

The Texas Natural Resource Conservation Commission (commission) adopts new Chapter 214, Secondary Containment Requirements for Underground Storage Tank Systems Located Over Certain Aquifers, §§214.1 - 214.3. Sections 214.1 - 214.3 are adopted *without changes* to the proposed text as published in the February 15, 2002 issue of the *Texas Register* (27 TexReg 1100) and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted rules is to implement House Bill (HB) 2912, Article 13, §13.01 and Article 18, §18.13, 77th Legislature, 2001. House Bill 2912 adds Texas Water Code (TWC), §26.3476, Secondary Containment Required For Tanks Located Over Certain Aquifers. TWC, §26.3476, specifies that an underground storage tank (UST) system, at a minimum, shall incorporate a method for secondary containment if the system is located in the outcrop of a major aquifer composed of limestone and associated carbonate rocks of Cretaceous age or older; and a county that has a population of at least one million and relies on groundwater for at least 75% of the county's water supply or has a population of at least 75,000 and is adjacent to a county that has a population of at least one million and relies on groundwater for at least 75% of the county's water supply.

TWC, §26.3476, applies only to a UST system that is installed, upgraded, or replaced on or after September 1, 2001 and applies only to the outcrop of the Edwards (Balcones Fault Zone) and Trinity aquifers in northern Bexar and Comal Counties as defined by the Texas Water Development Board (TWDB). For the limited areas where it is unclear as to which agency rules are applicable (30 TAC Chapter 213 concerning Edwards Aquifer, the Chapter 214 rules, or the statewide 30 TAC Chapter 334

rules concerning Underground and Aboveground Storage Tanks), the executive director will make a determination on a case-by-case basis.

#### SECTION BY SECTION DISCUSSION

New §214.1 sets forth the purpose of the chapter by providing the requirements for secondary containment for UST systems in certain aquifers.

New §214.2 sets forth and defines terms used in the chapter. Where the statute did not define terms, the commission relied on definitions in Chapter 334; Title 40 Code of Federal Regulations (CFR) Part 280 of the United States Environmental Protection Agency (EPA) rules; and on standard geologic terms and definitions. The definition for "Ancillary equipment" is identical to that which appears in §334.2 and clarifies what is included as part of a UST system. The definition for "Existing UST system" is identical to that which appears in §334.2 and is needed to clarify when a UST system is considered to be existing and subject to being "upgraded." A definition for "major aquifer" is included as new §214.2(3) as this term is included but not defined in statute. The TWDB has been given the authority to define aquifers in the state under TWC, Chapter 16 and has mapped the outcrop and regional extent of major aquifers within the state. They have defined a major aquifer as supplying large quantities of water in large areas of the state. The definition for "New UST system" is identical to that which appears in §334.2 and is needed to clarify when a UST system is considered to be new by definition and subject to being "upgraded" under the requirements of this chapter. The definition for "Outcrop" is included to define the geographic area within a major aquifer which is subject to the secondary containment requirements. These areas are mapped by the TWDB and define the area where the

aquifer is exposed at the land surface. The definition for “Replaced” clarifies that the UST system which replaces one which is permanently removed from service is subject to the secondary containment requirements of this chapter. The definition for “Secondary containment” reflects the statutory definition in TWC, §26.3476(a). The definition in the statute provides examples of secondary containment systems. For further clarification, other secondary containment devices such as containment boots, sumps, and jackets are also included in the definition. The definition for “Underground storage tank (UST)” is identical to that which appears in §334.2 and defines the components that are considered part of a UST. The definition for “Underground storage tank (UST) system” is identical to the definition contained in 40 CFR Part 280. The definition of UST system in §334.2 applies only to new UST systems installed on or after September 29, 1989. Any new UST system installed after December 22, 1988 and before September 29, 1989 will not be covered under the Chapter 334 rules. Therefore, to ensure that this rule covers all new UST systems installed after December 22, 1988, EPA’s definition of UST system in 40 CFR §280.12 is used. The definition for "Upgraded" clarifies when a UST system is subject to secondary containment requirements.

New §214.3 sets forth the applicability of the chapter. These rules are additional requirements beyond those in Chapter 213 and Chapter 334 and apply to USTs which are installed, upgraded, or replaced on or after September 1, 2001. The geographic area and aquifers where these rules apply is defined.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.225, and determined that the rulemaking is not subject to §2001.0225

because it does not meet the definition of a “major environmental rule” as defined in that statute. A major environmental rule is one 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 rulemaking implements HB 2912, Article 13, §13.01 and Article 18, §18.13. These sections specify that any person who installs, upgrades, or replaces a UST system on or after September 1, 2001 over certain major aquifers will have to ensure that a secondary containment system is incorporated into the system. The rules are intended to provide increased environmental protection over certain major aquifers by requiring new, upgraded, or replaced USTs to use secondary containment systems. Based on the requirements of the bill, the commission anticipates that only USTs located in the outcrop of the Edwards (Balcones Fault Zone) and Trinity aquifers in northern Bexar and Comal Counties will be affected by the rules. The fiscal analysis indicates that there will be adverse fiscal implications to small or micro-business that own or operate UST systems in the outcrop of the Trinity and Edwards (Balcones Fault Zone) aquifers that have to utilize a secondary containment system to comply with the rules; however, it will not affect this sector of the economy in a material way. There are at least 267 existing UST facilities, the majority of which are owned by small or micro-businesses, located in the affected areas; however, these systems will not be required to install a secondary containment system unless the storage tanks are upgraded or replaced subsequent to the effective date of the statute. As such, these rules do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or sector of the state.

Even if these rules met the definition of a major environmental rule, §2001.0225 only applies to a major environmental rule the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements of a major environmental rule. There are no equivalent standards set by federal law for secondary containment requirements in certain aquifers provided in HB 2912. This rule is specifically required by state law. This rulemaking does not exceed an express requirement of state law because this rulemaking specifically implements HB 2912, Article 13, §13.01 and Article 18, §18.13, 77th Legislature, 2001. The rulemaking does not exceed a requirement of a delegation agreement. Also, the rulemaking was not developed solely under the general powers of the agency, but was specifically authorized under TWC, §26.3476.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and analyzed whether the adopted rules are subject to Texas Government Code, §2007.003 and §2007.043. Texas Government Code, Chapter 2007, relating to governmental action affecting private property rights does not apply to actions taken by the government that are: 1) reasonably taken in response to a real and substantial threat to public health and safety; 2) designed to significantly advance the health and safety purpose; and 3) do not impose a greater burden than is necessary to achieve the health and safety purpose (Texas Government Code,

§2007.003(13)). This rulemaking implements HB 2912, which provides increased environmental protection to certain aquifers by requiring secondary containment systems for UST systems that are installed, replaced, or upgraded after September 1, 2001 in northern Bexar and Comal Counties.

Legislative history indicates that this statute was enacted because there was concern that these aquifers, which are an important source of drinking water, are not adequately protected. Bill analyses for these provisions also indicate that these requirements were introduced to address spills such as the one that took place at a gas station in July 1999, that caused more than 800 gallons of gasoline to spill into the Trinity Aquifer in Bexar County. Fiscal analysis indicates that there are at least 267 existing UST facilities, the majority of which are owned by small or micro-businesses, located in the affected areas; however, these systems will not be required to install a secondary containment system unless the storage tanks are upgraded or replaced subsequent to the effective date of the statute. By applying only to UST systems that are installed, replaced, or upgraded after September 1, 2001, the rules do not impose a greater burden than is necessary to significantly advance the health and safety purpose.

Based on this assessment, this rulemaking action will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has prepared a consistency determination for the adopted rules under 31 TAC §505.22, and has found that the 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 in Coastal Natural Resource Areas (CNRAs). This rulemaking implements HB 2912, §13.01 and §18.13. The rules do not govern any of the activities that are within the designated coastal zone management area or otherwise specifically identified under the Texas Coastal Management Act or related rules of the Coastal Coordination Council.

#### PUBLIC HEARING AND COMMENTERS

No public hearing was held on this rulemaking, and no public comments were submitted during the comment period.

**SECONDARY CONTAINMENT REQUIREMENTS FOR UNDERGROUND STORAGE  
TANK SYSTEMS LOCATED OVER CERTAIN AQUIFERS**

**§§214.1 - 214.3**

**STATUTORY AUTHORITY**

The new sections are adopted 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; and TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

**§214.1. Purpose.**

The purpose of this chapter is to provide requirements for secondary containment for underground storage tank systems located over certain aquifers to protect and maintain the quality of groundwater resources in the state from environmental contamination that could result from releases of harmful substances stored in such tanks.

**§214.2. Definitions.**

The following words and terms, when used in this chapter, shall have the following meanings and supercede the definitions in Chapter 334 of this title (relating to Underground and Aboveground

Storage Tanks), unless the context clearly indicates otherwise.

(1) **Ancillary equipment** - Any devices that are used to distribute, meter, or control the flow of petroleum substances or hazardous substances into or out of an underground storage tank (UST), including, but not limited to, piping, fittings, flanges, valves, and pumps.

(2) **Existing UST system** - A UST system which is used or designed to contain an accumulation of regulated substances for which installation either had commenced prior to December 22, 1988, or had been completed on or prior to December 22, 1988. Installation will be considered to have commenced if the owner or operator had obtained all federal, state, and local approvals or permits necessary to begin physical construction at the site or installation of the tank system, and if either a continuous on-site physical construction or installation program had begun or the owner or operator had entered into contractual obligations (which could not be canceled or modified without substantial loss) which required that the physical construction at the site or installation of the tank system was to be completed within a reasonable time.

(3) **Major aquifer** - An aquifer defined by the Texas Water Development Board (TWDB) as supplying large quantities of water in large areas of the state.

(4) **New UST system** - A UST system which is used or designed to contain an accumulation of regulated substances for which installation commenced after December 22, 1988; or a UST system which is converted from the storage of materials other than regulated substances to the

storage of regulated substances after December 22, 1988.

(5) **Outcrop** - The surface extent of a major aquifer as mapped by the TWDB in which the host geologic formations are exposed at the land surface or overlain by alluvial or soil covers.

(6) **Replaced** - The permanent removal from service (in accordance with all applicable requirements of Chapter 334 of this title) of a UST system and the installation of any replacement UST system in accordance with all applicable requirements of this chapter and Chapter 334 of this title.

(7) **Secondary containment** - A method by which a secondary wall or barrier is installed around a UST system in a manner designed to prevent a release of a regulated substance from migrating beyond the secondary wall or barrier before the release can be detected. A secondary containment system may include an impervious liner, jacket, containment boot, sump, or vault surrounding a primary tank or piping system or a double-wall tank or piping system.

(8) **Underground storage tank (UST)** - Any one or combination of underground tanks and any connecting underground pipes used to contain an accumulation of regulated substances, the volume of which, including the volume of the connecting underground pipes, is 10% or more beneath the surface of the ground.

(9) **Underground storage tank (UST) system** - A UST, connected underground piping, underground ancillary equipment, and containment system, if any.

(10) **Upgraded** -

(A) The addition, improvement, retrofitting, or renovation of an existing UST system with equipment or components as required to initially meet upgrading requirements with regard to corrosion protection, spill and overflow prevention, and release detection as specified in Chapter 334 of this title.

(B) The addition, improvement, retrofitting, or renovation of a new UST system with equipment or components as required to bring that system into initial compliance with the installation requirements which were:

(i) applicable after December 22, 1988 and before September 29, 1989 under EPA rules (40 Code of Federal Regulations Part 280); or

(ii) applicable on or after September 29, 1989 under Chapter 334 of this title.

**§214.3. Applicability.**

(a) The rules in this chapter provide secondary containment requirements for underground storage tank (UST) systems that are in accordance with and in addition to the requirements prescribed by Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks) and where

applicable, Chapter 213 of this title (relating to Edwards Aquifer).

(b) A UST system which is installed, upgraded, or replaced on or after September 1, 2001, shall, at minimum, incorporate a method for secondary containment if that system is located in:

(1) the outcrop of a major aquifer composed of limestone and associated carbonate rocks of Cretaceous age or older; and

(2) a county that:

(A) has a population of at least one million and relies on groundwater for at least 75% of the county's water supply; or

(B) has a population of at least 75,000 and is adjacent to a county described by subparagraph (A) of this paragraph.

(c) Effective September 1, 2001, the requirements in subsection (b)(1) of this section apply only to the outcrop of the Edwards (Balcones Fault Zone) and Trinity aquifers as defined by the Texas Water Development Board in Bexar and Comal Counties.