

(73) - (120) (No change.)

**§334.3. Exemptions for Underground Storage Tanks (USTs) and UST Systems.**

(a) Complete exemption. The following underground tanks and containment devices (including any connected piping) are completely exempt from regulation under this chapter:

(1) - (9) (No change.)

(10) pipeline facilities, including gathering lines, if such facilities are regulated under:

(A) the Natural Gas Pipeline [Pipelining] Safety Act of 1968 (49 United States Code, §§1671, et seq.); or

(B) (No change.)

(11) (No change.)

(b) - (c) (No change.)

**§334.5. General Prohibitions for Underground Storage Tanks (USTs) and UST Systems.**

(a) (No change.)

(b) Delivery prohibitions.

(1) Concerning UST systems which the tank owner or operator must self-certify under §334.8(c) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems):

(A) - (B) (No change.)

[(C) The requirement to observe a delivery certificate before delivering to an UST system regulated under §334.8(c)(2) of this title will phase-in according to the same schedule found in that section.]

(C) [(D)] If in the exercise of good faith, a common carrier who deposits a regulated substance into an UST system is first presented with an apparently valid, current TNRCC delivery certificate (or temporary delivery authorization, if applicable) represented by the UST system owner or operator to meet the requirements of subsection (a) of this section, this will be considered prima facie [facia] evidence of compliance by that common carrier with this subparagraph.

(2) Concerning UST systems which are not required to be self-certified compliant at a given time under §334.8(c) of this title, but which are required to be registered under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) [(e.g. tanks which have not yet “phased-in” to the compliance self-certification program under the schedule in §334.8(c)(2) of this title)]:

(A) - (B) (No change.)

(3) (No change.)

**§334.6. Construction Notification for Underground Storage Tanks (USTs) and UST Systems.**

(a) (No change.)

(b) Notification for major construction activities.

(1) Applicable activities.

(A) - (B) (No change.)

(C) When an UST system has been taken temporarily out-of-service under §334.54 of this title (relating to Temporary Removal from Service), the owner or operator must first

submit a construction notification form before returning the UST system to service.

(2) - (6) (No change.)

(c) (No change.)

**§334.8. Certification for Underground Storage Tanks (USTs) and UST Systems.**

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

(c) UST compliance self-certification requirements.

(1) Applicability. Except as provided in this paragraph, the requirements of this subsection are applicable to the owners and operators of USTs regulated under this chapter.

(A) The requirements of this subsection are not applicable to the following USTs:

(i) USTs which are completely exempt or partially exempt from regulation under §334.3 of this title (relating to Exemptions for Underground Storage Tanks (USTs) and UST Systems); [and]

(ii) (No change.)

(iii) USTs into which deliveries or deposits of regulated substances are exclusively made by persons other than a common carrier, as defined in §334.2 of this title (relating to Definitions); [.]

(iv) USTs used for storing regulated substances that are not motor fuels as defined in §334.2 of this title; and

(v) USTs temporarily out-of-service under §334.54 of this title (relating to Temporary Removal from Service).

(B) Nothing in this subsection affects the requirements under §334.7(d)(4) of this title.

(2) [(B)] The agency will not provide an UST delivery certificate for USTs covered by the exceptions in paragraph (1)(A) of this subsection [subparagraph (A) of this paragraph].

[(2) Phase-in schedule for all regulated substance UST systems except motor fuel (as defined in §334.2 of this title) UST systems.]

[(A) For these UST systems, the self-certification requirements of this subsection will become effective two years after the effective date of this subsection.]

[(B) Nothing in this subsection affects the requirements under §334.7(d)(4) of this title.]

(3) Conditions and limitations.

(A) (No change.)

(B) Completion of the UST registration and self-certification [self-certificaton] form in a manner that indicates compliance with applicable UST regulations (as specified in subparagraph (D) of this paragraph) will result in the agency's issuance of an UST delivery certificate for the tanks at the facility for which compliance is self-certified.

(C) - (D) (No change.)

(4) UST registration and self-certification form.

(A) Requirements for completion of the form.

(i) - (v) (No change.)

(vi) An [To ensure timely initial issuance by the agency of the UST delivery certificate, an] owner or operator must submit the required UST registration and self-certification form (including any additional or supplemental information required under clause (v) of this subparagraph) to the agency no later than the following dates:

(I) - (II) (No change.)

(vii) (No change.)

(B) - (C) (No change.)

(5) UST delivery certificate.

(A) - (C) (No change.)

(D) Temporary delivery authorization.

(i) Upon receipt of a TNRCC construction notification form indicating the pending installation of a new or replacement UST system(s), or indicating that an UST system temporarily out-of-service under §334.54 of this title will be returned to service, the agency will issue a temporary delivery authorization for those tank systems.

(ii) The temporary delivery authorization is valid for no more than 90 days after the first delivery of regulated substance into the [new or replacement] UST system described in clause (i) of this subparagraph.

(iii) The UST owner and operator are responsible for maintaining complete and accurate records of the date of the first deposit of regulated substances into the UST system(s) [a new or replacement UST(s)], as well as the date that the initial 90 day period expires. The bill of lading for the first delivery of regulated substance into the [any new or replacement] UST system at the facility must be attached to the temporary delivery authorization for that facility.

(6) (No change.)

#### **§334.12. Other General Provisions.**

(a) Other regulations.

Compliance [(1) Except as provided in paragraph (2) of this subsection, compliance] with the provisions of this chapter by an owner or operator of an underground storage tank (UST) system or aboveground storage tank (AST) system does not relieve such owner or operator from the responsibility of compliance with any other regulations directly and/or indirectly affecting such tanks and the stored regulated substances, including, but not necessarily limited to, all applicable regulations legally promulgated by the United States Environmental Protection Agency, United States Occupational

Safety and Health Administration, United States Department of Transportation, United States Nuclear Regulatory Commission, United States Department of Energy, Texas Department of Health, State Board of Insurance, Texas Commission on Fire Protection, Railroad Commission of Texas, Texas Department of Agriculture, State Comptroller, Texas Department of Public Safety, Texas Natural Resource Conservation Commission, and any other federal, state, and local governmental agencies or entities having appropriate jurisdiction.

[(2) As provided in the Texas Water Code (TWC), §26.359, this chapter establishes a unified statewide program for underground and surface water protection, and any local regulation or ordinance is effective only to the extent the regulation or ordinance does not conflict with the standards adopted for the design, construction, installation, or operation of USTs under this chapter.]

(b) - (c) (No change.)

**SUBCHAPTER C: TECHNICAL STANDARDS**

**§§334.45, 334.47, 334.50, 334.54**

**STATUTORY AUTHORITY**

The amendments are proposed under 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 amended sections are also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendments implement TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

**§334.45. Technical Standards for New Underground Storage Tank Systems.**

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

(d) Secondary containment for UST systems.

(1) Applicability.

(A) - (B) (No change.)

(C) An UST system, at a minimum, shall incorporate secondary containment as specified in Texas Water Code, §26.3476, if the UST system is located in an area described in that provision.

(D) [(C)] The agency may specifically require the installation of a secondary containment system meeting the requirements of this subsection at other times when necessary for the protection of human health or safety or the environment.

(2) - (4) (No change.)

(e) - (f) (No change.)

**§334.47. Technical Standards for Existing Underground Storage Tank Systems.**

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

(d) An UST system, at a minimum, shall incorporate secondary containment as specified in Texas Water Code, §26.3476, if the UST system is located in an area described in that provision.

(e) [(d)] Records for upgrading of existing UST systems.

(1) Owners and operators shall maintain all records related to the upgrading of existing UST systems required in this subsection in accordance with the requirements in §334.10(b) of this title (relating to Reporting and Recordkeeping).

(2) Owners and operators shall maintain the following records for the operational life of the UST system:

(A) general information related to the tank integrity assessment and cathodic protection requirements in subsection (b) of this section, including:

(i) dates of the tank integrity assessment and cathodic protection installation activities;

(ii) names, addresses, and telephone numbers of the persons conducting the tank integrity assessment and cathodic protection installation activities; and

(iii) copies of all related notifications or reports filed with the agency or others, including:

(I) registration information, as required by §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems); and

(II) installation certification information, as required by §334.8(a) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems);

(B) as-built drawings (or plans), which have been drawn to scale and in sufficient detail so as to accurately depict and describe the sizes, dimensions, and locations of any UST system components or equipment added or installed on or after the effective date of this subchapter which are installed pursuant to one of the construction activities included in §334.6(b)(1)(A) of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems); and

(C) equipment information for any UST system components or equipment added or installed on or after the effective date of this subchapter for the purpose of compliance with the upgrading requirements of this section, including manufacturers specifications, installation instructions, operating instructions, warranty information, recommended test procedures, and inspection and maintenance schedules.

(3) Owners and operators shall maintain the results of all equipment tests and tank integrity tests required in this section including internal inspections, tank and piping tightness tests, and site assessments, for at least five years after the dates such tests are conducted.

**§334.50. Release Detection.**

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

(d) Allowable methods of release detection. Tanks in an UST system may be monitored for releases using one or more of the methods included in paragraphs (2) - (10) of this subsection. Piping in an UST system may be monitored for releases using one or more of the methods included in paragraphs (5) - (10) of this subsection. Any method of release detection for tanks and/or piping in this section shall be allowable only when installed (or applied), operated, calibrated, and maintained in accordance with the particular requirements specified for such method in this subsection.

(1) Tank tightness testing and inventory control. A combination of tank tightness testing and inventory control may be used as a tank release detection method only until December 22, 1998, subject to the following conditions and requirements.

(A) (No change.)

(B) Inventory control. All inventory control procedures shall be in conformance with the following requirements.

(i) - (ii) (No change.)

(iii) The operator shall assure that the following additional procedures and requirements are followed.

(I) - (II) (No change.)

(III) Substance dispensing shall be metered and recorded within [the local standards for meter calibration or within] an accuracy of six or less cubic inches for every five gallons of product withdrawn.

(IV) (No change.)

(2) - (10) (No change.)

(e) (No change.)

**§334.54. Temporary Removal from Service.**

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

(c) Protected and monitored systems. Any UST system may remain out of service indefinitely so long as the following requirements are met during the period that the UST system remains temporarily out of service.

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

(3) Returning UST system to service.

(A) When a protected and empty UST system that has been temporarily out of service for longer than six months is placed back into service, the owner or operator shall ensure the integrity of the system by the performance of tank tightness and piping tightness tests that meet the requirements of §334.50(d)(1)(A), and as applicable, (b)(2)(A)(ii)(I), or (B)(i)(I), of this title, prior to bringing the system back into operation; [and]

(B) When either a protected and monitored or a protected and empty UST system is placed back into service, the owner or operator shall also ensure that the UST system either is in compliance or is brought into compliance with all applicable release detection, and spill and overfill prevention requirements of §334.50 of this title and §334.51 of this title (relating to Spill and Overfill Prevention and Control); and [.]

(C) Before any UST system is returned to service under this subsection, the owner or operator must first submit a construction notification form as specified in §334.6(b) of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems).

(d) - (e) (No change.)

**SUBCHAPTER D: RELEASE REPORTING AND CORRECTIVE ACTION**

**§334.71, §334.82**

**STATUTORY AUTHORITY**

The amendments are proposed under 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 amended sections are also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendments implement TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

**§334.71. Applicability and Deadlines.**

(a) For releases discovered and reported to the executive director on or before August 31, 2003, the provisions of this subchapter are applicable to owners and operators of all underground storage tanks (USTs) and all petroleum product aboveground storage tanks (ASTs) unless otherwise specified in Subchapters A or F of this chapter (relating to General Provisions and Aboveground

Storage Tanks, respectively). For releases reported to the agency on or after September 1, 2003, the provisions of this subchapter are applicable to owners and operators of all USTs and all petroleum product ASTs, except that Chapter 350 of this title (relating to Texas Risk Reduction Program) shall be used in lieu of §§334.78 - 334.81 of this title (relating to Site Assessment, Removal of Non-Aqueous Phase Liquids, Investigation for Soil and Groundwater Cleanup, and Corrective Action Plans, respectively).

(b) If the release was reported to the agency on or before December 22, 1998, the person performing the corrective action shall meet the following deadlines:

(1) a complete site assessment and risk assessment (including, but not limited to, risk-based criteria for establishing target concentrations), as determined by the executive director, must be received by the agency no later than September 1, 2002;

(2) a complete corrective action plan, as determined by the executive director and including, but not limited to, completion of pilot studies and recommendation of a cost-effective and technically appropriate remediation methodology, must be received by the agency no later than September 1, 2003. The person may, in lieu of this requirement, submit by this same deadline a demonstration that a corrective action plan is not required for the site in question under commission rules. Such demonstration must be to the executive director's satisfaction;

(3) for those sites found under paragraph (2) of this subsection to require a corrective action plan, that plan must be initiated and proceeding according to the requirements and deadlines in the approved plan no later than March 1, 2004;

(4) for sites which require either a corrective action plan or groundwater monitoring, a comprehensive and accurate annual status report concerning those activities must be submitted to the agency;

(5) for sites which require either a corrective action plan or groundwater monitoring, all deadlines set by the executive director concerning the corrective action plan or approved groundwater monitoring plan shall be met; and

(6) site closure requests for all sites where the executive director agreed in writing that no corrective action plan was required must be received by the agency no later than September 1, 2005. The request must be complete, as judged by the executive director.

(c) Failure to meet the deadlines detailed in subsection (b) of this section will result in a loss of reimbursement eligibility as described in Subchapter H of this chapter (relating to Reimbursement Program).

**§334.82. Public Participation.**

(a) For each confirmed release that requires corrective action, the owner or operator must [agency shall] provide notice to the public by means designated to reach those members of the public directly affected by the release and the planned corrective action. This notice may include, but is not limited to, public notice in local newspapers, block advertisements, publication in a state register, certified letters to individual households or businesses, or personal contacts [by field staff].

(b) The [executive director may require the] owner or operator must submit proof of the notification required under subsection (a) of this section to the agency within 30 days of the confirmation of the release [to perform or implement the public notices in this section and to verify that such activity has been satisfactorily completed].

(c) The agency [executive director] shall give public notice to affected parties if implementation of an approved corrective action plan does not achieve the established cleanup levels in the plan and termination of that plan is under consideration by the executive director. When corrective action is performed by the agency, the agency will provide the notification referenced in subsection (a) of this section.

**SUBCHAPTER G: TARGET CONCENTRATION CRITERIA**

**§334.201**

**STATUTORY AUTHORITY**

The amendment is proposed under 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 USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

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

**§334.201. Purpose, Applicability, and Deadlines. [Purpose and Applicability.]**

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

(c) Deadlines. For sites where the release was reported to the agency on or before December 22, 1998, the deadlines detailed in §334.71(b) of this title (relating to Applicability and Deadlines)

apply.

**SUBCHAPTER H: REIMBURSEMENT PROGRAM**

**§§334.301 - 334.303, 334.310, 334.313, 334.322**

**STATUTORY AUTHORITY**

The amendments are proposed under 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 amended sections are also proposed under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; and §26.351, which provides the commission authority to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an aboveground storage tank.

The proposed amendments implement TWC, Chapter 26, Subchapter I, Underground Storage Tanks.

**§334.301. Applicability of this Subchapter.**

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

(c) Expenses considered for payment - time frame in which corrective action performed.

Subject to the other requirements of this subchapter, the expenses which may be considered for payment

from the petroleum storage tank remediation fund (PSTR) are limited to expenses of corrective action which was performed for the owner or operator on or after September 1, 1987, and conducted in response to a confirmed release that was initially discovered and reported to the agency on or before December 22, 1998. Expenses for corrective action performed prior to September 1, 1987, are not subject to reimbursement or payment. No expenses for corrective action performed after September 1, 2005 will be reimbursed. No reimbursements will be made for corrective action expenses sought in claims submitted to the agency after March 1, 2006. Under no circumstances will any reimbursements be made [No expenses for corrective action will be reimbursed] on or after September 1, 2006 [2003].

(d) - (h) (No change.)

**§334.302. General Conditions and Limitations Regarding Reimbursement.**

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

(c) No payments shall be made by the agency under this subchapter for:

(1) - (3) (No change.)

(4) any expenses for corrective action incurred for confirmed releases initially discovered and reported to the agency after December 22, 1998; [or]

(5) any expenses related to corrective action performed after September 1, 2005; [any corrective action expenses on or after September 1, 2003, regardless of when the expenses were incurred.]

(6) any expenses related to corrective action contained in a reimbursement claim filed with the agency after March 1, 2006; and/or

(7) on or after September 1, 2006.

(d) - (l) (No change.)

**§334.303. When to File Application.**

(a) An application for reimbursement under this subchapter must be filed on or after January 17, 1990, but not after [prior to] March [June] 1, 2006 [2003].

(b) - (c) (No change.)

**§334.310. Requirements for Eligibility.**

(a) For a person to be an eligible owner or operator under this subchapter, each of the following requirements must be met.

(1) The person must meet the other requirements of this chapter (including, but not limited to, the restrictions under §334.302 of this title (relating to General Conditions and Limitations Regarding Reimbursement)) and must be:

(A) (No change.)

(B) any past owner or operator of a tank described in subparagraph (A) of this paragraph who performed corrective action on or after September 1, 1987[, and on or before September 1, 2003,] in response to a release of petroleum products from such tank;

(C) - (D) (No change.)

(E) a lender who forecloses on or receives an assignment or deed in lieu of foreclosure and becomes the owner of property contaminated by a release of petroleum products from a tank described in subparagraph (A) of this paragraph, and who performed corrective action in response to a release of petroleum products from such tank; or [and]

(F) (No change.)

(2) - (5) (No change.)

(b) If an otherwise eligible owner or operator misses a deadline under §334.71(b) of this title

(relating to Applicability), and that missed deadline is the fault of that person, his agent or contractor, then that person shall no longer be eligible for reimbursement for those or future corrective action expenses at that site. [Satisfaction of the eligibility criteria set forth in subsection (a) of this section shall constitute compliance for purposes of the Texas Water Code, §26.357(b)(2), for the purposes of this subchapter].

(c) - (f) (No change.)

**§334.313. Review of Application.**

(a) An application for reimbursement or supplemented application filed under this subchapter shall be subject to review by the agency:

(1) to determine if the information which is required to be submitted under this subchapter has been filed with the agency, utilizing the following procedure:

(A) - (E) (No change.)

(F) if it has been determined that an otherwise complete application contains costs for a corrective action activity which has been performed improperly, or the information or report that documents the activity has been determined to be deficient or defective by the agency under Subchapter D of this chapter (relating to Release Reporting and Corrective Action), the applicant will

be notified and the application will not be forwarded for further review. The applicant may resubmit the application after the defects or deficiencies have been resolved and the agency concurs that the corrective action activity or documentation is acceptable under Subchapter D of this chapter (though no reimbursement applications may be filed after March 1, 2006);

(G) (No change.)

(2) (No change.)

(b) An application which does not contain all the information required by this subchapter will not be considered a complete claim and will not be processed. This does not prevent the applicant from filing another application for the same occurrence at any time prior to March 1, 2006 [June 1, 2003].

(c) (No change.)

(d) If, during the course of the substantive (technical and financial) review, the agency finds that additional information of the type required by this subchapter is needed to evaluate the application, it may either, at the executive director's discretion:

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

(e) - (f) (No change.)

**§334.322. Subchapter H Definitions.**

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (8) (No change.)

(9) **Eligible owner** - Any person who meets the eligibility requirements prescribed in §334.310 of this title and who held or currently holds legal possession or ownership of an [a total or partial] interest in a petroleum storage tank. For the purposes of this subchapter, if [where] the actual ownership of the petroleum storage tank is [either] uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which [where] the petroleum storage tank is located is [shall be] considered the petroleum storage tank owner [,] unless that person [it] can demonstrate [be shown] by appropriate documentation, including a deed reservation, invoice, bill of sale, [(deed reservation, invoice, bill of sale, etc.)] or by other legally acceptable means that the petroleum storage tank is owned by another person. A person that has registered as an owner of a petroleum storage tank with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the petroleum storage tank owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the petroleum storage tank was transferred to a different person subsequent to the date of the tank registration. This definition is subject to the limitations found in Texas Water Code, §26.3514, Limits on Liability of Lender;

§26.3515, Limits on Liability of Corporate Fiduciary; and §25.3516, Limits on Liability of Taxing

Unit. ["Owner" does not include a person who holds an interest in a petroleum storage tank solely for financial security purposes unless, through foreclosure or other related actions, the holder of such security interest has taken legal possession of the petroleum storage tank.]

(10) - (20) (No change.)