

The Texas Natural Resource Conservation Commission (commission) proposes new Chapter 214, Secondary Containment Requirements for Underground Storage Tank Systems Located Over Certain Aquifers, §§214.1 - 214.3.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed 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. Texas Water Code, §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.

Texas Water Code, §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 proposed 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

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

Proposed 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 30 TAC 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 proposed 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 proposed 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 proposed to be 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 proposed 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 proposed 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 proposed 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 proposed definition for “Secondary containment” reflects the statutory definition in TWC, §26.3476(a). The definition in the statute provides examples of what secondary containment systems include. For further clarification, other secondary containment devices such as containment boots, sumps, and jackets are also included in the definition. The proposed 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 proposed definition for “Underground storage tank (UST) system” is identical to the definition contained in 40 CFR Part 280. The proposed 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 would 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 proposed definition for "Upgraded" clarifies when a UST system is subject to secondary containment requirements.

Proposed new §214.3 sets forth the applicability of the chapter. These rules are additional requirements beyond those in 30 TAC 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.

FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rules are in effect, there will be fiscal implications, which are not

anticipated to be significant, for units of state and local government due to administration and enforcement of the proposed rules. Units of government that install, upgrade, or replace 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 that system. The commission estimates the additional cost to install a secondary containment system will be approximately \$13,000 per facility. Underground storage tank systems not located in the affected areas of this rulemaking would not be affected by the proposed rules. Additionally, units of state and local government that do not own or operate USTs would not be affected by the proposed rules.

This rulemaking is intended to implement certain provisions of HB 2912 (an act relating to the continuation and functions of the commission; providing penalties), 77th Legislature, 2001. The bill requires UST systems that are installed, upgraded, or replaced on or after September 1, 2001 to incorporate a method of secondary containment if the system is located in the outcrop of certain major aquifers. A secondary containment system consists of a secondary wall, or barrier installed around the primary storage vessel to prevent a release from migrating beyond the secondary wall or barrier before the release can be detected.

In order to be affected by this rulemaking, the UST system would have to be located in the outcrop of a major aquifer composed of limestone and associated carbonate rocks of Cretaceous age or older that is located in a county that has a population of at least one million and relies on groundwater for 75% of the county's water supply. Underground storage tank systems located in major aquifers located in a county that 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 75% of the county's water supplies would also be affected by the proposed rules. Based on the requirements of the bill, the commission anticipates that only USTs located in the outcrop of the Trinity and Edwards (Balcones Fault Zone) aquifers in northern Bexar and Comal Counties will be affected by the proposed rules.

There are at least 267 existing facilities, some of which may be owned by units of state and local government, located in the affected areas that would be affected by the proposed rules. These systems would not be required to install a secondary containment system unless the storage tanks are upgraded, installed, or replaced in the future. There may be UST systems in the affected areas that are not currently in compliance with commission regulations that would have to be replaced and upgraded with a secondary containment system. For any unit of state or local government that decides to install, upgrade, or replace a UST system in areas affected by this rulemaking, the installation of a secondary containment systems will cost approximately \$13,000 more per facility compared to single-wall UST systems.

PUBLIC BENEFITS AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be increased environmental protection over certain major aquifers by requiring new, upgraded, or replaced USTs to utilize secondary containment systems.

This rulemaking is intended to implement certain provisions of HB 2912, 77th Legislature, 2001, which requires UST systems that are installed, upgraded, or replaced on or after September 1, 2001 to incorporate a method of secondary containment if the system is located in certain major aquifers. A secondary containment system consists of a secondary wall, or barrier installed around the primary storage vessel to prevent a release from migrating beyond the secondary wall or barrier before the release can be detected.

In order to be affected by this rulemaking, the UST system would have to be located in the outcrop of a major aquifer composed of limestone and associated carbonate rocks of Cretaceous age or older that is located in a county that has a population of at least one million and relies on groundwater for 75% of the county's water supply. Underground storage tank systems located in major aquifers located in a county that 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 75% of the county's water supplies would also be affected by the proposed rules. 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 proposed rules.

There are at least 267 existing UST facilities, many of which are owned by individuals and businesses located in the affected areas that would be affected by the proposed rules. These systems would not be required to install a secondary containment system unless the storage tanks were upgraded or replaced in the future. There may be other UST systems in the affected areas that are not currently in compliance with commission regulations that would have to be replaced and upgraded with a secondary

containment system. For any individual or business that decides to install, upgrade, or replace a UST system in areas affected by this rulemaking, the installation of a secondary containment system will cost approximately \$13,000 more per facility system compared to a single-wall system.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

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 proposed rules. This rulemaking is intended to implement certain provisions of HB 2912, 77th Legislature, 2001, which requires UST systems that are installed, upgraded, or replaced on or after September 1, 2001 to incorporate a method of secondary containment if the system is located in certain major aquifers. A secondary containment system consists of a secondary wall, or barrier installed around the primary storage vessel to prevent a release from migrating beyond the secondary wall or barrier before the release can be detected.

In order to be affected by this rulemaking, the UST system would have to be located in the outcrop of a major aquifer composed of limestone and associated carbonate rocks of Cretaceous age or older that is located in a county that has a population of at least one million and relies on groundwater for 75% of the county's water supply. Underground storage tank systems located in major aquifers located in a county that 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 75% of the county's water supplies would also be affected by the proposed rules. 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 proposed rules.

There are at least 267 existing UST facilities, the majority of which are owned by small or micro-businesses, located in the affected areas that would be affected by the proposed rules. These systems would not be required to install a secondary containment system unless the storage tanks were upgraded or replaced in the future. There may be other UST systems in the affected areas that are not currently in compliance with commission regulations that would have to be replaced and upgraded with a secondary containment system. For any small or micro-business that decides to install, upgrade, or replace a UST system in areas affected by this rulemaking, the installation of a secondary containment system will cost approximately \$13,000 more per facility compared to a single-wall system.

The following is an analysis of the cost per employee for a small or micro-business to comply with the proposed rulemaking. A small business is defined as a business with 100 or fewer employees, while a micro-business is defined as having fewer than 20 employees. If a small business decides to upgrade a UST in an area affected by this rulemaking, it would cost an additional \$100 per employee to comply with the proposed rules. If a micro-business decides to upgrade a UST in an area affected by this rulemaking, it would cost an additional \$500 per employee to comply with the proposed rules.

LOCAL EMPLOYMENT IMPACT

The commission has reviewed 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 reviewed the proposed 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 proposed rulemaking implements HB 2912, Article 13, §13.01 and Article 18, §18.13. These sections specify that any person that 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 proposed 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 proposed 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 proposed 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 would not be required to install a secondary containment system unless the storage tanks were upgraded or replaced subsequent to the effective date of the rules. 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 this 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. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and analyzed whether the proposed 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 is proposed to implement 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 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 would not be required to install a secondary containment system unless the storage tanks were upgraded or replaced. By applying only to UST systems that are installed, replaced, or upgraded after September 1, 2001, the proposed 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. The commission invites public comment on the draft takings impacts assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has prepared a consistency determination for the proposed rules under 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 in Coastal Natural Resource Areas (CNRAs). This proposed rulemaking implements HB 2912, §13.01 and §18.13. The proposed 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. 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 faxed to (512) 239-4808. Comments must be received by 5:00 p.m., March 15, 2002, and should reference Rule Log Number 2001-100-214-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

STATUTORY AUTHORITY

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

The proposed new sections implement TWC, §26.3476, as adopted by the Texas Legislature in HB 2912, Article 13, §13.01 and Article 18, §18.13, 77th Legislature, 2001.

SECONDARY CONTAINMENT REQUIREMENTS FOR UNDERGROUND STORAGE

TANK SYSTEMS LOCATED OVER CERTAIN AQUIFERS

§§214.1 - 214.3

§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.