The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts amendments to §§334.2, 334.5, 334.7 - 334.10, 334.12, 334.14, 334.46, 334.50, 334.55, 334.56, 334.302, 334.306 - 334.310, 334.313 - 334.315, 334.322, 334.530 - 334.535, and 334.560. Sections 334.2, 334.10, 334.50, 334.302, 334.306, 334.309, 334.313, 334.531, 334.533 - 334.535, and 334.560 are adopted *with changes* to the proposed text as published in the April 30, 2004 issue of the *Texas Register* (29 TexReg 4083). Sections 334.5, 334.7 - 334.9, 334.12, 334.46, 334.55, 334.56, 334.307, 334.308, 334.310, 334.314, 334.315, 334.322, 334.530, and 334.532 are adopted *without change*s to the proposed text and will not be republished. Section 334.14 is withdrawn.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

To better ensure that all payable reimbursement claims can be paid before the Petroleum Storage Tank Remediation (PSTR) Account sunsets in 2006, given limited agency resources, the standard for the reimbursement of eligible cleanup expenses related to leaking petroleum storage tank (LPST) sites is revised to move away from an "actual cost" -based system. Reimbursement will instead be based on the lower of either line-item amounts listed in Subchapter M of this chapter or line-item amounts listed in invoices submitted with the claim, with limited updates to those Subchapter M line-item amounts proposed in this rulemaking. In addition, better accountability provisions are proposed to be added in the reimbursement rules as a result of the agency's experiences with petroleum storage tank (PST) audit cases over the last few years.

Throughout this rulemaking package, administrative changes have been made in accordance with *Texas Register* requirements and to be consistent with other commission rules (e.g., references to the Texas

Natural Resource Conservation Commission or TNRCC have been updated to Texas Commission on Environmental Quality, TCEQ, or agency, as appropriate).

The commission specifically solicited comments and suggested alternatives with regard to each of the following issues in this rulemaking: 1) considering the language in §334.309(c) - should the agency continue to utilize an actual cost analysis and if so, how should actual cost be defined; 2) does the language overly limit the agency's audit authority as described in §334.309(d) and §334.533; and 3) considering the language in §334.306(f) - what method(s) could be used to address concerns that have been expressed regarding the ability of the agency to ensure that subcontractors receive payment for work performed as part of the PST reimbursement program.

SECTION BY SECTION DISCUSSION

Subchapter A - General Provisions

Regulatory reform changes are adopted to provide clarification of existing regulatory requirements concerning tank labeling and the definition of action level; to insert a definition of petroleum storage tank since the term was inadvertently omitted in a previous rulemaking and is used in this chapter; to add flexibility concerning certification of certain environmental professionals; to expand the "seller's disclosure" to include aboveground storage tanks (ASTs) as well as underground storage tanks (USTs); to delete outdated language concerning temporarily out-of-service tanks; and to correct an administrative error from a recent PST rulemaking.

Adopted §334.2 adds paragraph (6) to insert a definition of action level. The term is moved from the definitions section in Subchapter H because the term is used in other subchapters in this chapter, and is updated to remove language that is covered more thoroughly in Subchapters D and G of this chapter (see discussion of §334.322 in this preamble). Subsequent definitions are renumbered accordingly. The definition of corrosion technician is renumbered as paragraph (28) and the word "is" inserted into the last line to improve readability; the phrase "has been" is deleted from subparagraph (A) to improve readability; the word "is" is deleted from subparagraph (B) to improve readability; and subparagraph (C) is amended to allow the Steel Tank Institute as an additional entity from which certification of a cathodic protection tester will be accepted, as long as the manner of certification under the rule meets the agency's satisfaction. The definition of free product is renumbered as paragraph (41), with the parenthetical clarified to match the definitions in Subchapter M of this chapter. A definition of petroleum storage tank is added as paragraph (80), because the term was inadvertently omitted in a previous rulemaking and is used in this chapter. This definition tracks the statutory definition in Texas Water Code (TWC), Chapter 26, Subchapter I, §26.342(12). The definition of petroleum substance is renumbered as paragraph (81) and amended by adding "e.g.," as a precedent to each set of examples enclosed in parentheticals to specify that they are examples and not a restricted list. The definition of professional geoscientist is added, from proposal, as new paragraph (88) to recognize this professional licensure. Subsequent definitions are renumbered accordingly. The definition of spill is renumbered as paragraph (100) and amended by adding reference to ASTs as a correction. Throughout the section, the acronyms "AST" and "UST" are spelled out to be consistent with other commission rules.

Adopted §334.5(b)(1)(C) reflects the current name of the agency.

Adopted §334.7(d)(1)(A)(i) and (ii), concerning tank registration updates, is reinserted after accidental deletion in an administrative error in a recent PST rulemaking.

Adopted §334.8(c)(5)(C) inserts the phrase "or within 30 days of a subsequent tank installation," into the first sentence to clarify the existing requirement in §334.7(d)(4) of this subchapter. The change reiterates, in this section, that the tank-labeling requirement is applicable to tanks installed after the promulgation of the compliance self-certification regulations, in addition to tanks already installed at that time. Section 334.8(c)(5)(A)(i) - (iii), (B)(i) and (iii), and (D)(i) reflects the current name of the agency.

Adopted §334.9 is expanded to include ASTs as well as USTs, to ensure that purchasers of both types of regulated tanks are notified in writing of applicable requirements. The benefits of increased compliance with applicable regulations, previously realized for USTs, will also be realized for ASTs under the change. Parallel provisions for ASTs are inserted in the introductory language and in paragraphs (2) and (5). Subsection (4) adds the phrase "as to USTs" to make the paragraph specific to USTs, adds the phrase "and other" before the word "requirements" to reference other Texas Administrative Code requirements, and replaces "Texas Natural Resource Conservation Commission" with "Texas Commission on Environmental Quality" to reflect the current name of the agency. Paragraph (5) is added to provide language similar to paragraph (4), but altered to be specific to ASTs.

Adopted §334.10(a)(6) is deleted as an outdated provision, because such extensions of time are no longer allowable under 30 TAC §334.54. The subsequent paragraphs are renumbered accordingly.

New language is added, from proposal, to §334.10(a)(10) to specify that when agency requirements specify documents that must be prepared by, or prepared under, the supervision of a duly licensed professional engineer, a duly licensed professional geoscientist, or a duly licensed professional surveyor, those documents must be prepared in accordance with all requirements of statute and rule applicable to that respective professional.

Adopted §334.12(a) reflects the current name of the agency.

Subchapter C - Technical Standards

Regulatory reform changes are made to reflect agency experience with certain systems since the rules were written, to make corrections, and to delete outdated provisions.

Adopted §334.46 is amended to prevent double-walled tanks that are shipped by the manufacturer with a vacuum on the interstice from having to be needlessly air tested if that vacuum is still within manufacturer's specifications when the tank arrives at a site where it will be installed. Section 334.46(d)(1) deletes the sentence “New tanks shall be air tested before they are installed.” to allow some flexibility in the overall requirement. Section 334.46(f)(2)(B) changes the word “and” to the word “or” to allow a choice in allowable procedure.

Adopted §334.50(a)(1)(C)(ii)(V) deletes the phrase “and (B)(i)(III)” because that referenced subclause does not exist and by changing the word “subsections” to “subsection.” Section 334.50(d)(6)(B) corrects the spelling of the word “course” to “coarse.” Also, the word “subsection” has been replaced

with the word “subparagraph” in §334.50(d)(2)(C)(i)(II), as a correction from proposal, to conform with Texas Register requirements.

Adopted §334.55(a)(6)(B)(i) removes an erroneous reference to §334.50(d)(9), relating to “Statistical inventory reconciliation (SIR) and inventory control” as an external release monitoring and detection method, and an unnecessary reference to §334.50(d)(10), relating to ”Alternative release detection method” as an external release monitoring and detection method.

Adopted §334.56(b)(1)(A) removes an erroneous reference to §334.50(d)(9), relating to “Statistical inventory reconciliation (SIR) and inventory control” as an external release monitoring and detection method, and an unnecessary reference to §334.50(d)(10), relating to ”Alternative release detection method” as an external release monitoring and detection method. Section 334.56(c)(2) replaces “Texas Natural Resource Conservation Commission” and “TNRCC” with “Texas Commission on Environmental Quality” and “TCEQ” to reflect the current name of the agency.

Subchapter H - Reimbursement Program

To increase the agency's ability to process and pay all payable reimbursement claims before the PSTR Account sunsets in 2006, given limited agency resources, the standard for the reimbursement of eligible cleanup expenses related to LPST sites is revised to move away from an “actual cost”-based system. Reimbursement will instead be based on the lower of either line-item amounts listed in Subchapter M or line-items amounts listed in invoices submitted with the claim. In addition, better accountability provisions were are added in the reimbursement rules to better fulfill the stewardship role the agency

has for the PSTR Account under TWC, §26.3573(h). These changes are based on experience the agency has gained in conducting numerous PST reimbursement audits over the last several years. In addition to these changes, the rules concerning assignment of reimbursement rights, including associated paperwork requirements, are simplified and clarified. This will increase the predictability of the process by which an eligible owner or operator seeks to transfer reimbursement rights to another. Greater clarity in this process also reduces the agency's liability to suit based on an allegation that reimbursement funds were sent to a person other than the person authorized by the owner or operator. This rulemaking package also updates and clarifies existing program rules, and makes corrections to rule language to improve rule consistency.

Adopted §334.302 changes the title of the section by the addition of the word "Assignments" at the end, to make clear that the rules regarding the assignment of reimbursement rights are contained in this section. Section 334.302(c)(2) changes the word "one" to "$1" to conform with *Texas Register* formatting. Section 334.302(c)(6) deletes the word "or" and moves it to paragraph (7) to reflect that another item is added to this list of regulations. Section 334.302(c)(7) adds the phrase "any expenses" to clarify the requirement and improve readability. A new §334.302(c)(8) is added to the list of items for which reimbursement will not be made, that being markup of amounts paid to subcontractors by owners/operators who act as their own prime contractor or consultant. Cross-references to similar provisions proposed in Subchapter M are also included in the new language.

Adopted §334.302(d)(1) replaces the term "his duly authorized representative" with the term "his/her agent" to clarify the term. The phrase "through an assignment" is added to §334.302(d)(4) to clarify

the nature of the authorization by which an owner or operator may ask the agency to pay his/her reimbursement money directly to another party. The phrase "agents or" is deleted from §334.302(i) and (j) to clarify that an assignment of reimbursement rights under these regulations is needed for the agency to pay anyone other than the owner or operator in a reimbursement situation. Also in §334.302(i) the language "except as provided by §334.306(f) of this title (relating to Form and Contents of Application)" is added, from proposal, so that subcontractors who meet the requirements of §334.306(f) can be paid directly without obtaining an assignment. In §334.302(h), the word "fund" is replaced with the word "account" as a correction. In §334.302(j), the word "agent" is replaced with the word "assignee" to clarify and reiterate that an assignment of reimbursement rights under these regulations is needed for the agency to pay anyone other than the owner or operator in a reimbursement situation, and the words "insuring" and "insure" are replaced with the words "ensuring" and "ensure" to correct spelling errors.

Adopted §334.302(k) adds the word "eligible" before the phrase "owner or operator" to reiterate that owners or operators must be otherwise eligible before they are in a position to make an assignment of their reimbursement rights under the rule, and to make a cross-reference to the term "eligible owner or operator" in §334.310. Section 334.302(k)(1) is amended to read "the person assigned the right to accept payment on behalf of an eligible owner or operator. Such assignees are limited to the following:" to make it clear that an assignment under the rule is the authorizing mechanism, and that assignments can only be made as listed in the subsequent subparagraphs. The phrase "a purchaser of the property where the release occurred and on which the claim for payment is based" in §334.302(k)(1)(A) is deleted because an owner of contaminated property may already receive

reimbursement as an "eligible owner or operator" as provided in §334.310(a)(1)(C) once appropriate corrective action activities are performed. New language for §334.302(k)(1)(A) is added which reads "a Prime Corrective Action Specialist, properly registered under Subchapter J of this chapter (relating to Leaking Petroleum Storage Tank Corrective Action Specialist Registration and Project Manager Licensing), hired by the owner or operator to perform corrective action activities at the leaking petroleum storage tank site in question who also holds a lienhold interest on the real estate or fixture that is attached to the real estate where the release occurred and on which the claim for payment is based; or" to better describe the scenario where an owner or operator assigns his/her reimbursement directly to the prime contractor who is responsible for the performance of corrective action at the site, as opposed to the description currently found in §334.302(k)(1)(B), which is deleted because an amended version of the existing language has been incorporated into the new §334.302(k)(1)(A). Current language in §334.302(k)(1)(C) is relettered as §334.302(k)(1)(B) to reflect the deletion of the current §334.302(k)(1)(B). Section 334.302(k)(1)(D) is relettered as §334.302(k)(1)(C) to reflect the deletion of current §334.302(k)(1)(B).

Adopted §334.302(k)(2) provides reference corrections due to other changes to this subsection. Section 334.302(l) is deleted as part of simplifying the assignment process by no longer requiring a contract of subrogation to be submitted by the claimant.

Adopted §334.306(b)(6) replaces the phrase "legible copies of invoices providing a description of:" with the phrase "legible copies of contractor and subcontractor invoices and any other documents required by the executive director to provide a description of:" to clarify the type of invoices required

and to clarify the point, made throughout this subchapter and Subchapter M, that invoices are just one of the types of documents that may be necessary to demonstrate that applicable requirements have been met. The phrase ", using the same break-down of individual activities as are listed in this subchapter and Subchapter M of this chapter" is added at the end of the sentence in §334.306(b)(6)(E). This is intended to simplify the reimbursement review process by increasing continuity and consistency in reimbursement applications and to prevent "cost bundling," whereby an applicant lumps many activities together such that it becomes difficult to separate out the individual activities for proper agency review. This adopted rule should speed up agency processing of applications. In §334.306(b)(6)(F), the phrase "the total amount paid, or ensured to be paid through the posting of a payment bond" is added to provide clarification and to provide continuity with language in §334.306(b)(7), and to address the commission's specific concern regarding subcontractors who are not getting paid.

Current rules do not adequately require prime contractors to show that they have "paid costs in full" to subcontractors. This is true even though owners or operators, when receiving reimbursement monies from the agency, must make such a demonstration as to their prime contractors. To ensure equal treatment of all categories of reimbursement claimants and to prevent unjust enrichment from the PSTR Account as part of the agency's statutory duty to be a good steward of the Account, the rules would compel the same type of showing of §334.302(i) - (k) assignees that owners or operators have to make when they receive reimbursements directly. The change would likely encourage subcontractors to stay in the business of performing corrective action in reimbursement situations. Therefore, §334.306(b)(7) is amended to read "certification on the designated agency form, either that the amounts described in §334.309(c) of this title (relating to Reimbursable Costs) have been paid in full by the claimant or have

been ensured to be paid in full through the posting of a payment bond in the amount not yet paid in full by the claimant. The certification must include:" to require a specific certification, as opposed to other demonstrations of proof at the claim review stage, that the claimant has either made the payment or has been ensured to be paid in full through the posting of a payment bond in the amount not yet paid in full by the claimant. Section 334.306(b)(7)(A) provides details of what is being certified in situations where the claimant is either an eligible owner or operator or an insurer under §334.302(k)(1)(B). Section 334.306(b)(7)(B) provides details of what is being certified in situations where the claimant is an assignee contractor under §334.302(k)(1)(A). Language is deleted from §334.306(b)(7)(A) and (B) that would no longer be relevant in the change from a "proof" demonstration to a certification. Section 334.306(b)(7)(C), (D), and (E) is deleted as no longer relevant in the change from a "proof" demonstration to a certification.

Current language in §334.306(b)(8) is deleted as an outdated and unnecessary requirement. New language is added for the paragraph, which reiterates the requirement that before the agency can honor an otherwise proper request by an owner or operator to send a reimbursement check to an entity other than the owner or operator, the required assignment documents must be filled out completely and accurately. Adopted new §334.306(b)(9) states that if any combination of the owner or operator and the legal "persons" performing corrective action activities at the LPST site are "related parties," as defined in the new definition in §334.322, this information would have to be disclosed in the reimbursement application. It is important for the agency to have this information, because some reimbursement line-item amounts (e.g., allowable prime contractor markup on subcontractor expenses) are based on the idea that the two parties are indeed separate entities. The language will help prevent

unjust enrichment from the PSTR Account, and will be part of fulfilling the agency's statutory duty of good stewardship of that account under TWC, §26.3573(h). The existing §334.306(b)(9) is renumbered as §334.306(b)(10). Section 334.306(f) has been changed from proposal. The new language states that a subcontractor may submit information to the agency to assert a claim that the subcontractor has performed pre-approved work and has not been fully paid for the work. The new language also states that a subcontractor may be considered for direct reimbursement by the commission if all of the following requirements are met: 1) the subcontractor requesting to be directly reimbursed by the agency shall have performed work for a person eligible for reimbursement in accordance with §334.310 and performed such work as a subcontractor to a prime corrective action specialist retained by the eligible owner or operator; 2) a Fund Payment Report that contains the charges for which the subcontractor has not been paid has been issued in accordance with §334.314; 3) the prime corrective action specialist has failed to pay the subcontractor, due to insolvency subject to the limitations of 11 United States Code, §365(e)(1), the amount reflected on the Fund Payment Report; 4) the commission has not paid for the work performed in the Fund Payment Report or the commission has successfully recovered the money paid for the work performed in the Fund Payment Report in accordance with 30 TAC §334.318 and TWC, §26.355; and 5) the subcontractor has filed within 120 days of the effective date of this subchapter (Subchapter H) written notice to the agency of the amounts owed on each specific Fund Payment Report that the prime corrective action specialist has failed to pay and an affidavit by the subcontractor stating that the prime corrective action specialist has failed to pay the amount being requested by the subcontractor. The existing §334.306(f) is relettered as §334.306(g). Filings by subcontractors directly to the agency for reimbursement is limited to within 120 days of the effective date of the rule because new rule language in §334.306, requiring either proof of payment to

subcontractors or posting of a payment bond in the amount not yet paid to the subcontractors, will help subcontractors get paid by their prime contractors in the future and thereby alleviate the need for the agency to directly reimburse the subcontractors. The 120-day time period provides an opportunity for subcontractors who, under the prior rules, had not been paid by the contractor and had no recourse within the scope of the prior rules to be paid directly by the TCEQ for work performed.

Adopted §334.307(a)(3) replaces the word "which" with the word "what" to improve readability. Section 334.307(b) adds the word "may" and the phrase "allow for proper application" and deletes "the application" to provide clarification and to improve readability.

Adopted §334.308(a) replaces the word "which" with the word "that" to improve readability and replaces the word "section" with the word "chapter" to clarify the scope of the subsection. Section 334.308(b) replaces the phrase "which arise directly from" with the phrase "directly required for" and replaces the phrase "the requirements of the agency, subject to the limitations prescribed by this section" with the phrase "commission rules" to make the language simpler, provide clarification, and improve readability. Section 334.308(c)(14) inserts the phrase "under this paragraph" at three different places, and deletes "of tank removals," "removed," and "of removal" to provide clarification and improve readability. Section 334.308(c)(18) and (19) changes the word "guidelines" to the word "specifications" to reflect the new title of Subchapter M. Section 334.308(f) adds the phrase "of any substance listed in §334.301(a) of this title (relating to Applicability of this Subchapter)" to clarify the applicability of the subsection. Section 334.308(g)(12) adds the word "product" after the word "petroleum" to clarify what category of substances the paragraph is referencing. Section

334.308(g)(20)(B) replaces the word "which" with the word "that" to improve readability. Section 334.308(g)(22) is added to explicitly state that when a corrective action activity is not done correctly the first time, the claimant will be able to recover costs only if the work is correctly redone. Section 334.308(g)(23) is added to explicitly state that no reimbursements are allowed in instances where fraud is shown.

Adopted §334.309(a) changes the word "guidelines" to the word "specifications" to reflect the proposed new title of Subchapter M.

Adopted §334.309(c) states: "For reimbursements appropriate to be made under this subchapter, the amount reimbursed will be the lower of the invoiced amount or the line-item amount (adjusted for scope of work) for that activity specified in Subchapter M of this chapter (relating to Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program). An exception to this subsection is made for items under Subchapter M of this chapter requiring bidding, where reimbursement requests are processed as described in Subchapter M of this chapter. For those activities that require pre-approval under §334.310(f) of this title (relating to Requirements for Eligibility), the agency may also, at its discretion, limit the amount reimbursed to the pre-approved amount." This will cause the standard for the reimbursement of eligible cleanup expenses related to LPST sites to move away from an "actual cost" -based system. Reimbursement will instead be based on the lower of either line-item amounts listed in Subchapter M or line-item amounts listed in invoices submitted with the claim.

Under current PST program rules, agency staff are performing two separate reviews of each reimbursement claim. The first involves determining the activities that were pre-approved and the cost pre-approved for each activity, documenting that the activities were actually done as pre-approved, then adjusting for changes in scope of work (e.g., a pre-approval is initially given for the installation of three monitoring wells but, with agency concurrence for a "field change," the contractor only drills two). The second review of the claim is an "actual cost review." This involves a detailed evaluation of applicable invoices, receipts, cancelled checks, certified public accountant certifications, promissory notes, etc., whereby the applicant demonstrates what the pre-approved work actually cost to perform. Following these reviews, under current rules, the agency reimburses the lower of the amounts calculated in the two reviews for each claim. "Actual cost" reviews are very time consuming. Also, since statute (TWC, §26.35731(c)) requires that within 90 days after the date on which the commission receives a completed application for reimbursement from an owner or operator of a PST system that is seeking reimbursement, the commission shall send a fund payment report to that owner or operator, available staff must, therefore, be dedicated to the processing of new applications. In addition, questions have been raised about the consistency of agency actual cost reviews under the current rules.

The agency adopts changes in to the rules to eliminate actual cost reviews, and to use the concurrent resource savings to further ensure that all eligible valid claims are paid before the PSTR Account sunset. This will also allow the payment of as many eligible valid non-pre-approved claims as possible before PSTR Account sunset, as statute (TWC, §26.35731(b)) provides that non-pre-approved claims for reimbursement cannot be considered, processed, or paid until all pre-approved claims have been completed.

Another benefit to these particular rule changes is that they would constitute a significant simplification of the application process, both in terms of the work required by applicants to prepare and submit applications and the work required by agency staff to review them. This simplification is expected to result in reduction in the number of associated protests that are filed, saving time for both applicants and agency staff.

Adopted new §334.309(d) is changed from proposal to state: "A cost is not reimbursable if a contractor fails to pay its subcontractors for subcontracted work, or if there is a failure to perform the work claimed as technically required. The audit of reimbursable costs is addressed in §§334.530 - 334.535 of this title (relating to Purpose and Applicability of the Subchapter, Cooperation with Audit; False Submittals, Payments, Audits, Notice of Overpayment, and Objections to the Notice of Overpayment and Formal Petition for Hearing)." Agency audit staff may review claims based on actual cost as defined in §§334.530 - 334.535. Agency audit staff need the ability to review costs within invoices to properly determine if those costs are actual amounts paid for actual work performed. A review of actual costs within the invoices would then need to be compared to fair market rates for those costs (e.g., RCS line-item amounts in Subchapter M or agency PST State Lead Remediation rates) to ensure that only reasonable costs are being invoiced.

Adopted §334.310(c) adds the phrase "Agency eligibility determinations must" and deletes the phrase "The agency may determine other persons to be eligible owners or operators" to better express the limitations of the referenced statutory provision. Section 334.310(f) adds the sentence "Pre-approval of proposed corrective action activities and costs does not create an entitlement to reimbursement for any

corrective action task, at the amount pre-approved or a different amount." to provide a more specific restatement in this section of existing language found in §334.302(h).

Adopted §334.313(a)(1)(A)(ii) deletes the phrase "be accompanied by"; deletes the phrase "of invoices (contractor and subcontractor)"; deletes the existing reference to §334.306(b)(6); adds the phrase "as required under §334.306(b)(6) of this title" to eliminate redundant language, to clarify the clause, and to make included references more specific; and adds the phrase "by certification of" before the word "proof" to reflect new language in §334.306(b)(7). Section 334.313(a)(1)(A)(iii) deletes the phrase "be accompanied by" to eliminate redundant language. Section 334.313(a)(1)(A)(iv) deletes the phrase "the completion of" to eliminate unnecessary language. Existing language in §334.313(a)(1)(B) - (D) is deleted because the agency's treatment of incomplete applications is consolidated and clarified in a new §334.313(b). Existing language in §334.313(a)(1)(E) is relettered as §334.313(a)(1)(B), with the phrase "in a fund payment report that those costs" added and the phrase "and the application" deleted to clarify that a fund payment report will be the mechanism of notification; the words "completes" and "of" are added to provide clarification; and the existing reference to §334.313(f) is changed to reference §334.313(d) to reflect the relettering of this subsection. Existing language in §334.313(a)(1)(F) is relettered as §334.313(a)(1)(C) and is amended by deleting and adding language to simply state: "if it has been determined that an otherwise complete application contains costs for a corrective action activity which the agency determines to have been performed improperly, the applicant will be notified in a fund payment report that those costs are denied as not allowable under §334.308(g)(22) of this title (relating to Allowable Costs and Restrictions on Allowable Costs)." Existing language in §334.313(a)(1)(G) is amended to delete an unnecessary reference and relettered as

§334.313(a)(1)(D). Existing language in §334.313(b) and (c) is deleted because the agency's treatment of incomplete applications is proposed to be consolidated and clarified in new subsection (b). Existing rule language in these subsections could be read to require the agency to send back all applications for even the smallest deficiency. Existing language in §334.313(d) is relettered as §334.313(b) and amended to provide a consolidated statement of the agency's treatment of incomplete claims. Under the requirements, the agency has the flexibility to issue a fund payment report that classifies appropriate parts of a claim as payable, denies appropriate parts of a claim, and categorizes the deficient parts of the claim as "withheld" until such time as the deficiency is cured. Under this option, large payable amounts will not be held back for a small deficiency in another part of the claim. In §334.313(b), changes are adopted to delete references to different stages of the review process, so that the listed options are available to the agency whenever a deficiency is found, as well as to improve readability. Adopted §334.313(b)(2) is amended to more accurately reflect that payment for portions of a claim may be withheld, as opposed to characterizing the entire claim that way under the existing option. The phrase "of those portions of the claim for which additional information has been requested" replaces the phrase "for insufficiently documented costs or insufficiently documented corrective action activity" to ensure that all types of deficiencies under this subchapter are encompassed. Section 334.313(e) is relettered as §334.313(c) and §334.313(f) is relettered as §334.313(d) to reflect changes adopted earlier in this section that require the reformatting.

Adopted §334.314(b)(1) deletes the phrase ", provided a signed subrogation contract is submitted, when required" as an outdated provision. Section 334.314(d) deletes the phrase ", which may include the

submission of a signed subrogation contract, when required" as an outdated provision. Eliminating this requirement is part of streamlining the application and review process.

Adopted §334.315(b)(2) reflects the current name of the agency.

Adopted §334.322(1) amends the definition of action level to provide simplification and clarification and moves the definition to Subchapter A because the term "action" level is also used in other subchapters in this chapter (see §334.2 previously discussed in this preamble). Subsequent definitions are renumbered accordingly. The definition of contract of subrogation in §334.322(6) is deleted as outdated, since the regulations which use the term "contract of subrogation" are deleted as part of the agency's streamlining of the application and review process (see §334.314 previously discussed in this preamble). Subsequent definitions are renumbered accordingly. A new definition of related parties is added as §334.322(16) to support the new rule language in §334.306(b)(9) (see §334.306 previously discussed in this preamble). Subsequent definitions are renumbered accordingly. The definition of tank removal is renumbered as §334.322(18) and is clarified by the insertion of more precise terms for the tanks covered by the definition and for the material referenced. Subsequent definitions are renumbered accordingly.

Subchapter L - Overpayment Prevention

One of the motivations in initiating this rulemaking package was for the agency to incorporate the lessons learned in the last several years of conducting PST reimbursement audits. These experiences indicate that better accountability provisions are needed in this chapter, and that certain clarifications

are needed in this subchapter. A main point detailed in these amendments is clearly stating which parties will now be subject to a Notice of Overpayment (seeking disgorgement of monies reimbursed) versus which parties must cooperate with an audit.

Adopted §334.530(a) and (b) changed the word "Fund" to the word "Account" as a correction.

The title of adopted §334.531 is changed to "Cooperation with Audit; False Submittals" to better reflect the section's contents with the adopted changes. Section 334.531(a) defines the parties who must cooperate with an audit of a claim(s) and explicitly states that the agency is not to be charged for copies of required documents. Section 334.531(b) more clearly states that a disgorgement proceeding will ensue when the documents necessary to support a claim are not timely provided to the agency by the party(s) listed in subsection (a); while existing language on this point in subsection (c) is deleted and existing subsection (d) is relettered as subsection (c).

Adopted §334.532(a) changes the word "Fund" to the word "Account" as a correction.

Adopted §334.533 reletters current language as subsection (a) to allow insertion of a new subsection (b). The phrase "of claims and associated documents" is added as a clarification of what is being audited. Section 334.533(1) adds the phrase "eligible to be paid as provided by TWC, §26.3573" from proposal to add reference to the TWC, and clarify the meaning of the word "allowable." Existing paragraphs (2) and (3) are deleted as unnecessary given that the new language cross-references the subject matter of an audit. Paragraph (4) is renumbered as paragraph (2), with the clarifying phrase

"Subchapter H of this chapter" added to cross-reference the meaning of the term "reimbursable" in the existing language and a date is corrected in two places to provide continuity with Subchapter H language. A new paragraph (3) is added from proposal to state that actual cost is the actual amount paid for actual work performed, net of any discounts, offsets, or other reduction to the amount paid and that actual cost includes associated overhead and reasonable profit. Subsection (b) is added as a clarification of what information is subject to review during an audit and to clarify that any amounts included in a Notice of Overpayment represents amounts not actually paid, rather than amounts represented by only a promise to pay.

Adopted §334.534(a) deletes the phrase "necessary, allowable, or reimbursable cost of corrective action" and replaces it with the phrase "amount provided for under this chapter" to more clearly reference the various regulatory standards that must be met and adds language to allow the executive director to include in a notice of overpayment a charge for the claimant to pay interest when the overpayment was the result of incorrect, incomplete, or inaccurate documentation submitted by the claimant. Also the word "reimbursement" is changed from proposal to the word "payment" in the first sentence of subsection (a). Section 334.534(b) replaces the phrase "person who received money from the Petroleum Storage Tank Remediation (PSTR) Fund or to persons who were paid by the person who received money from the PSTR fund" with the phrase "claimant (either the party who contracted directly with the TCEQ for corrective action work, the eligible owner or operator, or the party assigned the reimbursement right under §334.302(i) - (k) of this title (relating to General Conditions and Limitations Regarding Reimbursement; Assignments)" to establish that a disgorgement action will only be initiated against a reimbursement claimant. Section 334.534(c) reflects the current name of the

agency. Section 334.534(d) changes the word "Fund" to the word "Account" as a correction. Section 334.534(e) is deleted and an amended version of the original language of this subsection is moved to subsection (a).

Adopted §334.535(a) replaces the phrase "the party" with the phrase "any person" to better express the entity covered by this subsection. Section 334.535(b) more clearly references the various regulatory standards at issue and matches adopted language in §334.533 and §334.534. Section 334.535(b) adds the sentence, "At hearing, the petitioner must prove that the audited claims or portions of claims were for amounts appropriately paid under the requirements of this chapter" to reiterate the requirements at issue and to overtly state that the burden of proof has always been with the petitioner.

Subchapter M - Reimbursable Cost Guidelines for the Petroleum Storage Tank Reimbursement Program

Though a comprehensive, exhaustive revisiting of all the Reimbursable Cost Guideline dollar line-item amounts would not be prudent given the limited time before the PSTR Account sunset and the time a rulemaking takes to complete, this rulemaking does include adjustments to these line-item amounts that were arrived at following discussions with a stakeholder group concerning changes in the marketplace since the last amendments to this subchapter. There are limitations, besides time considerations, to the changes that can be made in this subchapter in this rulemaking. During the 2001 session of the Texas Legislature, the agency was asked for a projection concerning the burden on the PSTR Account between that time and the Account sunset date. Based on that projection, as part of House Bill 2687, amendments were made to TWC, Chapter 26, Subchapter I, which changed the fee schedule (for the fee which supplies the Account) and extended the Account sunset date to 2006. The line-item dollar

amounts that the agency will reimburse for various eligible remedial activities are contained in this subchapter. Current changes to these line-item amounts include increases in some areas and decreases in others to reflect applicable changes in market pricing and costs of services. Because the agency needs to adhere to the PSTR Account Burden projections given to the legislature during the drafting of House Bill 2687, the agency seeks to assure that these line-item increases and decreases remain within the limits of the projected income to the Account established by the House Bill 2687 fee schedule to address remaining eligible LPST sites, statewide. This has limited the number of "marketplace" updates that can be made.

The title of this subchapter is changed to "Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program." In addition, this subchapter is revised to remove internal inconsistencies, add flexibility to improve efficiency, expand the use of bidding while simultaneously clarifying how the agency handles bidding situations, and reduce some of the paperwork burden on applicants for reimbursement. The rulemaking also removes most language associated with "actual cost" reviews (see §334.309 previously discussed in this preamble).

Also, language for this subchapter is adopted to match similar language adopted in Subchapter H of this chapter to ensure that owners or operators for LPST sites do not profit from the pollution for which they have a legal liability (see §334.302(c)(8) previously discussed in this preamble).

Adopted §334.560 amends the title of this section by changing the word "Guidelines" to "Specifications" because the word "Guidelines" is misleading given that these are rules and not

guidelines. This section merely contains language adopting "Figure: 30 TAC §334.560." The language adopting the figure is also amended to state: "The following Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program are in effect as of November 18, 2004." The referenced separate figure comprises the actual Reimbursable Cost Specifications (RCSs) and is amended as follows.

On the cover page of the figure, the title is changed to "Reimbursable Cost Specifications" because the word "Guidelines" could be misleading given that these are rules and not guidelines; the word "Division" is changed to "Reimbursement Program" to reflect current agency alignment; and "Texas Natural Resource Conservation Commission" is changed to "Texas Commission on Environmental Quality" to reflect the agency's recent name change. The first item addressed in the Table of Contents is changed to read "Introductory Requirements" to reflect the new title of that item; the page numbers are renumbered to correspond with changes in the document; and a new "Part 11: Allowable Reimbursable Costs for the Risk Evaluation of Individual Exposure Pathways" is adopted as an addition to the document in Section 2, Appendix A.

The "Introduction" section of the RCSs is renamed as "Introductory Requirements" to better reflect its purpose and new language. Changes are adopted throughout the Introductory Requirements to reflect the change from "Guidelines" to "Specifications" in the title, as well as to change "TNRCC" to "agency" to be consistent with the remainder of this chapter and with the definitions in 30 TAC Chapter 3. In the second paragraph, the phrase "the costs of corrective action" is added as clarifying language. The phrase "in all but extraordinary cases" is deleted because the only appropriate areas for discretion

in reimbursement amounts are expressed within the subchapter and in cross-referenced regulations elsewhere in the chapter. The sentence, "All requests for reimbursement must meet the requirements stated herein and in Subchapter H of this chapter" is adopted to provide a cross-reference to Subchapter H. The language: "For bid items, the agency requires a specific description of the items, including the item's exact type, model, age, history of previous usage, history of previous ownership, warranty information, and verification that all bids are at arm's length. The agency will only reimburse up to pre-approved bid amounts for pre-approved bid items. For bid items, at least three bids will be required, unless otherwise specified herein. When three bids are required, the agency may accept less than three bids for those situations where it is demonstrated to the satisfaction of the agency that three bids cannot be reasonably obtained (to be handled on a case-by-case basis)" is added to state specific requirements related to bid items. The language: "For non-bid items, the agency will reimburse either the invoiced amount or the RCSs line-item amount for that activity, whichever is lower. For those activities that require pre-approval under §334.310(f) of this title (relating to Requirements for Eligibility), the agency may also, at its discretion, limit the amount reimbursed to the pre-approved amount" is added to reflect the adopted language in §334.309(c) (see §334.309(c) previously discussed in this preamble). The last sentence of the second paragraph is deleted as unnecessary, given the language provided by additions which precede it. A new third paragraph is added to require prime contractors for LPST sites to submit a Site Closure Schedule to help ensure that there will be an ongoing dialogue between the contractor, owner/operator, and the agency coordinator concerning where the site is on the path to closure. The report will help the agency fulfill its statutory mandate to make sure that all LPST sites are progressing in a timely and proper manner toward ultimate closure. The paragraph goes on to state requirements for the submission of the schedule, and what will happen if the

schedule is not properly and timely submitted and updated. The following paragraph, beginning with "The Reimbursement Cost Guidelines will be utilized. . . ," is deleted as unnecessary, given the new language for paragraph two. The paragraph that begins with "The format of this document. . ." is deleted as unnecessary language. A new paragraph is added to explicitly state that records of applicable quantities associated with reimbursement claims must be kept, and examples are given of different types of quantities. These records will better allow the agency under the new reimbursement scheme, at the initial review and the audit stages, to evaluate reimbursement claims to see if the regulatory requirements have been met. Another new paragraph is added to ensure appropriate use of PSTR Account funds in the reimbursement of capital equipment item costs. This paragraph contains language specifying that the agency may require methods of identification such as serial numbers for capital equipment items in order to track the purchase, use, and condition of these items, and contains language stating that the agency may restrict reimbursable amounts for capital equipment items to prorated amounts, which consider usage.

Section 1: Activities, is amended. In the first paragraph, the term "TNRCC" is changed to "agency" to be consistent with the remainder of this chapter. In the second paragraph, the workplan/cost proposal amount is changed in this section and throughout the RCSs from $115 to $195, which allows for one additional hour for a Project Manager (PM) billed at $80 per hour and reflects the additional effort necessary to prepare adequate and complete cost proposals for submittal to the agency; the requirement for the submission of an Exit Criteria Flow Chart and Site Closure Schedule with the cost proposal is to provide the agency additional information as to the current site status to conduct a more

thorough appraisal of cost proposals; and “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter.

ACTIVITY 00: TANK REMOVAL. In the third paragraph, the term “table below” is changed to “following table” to improve clarity. In the fourth paragraph, the acronym “USTs” is substituted for the term “underground storage tanks” for consistency. In Notes 1 and 2, “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter; "TNRCC Region inspector"and "Region inspector" are changed to "agency Regional Inspector" to provide consistency in terminology; and "the TNRCC Central Office Project Coordinator" and "the Central Office Project Coordinator" are changed to "your agency Site Coordinator" to simplify the terms and provide consistency in terminology.

ACTIVITY 01: INITIAL ABATEMENT. “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter; "TNRCC Central Office Project Coordinator" is changed to "agency Site Coordinator" to simplify the term and provide consistency in terminology; "TNRCC Region inspector" is changed to "agency Regional Inspector" to provide consistency in terminology; the use of capitalization for the term "Initial Abatement" is eliminated as a correction; and the term "Reasonable Cost Guidelines” is changed to “Reasonable Cost Specifications” to reflect the new title of the RCSs.

ACTIVITY 02: PHASE-SEPARATED HYDROCARBON (PSH) RECOVERY. The use of capitalization for the term "Initial Abatement" is eliminated as a correction; language addressing pre-approval and referencing §334.310(f) is clarified by adding the phrase “written agency approval for”; the term "TNRCC Central Office Project Coordinator" is changed to "agency Site Coordinator" to

simplify the term and provide consistency in terminology; and the term "TNRCC Region inspector" is changed to "agency Regional Inspector" to provide consistency in terminology. Additional language is adopted, requiring submission of an Interim Corrective Action Plan (ICAP) with a Release Report for the approved continued recovery of free product in emergency situations, while existing language requiring the preparation of an ICAP for non-emergency situations is eliminated and replaced with the term "next phase of work." The Note block at the end of the paragraph adds the term “MDPE” to reference the definition of this technology as it has been added to the RCSs.

In the worksheet for this activity the word “Manual” in the title block is removed as this activity now refers to other work activities besides manual work associated with PSH removal.

In Activity 02, Part A, Personnel Costs, the following changes are adopted.

Activity 02, Part A, Section 1

The agency recognizes that alternative PSH removal technologies exist and it has been approving costs for these remedial activities on a case-by-case basis. Since the agency recognizes the value of these newer technologies, new line items are introduced into this activity to reimburse for costs associated with new PSH removal technologies. These technologies are categorized as Mobile Dual Phase Extraction (MDPE) technologies. The reimbursement for all work associated with this task is placed under this activity. The Section 1 title is changed to add the term “/MDPE CAP” to reflect the addition of these technologies to the section, and a new lump sum line item cost of $2,865 for preparation and submission of an MDPE CAP is adopted for this item. This will apply in cases where extensive site

alterations would be required to perform an MDPE event(s). (Site changes envisioned will include trenching, construction of fencing, and possibly waste disposal and will apply to MDPE events lasting 14 days or more.) The existing cumulative Total for Section 1 ($1,825) is deleted as no longer applicable.

In Activity 02, Part A, Section 2: Office Costs, costs to allow a Registered Corrective Action Specialist (RCAS) to prepare and submit reports following MDPE events are included and a differentiation is made between MDPE and non-MDPE report preparation. The section title adds the term “Non-MDPE Events” to specify the expanded intent of the section. In the first item, the terms “FAR“ and “or System O&M” are removed as unnecessary and the term “Report Preparation” is added to provide clarity. The term “Project Manager” is deleted and the term “/Data Review” is added to "Report Preparation & Submission" in the activity description for “PSH Recovery” to clarify that time required for analysis and reduction of field data is included in the report preparation costs. The term "PSH Recovery" is added to "Management Regulatory Interaction" in the activity segment for the PM item to clarify the item. PM time allotted per month is increased from 0.5 hours to 2.0 hours because stakeholders indicated that the current 0.5 hours per month for project management for PSH removal was insufficient to properly evaluate field data and manage field activities. The item “Staff E/G/H (SF)” with its corresponding activity description, Hours/Units, and Rate is deleted as no longer necessary due to the increase in allowable PM time in this section. The term "Cost Proposal/Workplan” is changed to "Workplan and Cost Proposal” to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities.

A new Activity 02, Part A, Section 3: Office Costs - MDPE Events - See Note 2, is adopted to address this new technology. The first item is PI-7 Standard Exemption Form (MDPE Events only); the corresponding activity is Preparation and Submission; the corresponding Hours/Units is 1; and the corresponding Rate and Total are $195 and $195, respectively. The second item is MDPE Report Preparation - (8-hour event); the corresponding activity is Report Preparation and Submission; the corresponding Hours/Units is 1; and the corresponding Rate and Total are $260 and $260, respectively. The third item is MDPE Report Preparation - (24-hour event); the corresponding activity is Report Preparation and Submission (includes periodic reporting to the agency, as required); the corresponding Hours/Units is 1; and the corresponding Rate and Total are $330 and $330, respectively. The fourth item is MDPE Report Preparation - (72-hour event); the corresponding activity is Report Preparation and Submission (includes periodic reporting to the agency, as required); the corresponding Hours/Units is 1; and the corresponding Rate and Total are $395 and $395, respectively. The fifth item is MDPE Report Preparation - (7-day event); the corresponding activity is Report Preparation and Submission (includes periodic reporting to the agency, as required); the corresponding Hours/Units is 1; and the corresponding Rate and Total are $535 and $535, respectively. The sixth item and corresponding activity is Workplan and Cost Proposal; the corresponding Hours/Units is 1; and the corresponding Rate and Total are $195 and $195, respectively, to be consistent with the amount allowed for this item throughout the RCSs, as discussed in this preamble in Section 1, Activities.

The existing Activity 02, Part A, Section 3: Field Personnel Costs, is renumbered from “3" to “4" to reflect the insertion of the previous new section and the section title is changed to "Field Personnel

Costs - Non-MDPE - See Note 2" to reflect that these costs are allowed specifically for non-MDPE PSH recovery events.

A new Activity 02, Part A, Section 5: Field Personnel Costs - MDPE - See Notes 2 and 3, is adopted as a new section to address the time required in the field for overseeing an MDPE event. Units are specified as (# of events/hours). Each item contains a referral to a specific section note that contains applicable details pertinent to that event. The first item is “MDPE 8-hour event (See Note 6)” with a corresponding Rate of $ 1,150. The second item is MDPE 24-hour event (See Note 7) with a corresponding Rate of $3,100. The third item is MDPE 72-hour event (See Note 8) with a corresponding Rate of $2,650. The fourth item is MDPE 72-hour event (See Note 10) and is specific to security needs for that event; the corresponding activity is Security Personnel; the corresponding number of hours is 35; the corresponding Rate is $30; and the corresponding Total is $ 1,050. The fifth item is MDPE 7-day event (See Note 9) with a corresponding Rate of $3,800. The sixth item is MDPE 7-day event (See Note 10) and is specific to security needs for that event; the corresponding activity is Security Personnel; the corresponding number of hours is 96; the corresponding Rate is $30, and the corresponding Total is $2,880. If this field activity is subcontracted out, a 15% markup is allowed.

In Activity 02, Part B: Equipment Costs, the original Part B is made a section and titled "Section 1: Equipment Costs - (Non-MDPE)" and a second section is added entitled "Section 2: Equipment Costs - MDPE" because the agency recognizes that it is necessary to differentiate itemized equipment costs for various PSH removal activities. A distinction is made between equipment costs associated with non-

MDPE events (reflected in Section 1) and MDPE events (reflected in Section 2). At a stakeholder's meeting, it was suggested that Section 1 include an increase for absorbent socks to $40 a dozen; an increase in small passive skimmer costs from $350 to $400; an increase in large passive skimmer costs from $750 to $900; an increase in dedicated PVC bailer costs from $15 to $35, and the addition of a new line item titled "Small Items (for use with fluid pump)" at a lump sum rate of $35 per site per day to replace the existing item "(Other)." These suggested changes/additions are within the new Section 1. A new Part B, Section 2: Equipment Costs - MDPE, addresses MDPE-related events and includes seven proposed new line items. The agency recognizes that MDPE is an effective technology for the removal of PSH in the subsurface. However, the term "MDPE" encompasses a variety of technologies and equipment, each with variable treatment times. In addition, pricing is further complicated because some RCAS companies own their own MDPE equipment, while others are contractors, thereby further complicating a plan for a fair and equitable reimbursement pricing scheme. A number of subcommittee stakeholder teleconferences/meetings were held to develop a consensus for an effective pricing schedule. It became apparent that any comprehensive pricing list covering all aspects of MDPE-related work would become very lengthy and cumbersome for the agency to implement. Given the variety of MDPE-related technologies on the market and the fact that the agency did not want to prescribe a list limiting current or future development of MDPE-related technologies, a pricing scheme based upon operating time was developed and proposed by the agency. The agency feels that a lump sum approach per event for reimbursing MDPE equipment that is based upon operational time coupled with specific performance measures will be the most straightforward to implement. Pricing for these line items is based upon actual costs reimbursed by the agency for past pre-approved MDPE events and from verbal and written input from the stakeholders. Each MDPE event item contains a referral to a specific

section note that contains applicable details pertinent to that event. The first item is MDPE - All Technologies - (8-hour event) - See Note 6 with a corresponding Rate of $2,050. The second item is MDPE All Technologies - (24-hour event) - See Note 7 with a corresponding Rate of $3,100. The third item is MDPE All Technologies - (72-hour event) - See Note 8 with a corresponding Rate of $6,100. The fourth item is MDPE All Technologies - (7-day event) - See Note 9 with a corresponding Rate of $11,750. The remaining three items in this section address issues that are beyond the defined MDPE event (e.g., these may include some construction costs to hook up the MDPE system to wells, where water recovery is anticipated to be beyond 2,500 gallons; a cost for bringing in additional holding capacity and an "Other" item for those costs out of the ordinary). Therefore, the fifth item is Construction costs - See Note 11 with no stated Units, Rate, or Total; the sixth item is Additional holding tank with no stated Units, Rate, or Total; and the seventh item is Other with no stated Units, Rate, or Total. Since this field work may be contracted, a markup of 15% is adopted that will follow the conditions set in Appendix A, Part 9, Markup.

A new Activity 02, Part C: Analytical Costs - See Note 12, is added to facilitate the preparation of proposals for MDPE-related events. During the course of an MDPE event, air, water, and possibly soil samples must be collected to verify the effectiveness of the MDPE treatment at the site and whether continued treatments are necessary. Air samples are required to be collected and analyzed from recovery lines prior to being treated; exhaust gases may need to be analyzed to verify compliance with discharge permits. Water samples from wells, intake, or discharge lines may need to be collected and analyzed, and under special conditions, soil samples may need to be collected. Sixteen new line items

are adopted for Part C: Analytical Costs shown in this section and are identical to those listed in Appendix A, Part 2: Laboratory Analysis Costs and specific line item comments.

The existing Activity 02, Part C: Waste Management Costs, is renamed as Part D to reflect the addition of the new Part C. The hourly rate for Vacuum Truck fluids transport for disposal is lowered from $75 per hour to $70 per hour. This reduction reflects the agency's experience that average hourly reimbursed rates for this service have decreased. Also, the Total Activity Costs block is changed to reflect Part D instead of Part C.

The existing Activity 02, Part D: Travel Costs, is renamed as Part E to reflect the addition of the new Part C. The rate per mile for mileage is increased from $.31 to $.35, as mileage rate is the lower of either the applicable Internal Revenue Service rate per mile or the applicable Official Mileage Guide for the State of Texas (OMGST) rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 per mile. The per diem rate is raised from $80 per day to $90 per day to reflect increases in motel and meal rates. Also, the Total Activity Costs block is changed to reflect Part E instead of Part D.

The existing Activity 02, Part E: Other Costs, is renamed as Part F to reflect the addition of the new Part C, and the Total Activity Costs blocks are amended to reflect Part F instead of Part E.

The Notes for Activity 02 are amended to address the changes to various line items within the activity. Note 1 references Part 8 of Appendix A, to provide a more specific point of reference and an

explanation of when the agency will approve an MDPE CAP; namely, for those events that will operate continuously for 14 days or more and for those instances where special conditions exist, such as complex site conditions or special waste discharge considerations that require further plan preparation. Note 2 references Parts 1 and 8 of Appendix A to provide a more specific point of reference and to address allowances regarding PI-7 Standard Forms. Note 3 deletes the phrase "for subcontracted expenses only" because it is redundant in the RCSs and provides specific reference to Appendix A, Part 9 for further information with respect to markup. Note 4 provides a more specific reference to Appendix A, Part 4 for a breakdown of travel costs. Notes 5 - 12 are new additions that explain the components that define MDPE treatment for reimbursement consideration and provide specific detail with respect to each separate duration event addressed by the RCSs. Details in each of the notes are based upon the agency's past experience with case-by-case approval of MDPE technology at various sites across the state and also upon verbal and written input from stakeholders. Note 5 details what is included in MDPE equipment costs and states that real time data acquisition will be required for continuous monitoring through the duration of an event, that no distinction is made as to type of equipment or technology used for a given event, and that the RCAS is to propose the best available technology that is most appropriate for a given site. Notes 6, 7, 8, and 9 separately define related specifics for purposes of reimbursement, with regard to the 8-hour event, 24-hour event, 72-hour event, and 7-day event, respectively. Note 10 addresses site security. Note 11 addresses construction costs and refers the reader to Activity 09 of the RCSs for the detail calculation of associated construction costs, the total of which is to then be reflected in Activity 02, Section 2. Note 12 provides a specific reference to Appendix A, Part 2 for additional information concerning laboratory analyses and costs.

ACTIVITY 03: EXCAVATION/WASTE MANAGEMENT. Modifications to line items costs are made in Part A: Personnel Costs, and reasons for the changes are discussed in this preamble in Activity 02. The changes for Part A include: the term "Cost Proposal/Workplan" is changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs; the Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities; and a corresponding increase in the total for Section 1 from $995 to $1,030. In Part C: Waste Management Costs, the hourly rate for Vacuum Truck (Fluids Transport for Disposal) is lowered from $75 per hour to $70 per hour. This reduction reflects the agency's experience that average hourly reimbursed rates for this service have decreased. In Part D: Analytical Costs, most costs are decreased to commensurate with the changes and reasoning provided in Appendix A, Part 2 of the RCSs and in preamble language applicable to Appendix A, Part 2. Also, analytical methodologies are specified to provide clarity. In Part E: Travel Costs, the rate per mile for mileage is increased from $.31 to $.35, as mileage rate is the lower of either the applicable Internal Revenue Service rate per mile or the applicable OMGST rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 per mile. The per diem rate is raised from $80 per day to $90 per day to reflect increases in motel and meal rates.

The following changes are adopted for the Notes. In Note 1, the term "standard work day" replaces the term "10-hour day" to prevent the specification of the length of a work day. Note 2 deletes the phrase "allowed on subcontracted costs" because it is redundant in the RCSs and adds specific reference to Appendix A, Part 9 for further information with respect to markup. Note 4 deletes specifics that are addressed in Appendix A of the RCSs and adds a specific reference to Appendix A, Part 7 of the RCSs.

ACTIVITY 04: SITE ASSESSMENT. In the opening paragraph, “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter. In Activity 04, Part A: Personnel Costs, Section 1, the term "Workplan/Costs Proposal” is changed to "Workplan and Cost Proposal/Workplan and Cost Proposal with Bidding” to be consistent with the remainder of the RCSs and to address situations where bidding is involved. The Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities. The Workplan and Cost with Bidding amount is proposed to be $355. A new line item (Licenses/Permits) addresses in rule the reimbursement of the cost of licensing and permitting fees charged for monitor wells on municipal and government property with a reimbursable amount specified as a maximum of $500 per well or boring.

In Activity 04, Part A: Personnel Costs, Section 2, Subsection 2A, all listed Unit Cost amounts are increased, with the exception of the item “Plan A Risk Assessment Report Form.” Currently, the submittal of data results when no report is required is not reimbursed. Comments were received from stakeholders that labor is expended to send in these results and should be reimbursed. The agency concurs and the Unit Cost amount for the “Submit Results (Labs and Drillers’ Logs) Only” activity is changed to $120 to address RCAS time spent; to review and submit this data; to verify that the information is correct; and to submit it in a format that is easy for the agency to interpret. A reference to Note 9 is added to the item "Plan B Risk Assessment" and the item "RA Update" is changed to "RA Update/Preparation." Unit Cost amounts are increased for the following reports: FAR - Site Assessment from $485 to $765; Plan B Risk Assessment from $5,715 to $5,765; and RA

Update/Preparation from $485 to $765. (See discussion in this preamble of Activity 05 and Appendix A, Part 8 for specifics.)

In Activity 04, Part A: Personnel Costs, Section 2, Subsection 2B, the project management Unit Cost amount is increased from $40 to $80 to allow for a full hour of PM time.

In Activity 04, Part A: Personnel Costs, Section 2, Subsections 2C - 2G, no changes are made.

In Activity 04, Part B: Drilling Costs, Section 1, Subsection 1B, the Unit Cost amount for Mobilization/Demobilization for the first 50 miles, one way, is increased from $245 to $300 to reflect current and anticipated costs for this activity. The Drill Crew Per Diem is increased from $190 to $240 per day (as provided in Appendix A, Part 3 for a three-man crew) to reflect current and anticipated per diem costs.

In Activity 04, Part B: Drilling Costs, Section 2, the Drill Crew Per Diem is increased from $150 per day to $180 per day (as provided in Appendix A, Part 3 for a two-man crew) to reflect current and anticipated per diem costs.

In Activity 04, Part C: Waste Management Costs, the hourly rate for Vacuum Truck fluids transport for disposal is lowered from $75 per hour to $70 per hour. This reduction reflects the agency's experience that average hourly reimbursed rates for this service have decreased.

In Activity 04, Part D: Analytical Costs, ten line item costs are changed and two are deleted. In addition, analytical descriptions are expanded to clarify the items. Costs shown in this section are identical to those listed in Appendix 1, Part 2: Laboratory Analysis Costs and reasoning for the changes is provided in the portion of this preamble applicable to Appendix A, Part 2.

In Activity 04, Part E: Travel Costs, the rate per mile for mileage is increased from $.31 to $.35, as mileage rate is the lower of either the applicable Internal Revenue Service rate per mile or the applicable OMGST rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 per mile. The per diem rate is raised from $80 per day to $90 per day to reflect increases in motel and meal rates.

The following changes are adopted for the Activity 04 Notes. In Note 1, the sentence, "Separate travel for a site visit can be pre-approved for the preliminary planning, receptor survey, or walking receptor survey" is added. This addition places into rule the agency's internal reimbursement policy for this task. In Note 3, the phrase "or as approved by an Agency Site Coordinator" is added to provide clarity; "TNRCC" is changed to "agency" to be consistent with the remainder of this chapter; and language requiring consultation with an Agency Site Coordinator prior to attempting to obtain site access from a state agency is added because frequently the agency coordinator can facilitate access to state property, saving time and effort. Note 5 deletes the phrase "may only be applied to subcontracted costs" because it is redundant in the RCSs and adds specific reference to Appendix A, Part 9 of the RCSs for further information with respect to markup. Note 6 adds the phrase "per Appendix A, Part 9" to provide a more specific reference. Note 9 is added to provide clarification that reimbursement for

a Plan B Risk Assessment will be based upon the number and type of pathways approved to be investigated. Note 10 specifies how the agency will reimburse permit fees charged by a municipality or government agency. Only one fee reimbursement per well installation is eligible, with no markup or periodic payments allowed.

ACTIVITY 05: RISK ASSESSMENT. The Plan B Risk Assessment Report Generation Costs title changes the reference from “Note 1" to “Note 2" to reflect a change in the applicability of Note 1. The number of hours for a Draftsperson II is increased from 10 to 11 and the total cost for that item is increased from $500 to $550 to address additional time necessary for this activity. The Plan B Risk Assessment Report Generation Costs total is increased by a commensurate $50 from a maximum of $5,715 to a maximum of $5,765. Note 1 changes the Workplan and Cost Proposal amount from $115 to $195 for the reasons discussed in this preamble in Section 1, Activities; adds the term “Plan A” for clarification; and deletes the second sentence, which refers to guidance manuals, as unnecessary. Note 2 is added to provide clarification by providing reference to Appendix A, Part 11 for an explanation of pricing with regard to the preparation of Plan B Assessment Reports dependent on number and type of pathways.

ACTIVITY 06: CORRECTIVE ACTION PLAN (CAP) FEASIBILITY TESTING. In Part A: Personnel Costs, Section 1: Slug and Bail Testing, the number of hours allotted to a Field Engineer/Geologist is increased from 10 hours to 15 hours and the total amount for that activity is thereby increased from $650 to $975. During a stakeholder’s meeting, it was suggested that the professional who actually performs the field work associated with CAP testing does not have enough

time to collate, check, and analyze the field data collected. The agency recognizes that the field data collected in this activity is vital, in that the results are directly utilized in optimizing the design of a remediation system. Therefore, it is reasonable to allow additional hours for data reduction and analysis. The amount applicable to the preparation of a PI-7 Standard Exemption Form is increased from $195 to $490 as recent revisions to the exemption form by the agency have increased the amount of time required to complete the form. The term "Workplan & Costs Proposal" is changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities.

In Activity 06, Part A: Personnel Costs, Section 2: Aquifer Pump Testing, the number of hours allotted to a Field Engineer/Geologist is increased from 10 hours to 20 hours and the total amount for that activity is thereby increased from $650 to $1,300. Reasoning is the same as that provided in Part A, Section 1 of this activity. The amount applicable to the preparation of a PI-7 Standard Exemption Form is increased from $195 to $490 as recent revisions to the exemption form by the agency have increased the amount of time required to complete the form. The term "Workplan & Cost Proposal" is changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities.

In Activity 06, Part A: Personnel Costs, Section 3: Soil Vapor Extraction Testing, the amount applicable to the preparation of a PI-7 Standard Exemption Form is increased from $195 to $490 as

recent revisions to the exemption form by the agency have increased the amount of time required to complete the form. The term "Workplan & Cost Proposal" is changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities.

In Activity 06, Part A: Personnel Costs, Section 4: Dual-Phase Extraction Testing, the number of hours allotted to a Field Engineer/Geologist is increased from 15 hours to 25 hours and the total amount for that activity is thereby increased from $975 to $1,625. Reasoning is the same as that provided in Part A, Section 1 of this activity. The amount applicable to the preparation of a PI-7 Standard Exemption Form is increased from $195 to $490 as recent revisions to the exemption form by the agency have increased the amount of time required to complete the form. The term "Workplan & Cost Proposal" is changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities.

In Activity 06, Part C: Waste Management Costs, the hourly rate for Vacuum Truck fluids transport for disposal is lowered from $75 per hour to $70 per hour. This reduction reflects the agency's experience that average hourly reimbursed rates for this service have decreased.

In Activity 06, Part D: Analytical Costs, four line item costs are changed and one (TPH (Air)) is added. In addition, analytical descriptions are expanded to clarify the line items. Costs shown in this section

are identical to those listed in Appendix 1, Part 2, Laboratory Costs, and applicable comments are provided in this preamble in Appendix 1, Part 2.

In Activity 06, Part E: Travel Costs, the rate per mile for mileage is increased from $.31 to $.35, as mileage rate is the lower of either the applicable Internal Revenue Service rate per mile or the applicable OMGST rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 per mile. The per diem rate is raised from $80 per day to $90 per day to reflect increases in motel and meal rates.

Activity 06, Notes, is amended as follows. Note 1 provides clarification by adding a sentence referencing Appendix A, Part 9 of the RCSs for direction on how markup for subcontracted work is to be applied. Note 5 also adds a reference to Appendix A, Part 9 of the RCSs to provide clarification.

ACTIVITY 07: GROUNDWATER MONITORING. In Activity 07, Part A: Personnel Costs, Section 1: Fixed Annual Costs, the number of hours for the activity "Management, Regulatory Interaction" by a PM is increased from 5 to 12, resulting in a change in the total amount for that activity from $400 to $960. Increases in the item “FAR - Annual Groundwater Monitoring Report” (from $440 to $580) and the item “FAR - Single Monitoring Event” (from $260 to $435) are also adopted and are fully discussed in this preamble in Appendix A, Part 8. The term "Workplan & Cost Proposal" is changed to "Workplan and Cost Proposal” to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities.

In Activity 07, Part A, Sections 2, 3, 4, and 5, a new line item is added to each of these sections. The addition is time for a Technician I to perform natural attenuation testing on a well at a rate of $40 per well. Performing natural attenuation testing has been approved in the past by the agency with reimbursement following an internal pricing schedule. This statement places in rule the agency's internal reimbursement policy for this task. Also, in Sections 2, 3, 4, and 5, in the line-item activity, "Purge and Sample Wells, Each Additional 25' (75' Max)" the parenthetical is deleted to remove that depth limit.

In Activity 07, Part B: Equipment Costs, a new line item for "Field Instruments - Natural Attenuation Testing" replaces the item "(Other)" and a Unit Cost for that item of $75 is added to reimburse the RCAS for specialized field equipment used to collect natural attenuation parameters in the field.

In Activity 07, Part C: Waste Management Costs, the hourly rate for Truck fluids transport for disposal is lowered from $75 per hour to $70 per hour. This reduction reflects the agency's experience that average hourly reimbursed rates for this service have decreased.

In Activity 07, Part D: Analytical Costs, three line item costs are changed and one is deleted. In addition, Analytical Test descriptions are expanded to clarify the line items. Costs shown in this section are identical to those listed in Appendix 1, Part 2, Laboratory Costs, and applicable comments are provided in this preamble in Appendix 1, Part 2.

In Activity 07, Part E: Travel Costs, the rate per mile for mileage is increased from $.31 to $.35, as mileage rate is the lower of either the applicable Internal Revenue Service rate per mile or the applicable OMGST rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 per mile. The per diem rate is raised from $80 per day to $90 per day to reflect increases in motel and meal rates.

Activity 07, Notes, is amended as follows. Notes 2 and 4 are amended by adding a reference to Appendix A, Part 9 of the RCSs for clarification. In Note 5 “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter. Note 6 is added to place in rule the agency’s internal reimbursement policy of reimbursing at half the field rate of $40 per well if a groundwater sample is not collected, but an attempt to enter the well was made. Note 7 is added to place in rule the agency’s internal reimbursement policy of allowing the submittal of a reimbursement application for work performed during the first six months. A partial review will be performed to ensure that work was performed. A comprehensive review will be performed at the time the reimbursement application is submitted for the full year’s work. Note 7 also states what technical information is necessary for evaluation of the six-month submittal.

ACTIVITY 08: CORRECTIVE ACTION PLAN (CAP) PREPARATION. In Activity 08, Part A: Corrective Action Plan - No Remediation System, the report generation cost total is increased by $375 from $1,150 to $1,525. This increase is due to adopted increases in allowed time (from 1 hour to 2 hours) for a Senior Engineer/Geologist and in allowed time (from 4 hours to 8 hours) for a Staff Engineer/Geologist (SF). Commensurate changes in total line item amounts are also adopted.

In Activity 08, Part B: Corrective Action Plan - With Remediation System, total report generation cost is increased by $1,485 from $6,660 to $8,145. This increase is due to increases in allotted hours, as follows: Associate Engineer (from 30 hours to 40 hours); Staff Engineer/Geologist (from 24 hours to 32 hours); and Draftsperson II (from 20 hours to 25 hours). Hours allotted to the Word Processor (WP) are decreased from 10 hours to 5 hours. Commensurate changes in total line item amounts are also adopted. These changes are adopted because oral and written comments from stakeholders indicated that current allowances for preparing a CAP were insufficient, and that the design of remediation systems is site dependent and typically requires many changes because of negotiations between the owner and the RCAS and between the agency and the RCAS. The agency recognizes that the preparation of a fully developed CAP is necessary for the proper and efficient operation of a remediation system. Additional hours to prepare the CAP are, therefore, adopted.

Activity 08: Part C: Travel Costs, is added as a new section. As was noted in stakeholder meetings, the agency concurs that if a registered engineer must design the system and seal the plans, that the engineer should visit the site to inspect it for special conditions that may influence the installation and operation of the system. The agency feels that reimbursing for the engineer's travel time will ultimately provide savings in construction costs and in operation of the system. Four line items are included in Part C, mileage rate of $.35 per mile, allowance of travel time of $70 per hour, a per diem rate of $90 per day, and air fare as needed. Discussion of the amounts for these line items is provided in this preamble in Activity 2, Part D, Travel Costs. A new line item is added to this activity that serves to total Parts A - C.

Activity 08, Notes. Note 1 reflects the change in the Workplan and Cost Proposal amount from $115 to $195, which is consistent throughout the RCSs as discussed in this preamble in Section 1, Activities. A new Note 4 is added to place in rule the agency's internal reimbursement policy of reimbursing for CAP preparation at 25% above the listed amount in Part B for sites that have special considerations. This amount could be approved for situations that are demonstrated by the RCAS as requiring an increased level of technical effort. Such situations will include off-site installation of recovery lines or wells or an engineering analysis of various disposal options. A maximum allowance for an approved CAP addendum ($305) is also addressed.

ACTIVITY 09: REMEDIATION SYSTEM INSTALLATION. In the second paragraph of the introduction, "TNRCC" is changed to "agency" to be consistent with the remainder of this chapter and the language "The agency requires specific descriptions of the items being quoted, including the item's exact type, model, warranty information, and verification that all quotes are at arm's length" is added to state specific requirements related to items being quoted. In the third paragraph, the word "should" is changed to "must" to appropriately reflect the requirement, and the language "The agency requires specific descriptions of the items being quoted, including the item's exact type, model, warranty information, and verification that all quotes are at arm's length" is added to state specific requirements related to items being quoted.

In Activity 09, Parts A1 - Section 1, A2 - Section 1, A3 - Section 1, and A4 - Section 1, the amount applicable to the preparation of a PI-7 Standard Exemption Form increases from $195 to $490 as recent revisions to the exemption form by the agency have increased the amount of time required to complete

the form. The term "Workplan/Costs Proposal" is changed, from proposal, in these sections to "Workplan and Cost Proposal/Workplan and Cost Proposal with Bidding" to be consistent with the remainder of the RCSs and to address situations where bidding is involved. The Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities. The Workplan and Cost Proposal with Bidding amount is $355.

In Activity 09, Part B: Capital Equipment Costs, the word "Catalytic" in the line item "Catalytic Oxidizer" is removed to avoid preclusion of other types of oxidizers. Also, the line item for "(Other)" is deleted and replaced with "Carbon Canister (state size)." It was stated in a stakeholder's meeting that larger size carbon canisters are being incorporated more and more in system designs. The agency feels that it is beneficial to include this item for clearer line itemization of equipment costs.

In Activity 09, Part C: Installation Costs, a dollar sign is added to the Unit Cost amount for Trenching and for Plumbing as a correction. The amount for the line item Remediation compound fence is removed and bidding is now required for fencing, as explained in Appendix A, Part 5 of this preamble. Also, two new line items, Outside Electrical Power Connection(s) and System Integration Costs, are added. Oral comments in stakeholders' meetings suggested a breakout of costs associated with providing power from a utility pole for a system to hook into. This line item will facilitate bidding and the review of reimbursement costs by listing it separately. Likewise, the addition of a System Integration Costs line item will capture the small costs associated with minor equipment adjustments or hooking the system to either an outside power source or to a discharge point. The agency agrees that

the addition of these two line items will facilitate documenting the installation of a system and the review of reimbursement claims.

In Activity 09, Part D: Waste Management Costs, the hourly rate for Vacuum Truck fluids transport for disposal is lowered from $75 per hour to $70 per hour. This reduction reflects the agency's experience that average hourly reimbursed rates for this service have decreased.

In Activity 09, Part E: System Performance Analytical Costs, four line item costs are changed and one line item, TPH (Air) (EPA 8015) Standard Rate/Rush, is added at a Unit Cost of $60/$90. In addition, Analytical descriptions are expanded to clarify the line items. Costs shown in this section are identical to those listed in Appendix A, Part 2, Laboratory Analysis Costs, and particular comments are provided in this preamble in Appendix A, Part 2, Laboratory Analysis Costs.

In Activity 09, Part F: Travel Costs, the first item, Equipment Truck, adds the parenthetical (Truck used by Technician II) to add specificity. A line item for vehicle mileage for a Staff Engineer is added because necessary travel for a site staff engineer may not coincide with necessary travel for a technician. The rate per mile for mileage is $.35, as mileage rate is the lower of either the applicable Internal Revenue Service rate per mile or the applicable OMGST rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 cents per mile. The per diem rate is increased from $80 to $90 per day to reflect increases in motel and meal rates. The original line item for Travel Time is amended and a new line item for Travel Time is added

to differentiate between travel by a staff engineer at $70 per hour and travel by a technician at $45 per hour.

Activity 09, Notes. In Note 2 the existing language is deleted and new language is added to more clearly show how costs for equipment should be tracked and which costs should have approval prior to purchase. The agency realizes that small items cannot be effectively tracked, while obtaining bids for higher priced equipment is financially sound. Three new groupings are presented. Equipment costs greater than $1,000 require a bid. Equipment costs between $100 and $1,000 must be itemized and supported by invoices. Equipment costs less than $100 will be included in the System Integration line item and not require invoices. A discussion of bidding containing specific requirements applicable to bids is also included. The agency reserves the right to refuse any and all bids believed not to be cost effective. A provision for allowing innovative technology without bidding is included. The agency believes that it should not inhibit the use of innovative technology and encourages its development if employing such equipment may significantly reduce the length of time for remediation.

Note 3 adds language that clarifies bid requirements. Three bids are required; however, in instances where it is demonstrated to the satisfaction of the agency that three bids cannot be reasonably obtained, fewer bids may be accepted. The agency reserves the right to refuse any and all bids believed not to be cost effective. The agency feels that this incorporates flexibility in the rules that benefits the PSTR Account. A reference to Appendix A, Part 9 of the RCSs is added to existing markup language, and language addressing unit costs per linear foot is added.

Note 5 adds language addressing bids for other chemical analyses not listed in the RCSs in order to provide flexibility. Three bids will be required and the agency reserves the right to refuse any and all bids believed not be cost effective. Reference to Note 3 is added, from proposal, with respect to bids. Reference is made that markup is applied only as stated in Appendix A, Part 9 of the RCSs.

Note 6 deletes text to clarify what the line items for travel time pertain to. Namely travel for an engineer and a technician are listed as separate line items instead of being combined as previously done.

ACTIVITY 10: OPERATION, MONITORING, & PERFORMANCE. In the opening paragraphs, the term "OM&P" is changed to "operation monitoring and performance (OMP)" to provide continuity in the RCSs.

In Activity 10, Part A: Personnel Costs, Section 1: Fixed Annual Office Costs, the line item “OMP Plan for Existing Systems - See Note 2" is replaced with “Revisions to OMP - See Notes 2 and 8 " for clarification. Because there should be no operating remediation systems without an OMP plan, this line item is changed so that amendments to an existing OMP plan can be made. Based upon the agency’s experience with reimbursing OMP plans, an increase in the line item amount for this activity is necessary, therefore, the line item amount is changed from $500 to $750. An increase in allowable PM hours from 12 hours to 21 hours is adopted with a commensurate increase in the total for that line item from $960 to $1,680. Oral and written communications from stakeholders indicated that the current allowance of one hour a month for a PM to review the status of an operating system is insufficient. The item “ OM&P Report” is changed to “OMP Report” and an increase in the Unit Cost and the total

for the OMP Report (from $1,295 to $1,925) is adopted for the reasoning given in this preamble in Appendix A, Part 8. A new line item and total is adopted for the preparation and submission of a cost proposal for continued OMP at $560. The routine maintenance of a system for one year requires considerable thought, especially when multi-phase units are remediating deep aquifers. The agency realizes that there is value in having a well-designed OMP plan. In addition, there are a variety of systems with OMP plans of varying complexity and the RCSs cannot address every situation. Therefore, the reimbursement amount is considered an average amount. The Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities. Also the word "Other" is added to the Workplan and Cost Proposal item to clarify the term.

In Activity 10, Part A: Personnel Costs, Section 2: Quarterly Monitoring Personnel Costs, Subsections 2A, 2B, 2C, and 2D, an increase from 1 hour a month to 2 hours a month for a staff engineer/geologist to coordinate quarterly sampling and evaluate the data is adopted with a commensurate increase in the total for that line item from $70 to $140. As was discussed in stakeholder's meetings, much emphasis is being placed on performance of system operation. Evaluation of groundwater monitoring is an important part of determining system performance and, hence, more time should be allotted to reviewing this data. The agency agrees with the necessity of an increase in review time.

In Activity 10, Part A: Personnel Costs Section 3: Operation and Monitoring Personnel Costs for the Remediation System Per Site Visit, the title of the section is amended by adding the phrase "and

Routine Weekly Maintenance" to better define the related activities. Time for a Technician III for the activity "O&M, 1st System, Up to 3 Wells" is increased from $75 to $100, since stakeholders expressed concern that not enough time is allotted for the technician to collected weekly samples, inspect the system, and preform minor maintenance when required. The agency agrees that a 33% increase in unit cost is reasonable. Also, the time allotted for a staff engineer for Field Prep, Data Formatting and for Field Prep, Data Formatting, Each Additional 3 System Wells is increased from 0.5 hours to 1 hour with a commensurate increase in the total amount from $35 to $70 for each activity.

Two new sections are added to Activity 10. They are "Section 4: Operation and Monitoring Mechanical/Electrical Personnel Costs for the Remediation System, Per Site Visit - Routine System Maintenance - See Note 10" and "Section 5: Operation and Monitoring Mechanical/Electrical Personnel Costs for the Remediation System, Per Site Visit - Emergency Service." Discussion during a stakeholders meeting centered on the need to have time allotted to a technician who is trained and specializes in electrical/mechanical maintenance. The stakeholders stated that their experience with maintaining systems was that the current allowance of once-a-week visits by an environmental technician is not sufficient to keep a system running properly. A system is composed of many checkpoints that are electrically connected to shutoff equipment. If any one of those checkpoints notes a failed condition, the entire system will shut down. This could occur any time between visits. The time reimbursed for a weekly visit by a technician does not cover those instances where infrequent trips are required for troubleshooting and repairing of the complex equipment. The agency places a great emphasis on operation time and performance of a system to ensure that CAP goals are met and removal of hydrocarbons is occurring on a continuous basis. Currently, full reimbursement for an OMP activity

is based upon whether or not a system has been operating for at least 85% of the time. The agency recognizes that time and money allowed for a trained technician to infrequently visit the site to repair a down system is good insurance for ensuring that a system remains operational for longer periods of time. The ultimate benefit will be that the cleanup goals will be more quickly achieved with remediation of the site ending quicker than anticipated, hence, a long-term savings in OMP costs could be realized.

Section 4 allows a trained Technician III (at an hourly rate of $50 per hour) to periodically visit the site to perform routine maintenance of the system. The RCAS will determine how many visits would be necessary for maintenance purposes only. Routine maintenance will include lubrication of components, validating flow rates, voltage checks of electrical equipment, and other measurements. A checklist is to be provided at the time of proposal and copies of all completed checklists to be submitted at the time for reimbursement requests. The agency does recognize that some systems may need to be "fine tuned" after initial startup to ensure sound long-term performance. This line item can be used for the purpose of having a trained technician present for a designated time interval to ensure that the system stays up and running. Spaces are provided for a subtotal for number of hours per trip, the number of trips, and a total cost for Section 4.

The agency realizes that there will be catastrophic events, whether natural (e.g., lightning strikes) or electromechanical failures that occur, causing the system to shut down. Section 5 provides for approval for a technician to visit the site during non-routine times to repair the system. Only the total number of

approved site visits actually performed will be reimbursed. Spaces are provided for a subtotal for number of hours per trip, the number of trips, and a total for Section 5.

In Activity 10, Part B: Equipment Costs, the unit cost for the item "Carbon Canisters, includes installation, recycling, and/or disposal" is removed to allow greater flexibility. Three additional items, "Fencing"; "Soundproofing"; and "Winterization" are added. Since fencing around a system is usually required and in some instances, soundproofing of equipment and the protection from freezing conditions, these line items are added. Since the quantities and types of these items are variable, the agency believes that acquiring bids for the purchase of materials and installation will be best to be protective of the Account. The monthly amount allowed for the item "Small Items for System Maintenance" is increased from $50 per month to $200 per month and a commensurate total annual amount of $2,400 placed in the total column for that activity. In oral and written comments, stakeholders noted that replacement of sensors, repair or replacement of flow meters or other equipment, and material for repairs of leaks come out of this monthly stipend. The agency feels that the reimbursement of small items should be more equitable and expects to see operations times of systems dramatically improve because of this allowance.

In Activity 10, Part C: Analytical Costs, the reference to Note 3 in the title is changed to Note 5 as a correction. In Activity 10, Part C: Analytical Costs, Section 1: Groundwater Testing, three line item costs are changed and Analytical Test descriptions are expanded to clarify the line items. Costs shown in this section are identical to those listed in Appendix A, Part 2, Laboratory Analysis Costs, and particular comments are provided in this preamble in Appendix A, Part 2.

In Activity 10, Part C: Analytical Costs, Section 2: System Performance Analytical Testing, two line item costs are changed, one is deleted, and two air analyses line items are added. In addition, analytical descriptions are expanded to clarify the line items. Costs shown in this section are identical to those listed in Appendix A, Part 2, Laboratory Analysis Costs, and particular comments are provided in this preamble in Appendix A, Part 2.

In Activity 10, Part D: Waste Management Costs, the reference in the section title is changed from "Note 5" to "Note 6" as a correction. Also, the hourly rate for Vacuum Truck fluids transport for disposal is lowered from $75 per hour to $70 per hour. This reduction reflects the agency's experience that average hourly reimbursed rates for this service have decreased.

In Activity 10, Part E: Travel Costs, the reference in the section title is changed from "Note 6" to "Note 7" as a correction. The parenthetical (Truck used by Technician III) is added to the Equipment Truck line item for clarification as to how to apply this line item in a proposal. The rate per mile for mileage is increased to $.35, as mileage rate is the lower of either the applicable Internal Revenue Service rate per mile or the applicable OMGST rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 per mile. Two new line items are added. Stakeholders had brought up the issue that there are instances where either a malfunction of the system occurs or operational characteristics of the system are below expectations, requiring the services of an engineer. The agency agrees that these situations do arise from time to time and to ensure proper operation of the system, an allowance for an engineer to travel to the site should be allowed. The line item "Car mileage (Transportation to site by Staff Engineer can charge mileage

only, no vehicle charge)" at $.35/mile is added. Also, since time for a trained technician to visit the site is added, a line item for “Travel Time - Technician III - electrical/mechanical” is added at $50 per hour. It is expected that if the technician is subcontracted and the subcontracted amount includes travel and vehicle, a separate vehicle charge for the technician will not be reimbursed. The phrase “Technician III - environmental” is added for clarity in preparing the proposal as the agency recognizes that the environmental technician conducts the routine weekly visits, while the electrical/mechanical technician visits the site irregularly. The per diem rate is increased from $80 to $90 per day to reflect increases in motel and meal rates.

ACTIVITY 10: Notes. In Note 1, language is added stating that additional hours may be approved on a case-by-case basis for project management.

In Note 2, “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter.

In Note 5, the phrase “ per Appendix A, Part 9” is added as a reference.

In Note 7, “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter and additional language is added to address separate vehicle charges for subcontracted technicians.

A new Note 8 is added to provide clarification with regard to the approval of revisions to OMP plans as those revisions must be approved by the agency.

A new Note 9 is added to provide clarification as to when reimbursement claims can be submitted and what information needs to be provided with regard to sites that have been approved for an OMP activity.

A new Note 10 is added to provide the requirement for the submission of a checklist in the Workplan and Cost proposal for routine system maintenance performed in accordance with Part A, Section 4 of this activity.

ACTIVITY 11: SITE CLOSURE. In the sentence below the activity title, "TNRCC" is changed to "agency" to be consistent with the remainder of this chapter.

In Activity 11, Part A: Personnel Costs, Section 1: Office Costs, the unit cost and total for the preparation and submission of a Site Closure Request are increased from $275 to $550 for reasons addressed in this preamble in Appendix A, Part 8. An increase in the PM's hours from 2 hours to 4 hours is adopted, as during stakeholders meetings, it was noted that 2 hours did not cover the time for organizing the project and coordinating with staff, the owner or operator, and the driller or contractor to remove remediation systems. If site access or coordination problems arise, the PM can spend several times that amount of time. The agency agrees that an increase of 2 additional hours is reasonable and these changes are also reflected in the total for this line item, which is changed from $160 to $320. An increase in the unit cost and total for the preparation and submission of a Final Closure Report (from $195 to $230) is addressed in this preamble in Appendix A, Part 8. The term "Workplan/Costs Proposal" is changed, from proposal, in these sections to "Workplan and Cost Proposal/Workplan and

Cost Proposal with Bidding" to be consistent with the remainder of the RCSs and to address situations where bidding is involved. The Workplan and Cost Proposal amount is changed in this section and throughout the RCSs from $115 to $195 as discussed in this preamble in Section 1, Activities. The Workplan and Cost with Bidding amount is $355. All individual totals are increased commensurate with the previous individual increases and the overall total is changed from $745 to $1,295.

In Activity 11, Part A: Personnel Costs, Section 2: Field Personnel Costs, stakeholders had noted that the line item costs allowed to remove a remediation system are underestimated, especially if large equipment (such as a thermal oxidizer) is to be removed. Stakeholders suggested that system removal be subdivided into two line items, small and large. The agency agrees that the distinction for removing a large or small unit should be added. To incorporate this, the line item "Remediation System Removal" is amended: to add a reference to Note 5, which helps clarify the use of bids for system removal; to amend the activity description to specify "small" systems "with few" capital components; and to increase the unit cost for that activity by 50% from $500 to $750 to compensate an RCAS for the removal of more complex small systems. A new line item for reimbursing the costs of removing large systems, "Remediation System Removal (See Notes 2 & 5)," is added with the activity descriptor "Remove and dispose of large system with large capital components." Since the agency recognizes that reimbursing a fixed amount would be too restrictive given the variety of systems present in locales across the state, it believes that it will be best to have bids for the removal services.

In Activity 11, Part B: Rig Costs, the title replaces the term "Rig Costs" with the term "Well Plugging and Abandonment Costs." The unit cost and total for the item "Mobilization (less than 50 miles)" is

increased from $245 to $300. The agency notes that the average mob-demob rate for a drilling crew has increased since the last revisions to the reimbursement guidelines. Per diem for a drilling crew is increased from $190 per day to $240 per day to more accurately reflect actual per diem costs for a three-man drill crew.

In Activity 11, Part D: Travel Costs, the rate per mile for mileage is $.35, as mileage rate is the lower of either the applicable Internal Revenue Service rate per mile or the applicable OMGST rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 per mile. The average per diem rate is raised from $80 per day to $90 per day to reflect increases in motel and meal rates.

Activity 11, Notes. Note 2 adds a new sentence, which explains that all capital remediation equipment purchased with agency reimbursement funds is owned by the owner/operator of the LPST site. This statement places in rule the agency's internal policy regarding capital equipment ownership.

Note 3 deletes the phrase "for subcontracted costs only" as it is redundant in the RCSs; adds specific reference to Appendix A, Part 9 of the RCSs for further information with respect to markup; and adds a sentence that further limits reimbursement for plugging and abandoning of wells. The agency believes that fewer costs are encountered by a drilling company if a well casing is not removed. Therefore, if the well casing is not drilled out or otherwise removed, only $150 will be reimbursed for that well.

A new Note 5 is added. This note defines what a large remediation system is composed of; that two or more bids are required to dismantle and remove the system; and that the agency may reject any proposal on technical grounds or believed not to be cost effective. The two-bid requirement is imposed because in remote locations where contractors may not be readily available for equipment removal, imposing a three-bid requirement could unnecessarily increase dismantling and removal costs.

Appendix A, Reimbursable Unit Costs, Part 1, is amended, from proposal, to remove the word "Maximum" in the heading "Maximum Rate/Hour." Part 1, Notes, is amended as follows. Note 3 is amended by adding a new sentence that clarifies how the agency will reimburse for labor rates when a person who bills at a higher rate (e.g., a Geologist) performs a task for another person who bills at a lower rate (e.g., a Technician II).

Note 4 is amended to include a reference to Appendix A, Part 9 for further direction concerning markup, and to remove redundant language from the note.

Note 5 is added to ensure that owners/operators who are responsible for a petroleum release and who also perform the cleanup of any contamination do not profit as a result of that release and are not fully reimbursed for cleanup activities funded internally. If an owner/operator uses in-house labor to perform the corrective action activities, then those costs will only be partially reimbursed. Since the agency feels that it will be too cumbersome to adjust all the applicable line item amounts that could possibly be requested for reimbursement by an owner/operator claimant, the agency has decided it will

be more prudent to limit the reimbursable amount to labor line items. A flat rate of 85% of the requested amount for labor performed by an owner's/operator's staff is felt to be appropriate.

Appendix A, Part 2: Laboratory Analysis Costs. In general, changes in this part reflect the results of the agency's analysis of current costs with respect to analytical testing of samples related to LPST sites. Where noted, analytical rates have been adjusted downward. The new rates were obtained from averages of prices submitted by private laboratories, from invoices submitted to the agency through reimbursement applications, and from prices submitted by contractors in the State Lead LPST Program. Also, the most recent version of applicable United States Environmental Protection Agency (EPA) analytical methodology is referenced.

Adopted changes to testing for TPH. Since 1998, the agency has required that all testing of water and soil for TPH be performed using Method TX1005. Previously, the agency reimbursed analytical costs for TPH analysis only if EPA Method 418.1 was used. Reimbursement for Method 418.1 analysis is left in because the agency believes it will continue to receive claims for reimbursement for the old analytical method because analysis performed prior to the date Method TX1005 was required. Four new lines are added that place in rule the agency's internal reimbursement policy of reimbursing for costs associated with TPH analysis. These additions are "TPH-TX 1005" for "Soil"; "Water"; and "TPH Air (8015)." Listed prices for these were obtained as described in the previous paragraph.

Adopted changes to testing for BTEX - EPA 8021B. Reimbursable prices are lowered for reasons previously described.

Adopted changes to testing for BTEX w MTBE-EPA 8021B. Reimbursable prices are lowered for reasons previously described.

Adopted changes to testing for PAH - EPA 8270. The analytical method 8270C replaces the outdated analytical method 8270 and reimbursable prices are lowered for reasons previously described.

Adopted changes to testing for Soil Parameters. The reimbursable price is raised for reasons previously described.

Adopted changes to testing for Volatile Organic Compounds - VOCs - EPA 8260B. The standard rate reimbursable prices are adjusted downward for reasons previously described.

Adopted changes to testing for Semi-VOCs - EPA 8270. The analytical method 8270C replaces the outdated analytical method 8270 and the standard rate reimbursable prices are adjusted downward for reasons previously described.

Adopted changes to testing for TCLP Benzene - EPA 1311 w 8020. The analytical method “8021B” replaces the outdated EPA method 8020.

Adopted changes to testing for Reactivity, Corrosivity, Ignitability (RCI) on soil. The standard rate reimbursable price is raised for reasons previously described.

The phrase “(See Note 5)" is added to the line item for "Mobile Laboratory" to provide clarification.

Appendix A, Part 2, Notes, is amended as follows. In Note 4, a minimum reimbursable amount for shipping is allowed. This amount is set at $40.

In Note 5, “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter.

Note 6 is amended by deleting analytical method specific language and replacing it with language that indicates that the agency acknowledges that analytical methods will change in the future. Instead of going through the rule change process to update the analytical tables, it is more prudent and cost effective for the agency to notify an RCAS through written correspondence when new analytical procedures are adopted.

Appendix A, Part 3: Drilling, Well Installation, and Direct Push Technology Costs. The term “Water Well Report generation costs” replaces the term “Water Well Report Generation” in the opening paragraph for clarification purposes.

In Appendix A, Part 3, Section A: Conventional Drilling, in each of the first three separate blocks of Section A: the Depth Interval “51' to 100'” is replaced with “>50'” and a reference to Note 6 is added, and the Depth Interval “>100'” is deleted along with the accompanying footage rates. The agency, in reviewing amounts reimbursed for drilling boreholes and installing monitor wells, noted that the current reimbursable guidelines for drilling costs do not reflect market rates for such services. It

was further noted that the current guidelines are representative of market rates for shallow wells (wells installed less than 25 feet deep) and for low number of wells installed (three or less). However, as the depth of the well increases and the number of wells installed during one session increases, the current guideline rates are skewed higher than a competitive market rate for the same work. Various pricing scenarios to alleviate this situation were reviewed, including a more detailed breakout on pricing, bidding, or no change to the pricing schedule. Producing a more detailed pricing list with lower rates was felt to be too cumbersome to manage, too time consuming with regard to analyzing the market, and would, in the end, remain too rigid to address the variety of drilling conditions faced across the state. A modified bidding process was decided upon. The agency believes that strict bidding for all drilling will not be cost effective to administer and will impose an undue burden on the RCAS to obtain bids for every well or boring installed. The agency also acknowledges that the greatest cost discrepancy exists for the deeper wells and wells drilled in hard rock. These sites are principally located in central and west Texas. Therefore, a system was devised that will require bidding that will focus on these types of wells while paying up to an RCS amount for the shallower wells drilled in the eastern, central, or southern portions of the state. The agency has decided that a workable arrangement will be to pay up to RCSs amounts for any drilling project that had 150 feet or less of the drilling footage, regardless of the number of borings or wells installed. In addition, if a well or boring is drilled to a depth of 50 feet or less, reimbursement will be eligible up to RCSs amounts. For drilling projects that exceed this, bidding will be required.

In the Appendix A, Part 3, Section A block entitled “Completion Footage Rates Expected in a Standard (10-Hour) Work Day,” the parenthetical (10-Hour) is deleted to prevent the specification of the length of a work day.

In the Appendix A, Part 3, Section A block entitled “Mobilization/Demobilization and Per Diem,” mobilization for a driller, crew, and equipment to a site is increased from $245 to $300. The phrase “450 additional miles” is deleted and replaced with “500 miles round trip” to clarify and place in rule the agency’s internal reimbursement policy of reimbursing for mob/demob costs only for travel to and from sites that are located 250 miles or less from the RCAS’s home office. The agency notes that the average mob-demob rate for a drilling crew has increased since the last revisions to the reimbursement guidelines. Per diem for the drilling crew is increased from $190 per day to $240 per day to more accurately reflect actual per diem costs for a three-man drill crew.

In the Appendix A, Part 3, Section B block entitled "Mobilization/Demobilization and Per Diem," the phrase “450 additional miles” is deleted and replaced with “500 miles round trip” to clarify and place in rule the agency’s internal reimbursement policy of reimbursing for mob/demob costs only for travel to and from sites that are located 250 miles or less from the RCAS’s home office. The agency notes that the average mob-demob rate for a drilling crew has increased since the last revisions to the reimbursement guidelines. Per diem for the drilling crew is increased from $130 per day to $180 per day to more accurately reflect actual per diem costs for a two-man drill crew.

Appendix A, Part 3, Notes, is amended as follows. In Note 1, "TNRCC" is changed to "agency" to be consistent with the remainder of this chapter. To ensure that bids received are reasonable, language is added to Note 1 that specifies the number of bids required and states that the agency has the right to reject any proposal on technical grounds, or if it is believed not to be cost effective. The sentence "Submitted costs will be reviewed on a case-by-case basis." is deleted as redundant.

In Note 4, "TNRCC" is changed to "agency" to be consistent with the remainder of this chapter.

A new Note 5 is added to explain that when certain ceilings are reached, bidding of drilling projects will be required as explained in this preamble in Appendix A, Part 3. The note further states that the bids must be independent, specifies the minimum number of bids, and states that the agency may reject any proposal on technical grounds, or if the proposal is believed not to be cost effective. This note is added to allow the agency to be protective of the PSTR Account if it believes that the bids are not representative of similar work performed in the area or are too expensive to be cost effective.

A new Note 6 is added to specify and clarify when stated rates apply to wells greater than 50 feet in depth.

A new Note 7, Defining Drilling Equipment Categories, is added to specify and clarify the applicable reimbursement rate to a specific type of drill rig. It is recognized that lighter, more versatile drill rigs have entered the market designed to drill soil borings and install shallow monitor wells in locales that a larger drill rig cannot access. Correspondingly, these smaller, more specialized drill rigs have

decreased capacities to drill deep borings in a variety of soil conditions and obtain continuous samples as directed in agency guidance for soil sampling at LPST sites. The capitalization and operating costs for these pieces of equipment are lower. A lower drilling rate is adopted for these lighter drilling rigs to more closely align the drilling rates allowed in the RCSs with the market rates.

Also in Note 7 are definitions for three categories of drilling equipment. The first is TYPE I Rigs defined as a typical large truck-mounted drilling rig of sufficient capability to drill a ten-inch diameter borehole to 50 feet or deeper using a hollow-stem auger. Additional capabilities and the necessity of a three-man crew also differentiate this type of drilling equipment. The second type is termed TYPE II Rigs that are smaller, typically trailer-mounted, capable of turning solid flight augers, but not having the capability of obtaining blow counts. Typically, these trailer-mounted rigs are pulled by a truck and have a two-man crew. The third type, TYPE III Rigs, are usually mounted on a truck, such as a 3/4 ton flat bed truck and are only capable of direct push drilling.

A reimbursement rate for TYPE I Rigs is the standard RCS rate for well and boring installation for augering and rotary drilling. TYPE II Rigs drilling rates will be reimbursed up to 65% of the standard RCS rate. The standard RCS mobilization and demobilization rates will apply. Any additional amount requested must be justified. TYPE III Rigs will be reimbursed at the published RCS rate for a direct push drill rig.

Appendix A, Part 4: Travel Costs is amended. In the section entitled "Travel by Air vs. Travel by Surface Vehicle," in the first paragraph, the term “TNRCC” is changed to “agency” to be consistent

with the remainder of this chapter. Wording in Paragraph 2 is modified to clarify that an RCAS should try to limit travel expenses by combining corrective activities conducted at several sites into one trip, when possible. A second change in this paragraph is to update the reference date and amount that the mileage reimbursement rate is tied to. A new Paragraph 3 is added that clarifies how the agency will reimburse for labor rates when a person who bills at a higher rate (e.g., a Geologist) performs a task for another person who bills at a lower rate (e.g., a Technician II). The agency realizes that an RCAS can achieve cost savings by shifting personnel to perform multiple tasks at multiple sites and encourages this, if it is protective of the fund.

In the section entitled “Per Diem and Non-reimbursable Costs,” changes in the first paragraph include raising per diem rates from $80 per day to $90 per day as discussed in the preamble in Activity 2, Part D, Travel Costs. Also, per diem for two- and three-man drilling crews is increased to more accurately reflect current per diem costs for these crews.

In Appendix A, Part 5: Equipment and Supply Costs, the phrase "plus mark-up” is deleted in the first paragraph because it is redundant. Further, the agency requested from many suppliers current pricing concerning equipment and supply costs. Although a limited response was received, sufficient information was obtained to allow proposed modifications to this part. Where current prices could be obtained, the agency has modified up or down the respective line item price. In some areas, prices were supplied that were previously unavailable. One new line item, Fencing and Enclosures, is adopted to reflect the addition of this item in the Remediation Installation Activity. Specifically, "Fencing and Enclosures" replaces "Fences" with an added reference to a new Note 8 that will require bidding.

Since bidding is required for fencing and enclosures, the line item amounts for “Compound Fence (Wood/Chain)” and “Chain Link, $/Foot” are removed. In special situations, winterizing and soundproofing of remediation is necessary and are added in this section for completeness. Bidding is adopted for costing these two line items. A new line item, Water Treatment Trailer, with a reference to a new Note 10 and a pricing of $75 per day addresses the common use of this equipment. A reference to a new Note 9 is added to the line item “Traffic Control Components.”

Appendix A, Part 5, Notes, is amended as follows. In Note 1, the word "quote" is replaced with the word "bid"; specific requirements related to bids are included; language addressing the use of innovative remedial technologies is added; language stating that the agency may require methods of identification such as serial numbers for capital equipment items in order to track the purchase, use, and condition of these items is added; and language stating that the agency may restrict reimbursable amounts for capital equipment items to prorated amounts that consider usage is added. Also, “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter.

A new Note 7 is added to allow an RCAS to be reimbursed for extra rental days because of shipping-related delays. The agency recognizes that there are many sites statewide that are distant from equipment rental businesses, or that equipment must occasionally be rented from out-of-state businesses and that additional shipping or rental charges are accrued because of the distance to these sites. So to not penalize these sites for requiring specialized equipment, the allowance for shipping charges and extra rental days are allowed.

A new Note 8 is added to provide detailed conditions for bidding and acceptance of bids with regard to fencing.

A new Note 9 is added to provide a minimum amount to be reimbursed for rental of traffic control components. The agency recognizes that companies charge minimum rental rates for traffic control equipment and minimum daily, weekly, and monthly rates are added.

A new Note 10 is added to provide details as to the use and components of a water treatment trailer. The agency believes that with the use of this equipment, a savings on the disposal of contaminated water at LPST sites can be seen. The treatment trailer is designed to treat and discharge, on-site, small amounts of water collected during short-term field testing and groundwater monitoring events.

Appendix A, Part 6: Excavation, Backfilling, and Resurfacing Costs. In Note 1, the phrase “A TCEQ coordinator” is replaced with the phrase "An agency Site Coordinator" to provide consistency in terminology in the RCSs.

Appendix A, Part 7: Soils and Wastewater Management Costs. The hourly rate for the Truck under the activity "Load Haul, & Dispose" is lowered from $75 per hour to $70 per hour. This reduction reflects the agency’s experience that average hourly reimbursed rates for this service have decreased.

Appendix A, Part 7, Notes, is amended as follows. In Note 1, nearly all the existing language is deleted and replaced with a reference to Appendix A, Part 9 for an allowable markup to provide simplification.

In Note 2, "TNRCC" is changed to "agency" to be consistent with the remainder of this chapter.

A new Note 3 is added to address an issue, which stakeholders had noted, that at times there are no reasonably close waste disposal sites to a generating site and additional costs must be incurred to dispose of waste at more distant sites. The agency believes that in these cases an ability to receive bids for waste disposal is warranted and protective of the PSTR Account and a minimum number of bids is specified. There is adopted language that provides for reimbursement up to $75 per day for the rental of a water treatment trailer consisting of a pump, holding tank, and drums of granulated activated carbon and $.40 per gallon for the treatment of wastewater by the water treatment trailer. Adopted is a flat rate of $250 to dispose of clean soils on- or off-site, derived from on-site corrective action activities.

Existing Note 3 is renumbered as Note 4 to reflect the insertion of the adopted new Note 3 and "TNRCC" is changed to "agency" to be consistent with the remainder of this chapter. The following additional language is added, from proposal, to provide allowances for the cost of preparation of Class V injection well permits and Texas Pollutant Discharge Elimination System (TPDES) storm water discharge permits: "The cost of Class V injection well permits and the cost of TPDES storm water discharge permits associated with on-site treatment and discharge will also be considered for payment."

A new Note 5 is added to clarify issues with regard to wastewater hauling and disposal. The agency acknowledges that many RCAS have scheduled a wastewater hauler to pick up wastewater, in sequence from multiple sites in one run. In doing so, cost savings are incurred. The agency believes that these cost savings should be realized by the PSTR Account and that an RCAS can prorate costs to multiple sites, thus recouping its costs.

Existing Note 4 is renumbered as Note 6 to reflect the insertion of the adopted new Notes 3 and 5. The second sentence stating what the agency will pay for landfill disposal is removed, as this language is made unnecessary by new Note 3, and a reference to Notes 1 and 3 is added.

Appendix A, Part 8: Report Generation Costs. An increase in the amount allowed for preparation of most reports listed in this part is adopted. During and after the stakeholder meetings, oral and written comments were received stating that time allotted for an RCAS to research, collate, and analyze field data and prepare it in a format acceptable to the agency for the 11 listed activities was insufficient to properly prepare a well thought out and comprehensive document with supporting information. The task remains more challenging given that the sites remaining in the program are older sites having reams of information that must be reviewed in context of newly collected data. The agency has eased the task of preparing and submitting field data by having pertinent information submitted on provided forms. For some tasks, such as site closure, the form has simplified the report writing process. However, the agency acknowledges that these forms are not stand-alone documents and require additional information to be attached such as tables, graphs, maps, and written commentary. In light of this, the agency acknowledges that an increase in hours allowed for report preparation will translate into

reports with clearer data presentation and more concise conclusions and recommendations that will allow agency coordinators less time for review.

RELEASE DETERMINATION REPORT. The hours for a PM are increased from 2 hours to 4 hours. Additional information is required to be added to the report warranting an increase in the time for the PM to analyze the data. Correspondingly, more time is allotted for the WP to finalize reports and prepare files and the hours for a WP are increased from 1 hour to 2 hours. These increases result in changes in total amounts, as follows: the PM total increases from $160 to $320; the WP total increases from $35 to $70; and the Total for the report increases from $195 to $390.

FIELD ACTIVITY REPORT (FAR) - SEMI-ANNUAL PSH RECOVERY, PSH RECOVERY SYSTEM O&M. The title is amended to “Field Activity Report (FAR) - Groundwater Monitoring - One-time Event" to provide clarification. The hours for an SF are increased from 2 hours to 4 hours with a commensurate increase in the total amount for the SF from $140 to $280. The hours for a WP are increased from 1 hour to 2 hours with a commensurate increase in the total amount for the WP from $35 to $70. The Total for the report is increased from $260 to $435. The agency recognizes that the sites remaining in the reimbursement program are older with a large history of data accumulation that must be interpreted with respect to new information developed. Presentation of this data in tables, graphs, and maps must be updated. The agency believes that more hours are required to adequately process this information.

PSH REPORT/MDPE REPORTS (PER EVENT) FOR 8-HOUR OR 24-HOUR EVENTS. These are new reports that cover three types of events: the PSH report prepared at the end of each PSH recovery phase and reports prepared at the end of an 8-hour or 24-hour MDPE event. The PSH report documents all field activities and amounts of free product recovered associated with passive and active free product recovery systems. The MDPE reports document the MDPE activities and amounts of free product recovered. The hours for an Associate Engineer (P1) are 1 hour for each event with a commensurate total amount for the P1 of $85 for each event. The hours for an SF are 2 hours for the 8-hour event and 3 hours for the 24-hour event with a commensurate total amount for the SF of $140 and $210. The hours for a WP are 1 hour for each event with a commensurate total amount for the WP of $35 for each event. The total for the report is $260 for the 8-hour event and $330 for the 24-hour event.

MDPE REPORTS (PER EVENT) FOR 72-HOUR OR 7-DAY EVENTS. These are new reports that are prepared at the end of the 72-hour and 7-day MDPE events. The MDPE reports document the MDPE activities and amounts of free product recovered. The hours for a PM are 1 hour for the 72-hour and 7-day events with a commensurate total amount for the PM of $80 for both events. The hours for an SF are 4 hours for a 72-hour event and 6 hours for a 7-day event with a commensurate total amount for the SF of $280 and $420, respectively. The hours for a WP are 1 hour for the 72-hour and 7-day events with a commensurate total amount for the WP of $35 for both events. The total for the report is $395 for a 72-hour event and $535 for a 7-day event.

INTERIM CORRECTIVE ACTION PLAN (ICAP). The title is changed to include the phrase "/Mobile Dual Phase Extraction Corrective Action Plan (MDPE CAP)" to reflect additions made in Activity 02, Part A of the RCSs. No changes to the ICAP portion are made. For the added Mobile Dual Phase Extraction Corrective Action Plan (MDPE CAP) portion, the following amounts are added. The hours for a Principal Engineer (P3) are 1 hour with a commensurate total amount for the P3 of $110. The hours for a P1 are 2 hours with a commensurate total amount for the P1 of $170. The hours for a PM are 6 hours with a commensurate total amount for the PM of $480. The hours for an SF are 20 hours with a commensurate total amount for the SF of $1,400. The hours for a Draftsperson II (D2) are 12 hours with a commensurate total amount for the D2 of $600. The hours for a WP are 3 hours with a commensurate total amount for the WP of $105. The total additional proposed MDPE CAP amount for the report is $2,865.

FAR - PSH RECOVERY SYSTEM INSTALLATION. The "Rate/HR" and "Hours" values in this table are switched as a correction to the table.

RISK ASSESSMENT UPDATE OR FAR-SITE ASSESSMENT. A reference to Note 1 is added. Hours for an SF are increased from 4 hours to 8 hours, with a commensurate increase in the total for an SF from $280 to $560. The increase in the overall total for the report is from $485 to $765. The agency believes that if an update is required, more time is required to produce the assessment because the sites remaining in the reimbursement program are older with a larger amount of historic data that must be interpreted with respect to new information developed.

REPORT GENERATION - MISCELLANEOUS. This is added with a reference to Note 3 and an amount of $485, to address situations where reports are specifically requested by an agency Site Coordinator when the Coordinator determines that the subject of the report does not easily fit into other line items within the RCSs.

ANNUAL REPORT - GROUNDWATER MONITORING ONLY. Hours for an SF are increased from 4 hours to 6 hours, with a commensurate increase in the total for an SF from $280 to $420. The increase in the overall total for the report is from $440 to $580. The agency believes that more time is required to produce the assessment because the sites remaining in the reimbursement program are older with a larger amount of historic data that must be interpreted with respect to new information developed.

ANNUAL REPORT - OPERATION, MONITORING, AND PERFORMANCE. Hours for an SF are increased from 6 hours to 14 hours, with a commensurate increase in the total for an SF from $420 to $980. Hours for a WP are increased from 3 hours to 5 hours, with a commensurate increase in the total for a WP from $105 to $175. The increase in the overall total for the report is from $1,295 to $1,925. The agency believes that more time is required to produce the assessment because the sites remaining in the reimbursement program are older with a larger amount of historic data that must be interpreted with respect to new information developed.

SITE CLOSURE REQUEST. Hours for a PM are increased from 3 hours to 6 hours with a commensurate increase in the total for a PM from $240 to $480. Hours for a WP are increased from 1

hour to 2 hours, with a commensurate increase in the total for a WP from $35 to $70. The increase in the overall total for the report is from $275 to $550. The agency believes that more time is required to produce the assessment because the sites remaining in the reimbursement program are older with a larger amount of historic data that must be interpreted with respect to new information developed.

FINAL SITE CLOSURE REPORT. Hours for a WP are increased from 1 hour to 2 hours, with a commensurate increase in the total for a WP from $35 to $70. The increase in the overall total for the report is from $195 to $230. The agency believes that more time is required to produce the assessment because the sites remaining in the reimbursement program are older with a larger amount of historic data that must be interpreted with respect to new information developed.

Appendix A, Part 8, Notes, is amended as follows. Note 1 is amended to remove the hourly rate for a PM "($80.00)" as a correction and to add a reference to Activity 03 for costs applicable to FAR Preparation and Submission.

A new Note 2 is added to ensure that owners/operators who are responsible for a petroleum release and who also perform the cleanup of any contamination do not profit as a result of that release and are not fully reimbursed for cleanup activities funded internally. If an owner/operator uses in-house labor to perform the corrective action activities, then those costs will only be partially reimbursed. Since the agency feels that it will be too cumbersome to adjust all the applicable line item amounts that could possibly be requested for reimbursement by an owner/operator claimant, the agency has decided that it

will be more prudent to limit the reimbursable amount to labor line items. A flat rate of 85% of the requested amount for labor performed by an owner's/operator's staff is felt to be appropriate.

A new Note 3 is added with respect to Report Generation - Miscellaneous, to include the cost of preparation of Recovery Well Installation FARs and to address situations where reports are specifically requested by an agency Site Coordinator when the Coordinator determines that the subject of the report does not easily fit into other line items within the RCSs.

Appendix A, Part 9: Markup changes the item "All Other Subcontractor Invoices" to "All Other Allowable Subcontractor Costs" for clarification.

Appendix A, Part 9, Notes, is amended as follows. Note 1 is amended to delete redundant language and to add new language to clarify who is and is not allowed to add markup and what can be marked up.

Note 2 is amended to clarify that though a Prime may not mark up in-house costs, there are in-house costs incurred by a Prime to which the Prime is entitled. The agency realizes that the RCSs inherently contain profit as they are representative of market rates for such services. The agency realizes that the RCSs were not constructed to anticipate all instances where a Prime may ask to be reimbursed for an in-house service. The agency believes that those instances do not occur frequently enough to warrant that the agency expend the time and effort to review them.

Appendix A, Part 10: Change Orders. In the second paragraph under Field Activity Change Orders, and in the first paragraph under General Change Orders, “TNRCC” is changed to “agency” to be consistent with the remainder of this chapter.

Appendix A, Part 11: Allowable Reimbursable Costs for the Risk Evaluation of Individual Exposure Pathways, is a new part that is added. The addition of this part places in rule, the agency’s internal reimbursement policy of defining the reimbursable costs associated with preparing a Plan B Risk Assessment report.

APPENDIX B, DEFINITIONS AND ACRONYMS is amended as follows. Part 1: Definitions, is amended by deleting and adding language to clarify the definition of "Free Product."

Part 2: Acronyms, adds the term “Mobile Dual Phase Extraction (MDPE)” since this methodology is added to the RCSs; replaces the term “Reimbursable Cost Guidelines (RCG)” with the term “Reimbursable Cost Specifications (RCSs)”; adds the term "Site Specific Target Level (SSTL)” because the term is used in Appendix A, new Part 11; and changes “Texas Natural Resource Conservation Commission (TNRCC)” to “Texas Commission on Environmental Quality (TCEQ).”

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, 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 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 requirements listed in §2001.0225(a).

The vast majority of these rule amendments concern an attempt by the agency to handle PSTR reimbursement claims in a way that makes best use of limited agency resources given statutory processing deadlines and the sunset date of the PSTR Account (revised during the last legislative session). The agency is charged under TWC, §26.3573(h) with being a good steward of the PSTR Account, but is also charged by statute to process and pay reimbursement claims within certain time frames when the agency believes the legal requirements have been met. To balance these two charges, the rule amendments eliminate "actual costs" reviews from the regulatory reimbursement scheme and replace them with reimbursement of the lesser of RCSs line-item amounts or invoiced amounts. (An element of actual cost would remain in limited bidding situations for items that do not lend themselves to set line-item costs.) "Actual cost" reviews consume more resources than the agency can devote to them given existing personnel and statutory deadlines, and claimants have increasingly found ways to claim that their "actual costs" are the same as the line-item costs in Subchapter M (which reduces benefits to the PSTR Account achieved through actual cost reviews).

The PSTR Account was created 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 actions that they are required to perform at LPST sites (the agency is also authorized to use the PSTR Account for certain expenses associated with the PST program). Under the current PST program rules, agency staff are required to perform two separate reviews of each reimbursement claim. The first involves matching the activities that were pre-approved, at costs listed in Subchapter M, to documentation that the tasks were actually done as pre-approved, then adjusting for changes in scope of work (e.g., a pre-approval for three monitoring wells but, with agency concurrence, once in the field the contractor only drills two). The second review of the claim is an "actual cost review." This involves a detailed submission of invoices, etc., whereby the applicant demonstrates what the pre-approved work actually cost to perform. Following these reviews, under current rules, the agency reimburses the lower of the amounts calculated in the two reviews for each claim.

The adopted amendments make reimbursements based largely on the amounts listed at Subchapter M. By basing reimbursements on listed amounts, the process for claimants to make claims and the agency to review them would be significantly simplified, with commensurate cost savings to claimants. A number of the current in-house reimbursement protests, filed under 30 TAC §334.315, are based on controversies involving actual cost reviews. The elimination of these reviews under §334.309(c) should prospectively reduce the number of new protests filed, with associated savings as litigation is avoided and reimbursement payments are made based on the new wording of §334.309(c).

The agency believes that this move away from "actual cost" reviews should remove many of the apparent incentives for fraud that exist in the current system. Current staff resources are insufficient to

adequately police the "actual cost" submissions to prevent this fraud and still make the statutorily-mandated application processing deadline. Reduced fraud upon the PSTR Account leaves more money in the PSTR Account to reimburse legitimate claims and frees up staff time to process claims more quickly, which leads to payments going out more quickly.

This rulemaking package makes a variety of adjustments to the line-item amounts listed for various corrective action activities in Subchapter M. Following extensive discussions with stakeholders, the amounts were adjusted, where possible, to better reflect current market rates. However, the agency is limited in the adjustments it can make. During the 2001 session of the Texas Legislature, the agency was asked for a projection concerning the burden on the PSTR Account between that time and the Account sunset date. Based on that projection, as part of House Bill 2687, amendments were made to the TWC, Chapter 26, Subchapter I, which changed the fee schedule (for the fee which supplies the PSTR Account) and extended the Account sunset date to 2006. The line-item dollar amounts that the agency will reimburse for various eligible remedial activities are contained in Subchapter M. Current changes to these line-item amounts include increases in some areas and decreases in others to reflect applicable changes in market pricing and costs of services. Because the agency needs to adhere to the PSTR Account Burden projections given to the legislature during the drafting of House Bill 2687, the agency seeks to assure that these line-item increases and decreases remain within the limits of the projected income to the Account established by the House Bill 2687 fee schedule to address remaining eligible LPST sites, statewide.

In addition, because stronger accountability provisions are being adopted for Subchapters H and M to work in tandem with the elimination of "actual cost" from §334.309(c), the savings to the PSTR Account can make more money available for the reimbursement of legitimate claims. The simplifying of the process by which an owner or operator may assign his reimbursements rights under Subchapter H should save claimants application preparation time, with commensurate savings.

This rulemaking contains provisions seeking to eliminate profit for owners or operators who are also their own prime contractors, because the agency's stewardship duty toward the PSTR Account under TWC, §26.3573(h) calls for money to go to reimbursing corrective action expenses as opposed to creating a financial benefit for being liable for pollution at an LPST site. However, there are few such owners or operators in the reimbursement program and, because no new sites have come into the PSTR Account since December 1998, that number should not increase. Monies that do not go toward profiting polluters will instead be available to reimburse other corrective action activities.

In addition, even if a rule was to be considered a "major environmental rule," a draft regulatory impact statement 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, and are not adopted solely under the general powers of the agency.

Greater efficiencies and accountability in the PST reimbursement program facilitate better and faster corrective action at LPST sites, leading to faster closures of those sites. PST program delegation from EPA requires TCEQ to have an effective program in place to bring these sites to timely closure (see 40

Code of Federal Regulations §281.34). These rules also do not exceed an express requirement of state law. TWC, §26.3573(h) requires the agency to be a good steward of the PSTR Account, and as part of this obligation this rulemaking improves accountability in the reimbursement process. TWC, §26.35731(c) puts a deadline on the agency for issuing a Fund Payment Report for each complete claim within 90 days, and other sections of TWC, Chapter 26, Subchapter I, describe when the agency should make reimbursement payments. That statutory subchapter also sets the PSTR Account sunset date as 2006. A large majority of the changes are designed to improve efficiencies in the reimbursement process to help ensure that statutory processing and payment requirements are met, and that all good claims are paid before PSTR Account sunset. This rulemaking is authorized as described in the STATUTORY AUTHORITY section of this preamble. It is not adopted solely under the general powers of the agency, but rather under specific state law.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. To better ensure that all payable reimbursement claims can be paid before the PSTR Account sunsets in 2006, given limited agency resources, the standard for the reimbursement of eligible cleanup expenses related to LPST sites is revised to move away from an “actual cost”-based system. Reimbursement will instead be based on the lesser of either invoiced amounts or line-item amounts listed in Subchapter M, with limited updates to those line-item amounts adopted in this rulemaking. In addition, better accountability provisions are added in the reimbursement rules as a result of the agency’s experiences with PST audit cases over the last few years. The rulemaking also updates and clarifies existing program rules, including the correction of

typographical and other errors. This action will not create a burden on private real property. The PSTR Account 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 PSTR Account for certain expenses associated with the PST program). Greater efficiencies and accountability in the PST reimbursement program facilitate better and faster corrective action at LPST sites, leading to faster closures of those sites. Once an LPST site has been closed, the potential marketability of that real property is greatly increased. The small number of rules adopted as part of the commission's regulatory reform effort, not concerning the PSTR Account, also do not create a burden of private real property. These rules clarify existing rules, correct errors, allow greater flexibility with regard to the certification of testers of corrosion protection on USTs, increase flexibility, delete outdated language, and add ASTs to the seller's obligation to disclose in property conveyances. This last point should help ensure that purchasers of real property are aware if ASTs are present on property they are considering buying (the requirement already exists as to USTs), thus avoiding the inadvertent purchasing of encumbered property. A seller might now elect to deal with environmental issues related to ASTs before selling property, as opposed to attempting to pass the problem on without disclosure. This should result in more property in Texas where PST-related environmental problems have been addressed. As a whole, this rulemaking will not be the cause of a reduction in market value of private real property, does not create a burden on private real property, and will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is consistent with the applicable CMP goals and policies.

PUBLIC COMMENT

A public hearing on this proposal was held in Austin on May 25, 2004 and oral comments were received. The public comment period ended at 5:00 p.m. on June 1, 2004. Comments were submitted by Bourdeau Research Group (BRG); Chapman Engineering (Chapman); Earth Solutions, Inc. (ESI); EnVac Environmental Services, L.L.C. (EES); Grissom & Thompson, L.L.P. on behalf of Universal Engineering Sciences, Inc. and B&A Laboratories, Inc. (G&T); High Plains Underground Water Conservation District No. 1 (HPUWD); Industry Council on the Environment (ICE); McCleskey, Harriger, Brazill & Graf, L.L.P. on behalf of Harrison & Cooper (MHB&G); Meridian Alliance Group, LLC (MAG); Texas Board of Professional Geoscientists (TBPG); Ranger Environmental Services, Inc. (RESI); Shaw Environmental, Inc. on behalf of 7-Eleven, Inc. (SEI); Texas Association of Storage Tank Professionals (TASTP); Texas Department of Transportation (TxDOT); Texas Petroleum Marketers and Convenience Store Association (TPCA); Trace Analysis, Inc. (TAI); and Xenco Laboratories (Xenco).

The commenters generally supported the proposed rules and provided both general and specific comments on the rules.

RESPONSE TO COMMENTS

ICE, in a general comment regarding this rulemaking stated that ICE has participated in stakeholder meetings regarding this rulemaking beginning in the summer of 2002 and thanked the TCEQ staff for the opportunity to share ideas and constructive criticism throughout the process.

The commission thanks ICE for its participation and for its expression of gratitude.

ICE, in comments regarding the PSTR fund, stated that in 1998, 1999, and 2001, it worked with TCEQ staff and the TPCA to project estimates of the funds needed to properly close the known LPST universe and that most of those projections and the PSTR fund's balance information to date show that the TCEQ is not threatening the Fund balance with its current patterns of spending. ICE further stated that the TCEQ should ensure that the assets of the fund are only spent on the proper assessment and cleanup of properties, that those funds should not be earmarked for any other program areas or swept into general revenue when the PSTR fund sunsets, and that those funds should be spent on proper reimbursements to the maximum practical extent. ICE commented that it is concerned that legislators and/or regulators may try to appropriate remaining funds for non-assessment uses.

The commission responds that the assets of the PSTR Account have been, and will continue to be, utilized by the agency in strict accordance with applicable statute and rule. No change has been made in response to this comment.

ESI commented that the TCEQ should abolish the requirement for the RCAS that requires a company to have $25,000 in assets to be registered as an RCAS. ESI also commented that other TCEQ programs do not have such a requirement to do work and questioned why it is different for the PST program.

The commission responds that the requirement for demonstrating minimum net worth to become an RCAS is contained in 30 TAC Chapter 30 and only referenced in Subchapter J of this chapter. Neither Chapter 334, Subchapter J nor Chapter 30 are contained in this rulemaking and, therefore, this concern cannot be addressed as part of this rulemaking. The commission has made this concern known to the agency's Operator Licensing Section.

TxDOT referred to the definition for corrective action and asked that the first occurrence of the word "and" be changed to "or" to clarify the definition. TxDOT further requested that a definition of professional geoscientist be included in this rulemaking.

The commission agrees, has made the requested change to the definition of corrective action, and has added a definition for professional geoscientist in this rulemaking.

TxDOT referred to the definition for tank removal in §334.322(18) and requested that the term "petroleum storage tank" with which the agency proposes to replace the term "an UST" be changed to the term "petroleum underground storage tank."

The commission responds that the existing proposed language is clear. No change has therefore been made in response to this comment.

SEI commented on the definition of action level and stated that the definition pertains to samples obtained in "native soils or water." What about samples obtained from pea gravel or tank pad back fill (under repairs)? What if the levels in these samples exceed action levels? SEI asked if the definition should read "groundwater" and not just "water."

The commission responds that the proposed definition of action level refers to "soils" not "native soils" and the term "water" was chosen to include not only groundwater, but also rainfall or runoff, which might enter an open tank pit and become contaminated. The proposed definition was also carefully written to preclude conflict with Texas Risk Reduction Program rules. No change has been made in response to this comment.

SEI referred to the definition of ancillary equipment and stated that the definition only references appurtenances to USTs and asked whether the term "aboveground storage tank" should be included.

The commission responds that the definition is intended to apply only to USTs. No change has therefore been made in response to this comment.

SEI commented on the definition of corrective action and asked if remedial activities other than emergency response can be performed without an approved Corrective Action Plan/Remedial Action Plan.

The commission responds that remedial activities other than emergency response can be performed with an approved Corrective Action Plan/Remedial Action Plan. The commission recommends that SEI contact the Responsible Party Remediation Section of the agency's Remediation Division to discuss the issue in detail. No change is therefore considered necessary and none has been made in response to this comment.

ICE commented that the cathodic protection training market place is not regulated directly. ICE stated that for TCEQ to accept more than one or two organization's training is appropriate, but for TCEQ to make claims that training costs will fall seems improper at best, and misleading in the main. ICE further commented that NACE International is the leading organization in the cathodic and corrosion protection field and that both it and the Steel Tank Institute have good reputations and deliver much-needed standards and training to the market. ICE stated that it doubts that one group's new training program will "drive down" costs and time commitments for training at least in obtaining equivalent strength of certification and that this claim should be considered out of bounds for the agency to make, on principle. ICE stated that the TCEQ's mission calls for it to regulate responsible persons and in only a few instances does it regulate contractors and never has it regulated standards-producing bodies. ICE also commented: "In practice, NACE International requires five and a half days of training for its Level I Cathodic Protection Tester designation. Does the Agency have any way to force NACE to

shorten its course to match what Steel Tank Institute is offering? No it does not. Does the Agency have the means to say how two training courses and training results compare? That is difficult."

The commission responds that it is merely adding the Steel Tank Institute (a standard-making organization in the steel tank field) as an additional entity from which the agency will recognize the certification of a Cathodic Protection Tester, which is the *minimum* certification level recognized by the agency for a person who engages in the practice of inspection and testing of corrosion protection and control. The commission is not making any comparison between the two organizations it proposes to recognize with regard to the certification of cathodic protection testers. The rule preamble merely points out that the certification course provided by the Steel Tank Institute is shorter and less expensive than that provided by NACE International. There was, and is, no attempt by the commission to infer any equivalency comparison between the courses/certifications provided by each entity. No change has been made in response to this comment.

TBPG requested that the following language be added to §334.10 (Reporting and Recordkeeping): "All engineering, geoscientific, and surveying information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer, licensed professional geoscientist, or licensed professional surveyor and shall be signed, sealed, and dated by these qualified professionals as required by the Texas Engineering Practice Act, the Texas Geoscience Practice Act, the Texas Professional Land Surveying Practices Act and under the rules of the licensing and registration boards under these

acts." With the exception of the word "these" that precedes the term "qualified professionals," TxDOT requested that identical language be added as §334.10(a)(11).

The commission agrees that the rule should address this issue and has added the following language at §334.10(a)(10): "When agency requirements specify documents that must be prepared by, or prepared under, the supervision of a duly licensed professional engineer, a duly licensed professional geoscientist, or a duly licensed professional surveyor, those documents must be prepared in accordance with all requirements of statute and rule applicable to that respective professional."

SEI commented on §334.302(c)(7) and stated that no payments will be made after September 1, 2006. The PSTR fund was set up and funded by fees paid by the responsible parties (RPs) to assist them in assessing and remediating their sites impacted by releases from the UST system(s). SEI asked why the fund should not pay claims until the fund is exhausted and no monies are remaining in the fund and stated that this should be amended to allow full depletion of the fund before sunset.

The commission points out that the statute controls the deadline for when the last payments from the PSTR Account can be made and the statute does not allow amendments to the rules so that payments of funds could occur after September 1, 2006 until the PSTR Account is exhausted. No changes have been made in response to this comment.

BRG commented that the recommended changes added in new §334.306(f) are disconcerting. BRG stated that it is totally understandable and reasonable to be concerned that subcontractors who have performed pre-approved work do, in fact, get paid for performance of that work. It is also reasonable to understand that in today's business world, that doesn't always happen. That is not just in this program, but business in general. BRG stated that the disconcerting point here is that the agency may be placing itself in the middle of a legitimate disagreement between a prime contractor and a subcontractor. BRG further commented that it is understood that the agency is not "choosing sides" in the disagreement, but is rather providing funds to the court for distribution based on its determination; however, it still seems to provide the court a "third party" concern that the subcontractor is correct in his assertion or defense and may place an unfair influence on the outcome.

BRG commented that the commissioners' concern, as stated in the preamble considering the proposed language in §334.306(f) regarding the ability of the agency to ensure that subcontractors receive payment for work performed as part of the PST reimbursement program is a valid one, but asked whether the agency truly wants to assume the role of enforcing this assurance, or does it want to establish a vehicle that provides the subcontractors with evidence it can use in support of its claim against a prime contractor or owner or operator. BRG stated that §334.306(b)(7) provides a certification that legally obligates the payments. This form is not available for review at this juncture, but it could easily be one that is used for the owners or operators, and for prime contractors as well. The subcontractors could then file a Uniform Commercial Code financing statement that secures them for the specific amount until paid and would raise them, even in bankruptcy, above unsecured creditors. BRG also stated that considerable protection to the environment and public health and safety has been

completed during the past years by leveraging capital from all levels of the parties to this program, and it would seem prudent to continue to leverage this capital, considering the short time frames remaining to complete this program. It is necessary to tighten the "loopholes" to afford equal protection for those multiple levels of participants, yet still provide for the most efficient use of capital, not only from the "account" but from the industry as well. BRG commented that further support to subcontractors can be provided by the commission adopting the rule as provided under the rulemaking petition submitted by Universal Engineering Sciences, Inc., Harrison & Cooper, Inc., and B & A Laboratories, Inc., which was supported by a decision of the commission regarding said petition, dated April 14, 2004. In cases of insolvency or bankruptcy, this further protection satisfies the concern of the commissioners, as well as provides for the efficient use of the account.

BRG also commented that §334.306(b)(7)(A) still does not provide protection to the subcontractors. It provides the prime contractor with a certification of legal obligation to pay, but not the subcontractors. BRG also stated that the recommended change includes both. This still provides prime contractors, and in some cases, subcontractors, with the ability to enter into contracts with one another that maximize the use of all available capital to perform corrective action activities, yet provide a vehicle to assist all parties in securing their interests in the normal course of business through the Uniform Commercial Code, the appropriate enforcer.

Xenco requested that language be included in the rules to ensure payment of subcontractors by the owner/operator or prime consultant.

Chapman commented that there are a lot of subcontractors who have done work in good faith, reports have been submitted, reimbursement claims have been paid, and the subcontractors have been told to wait. Those subcontractors quite often carry the costs for long periods of time. Chapman stated that it would appreciate it if the commission could help subcontractors and primary contractors with problems with RPs that do not want to pay and that do not sign reimbursement claims after the work is complete.

EES commented that applicable statutes and regulations must be revised to provide subcontractors with some protection. EES stated that the easiest way to resolve this issue would be to codify the ruling in the Key case and condition any contractor's or property owner's entitlement to reimbursement upon proving that all subcontractors have been paid. EES further commented that absent such a showing, the state should be entitled to withhold such unpaid amounts and be authorized to make payments directly to subcontractors that are owed money.

ICE commented that in general, it is in favor of TCEQ's attempt to aid subcontractors in getting payment of their invoices, but the proposed process appears very cumbersome. ICE further commented that a different approach may be to create a subcontractor-specific signature form for the reimbursement application, which allows the subcontractor to sign in place of the RCAS only if the subcontractor has proof of inadequate performance by that RCAS. If the RP is willing to sign the form, then the subcontractor can attempt to lodge a reimbursement claim directly with TCEQ. If payment for the subcontractor on that claim has already been made to the RCAS then the next claim up for consideration on that LPST case by that RCAS could be "garnished" for payment to the subcontractor.

SEI commented that at §334.306(f) clarification of the "Interpleader process" is needed. SEI asked the following questions. How is the RP to know when this has occurred? How will it impact the RP and his future claims? Will processing of future claims be delayed up until the issue is resolved? If the subcontractor is owed payment, will the next reimbursement application be encumbered for payment of this unpaid subcontractor invoice?

G&T commented that there currently is no rule by which the commission pays subcontractors directly for work performed by the subcontractors for a prime corrective action specialist at an eligible LPST site. G&T filed a rulemaking petition with the commission on February 10, 2004, which requested the adoption of an amendment to Chapter 334, Subchapter H. The proposed rule in the petition would allow the agency to pay subcontractors for work they performed for prime corrective action specialists at LPST sites. The rule proposed in the petition would apply only if the prime corrective action specialist is found to be financially unable to pay the subcontractors due to bankruptcy or insolvency. The rule proposed in the petition also contains a provision stating that the rule is to be retroactive, but would require that all claims made by subcontractors to the agency for direct payment be made within 120 days of the effective date of the rule. On April 7, 2004, the commission directed the executive director to examine the issues raised in the G&T petition and to initiate rulemaking related to direct reimbursement to subcontractors.

G&T also commented that at the commission agenda on April 7, 2004, Commissioner Soward and Chairman White agreed with G&T that the executive director’s proposed language in §334.306(f) regarding the filing of interpleaders was not an effective way to get subcontractors paid. G&T

recommended that the commission replace proposed §334.306(f) with the text of the proposed rule that was included in the G&T rule petition dated February 10, 2004. G&T stated that the rule language in its proposal clearly sets out the requirements for when a subcontractor is eligible to be reimbursed directly by the commission and provides an effective method of assuring payment to subcontractors without the necessity of involving courts.

MHB&G commented on §334.306(f) and recommended the adoption of language contained in G&T's petition for rulemaking, which would allow for direct payment to subcontractors. MHB&G also commented that the current proposed language in §334.306(f) allowing payment to subcontractors through the use of an interpleader would not be an adequate way to allow payment to subcontractors.

TPCA commented on §334.306(f) and recommended the adoption of language contained in G&T's petition for rulemaking, which would allow for direct payment to subcontractors.

The commission appreciates the comments and agrees that changes in the proposed rules should be made so that the commission is able to pay subcontractors directly. The commission has incorporated language similar to that in G&T's rule petition into §334.306(f) and §334.302(i) so that the commission is able to pay subcontractors directly, but has added a fourth requirement to the subchapter that would require that the commission has not paid for the work performed or that the commission has successfully recovered money paid before money can be paid to subcontractors. This additional language is needed to make it clear that the commission will not pay twice for the same work performed. The commission has also removed the language

"bankruptcy or" at §334.306(f)(3) and added the language "subject to the limitation of 11 United States Code, §365(e)(1)" because the petitioned language would be contrary to federal bankruptcy law. Proposed language allowing for the filing of an interpleader has been removed from this rulemaking. The commission also agrees with the comments that the commission should find a way to help subcontractors get paid by prime contractors. The rule language regarding certification on the designated agency form and the rule language that seeks to ensure payment of subcontractors who have performed work has been modified at §334.306(b)(6)(F) and (7) by removing the phrase "legally obligated to be paid" and adding the phrase "ensured to be paid in full through the posting of a payment bond in the amount not yet paid in full by the claimant." The commission agrees with the comment that subcontractors should make Uniform Commercial Code filings in order to secure their right to payments from prime contractors. The commission disagrees with the comments regarding codifying the ruling in the Key case. The Key decision was based on current rules and proposed language will allow for payment to subcontractors directly. The commission disagrees with the comments regarding creating a subcontractor-specific signature form for the reimbursement application. A new application form will be created that subcontractors can submit in order to get paid directly when subcontractors can show that they have not been paid by a prime contractor.

HPUWCD referred to §334.308(b) and (g)(12), cited TWC, §26.35731(b) that prevents consideration, processing, or payment of non-pre-approved claims for reimbursement before those which have been pre-approved, and contended that "TCEQ must provide an adequate window of opportunity to reimburse for non pre-approved work."

The commission responds that the cited statute is clear and can only be changed by the Texas Legislature. This rulemaking cannot provide any specific "window" without statutory change. The commission will make every attempt to complete all consideration, processing, and payment of eligible pre-approved claims for reimbursement prior to PSTR Account sunset in order that as many eligible non-pre-approved claims as possible can be addressed.

ICE commented on Chapter H, Reimbursement, by stating that the agency claims not to need the "two review" and "actual cost" reimbursement approach now in use, once the proposed rule changes become final. ICE stated that one must consider that the current process really involves three cost reviews over and above the original proposal's "proposed costs." When a reimbursement claim is submitted now, it goes through another technical review to compare the proposed work and costs to performed work and costs. That technical review may be the "actual cost" review, but it is done in tandem with a detailed comparison of "actual work performed" to "work proposed." ICE further commented that technical review may or may not compare invoice line-item descriptions and costs to proposed line-item descriptions and costs and is probably the most time-consuming part of the process at TCEQ.

ICE also stated that the new set of RCSs may do a better job of defining line items and their specific costs, but the reviewer is still going to compare the technical work done and its corresponding line items as invoiced and costs associated with those line items, and that of course, the reviewer will recommend payment of amounts that are both justifiable and no higher than the RCSs amounts. That is what happens currently, unless an RP and/or consultant have not yet learned to construct invoices in general accordance with reimbursable costs. ICE commented that if the actual costs for a scope of

work exceed pre-approved costs, without any approved change orders involved, then the TCEQ reviewer is only continuing the review to see if the agency can cut the reimbursable amounts even further than RCSs limits, based on inaccurate billing, insufficient documentation (subcontractor invoice copies and similar), or inadequate reporting by the consultant. ICE agreed that this review step is necessary to make sure an RP and consultant are dealing in good faith. However, ICE also commented that in the end, review times and needs appear similar under both current and proposed new models.

BRG commented on §334.309 and stated that continual use of an actual cost analysis should not be maintained, as it requires a thorough definition of actual costs, written and prepared by someone with extensive knowledge of the professional services industries, the construction industries, manufacturing industries, drilling industries, and trucking industries. This knowledge needs to be in cost accounting for these industries, pricing structures within these industries, and business methodologies of these industries. In addition, BRG commented that when viewing Subchapter L related to audits, the definitions should also include required recordkeeping, as it is totally up to the discretion of the auditing unit to determine what it believes it needs to complete the audit, yet some of these industries may not, in fact, keep the type of records the TCEQ audit unit believes it needs, thereby placing the applicant in a position of notice of overpayment, not through a lack of wanting to assist, but for an inability to assist through the lack of documentation. BRG further commented that the line item replacement provides the audit group with two specific road maps by which to ascertain that the program is being appropriately followed, as stated in §334.530 and in compliance with the auditing standards as provided by TWC, §26.35735. By including all payments being subject to audit as §26.35735 requires (“Sec. 26.35735. CLAIMS AUDIT. (a) The commission annually shall audit claims for payment from the petroleum

storage tank remediation account."), the audit unit would have both State Lead Contractor negotiated pricing to use in their reviews (which will assist in putting geographic differences into perspective) as well as the RCSs and pre-approvals with which to match expected outcomes of work performed to the costs approved either by line item, pre-approval, or bidding. BRG stated that this is, after all, the primary principle found in all of the auditing standards listed in TWC, §26.35735, and should be the primary principle of all audits performed under this chapter.

BRG also commented that as to audit limitations being perceived by the changes in §334.309(d), it is difficult to understand where the limitations are. It is establishing that §334.309(c) is the governing section for audits, but it does not limit the auditors in their primary duties of assuring the most efficient use of the money available and to provide the most effective protection to the environment and public health and safety. BRG commented that when analyzing each and every cost, there may be some disagreement as to whether the "actual cost" amounts are more efficient than the line item amounts. However, in analyzing each and every cost, it is quite possible that the line item would be the more efficient. It would seem that the program personnel have had extensive experience in these costs, and have considered this in developing the RCSs, and recognize that in each and every case, those differences will arise, but in the program as a whole, the recommendations contained in §334.309 are the most reasonable, both for the agency and those it regulates.

The commission points out with regard to comment indicating that review times and needs appear similar under both current and proposed new models, that review times and needs represent only a portion of the time necessary to process reimbursement claims and that overall program

efficiency is expected to increase as a result of the proposed discontinuation of actual cost review by the program. The commission appreciates those comments in support of the proposed discontinuation of actual cost review, however, responds that actual cost language has been added to the rule language so that audits may determine what costs have actually been paid for work performed.

SEI, with regard to proposed §334.313(a)(1)(C), requested that clarification language be added with respect to corrective action activity that has been done improperly, specifically with regard to unsuccessful pilot tests that have been performed properly, but show that a given remediation system design will not work at a given site.

ICE, with regard to proposed §334.313(a)(1)(C), requested a definition of "performed improperly" or that more descriptive and definitive terms be used with respect to corrective action activity that has been performed improperly. ICE referenced pilot tests as an example.

The commission points out that this issue would be one that should be discussed with the appropriate agency remediation coordinator so that a determination using current technical standards can be made on a case-by-case basis. This gives the ability to take advantage of the flexibility allowed under current and proposed rule language and not addressed by specific rule language. No changes are considered necessary and none have therefore been made with respect to this comment.

ICE appreciated that existing language in §334.313(d) is proposed to be relettered as §334.313(b) and amended to provide a consolidated statement of the agency's treatment of incomplete claims, and stated that it is appropriate that TCEQ codifies the means by which a TCEQ reviewer can pay much of a claim in reasonable fashion, rather than holding up the whole dollar amount based on minor deficiencies.

The commission appreciates ICE's comment in support of this rule amendment.

BRG commented on §334.322(16), and stated that the removal of the language, "In addition, any of the parties listed in this paragraph are related parties if they share common employees, common offices, or centralized accounting; if they operate under a common business name; or if one party pays the wages of another party's employees, makes undocumented transfers of funds to the other party, or allows its employees to render services on behalf of another party" does not seem to change the extent of relationship relative to ownership, but does eliminate some onerous additions that seem invasive of normal business practices. BRG commented that: the ability of a business in a certain locale to share an employee who holds specific skills with another business that requires these skills reduces the cost to each business, and yet does not interfere with distinct separation of these businesses; the ability of a business in a certain locale to rent its facilities to another business in that same locale does not interfere with distinct separation of these businesses; the ability of a business in a certain locale to purchase accounting services from an agency that also provides accounting services for another business in that locale does not interfere with distinct separation of these businesses; and the ability of a business in a certain locale to subcontract an employee to another business in the same locale for a specific purpose

does not interfere with the distinct separation of these businesses. BRG further commented that all of these items happen on a day-to-day basis in normal business environments. To restrict them here seems extremely invasive and ludicrous. If there are not any ownership relationships as defined by this section, then there does not seem to be any legitimate reason to further invade the ability of businesses to perform business.

The commission disagrees and responds that the definition of "Related parties" proposed in this rulemaking is considered appropriate because the proposed language allows the executive director to consider the relationship of parties so that a proper determination of allowable markup can be made; therefore, no change has been made in response to this comment.

Meridian commented that there are several sections of the proposed regulations that reference "related parties" and "arms length" bidding. Meridian asked who will be making the decisions as to what is considered a related party or if the bids are arms length. Additionally, Meridian questioned when this decision will be made, prior to pre-approval, upon invoicing, or at any time? Meridian recommended that any questions involving related parties or arms length bidding are clarified and approved along with the pre-approval process to reduce the potential for disagreement after the work has been performed and reimbursement application submitted to the TCEQ.

The commission disagrees with this comment. The definition of related parties proposed in this rulemaking is considered appropriate because the proposed language allows the executive director to consider the relationship of parties so that a proper determination of allowable markup can be

made. The executive director will consider "related parties" and "arms length bidding" throughout the reimbursement process and make a determination based on language and documentation submitted. No change has been made nor is one considered necessary in response to this comment.

ICE, with regard to the commission's specific solicitation of comments concerning the utilization of "actual cost analysis," defining "actual cost," and whether proposed rule language limits the agency's audit authority, stated that in general, it agrees with proposed changes to the auditing and overpayment prevention rule language. ICE also pointed out that it is vital that TCEQ root out fraud or financial abuse of the PSTR fund when and if it exists, but cautioned that auditing must be done in an ethical manner, using good accounting practices and defensible principles.

The commission appreciates ICE's comment in support of the changes to the auditing and overpayment prevention rule language.

BRG commented regarding §334.531(a) and TWC, §26.35735 (concerning Claims Audit) and recommended that proposed language be amended to include the phrase, "The party who has entered into a contract with the agency pursuant to this Chapter to perform corrective action work," to allow audit of PST Remediation Account funds utilized in the agency's State Lead program.

The commission agrees with the comment and language addressing this issue has been incorporated into the rule.

Meridian commented that §334.531 states that all Corrective Action Specialists, contractors, and subcontractors shall cooperate in the event of an audit and shall provide copies of all "documents" relating to an audited claim. Additionally, if the requested documents are not provided, a notice of overpayment can be made to the party that received the reimbursement. Meridian requested that clarification be made as to what documents are required to be made available for an audit and what length of time is required for retaining those documents.

The commission disagrees with the comment and no change has been made in response to this comment. Audit needs the ability to obtain all documents relating to a particular claim and to have the documents for the time necessary to make a proper determination of the actual cost of the work performed.

BRG commented on §334.533 and stated that by referencing TWC, §26.3573 in §334.533(a)(1), it eliminates any discriminatory references to only one portion of the program and makes it all inclusive. That specific section of the TWC states: "The commission shall satisfy a claim for payment that is eligible to be paid under this subchapter and the rules adopted under this subchapter made by a contractor, from the petroleum storage tank remediation account as provided by this section and rules adopted by the commission under this section, regardless of whether the commission: (1) contracts directly for the goods or services; or (2) pays a claim under a contract executed by a petroleum storage tank owner or operator." Further, this provides the audit staff with comparison vehicles by which to perform their audits. BRG stated that it is entirely possible that certain eligible expenses paid for by the State Lead program are different than through the reimbursement program. The audit staff would have

the ability to analyze those differences and recommend changes to either program to provide comparability and standardization. BRG also commented that in addition, this speaks to eliminating the "actual cost" review by the "line item" review. By providing the comparability, the pre-approved line items will almost, by definition, be the same as the negotiated prices paid by State Lead. Therefore, the "actual cost" review was done prior to the pre-approval and the stewardship obligation of the account is fulfilled. BRG commented that changing the wording in §334.533(b) from "actually paid" to "contractually obligated to be paid" eliminates any concern or questions that can be raised as to what "actually paid" means and is consistent with the changes in the certification language that makes it apparent that there is a legal obligation to pay.

The commission agrees with the suggested change to reference the TWC and has incorporated the reference to the TWC in §334.533(a)(1). No change has been made to §334.533(b) as the commission considers current proposed language to be appropriate. Further, the commission has changed language in §334.306(b) from amounts promised to be paid to amounts that "have been ensured to be paid in full through the posting of a payment bond in the amount not yet paid in full by the claimant."

BRG commented on §334.534 and stated that by changing the word "reimbursement" to "payment" in §334.534(a), one eliminates the discriminatory application of this section to include any payment from the account. BRG also commented that by adding the word "known" before the "incorrect or inaccurate documentation" portion, some of the due process concerns also disappear. It is entirely likely, especially when all subcontractors must comply with this subchapter, that the persons receiving

the notice of overpayment were not aware of incorrect or inaccurate documentation supplied to them, and the results of an audit should disclose known or unknown or it wasn't a truly effective audit. BRG commented that by adding "either the party who contracted directly with the TCEQ for corrective action work" to §334.534(b) further eliminates the discriminatory application of this section and that by adding "and pursuant to the audit being a post payment audit" to §334.534(c), eliminates any disgorgement of funds prior to payment, as a prepayment audit would eliminate those funds from the fund payment report, and no loss would have occurred.

The commission agrees with the suggestion to change "reimbursement" to "payment" in subsection (a) and this change has been made in this rule; however, the insertion of the word "known" as suggested in the second sentence is considered unnecessary as contractors should be aware of the accuracy of documentation they submit for reimbursement, even if the contractor did not originally generate the documentation. The commission agrees with the suggestion to add the phrase "the party who contracted directly with the TCEQ for corrective action work" to the parenthetical which describes the claimant in subsection (b) and has amended §334.534(b) accordingly. Adding the phrase "and pursuant to the audit being a post payment audit" in subsection (c) would be redundant and the commission considers the current rule language in subsection (c) appropriate without change.

ICE, in a general comment regarding the RCSs, stated: "It is not reasonable for TCEQ to make cost changes in the proposed Reimbursable Cost Specifications (RCS) on the basis that changes in RCS should result in zero-sum changes in overall Petroleum Storage Tank Reimbursement (PSTR) fund

budgeting or projecting." ICE pointed out that the cost of doing business has increased year by year since the inception of the PSTR Account and that although some areas of work have proven to cost less, most have increased.

The commission responds that it has not attempted to assure zero growth in the amendment of the proposed RCSs and references language included in the preamble to this rulemaking, which states that following extensive discussions with stakeholders, the amounts were adjusted, where possible, to better reflect current market rates. However, the agency is limited in the adjustments it can make. During the 2001 session of the Texas Legislature, the agency was asked for a projection concerning the burden on the PSTR Account between that time and the Account sunset date. Based on that projection, as part of House Bill 2687, amendments were made to TWC, Chapter 26, Subchapter I that changed the fee schedule (for the fee that supplies the PSTR Account) and extended the Account sunset date to 2006. Current changes to the line-item dollar amounts that the agency will reimburse for various eligible remedial activities include increases in some areas and decreases in others to reflect applicable changes in market pricing and costs of services. Because the agency needs to adhere to the PSTR Account Burden projections given to the legislature during the drafting of House Bill 2687, the agency seeks to assure that these line-item increases and decreases remain within the limits of the projected income to the Account established by the House Bill 2687 fee schedule to address remaining eligible LPST sites, statewide. The agency estimates that overall growth of expenditures for reimbursement will be less than 1%. No changes have been made with respect to this comment.

Ranger, in a general comment regarding the RCSs, recommended that the agency include costs for the preparation of Class V injection well permits and TPDES storm water discharge permits in the RCSs.

The commission responds that allowance for these costs has been made at Appendix A, Part 7, Note 4.

Meridian, in a general comment regarding the RCSs, recommended that the agency include a line item in the RCSs for the preparation of TPDES storm water discharge permits for long term (greater than three days) MDPE events.

The commission responds that allowance for these costs has been made at Appendix A, Part 7, Note 4.

SEI, with regard to proposed rule requirements for bidding addressed in RCSs Introductory Requirements and throughout the RCSs, stated that proposed changes add requirements for obtaining bids for additional items and pointed out that one gets what one pays for and that the low bidder is not the winner in all instances.

ICE, with regard to the proposed rule requirements for bidding, stated that the requirement for bidding for certain types of work will likely generate little savings because: 1) the drilling and remediation markets have not been highly profitable in the LPST arena in the past 12 years, related in part to the cost of money over time and in part to the unpredictable nature of TCEQ review times, approval

processes, and elapsed times for reimbursement; and 2) many drillers, equipment contractors, and other subcontractors have on a recurring basis, been stuck with partial payments by RPs (owner/operators) or their consultants for LPST work. ICE also pointed out that it is often the case that the low bidder is not the best bidder.

Chapman commented that the agency should be flexible when it comes to bidding because there are times when you are in a remote portion of the state where you do not have a wealth of vendors to choose from. Chapman stated that the agency should consider and not question work, as long as the work is done within RCSs.

The commission responds that bidding requirements have been expanded in this rulemaking to help hold down overall costs, but that the rule does not require the agency to accept the lowest bid. A higher bid can be accepted in instances where the higher bid seems to be the best overall product and the most cost effective. As stated in this rule, the agency may reject any proposal on technical grounds or if the proposal is believed not to be cost effective. Also, as stated in the preamble to this rule, the agency reserves the right to refuse any and all bids believed not to be cost effective. Therefore, all submitted bids can be rejected if the agency considers them to be inappropriate and rebidding then required. No changes have been made with regard to these comments.

Ranger, with regard to a proposed rule requirement for the submission of a "Site Closure Schedule" in the RCSs Introductory Requirements, stated that such a schedule will typically be too hard to predict,

based upon available information, will be prone to inaccuracy, and will be a significant added cost for which little value is gained. Ranger recommended that any schedule be limited strictly to those corrective action activities that are included in the corrective action proposal.

The commission responds that the Site Closure Schedule is intended to be a dynamic document, which is updated at the time of any new proposal, to provide a snapshot of the remedial progress of a site at any given time. It is also intended to function as a regularly updated form of disclosure to the Owner/Operator and its value to the agency and the owner/operator are felt to outweigh what the agency anticipates to be minimal associated costs. The suggested changes are not in keeping with the intent of the document and no changes have been made with regard to this comment.

Ranger, with regard to proposed rule language in the RCSs Introductory Requirements stating that records should be kept to show applicable quantities involved with corrective action activities, commented that it does not believe this will be practicable, that the level of detail required is not adequately defined, that it is too vague to implement, and that it will increase overhead costs and pose unnecessary burdens on private enterprise.

The commission responds that as stated in the preamble to this rulemaking, these records will better allow the agency to evaluate reimbursement claims to see if the regulatory requirements have been met at the initial review and the audit stages and are considered necessary to the

program. Except for the change of the word "should" to "must" in this requirement, no other changes are made with regard to this comment.

SEI, with regard to Activity 02 (Phase-Separated Hydrocarbon (PSH) Recovery) stated that MDPE field personnel and equipment costs are too low for all events.

Ranger, with regard to Activity 02 (Phase-Separated Hydrocarbon (PSH) Recovery) recommended: adding costs for holding tank drop and rental charges; adding technician and engineer/geologist time for field preparation and for data formatting for MDPE events; increasing engineer time from 9.5 to 10 hours for the 8-hour MDPE event; allowing three-person crews (a staff engineer/geoscientist and two technicians) for the 24-hour through 7-day MDPE events; allowing for more time on-site for a staff engineer for the 72-hour and 7-day MDPE events; and recommending that all MDPE events be evaluated as 8-hour events.

ICE, with regard to Activity 02 (Phase-Separated Hydrocarbon (PSH) Reovery) stated that with respect to proposed changes related to MDPE, it is in general agreement with the comments offered by the TASTP and recommended: 1) that when an MDPE event lasts more than 8 hours, it should be staffed by a knowledgeable, well-trained technician (or one should be on-call from a nearby location) for virtually all the run time of the of the activity; 2) that for safety and security of equipment a person needs to be on the site; 3) that for human health and safety, either the buddy system should be used or other provisions for safety of a solo operator should be in place; 4) that the proposed allowance of $20

per hour for security personnel is too low; and 5) that the proposed rates for equipment and labor are far lower than what was discussed in the past between TCEQ and industry representatives.

TASTP, with regard to Activity 02 (Phase-Separated Hydrocarbon (PSH) Recovery) stated that it is disappointed that TCEQ refused to accept input on costs from the stakeholders' MDPE subcommittee members. TASTP stated that unfortunately, the proposed RCSs for MDPE are deficient in the following areas: 1) costs have been lowered; 2) site location is not considered; 3) additional data collection (i.e., gauging and vacuum measurements) are not considered as extras; 4) no flexibility in costs for site-specific conditions (i.e., depth to water, soils and geology, disposal options, etc.); and 5) prejudice against the small mom and pop operators the Fund was designed to help perform corrective action. TASTP stated that traditionally, the TCEQ has pre-approved a lump-sum, all-inclusive $3,500 for mobilization, equipment, and personnel for 8-hour MDPE contractor services for any location in Texas and maintains that that amount is adequate to cover contractor costs for large RPs with multiple locations, but inadequate to cover small mom and pop type RPs with one location who must then bear additional contractor costs that exceed pre-approved amounts. TASTP proposed that MDPE costs be based on location and proposes a new format for MDPE in the proposed RCSs that provides additional items/activities and increasing amounts for currently proposed items/activities. For example, TASTP's proposed format included $3,250 for equipment and personnel for an 8-hour day and an additional $325 per hour for additional hours up to 7 days for the same mobilization. TASTP stated that TCEQ often requests that vacuum readings be taken at nearby wells, that additional equipment and personnel costs are needed to address this issue, and gave suggested amounts. TASTP stated that the proposed amounts in the RCSs for the 24-hour, 72-hour, and 7-day events are woefully inadequate for personnel and

equipment. TASTP stated that the allowance for security guards and fencing is a good idea but an experienced operator must be present or readily available. TASTP maintained that an extension of its suggested hourly rates and per diem are more representative of the longer duration events than the costs currently proposed in the RCSs.

Chapman commented, concerning Activity 02, Phase-Separated Hydrocarbon Recovery (i.e., mobile dual-phase extraction), that the stakeholder's committee spent a great deal of time working on the guidelines and that will bring lots of stability to the group. The field personnel costs need to be looked at because the proposed rules do not give any specifications as to what the personnel costs are for the field, it just says "field costs." Chapman also commented that the notes also do not specify where those monies go. For example, for a 24-hour event there isn't an MDPE vendor in the state who's worth having on your site that's going to conduct a 24-hour event for equipment cost only. Chapman commented that there needs to be personnel cost and that it would like to see a greater definition to avoid problems, to avoid change orders, and to avoid necessary headaches. Chapman also commented that in reference to Activity 2, Note 7, regarding mobilization and de-mobilization, the agency needs to give some time on both sides for the field contractors because it takes a little longer to set up site than 24 hours and a little longer than that to break it down. Chapman stated that the agency should give at least 26 hours.

The commission responds that in an attempt to impart a greater degree of consistency and predictability into the process by which MDPE technologies are addressed, the agency is incorporating allowable amounts for those technologies into the RCSs. Those technologies have to

date, only been addressed by the agency on a case-by-case basis. The commission further responds that costs and applicable line item amounts with respect to MDPE were arrived at as a result of a number of meetings and teleconferences with stakeholders and MDPE providers, are reflective of consensus agreement among the participants of those meetings, and are also reflective of charges observed by the agency for this activity in reimbursement applications and in the agency's State Lead Remediation Program. The commission recognizes the concerns of the commenters, however, and has made the following changes in the RCSs to address those concerns: 1) for the 8-hour event, SF hours have been increased from 9.5 hours to 10 hours and combined allowable costs for Field Personnel-MDPE and Equipment-MDPE have been increased from $3,000 to $3,200; 2) for the 24-hour event, the allowance for two technicians for 25 hours each has been replaced with an allowance for an SF and a technician for 27 hours each and combined allowable costs for Field Personnel-MDPE and Equipment-MDPE have been increased from $5,110 to $6,200; and 3) for the 72-hour event, SF hours have been increased from 11 hours to 20 hours, technician (T-II) hours have been increased from 26 hours to 28 hours, and combined allowable costs for Field Personnel-MDPE and Equipment-MDPE have been increased from $7,650 to $8,750. In addition, the proposed hourly rate for security personnel has been increased from $20 per hour to $30 per hour. For the 7-day event, SF hours have been increased from 12 hours to 16 hours and combined allowable costs for Field Personnel-MDPE and Equipment-MDPE have been decreased from $16,820 to $15,550; however, the increase in the hourly rate for security personnel counteracts that decrease for this extended event.

Meridian, with regard to Activity 04 (Site Assessment), requested that the current proposed language allowing up to $500 for licenses/permits associated with obtaining off-site access from municipalities or government agencies be modified to include landowners who are requesting payment for their legal costs associated with providing the off-site access agreement.

The commission responds that the $500 amount is in addition to $320 per property otherwise provided in the proposed RCSs and specifically addresses the additional cost of municipal permits. No changes are therefore considered necessary and none have been made with respect to this comment.

Ranger, with regard to Activity 04 (Site Assessment), stated that separate travel for site visits should be allowed for any corrective action proposal that involves off-site drilling activities.

The commission responds that current rules and this rulemaking allow for as much travel as is necessary to perform eligible remedial activities. No change is therefore considered necessary and none has been made in response to this comment.

ICE, with regard to Activity 04 (Site Assessment), stated that in the case of work scopes requiring bidding, the workplan cost proposal amount of $195 is still inadequate.

The commission agrees with ICE's comment and responds that the RCSs have been amended at Activity 04, Part A, Section 1; at Activity 09, Parts A1, A2, A3, and A4, Section 1 of each part; and at Activity 11, Part A, Section 1 to add "Workplan and Cost Proposal with Bidding" at $355.

ICE, with regard to Activity 04 (Site Assessment), requested that the unit cost allowance of $300 for determining well elevations in a Site/Monitoring Well Survey be increased to allow use of a surveying firm.

The commission responds that the proposed RCSs already address that issue at Activity 04, Note 2, which allows the submission of quotes to be submitted with regard to contracting with a licensed surveyor. No change has therefore been made in response to this comment.

Meridian, with regard to proposed rule requirements for bidding addressed at Activity 09, Note 2 of the RCSs stated that the requirement to obtain three bids for any remediation equipment costs exceeding $1,000 sets the amount for the requirement too low and suggested that an amount of $5,000 should be used.

The commission responds that the current requirement of $1,000 is considered appropriate because many of the items routinely utilized in remediation systems are priced between the $1,000 and $5,000 range, and setting the bid minimum higher than $1,000 would not assure the best use of the funds in the PSTR Account. No change has therefore been made with respect to this comment.

Activity 10 (Operation, Monitoring & Performance), Note 9 of the proposed RCSs allows (for sites which have been approved for annual OMP activity) a claim for reimbursement to be filed after the initial six months of the activity is completed. Bordeaux suggested that the initial period prior to filing for reimbursement be changed from six months to three months.

Ranger, with regard to Activity 10 (Operation, Monitoring & Performance), stated that claims should be allowed to be submitted on a quarterly basis as operation and maintenance activities are typically performed on a weekly basis and attendant bills can be very significant.

The commission responds that although the current language in this rulemaking already contains a relaxation of agency requirements, the commission agrees with the commenters and has changed rule language at Activity 10, Note 9 to allow claims for reimbursement to be filed quarterly instead of every six months.

With regard to Appendix A, Part 1 (Professional Personnel/Labor Rates), SEI stated that labor rates are low, having remained unchanged since 1997, and requested that they be increased to reflect interim increases in cost of living, wages, and employee promotions.

With regard to Appendix A, Part 1 (Professional Personnel/Labor Rates), Ranger stated that labor rates are low, having remained unchanged since the inception of the reimbursement program and do not

reflect the increased cost of living since that time. Ranger recommended increases in the hourly rate for Staff and Field Engineer/Geologist/Hydrogeologist, Technician I - III, and Clerical.

The commission responds that the agency's experience in the reimbursement program indicates that current labor rates continue to be fair and although no changes to labor rates in this rule are being made, the agency has made other changes such as increasing total allowable personnel hours for some activities that increases the amount that can be reimbursed for labor for that activity. The commission considers the rates to be appropriate and no changes have been made in response to these comments.

With regard to Appendix A, Part 2 (Laboratory Analysis Costs), TAI provided reasoning and recommended that increases be made in several areas of the proposed RCSs.

With regard to Appendix A, Part 2 (Laboratory Analysis Costs), Xenco provided reasoning and recommended that increases be made in several areas of the proposed RCSs with regard to lab analysis costs. Xenco also suggested revisions including additional application of rush rates and additional line items with regard to analytical methods.

The commission responds that the proposed costs and applicable line items, with respect to lab analysis, were arrived at as a result of a number of meetings and teleconferences with stakeholders and laboratory representatives and are reflective of past and current market rates

observed by the agency in reimbursement applications and in the agency's State Lead Remediation Program. The commission, therefore, feels that the rates are appropriate without change.

With regard to Appendix A, Part 3 (Drilling, Well Installation and Direct Push Technology Costs), Note 5, Bordeaux suggested that more flexibility should be applied with regard to the requirement for three bids for drilling in areas where it may be difficult to obtain bids from three separate drillers.

The commission agrees and points out that although the requested flexibility had been addressed in the current rulemaking at Activity 09, Note 3 of the proposed RCSs, the following additional clarification has been provided by adding a reference to Activity 09, Note 3 in Activity 09, Note 5, and by adding language similar to that of Activity 09, Note 3, as follows: 1) in the second paragraph of the Introductory Requirements; 2) in Appendix A, Part 3, Notes 1 and 5; 3) in Appendix A, Part 5, Note 1; and 4) in Appendix A, Part 7, Note 3.

With regard to Appendix A, Part 3 (Drilling, Well Installation and Direct Push Technology Costs), Ranger recommended using reimbursable unit rates in lieu of bidding, but stated that if bidding is required, an additional several hours of PM time should be approved to allow gathering requested bids.

The commission points out that bidding requirements have been expanded in this rulemaking to help hold down overall costs, not further increase them, and that no change is being made with respect to this comment.

With regard to Appendix A, Part 4 (Travel Costs), Bordeaux suggested that more flexibility should be applied to the issue of per diem versus travel time.

With regard to Appendix A, Part 4 (Travel Costs), Ranger recommended, due to record high gasoline prices, that the mileage rate be increased to $.50 per mile.

With regard to Appendix A, Part 4 (Travel Costs), ICE recommended that the mileage rate be increased to $.37 per mile or higher as it better reflects the actual costs of owning and operating a work vehicle.

With regard to Appendix A, Part 4 (Travel Costs), Meridian questioned why two options have been included for the mileage rate and recommended using the OMGST rate.

The commission responds that, as stated in the preamble to this rulemaking, the rate per mile for mileage is increased from $.31 to $.35, as mileage rate is to be the lower of either the applicable Internal Revenue Service rate per mile or the applicable OMGST rate per mile at the time the activity was performed, rounded to the next highest cent. As of August 1, 2003, that rate was $.35 per mile. The current language regarding travel costs in general, is considered fair and appropriate without change.

With regard to Appendix A, Part 7 (Soils and Wastewater Management Costs), Ranger recommended that the truck rate, which is proposed to be reduced, be left the same or increased, due to high gasoline prices.

The commission responds that, as stated in the preamble to this rulemaking, this reduction reflects the agency's experience that average hourly reimbursed rates for this service have decreased, and also points out that it might be unwise to react to short-term fluctuations in fuel pricing. No change in the proposed rate is therefore considered necessary.

With regard to Appendix A, Part 8 (Report Generation Costs), Ranger stated that, with respect to MDPE Reports, clarification is needed as to whether stated amounts are per event or per multiple events and further stated that if these costs are per multiple event, they are significantly inadequate and should be increased.

The commission responds that the specified amounts apply on a "per event" basis and that the RCSs language has been amended to specify that point.

With regard to Appendix A, Part 8 (Report Generation Costs), Ranger stated that the proposed cost of $765 for an updated assessment report form is insufficient if the report contains both soil and groundwater data and recommends it be raised to $1,200.

The commission disagrees and points out that the amount was determined as a result of meetings and teleconferences with stakeholders and industry representatives. No changes have therefore been made as a result of this comment.

With regard to Appendix A, Part 8 (Report Generation Costs), Ranger stated that the agency did not include costs for the preparation of Recovery Well Installation Field Activity Reports (FARs) and recommended that allowance for these reports be made in the range of $485 to $750.

The commission responds that Appendix A, Part 8, Note 3 has been amended to include Recovery Well Installation FARs in the "Report Generation - Miscellaneous" section of Part 8, which allows an amount of $485.

SUBCHAPTER A: GENERAL PROVISIONS

§§334.2, 334.5, 334.7 - 334.10, 334.12, 334.14

STATUTORY AUTHORITY

The amendments 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; §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 adopted under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an AST; and §26.3573, which allows the commission to use funds from the PST remediation account to reimburse an eligible owner or operator or insurer for the expenses of corrective action or to pay the claim of a contractor hired by an eligible owner or operator to perform corrective action.

§334.2. Definitions.

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

(1) **Abandonment in-place** - A method of permanent removal of an underground storage tank from service where the tank is left in the ground after appropriate preparation and filling with an acceptable solid inert material in accordance with the requirements of §334.55 of this title (relating to Permanent Removal from Service).

(2) **Abatement** - The process of reducing in sufficient degree or intensity the source of the release or impacted area, and potential fire, explosion, or vapor hazards, such that immediate threats to human health no longer exist. This includes the removal, as necessary, of all regulated substances from any confirmed or suspected release source (including associated aboveground or underground tanks, individual tank compartments, or associated piping) and the removal of phase-separated regulated substances from the impacted area.

(3) **Aboveground release** - Any release to the surface of the land or to surface water, including, but not limited to, releases from the aboveground portion of an underground storage tank (UST) system and releases associated with overfills and transfer operations during the dispensing, delivering, or removal of regulated substances into or out of a UST system.

(4) **Aboveground storage tank (AST)** - A non-vehicular device, (including any associated piping), that is made of non-earthen materials; located on or above the surface of the ground, or on or above the surface of the floor of a structure below ground, such as mineworking, basement, or vault; and designed to contain an accumulation of petroleum products.

(5) **ACT** - A trademark of the former Association for Composite Tanks, now a licensed trademark of the Steel Tank Institute.

(6) **Action level -** The concentration of constituents of any substance or product listed in §334.1(a)(1) of this title (relating to Purpose and Applicability) in the soil or water at which corrective action will be required.

(7) **Allowable cost** - As defined by, §334.308 of this title (relating to Allowable Costs and Restrictions on Allowable Costs).

(8) **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.

(9) **ANSI** - American National Standards Institute, a nationally recognized organization which provides certifications and standards for consumer products and services.

(10) **API** - American Petroleum Institute, a nationally recognized organization which provides certifications and standards for petroleum equipment and services.

(11) **Appropriate regional office** - The agency's regional field office which has jurisdiction for conducting authorized agency regulatory activities in the area where a particular underground storage tank system or aboveground storage tank system is located.

(12) **ASTM** - American Society of Testing and Materials, a nationally recognized organization which provides certifications and standards for products and services.

(13) **Backfill** - The volume of materials or soils surrounding the underground storage tank bounded by the ground surface, walls, and floor of the tank pit.

(14) **Below-ground release** - Any release to the subsurface of the land or to groundwater, including, but not limited to, releases from the below-ground portions of an underground storage tank (UST) system and releases associated with overfills and transfer operations during the dispensing, delivering, or removal of regulated substances into or out of a UST system.

(15) **Beneath the surface of the ground** - Beneath the ground surface or otherwise covered with materials so that visual inspection is precluded.

(16) **Cathodic protection** - A technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell, normally by means of either the attachment of galvanic anodes or the application of impressed current.

(17) **CERCLA** - The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(18) **Change-in-service** - A method of permanent removal from service involving the permanent conversion of a regulated underground storage tank to a tank which is not regulated under this chapter, where all regulated substances are properly removed by emptying and cleaning, and the tank is left in the ground for the storage of materials other than regulated substances.

(19) **Closure letter** - A letter issued by the agency which states that, based on the information available, the agency agrees that corrective action has been completed for the referenced release in accordance with agency requirements.

.

(20) **Commingled** - A combination or mixture of a petroleum product and a substance other than a petroleum product (excluding soil and/or water).

(21) **Common carrier** - With respect to delivery prohibitions, a person (as defined in this section) who physically delivers a regulated substance into an underground storage tank directly from a cargo tank which is affixed or mounted to a self-propelled, towable, or pushable vehicle (e.g., wagon, truck, trailer, railcar, aircraft, boat, or barge).

(22) **Composite tank** - A single-wall or double-wall steel tank, to which a fiberglass-reinforced plastic laminate or cladding has been factory-applied to the external surface of the outer tank wall.

(23) **Consumptive use** - (With respect to heating oil) the utilization and consumption of heating oil on the premises where stored.

(24) **Corporate Fiduciary** - An entity chartered by the Banking Department of Texas, the Savings and Loan Department of Texas, the United States comptroller of the currency, or the director of the United States Office of Thrift Supervision that acts as a receiver, conservator, guardian, executor, administrator, trustee, or fiduciary of real or personal property.

(25) **Corrective action** - Any assessment, monitoring, and remedial activities undertaken to investigate the extent of, and to remediate, contamination.

(26) **Corrective action plan (or remedial action plan)** - A detailed plan developed to address site remediation of soil, groundwater, or surface water contamination that provides for required protection of human health, safety, and the environment. The selection of the most effective and efficient remedial method will be dictated by the nature and location of the release, the site soils, hydrogeological conditions, and the required degree of remediation. The remedial method selection should take into consideration such factors as cost, time, and state compliance requirements with each

method. The title of any report which contains a corrective action plan must include the designation "remedial action plan."

(27) **Corrosion specialist** - A person who, by reason of a thorough knowledge of the physical sciences and the principals of engineering and mathematics acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks, and who is either:

(A) certified as a corrosion specialist or a cathodic protection specialist by NACE International; or

(B) licensed as a professional engineer by the Texas Board of Professional Engineers in a branch of engineering that includes education and experience in corrosion control of buried or submerged metal piping systems and metal tanks.

(28) **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 related 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 is either:

(A) certified by NACE International as a corrosion technician, corrosion technologist, or senior corrosion technologist;

(B) employed under the direct supervision of a corrosion specialist (as defined in this section), where the corrosion specialist maintains responsible control and oversight over all corrosion testing and inspection activities; or

(C) certified as a cathodic protection tester, in a manner satisfactory to the agency, by either NACE International or the Steel Tank Institute (STI).

(29) **Date installation is complete** - The date any regulated substance is initially placed in an underground storage tank or the date any petroleum product is initially placed in an aboveground storage tank.

(30) **Dielectric material** - A material that does not conduct direct electrical current, as related to coatings, bushings, and other equipment and materials used with underground storage tank systems.

(31) **Electrical equipment** - Underground equipment which contains dielectric fluid which is necessary for the operation of equipment such as transformers and buried electrical cable.

(32) **Emergency generator** - A standby electrical generating system powered by an internal combustion engine (including a turbine), where such system is designed to supply temporary electrical service only when service from the normal or primary electrical source is disrupted. Such systems include, but are not necessarily limited to, those providing emergency electrical service for hospitals, life support systems, and other medical service facilities; telephone and electrical utilities; heating, lighting, ventilation, security, elevator, fire control, and other essential building operations systems; uninterruptible power systems; essential air conditioning and refrigeration; and motors, machinery, and controls used for other essential or critical purposes.

(33) **Excavation zone** - The space containing the underground storage tank (UST) system and backfill material, which is bounded by the ground surface and the walls and floor of the pit and trenches into which the UST system is placed at the time of installation.

(34) **Existing underground storage tank (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.

(35) **External release detection** - A method of release detection which includes equipment or procedures designed to effectively monitor or measure for the presence of regulated substances in the excavation zone, soil, or other media outside of a single-wall or double-wall underground storage tank system.

(36) **Facility** - The site, tract, or other defined area where one or more underground storage tank systems or one or more aboveground storage tank systems are located.

(37) **Farm** - A tract or tracts of land (including all associated structures and improvements) which are principally devoted to the raising of agricultural or other types of crops, domestic or other types of animals, or fish for the production of food, fiber, or other products or for other useful purposes, including fish hatcheries, rangeland, and plant nurseries with growing operations, but not including timber-growing land and operations dedicated primarily to recreational, aesthetic, or other non-agricultural activities (e.g., golf courses and parks).

(38) **Farm tank** - A tank located on a farm where the stored regulated substance is or will be utilized directly in the farm activities.

(39) **Field-constructed tank** - A tank which is not factory-assembled, and which is principally constructed, fabricated, or assembled at the same facility where the tank is subsequently placed into service.

(40) **Flow-through process tank** - A tank through which regulated substances flow in a steady, variable, recurring, or intermittent manner during, and as an integral part of, a production process (such as petroleum refining, chemical production, and industrial manufacturing), but specifically excluding any tank used for the static storage of regulated substances prior to their introduction into the production process and any tank used for the static storage of regulated substances which are products or by-products of the production process.

(41) **Free-product (or non-aqueous phase liquid)** - A regulated substance in its free-flowing non-aqueous liquid phase at standard conditions of temperature and pressure (i.e., that portion of the product not dissolved in water or adhering to soil).

(42) **Gathering lines** - Any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.

(43) **Hazardous substance** - Any substance defined or listed in the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), §101(14) (42 United States Code, §§9601, *et seq*.), and which is not regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code, §§6921, *et seq*.).

(44) **Hazardous substance underground storage tank (UST) system** - A UST system that contains an accumulation of either a hazardous substance, a mixture of two or more hazardous

substances, or a mixture of one or more petroleum substances with one or more hazardous substances, and which does not meet the definition of a petroleum UST system in this section.

(45) **Heating oil** - A petroleum substance which is typically used in the operation of heating, boiler, or furnace equipment and which either is one of the following seven technical grades of fuel oil: Number 1, Number 2, Number 4-light, Number 4-heavy, Number 5-light, Number 5-heavy, and Number 6; is a residual fuel oil derivative of the refining process (such as Navy Special and Bunker C residual fuel oils); or is another fuel (such as kerosene or diesel) used for heating purposes as a substitute for one of the fuel oils or residual fuel oil derivatives listed in this paragraph.

(46) **Hydraulic fluid** - Any regulated substance that is normally used in a hydraulic lift system.

(47) **Hydraulic lift tank** - A tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air and hydraulic fluid to operate lifts, elevators, or other similar devices.

(48) **Impressed current system** - A method of cathodic protection where a rectifier is used to convert alternating current to direct current, where the current then flows in a controlled electrically connected circuit to non-sacrificial anodes, then through the surrounding soil or backfill to the protected metallic structure or component, and back to the rectifier.

(49) **In operation** - The description of an in-service underground storage tank which is currently being used on a regular basis for its intended purpose.

(50) **In service** - The status of an underground storage tank (UST) beginning at the time that regulated substances are first placed into the tank and continuing until the tank is permanently removed from service by means of either removal from the ground, abandonment in-place, or change-in-service. An in-service UST may or may not contain regulated substances, and may be either in operation or out of operation at any specific time.

(51) **Installer** - A person who participates in or supervises the installation, repair, or removal of underground storage tanks.

(52) **Inventory control** - Techniques used to identify a loss of product that are based on volumetric measurements in the tank and reconciliation of those measurements with product delivery and withdrawal records.

(53) **Jacketed tank** - A factory-constructed tank consisting of a single-wall or double-wall steel internal (or primary) tank that is completely enclosed in an external secondary-containment jacket made of noncorrodible material, and which is designed so that releases of stored substances from the internal tank can be contained and monitored within a liquid-tight interstitial space between the internal tank and the external jacket.

(54) **Lender** - A state or national bank; a state or federal savings bank; a credit union; a state or federal savings and loan association; a state or federal government agency that customarily provides financing; or an entity that is registered with the Office of Consumer Credit Commissioner under Chapter 7, Title 79, Revised Statutes (Texas Civil Statutes, Article 5069-7.01, *et seq*.) if the entity is regularly engaged in the business of extending credit and if extending credit represents the majority of the entity's total business activity.

(55) **Liquid trap** - A collection device (such as a sump, well cellar, and other trap) which is used in association with oil and gas production, gathering, and extraction operations (including gas production plants) for the purpose of collecting oil, water, and other liquids, and which either may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.

(56) **Leaking petroleum storage tank (LPST) site** - A site at which a confirmed release of a petroleum substance from an underground storage tank or aboveground storage tank has occurred. Petroleum substance contamination which results from multiple sources may be deemed as one LPST site by the agency.

(57) **Maintenance** - The normal and routine operational upkeep of underground storage tank systems necessary for the prevention of releases of stored regulated substances.

(58) **Monitoring well** - An artificial excavation constructed to measure or monitor the quantity or movement of substances, elements, chemicals, or fluids below the surface of the ground. The term does not include any monitoring well which is used in conjunction with the production of oil, gas, or any other minerals.

(59) **Motor fuel** - A petroleum substance which is typically used for the operation of internal combustion engines (including stationary engines and engines used in motor vehicles, aircraft, and marine vessels), and which is one of the following types of fuels: motor gasoline, aviation gasoline, Number 1 diesel fuel, Number 2 diesel fuel, or gasohol.

(60) **NACE** - NACE International (formerly National Association of Corrosion Engineers), a nationally recognized organization which provides certifications and standards for corrosion protection services.

(61) **New underground storage tank (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 an underground storage system which is converted from the storage of materials other than regulated substances to the storage of regulated substances after December 22, 1988.

(62) **NFPA** - National Fire Protection Association, a nationally recognized organization which provides certifications and standards for fire protection equipment and services.

(63) **Non-aqueous phase liquid (NAPL)** - See "Free product (or non-aqueous phase liquid)" as defined in this section.

(64) **Non-commercial purposes** - (With respect to motor fuel) all purposes except resale.

(65) **Noncorrodible material** - A material used in the construction, maintenance, or upgrading of any component of an underground storage tank (UST) system which is designed to retain its physical and chemical properties without significant deterioration or failure for the operational life of the UST system when placed in contact with (and subjected to the resulting electrical and chemical forces associated with) any surrounding soil, backfill, or groundwater, any connected components constructed of dissimilar material, or the stored regulated substance.

(66) **Observation well** - A monitoring well or other vertical tubular structure which is constructed, installed, or placed within any portion of an underground storage tank excavation zone (including the tank hole and piping trench), and which is designed or used for the observation or monitoring of groundwater, or for the observation, monitoring, recovery, or withdrawal of either released regulated substances (in liquid or vapor phase) or groundwater contaminated by such released regulated substances.

(67) **Occurrence** - An incident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank or aboveground storage tank or tank system.

(68) **On the premises where stored** - (With respect to heating oil) refers to the consumptive use of heating oil on the same property or site where the heating oil is stored.

(69) **Operational life** - The actual or anticipated service life of an underground storage tank system, which begins when regulated substances are first placed into the tank system and which continues until the tank system is permanently removed from service by means of either removal from the ground, abandonment in-place, or change-in-service.

(70) **Operator** - Any person in day-to-day control of, and having responsibility for, the daily operation of the underground storage tank system or the aboveground storage tank system, as applicable.

(71) **Out of operation** - The description of an in-service underground storage tank which is not currently being used on a regular basis for its intended purpose.

(72) **Overfill** - A release that occurs when an underground storage tank system is filled beyond its capacity, thereby resulting in a discharge of a regulated substance to the surface or subsurface environment.

(73) **Owner** - Any person who holds legal possession or ownership of an interest in an underground storage tank system or an aboveground storage tank. For the purposes of this chapter, if the actual ownership of a UST system or a AST is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the UST system or the AST is located is considered the UST system or AST owner unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the UST system or AST is owned by another person. A person who has registered as an owner of a 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 TWC, §26.3514, Limits on Liability of Lender; §26.3515, Limits on Liability of Corporate Fiduciary; and §25.3516, Limits on Liability of Taxing Unit.

(74) **PEI** - Petroleum Equipment Institute, a nationally recognized organization which provides certifications and standards for petroleum equipment and services.

(75) **Permanent removal from service** - The termination of the use and the operational life of an underground storage tank by means of either removal from the ground, abandonment in-place, or change-in-service.

(76) **Person** - An individual, trust, firm, joint-stock company, corporation, government corporation, partnership, association, state, municipality, commission, political subdivision of a state, an interstate body, a consortium, joint venture, commercial entity, or the United States government.

(77) **Petroleum marketing facilities** - All facilities at which a petroleum substance is produced or refined and all facilities from which a petroleum substance is sold or transferred to other petroleum substance marketers or to the public.

(78) **Petroleum marketing firms** - All firms owning petroleum marketing facilities. Firms owning other types of facilities with underground storage tanks as well as petroleum marketing facilities are considered to be petroleum marketing firms.

(79) **Petroleum product** - A petroleum substance obtained from distilling and processing crude oil that is liquid at standard conditions of temperature and pressure, and that is capable of being used as a fuel for the propulsion of a motor vehicle or aircraft, including, but not limited to, motor gasoline, gasohol, other alcohol blended fuels, aviation gasoline, kerosene, distillate fuel oil, and Number 1 and Number 2 diesel. The term does not include naphtha-type jet fuel, kerosene-type jet fuel, or a petroleum product destined for use in chemical manufacturing or feedstock of that manufacturing.

(80) **Petroleum storage tank** -

(A) Any one or combination of aboveground storage tanks that contain petroleum products and that are regulated by the commission; or

(B) Any one or combination of underground storage tanks and all connecting underground pipes that contain petroleum products and that are regulated by the commission.

(81) **Petroleum substance** - A crude oil or any refined or unrefined fraction or derivative of crude oil which is liquid at standard conditions of temperature and pressure (except for any substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code, §§6921, *et seq.*)). For the purposes of this chapter, a petroleum substance is limited to one or a combination of the substances or mixtures in the following list:

(A) basic petroleum substances - crude oils, crude oil fractions, petroleum feedstocks, and petroleum fractions;

(B) motor fuels - (see definition for "Motor fuel" in this section);

(C) aviation gasolines - (e.g., Grade 80, Grade 100, and Grade 100-LL);

(D) aviation jet fuels - (e.g., Jet A, Jet A-1, Jet B, JP-4, JP-5, and JP-8);

(E) distillate fuel oils - (e.g., Number 1-D, Number 1, Number 2-D, and Number 2);

(F) residual fuel oils - (e.g., Number 4-D, Number 4-light, Number 4, Number 5-light, Number 5-heavy, and Number 6);

(G) gas-turbine fuel oils - (e.g., Grade O-GT, Grade 1-GT, Grade 2-GT, Grade 3-GT, and Grade 4-GT);

(H) illuminating oils - (e.g., kerosene, mineral seal oil, long-time burning oils, 300 oil, and mineral colza oil);

(I) solvents - (e.g., Stoddard solvent, petroleum spirits, mineral spirits, petroleum ether, varnish makers' and painters' naphthas, petroleum extender oils, and commercial hexane);

(J) lubricants - automotive and industrial lubricants;

(K) building materials - (e.g., liquid asphalt and dust-laying oils);

(L) insulating and waterproofing materials - (e.g., transformer oils and cable oils); or

(M) used oils - (see definition for "Used oil" in this section).

(82) **Petroleum underground storage tank (UST) system** - A UST system that contains, has contained, or will contain a petroleum substance (as defined in this section), a mixture of two or more petroleum substances, or a mixture of one or more petroleum substances with very small amounts of one or more hazardous substances. In order for a UST system containing a mixture of petroleum substances with small amounts of hazardous substances to be classified as a petroleum UST system, the hazardous substance must be at such a dilute concentration that the overall release detectability, effectiveness of corrective action, and toxicity of the basic petroleum substance is not altered to any significant degree.

(83) **Pipeline facilities (including gathering lines)** - New and existing pipeline rights-of-way, including any equipment, facilities, or buildings therein which are used in the transportation or associated treatment (during transportation) of gas or hazardous liquids (which include petroleum and other liquids as designated by the Secretary of the United States Department of Transportation), and which are regulated under the federal Natural Gas Pipeline Safety Act of 1968 (49 United States Code App. 1671, *et seq.*); the federal Hazardous Liquid Pipeline Safety Act of 1979 (49 United States Code App. 2001, *et seq.*); or (for intrastate pipeline facilities) the Texas Natural Resources Code, Chapters 111 or 117, or Texas Civil Statutes, Articles 6053-1 and 6053-2.

(84) **Piping** - All underground pipes in an underground storage tank system, including valves, elbows, joints, flanges, flexible connectors, and other fittings attached to a tank system through which regulated substances flow or in which regulated substances are contained or stored.

(85) **Piping trench** - The portion of the excavation zone at an underground storage tank facility which contains the piping system and associated backfill materials.

(86) **Pressurized piping** - Product or delivery piping in an underground storage tank system which typically operates at greater than atmospheric pressure.

(87) **Professional engineer** - A person who is currently duly licensed by the Texas Board of Professional Engineers to engage in the practice of engineering in the State of Texas.

(88) **Professional geoscientist** - A person who is currently duly licensed by the Texas Board of Professional Geoscientists to engage in the public practice of geoscience in the State of Texas.

(89) **Qualified personnel** - Persons who possess the appropriate competence, skills, and ability (as demonstrated by sufficient education, training, experience, and/or, when applicable, any required certification or licensing) to perform a specific activity in a timely and complete manner consistent with the applicable regulatory requirements and generally accepted industry standards for such activity.

(90) **Radioactive materials** - Radioactive substances or radioactive waste materials (e.g., high-level radioactive wastes and low-level radioactive cooling waters) which are classified as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), §101(14), 42 United States Code, §§9601, *et seq.*, except for radioactive materials regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C, 42 United States Code, §§6921, *et seq.*

(91) **Regulated substance** - An element, compound, mixture, solution, or substance that, when released into the environment, may present substantial danger to the public health, welfare, or the environment. For the purposes of this chapter, a regulated substance is limited to any hazardous substance (as defined in this section), any petroleum substance (as defined in this section), any mixture of two or more hazardous substances and/or petroleum substances, and any other substance designated by the commission to be regulated under the provisions of this chapter.

(92) **Release** - Any spilling including overfills, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank or aboveground storage tank into groundwater, surface water, or subsurface soils.

(93) **Release detection** - The process of determining whether a release of a regulated substance is occurring, or has occurred, from an underground storage tank system.

(94) **Repair** - The restoration, renovation, or mending of a damaged or malfunctioning tank or underground storage tank system component.

(95) **Residential tank** - A tank located on property used primarily for dwelling purposes.

(96) **Retail service station** - A facility where flammable liquids used as motor fuels are stored and dispensed from fixed equipment into the fuel tanks of motor vehicles and where such dispensing is an act of retail sale.

(97) **Risk-based corrective action** - Site assessment or site remediation, the timing, type, and degree of which is determined according to case-by-case consideration of actual or potential risk to public health from environmental exposure to a regulated substance released from a leaking underground storage tank or aboveground storage tank.

(98) **Secondary containment** - A containment method by which a secondary wall, jacket, or barrier is installed around the primary storage vessel (e.g., tank or piping) in a manner designed to prevent a release from migrating beyond the secondary wall or barrier before the release can be detected. Secondary containment systems include, but are not limited to: double-wall tank and/or piping systems, impervious liners, jackets, containment boots, sumps, or vaults surrounding a primary (single-wall) tank and/or piping system.

(99) **Septic tank** - A water-tight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer.

(100) **Spill** - A release of a regulated substance which results during the filling, placement, or transfer of regulated substances into an underground storage tank (UST) or an aboveground storage tank (AST), or during the transfer or removal of regulated substances from a UST system or an AST.

(101) **Standard conditions of temperature and pressure** - A temperature of 60 degrees Fahrenheit and an atmospheric pressure of 14.7 pounds per square inch absolute.

(102) **STI** - Steel Tank Institute, a nationally recognized organization which provides certifications and standards for steel tanks.

(103) **Stormwater collection system** - The piping, pumps, conduits, and any other equipment necessary to collect and transport surface water runoff resulting from precipitation to and from retention areas and into natural or man-made drainage channels.

(104) **Suction piping** - Product or delivery piping in an underground storage tank system which typically operates below atmospheric pressure.

(105) **Sump** - Any man-made pit or reservoir that meets the definition of a tank (including any connected troughs or trenches) that serves to collect and temporarily store regulated substances.

(106) **Surface impoundment** - A natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (but possibly lined with man-made materials) that is designed to hold an accumulation of regulated substances.

(107) **Tank** - A stationary device (generally exclusive of any associated ancillary equipment) designed or used to contain an accumulation of regulated substances which is constructed of a non-earthen material (e.g., concrete, steel, or plastic) that provides structural support.

(108) **Tank hole** - The portion of the excavation zone at an underground storage tank facility which contains the tanks and associated backfill materials.

(109) **Tank system** - An underground storage tank system.

(110) **Temporary removal from service** - The procedure by which an underground storage tank system may be temporarily taken out of operation without being permanently removed from service.

(111) **Tightness test (or tightness testing)** - A procedure for testing and analyzing a tank or piping system to determine whether the system(s) is capable of preventing the inadvertent release of a stored substance into the environment.

(112) **UL** - Underwriters Laboratories, Inc., a nationally recognized organization which provides certifications and standards for consumer products and services.

(113) **Underground area** - An underground room, basement, cellar, shaft, or vault, which provides enough space for physical inspection of the exterior of a tank or tank system situated on or above the surface of the floor.

(114) **Underground storage tank** - 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.

(115) **Underground storage tank system** - An underground storage tank, all associated underground piping and underground ancillary equipment, spill and overfill prevention equipment, release detection equipment, corrosion protection system, secondary containment equipment (as applicable), and all other related systems and equipment.

(116) **Unsaturated zone** - The subsurface zone containing water under pressure less than that of the atmosphere (including water held by capillary forces within the soil) and containing air or gases generally under atmospheric pressure. This zone is bounded at the top by the ground surface and at the bottom by the upper surface of the zone of saturation (i.e., the water table).

(117) **Upgrading** - The addition, improvement, retrofitting, or renovation of an existing underground storage tank system with equipment or components as required to meet the corrosion protection, spill and overfill prevention, and release detection requirements of this chapter.

(118) **Used oil** - Any oil or similar petroleum substance that has been refined from crude oil, used for its designed or intended purposes, and contaminated as a result of such use by physical or chemical impurities; and including spent motor vehicle and aircraft lubricating oils (e.g., car and truck engine oil, transmission fluid, and brake fluid), spent industrial oils (e.g., compressor, turbine, bearing, hydraulic, metalworking, gear, electrical, and refrigerator oils), and spent industrial process oils.

(119) **UST** - An underground storage tank (as defined in this section).

(120) **UST system** - An underground storage tank system (as defined in this section).

(121) **Vent lines** - All pipes including valves, elbows, joints, flanges, flexible connectors, and other fittings attached to a tank system, which are intended to convey the vapors emitted from a regulated substance stored in an underground storage tank to the atmosphere.

(122) **Wastewater collection system** - The piping, pumps, conduits, and any other equipment necessary to collect and transport domestic, commercial, or industrial wastewater to and from any facilities or areas where treatment of such wastewater is designated to occur.

(123) **Wastewater treatment tank** - A tank that is designed to receive and treat an influent wastewater through physical, chemical, or biological methods.

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

(a) Design prohibitions. On or after September 1, 1987, no person may install or have installed an underground storage tank (UST) system for the purpose of storing or otherwise containing regulated substances unless such UST system, whether of single-wall or double-wall construction, meets the following standards.

(1) The UST system must prevent releases due to corrosion or structural failure for the operational life of the UST system.

(2) All components of the UST system must be either cathodically protected against corrosion, constructed of noncorrodible material, constructed of a steel material which has been clad with a noncorrodible material, or must be otherwise designed and constructed in a manner that prevents the release of any stored substances.

(3) The UST system must be constructed of, or lined with, a material that is compatible with the stored substance.

(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), the following applies.

(A) Except as provided under subparagraphs (B) and (C) of this paragraph, no common carrier (as defined in §334.2 of this title (relating to Definitions)) shall deposit any regulated substance into a UST system regulated under this chapter unless he observes that the owner or operator has a valid, current delivery certificate issued by the agency covering that UST system.

(B) For new or replacement UST systems, only during the initial period ending 90 days after the date that a regulated substance is first deposited into the new or replacement system(s), a common carrier may accept, as adequate to meet the requirements of subsection (a) of this

section, documentation that the owner or operator has a "temporary delivery authorization," as defined in §334.8(c)(5)(D) of this title, issued by the agency for the facility at which the new or replacement UST system(s) exist.

(C) If in the exercise of good faith, a common carrier who deposits a regulated substance into a UST system is first presented with an apparently valid, current Texas Commission on Environmental Quality 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 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), the following applies.

(A) Except as provided under subparagraph (B) of this paragraph, no person (as defined in §334.2 of this title) shall deposit any regulated substance into a UST system regulated under this chapter unless he observes that the owner or operator has a valid, current registration certificate issued by the agency covering that UST system.

(B) The prohibition referenced in subparagraph (A) of this paragraph is not applicable to deliveries into a new or replacement UST system occurring within 30 days of the first deposit of regulated substances.

(3) Concerning both types of delivery prohibition referenced in this subsection, the following documentation can be accepted as adequate:

(A) the original valid, current document issued by the agency; or

(B) a legible copy of the valid, current document issued by the agency.

§334.7. Registration for Underground Storage Tanks (USTs) and UST Systems.

(a) General provisions.

(1) All underground storage tanks (USTs) in existence on or after September 1, 1987, must be registered with the agency on authorized agency forms in accordance with subsection (e) of this section, except for those tanks which:

(A) are completely exempted or partially exempted from regulation under §334.3(a) or (b) of this title (relating to Exemptions for Underground Storage Tanks (USTs) and UST Systems);

(B) are completely excluded or partially excluded from regulation under §334.4(a) or (c) of this title (relating to Exclusions for Underground Storage Tanks (USTs) and UST Systems);

(C) were properly registered with the agency prior to the effective date of this subchapter under the provisions of the federal Solid Waste Disposal Act, §9002 (42 United States Code, §§6921, *et seq*.), provided that the owner or operator must submit notice of all changes and additional information in accordance with the provisions of subsection (d) of this section;

(D) have been permanently removed from usage by either:

(i) were permanently removed from the ground before May 8, 1986; or

(ii) remain in the ground, but were emptied, cleaned, and filled with solid inert materials on or before January 1, 1974, in accordance with accepted industry practices in effect at the time the UST was taken out of operation; or

(E) were out of operation and empty of regulated substances at the time of their discovery, provided that:

(i) the facility owner and operator can reasonably demonstrate no prior knowledge of the existence of the USTs; and

(ii) the USTs are permanently removed from service in accordance with §334.55 of this title (relating to Permanent Removal from Service) no later than September 29, 1990, or within 60 days of their discovery, whichever is later.

(2) The owner and operator of a UST are responsible for compliance with the tank registration requirements of this section. An owner or operator may designate an authorized representative to complete and submit the required registration information. However, the owner and operator remain responsible for compliance with the provisions of this section by such representatives.

(3) All USTs subject to the registration requirements of this section are also subject to the fee provisions of Subchapter B of this chapter (relating to Underground Storage Tank Fees), except where specifically exempted in this chapter. The failure by a tank owner or operator to properly or timely register any tanks does not exempt the owner from such fee assessment and payment provisions.

(4) Proper completion of the tank registration portions of the UST registration and self-certification form will result in the agency's issuance of a UST registration certificate for the tanks at the facility covered by that registration. This certificate is tied to the delivery prohibitions detailed in §334.5(b)(2) of this title (relating to General Prohibitions for Underground Storage Tanks (USTs) and UST Systems).

(b) Existing tanks. Any person who owns a UST that was in existence on September 1, 1987, must register such tank with the agency not later than September 1, 1987, on an authorized agency

form, except for those tanks exempted and excluded under subsection (a)(1)(A) - (D) of this section. Upon the effective date of this subsection, the obligation becomes joint and several with the tank operator as well.

(c) New or replacement tanks. Any person who owns a new or replacement UST that is placed into service on or after September 1, 1987, must register the tank with the agency on an authorized agency form within 30 days after the date any regulated substance is placed into the tank, except for those tanks exempted or excluded under subsection (a)(1)(A) - (D) of this section. Upon the effective date of this subsection, the obligation becomes joint and several with the tank operator as well.

(d) Changes or additional information.

(1) The owner or operator of a UST system must provide written notice to the agency of any changes or additional information concerning such system. Types of changes or additional information subject to this requirement must include, but are not limited to, the following:

(A) change in owner or operator, or change in owner or operator information (e.g., authorized representative, mailing address, and/or telephone number), provided that:

(i) amended registrations of owner or operator information (other than ownership transfers) may be submitted by the owner, operator, or an authorized representative of the owner or operator; and

(ii) amended registrations reflecting UST ownership transfers must be provided by the new UST owner or a legally-authorized representative of the new UST owner (i.e., registrations of ownership transfers submitted by others will be returned and will not be recorded);

(B) change in the operational status of any tank system (e.g., in service, temporarily out-of-service, removed from the ground, permanently abandoned in-place, change-in-service to provide for the storage of a substance other than a regulated substance, or change to exempt or excluded status);

(C) change in the type of stored regulated substance;

(D) installation of additional tanks and/or ancillary equipment at an existing facility;

(E) change in the type of piping for an existing tank;

(F) the addition of, or a change in the type of, internal or external corrosion protection for the tanks, piping, and/or ancillary equipment;

(G) the addition of, or a change in the type of, spill and overfill prevention equipment for the tanks;

(H) the addition of, or a change in the type of, release detection equipment or methods for the tanks and/or piping;

(I) change in the location of documents and records for the facility; and

(J) change in financial assurance information related to the facility as specified in Chapter 37, Subchapter I of this title (relating to Financial Assurance for Petroleum Underground Storage Tank Systems).

(2) Notice of any change or additional information must be submitted on an authorized agency form which has been completed in accordance with subsection (e) of this section. The agency's UST facility number for the facility must be included in the appropriate space on the form.

(3) Notice of any change or additional information must be filed with the agency within 30 days from the date of the occurrence of the change or addition, or within 30 days from the date on which the owner or operator first became aware of the change or addition, as applicable.

(4) However, for the initial filing of the UST registration and self-certification form (which is described in §334.8(c)(4) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems)) for all regulated UST systems at a facility, all UST owners and operators must complete the "Tank Identification/Description" section of the UST registration portion of the form

by the same deadline given in §334.8(c)(4)(A)(vi) of this title. This requirement does not relieve an owner or operator from any other registration requirements under this section.

(e) Required form for providing UST registration information.

(1) Any UST owner or operator required to submit UST registration information under subsections (a) - (d) of this section must provide all the information indicated on the agency's authorized form for each regulated UST. The UST registration information must be provided on the appropriate agency form, as specified in paragraph (6) of this subsection.

(2) The UST registration portion of the form must be filled out completely and accurately. Upon completion, the form must be dated and signed by the owner, or the operator, or an authorized representative of the owner or operator, and must be filed with the agency within the specified time frames.

(3) All UST owners or operators required to submit UST registration information under subsections (a) - (d) of this section must provide the registration information for all USTs located at a particular facility on the same form.

(4) UST owners or operators who own or operate USTs located at more than one facility must complete and file a separate form for each facility where regulated USTs are located.

(5) If additional information, drawings, or other documents are submitted with new or revised registration data, specific facility identification information (including the facility identification number, if known) must be conspicuously indicated on each document and all such documents must be attached to and filed with the form.

(6) For any UST registration information filed with the agency on or after the effective date of this paragraph, UST owners and operators must provide the required information on an authorized agency UST registration and self-certification form, as prescribed by §334.8(c)(3) of this title.

(7) Owners and operators of petroleum UST systems should also see the financial assurance requirements in §37.870(b) of this title (relating to Reporting, Registration, and Certification).

(f) Inadequate information. When any of the required UST registration information submitted to the agency is determined to be inaccurate, unclear, illegible, incomplete, or otherwise inadequate, the agency may require the owner and/or operator to submit additional information. An owner or operator must submit any such required additional information within 30 days of receipt of such request.

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

(a) Underground storage tank (UST) construction activity certifications. The following UST construction activity certifications are required.

(1) Certification by installer or on-site supervisor. After September 29, 1989, any installer who is employed or otherwise engaged by a UST owner or operator to install or replace a UST system must also certify by signature that the installation methods are in compliance with §334.46 of this title (relating to Installation Standards for New Underground Storage Tank Systems).

(2) Filing requirements. The installation or construction certification information required under paragraph (1) of this subsection must be included in the appropriate sections of the agency's authorized UST registration form or UST registration and self-certification form, as applicable, in accordance with §334.7(e) of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems), and must be filed with the agency in accordance with the applicable tank registration time limits prescribed under §334.7 of this title.

(b) Financial assurance certification for USTs storing a petroleum substance. Owners and operators of UST systems regulated under this section must comply with the requirements of subsection (c) of this section.

(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);

(ii) USTs which are completely excluded or partially excluded from regulation under §334.4 of this title (relating to Exclusions for Underground Storage Tanks (USTs) and UST Systems);

(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) The agency will not provide a UST delivery certificate for USTs covered by the exceptions in paragraph (1)(A) of this subsection.

(3) Conditions and limitations.

(A) Filing of the UST registration and self-certification form does not relieve an owner or operator from the responsibility for timely compliance with other applicable filing requirements under this chapter.

(B) Completion of the UST registration and self-certification 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 a UST delivery certificate for the tanks at the facility for which compliance is self-certified.

(C) The agency's issuance of a delivery certificate for a UST(s) does not constitute agency certification or affirmation of the compliance status of the tank(s) in question with

agency UST technical and/or administrative requirements, and this issuance does not preclude the agency from investigating these tanks and pursuing enforcement actions under the Texas Water Code when apparent violations are discovered.

(D) The administrative requirements and technical standards that are the subject of the compliance self-certification shall include:

(i) tank registration, as described in §334.7 of this title;

(ii) facility fees, as described in Subchapter B of this chapter (relating to Underground Storage Tank Fees);

(iii) financial assurance, as described in Chapter 37, Subchapter I of this title (relating to Financial Assurance for Petroleum Underground Storage Tank Systems); and

(iv) technical standards, as described in §334.49 of this title (relating to Corrosion Protection), §334.50 of this title (relating to Release Detection), §334.51 of this title (relating to Spill and Overfill Prevention and Control), and §334.43 of this title (relating to Variances and Alternative Procedures) when a variance to all or part of one or more of the previous three sections has been granted by the agency in writing under the procedures described in §334.43 of this title (for the purposes of this clause only, certifying to the “technical standards” listed in this subparagraph

includes a certification as to recordkeeping and reporting duties required under those regulations for only the 60 days prior to and including the date of certification).

(4) UST registration and self-certification form.

(A) Requirements for completion of the form.

(i) Each UST registration and self-certification form must be completed with all the applicable information requested on the agency's authorized form for all regulated UST systems at the specified facility.

(ii) Owners or operators who own or operate regulated USTs at more than one facility must complete and file a separate UST registration and self-certification form for each facility.

(iii) The agency will not issue a delivery certificate based upon an incomplete submittal.

(iv) Upon completion, the UST registration and self-certification form must be dated and signed by either the UST owner (or the owner's legally authorized representative) or by the UST operator (or the operator's legally authorized representative).

(v) If additional information, drawings, or other documents are submitted with the UST registration and self-certification form, specific facility identification information (including the facility identification number) must be conspicuously indicated on each document and all these documents must be securely attached to and filed with the UST registration and self-certification form.

(vi) 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) For UST systems where the first storage of regulated substances was initiated before the effective date of this clause, the deadline for submission is 60 days after the effective date of this section.

(II) For UST systems where the date of the first storage of regulated substances was on or after the effective date of this section, the deadline for submission is no later than 30 days after the date of initial storage of regulated substances.

(vii) To ensure timely renewal of a previously issued UST delivery certificate, the deadline for submission is 30 days before the annual renewal date for the UST delivery certificate for that specific facility, as indicated in paragraph (5)(B)(iii) of this subsection.

(B) The facility owner and operator are both responsible for ensuring that the UST registration and self-certification form is fully and accurately completed, and that it is submitted to the agency in a timely manner. To minimize processing delays, the form should be mailed directly to the specific agency office, department, and mail code shown on the form.

(C) When tank ownership at a facility changes, a new certification under this subsection must be made within 30 days of the ownership change.

(5) UST delivery certificate.

(A) Certificate availability.

(i) The owner and operator of USTs regulated under this section must make available to a common carrier a valid, current Texas Commission on Environmental Quality (TCEQ) delivery certificate (or TCEQ temporary delivery authorization under subparagraph (D) of this paragraph, as applicable) before delivery of a regulated substance into the UST(s) can be accepted. The delivery certificate must cover each UST at the facility accepting a delivery. The bill of lading for the first delivery of regulated substance into any new or replacement UST at the facility must be attached to the temporary delivery authorization for that facility.

(ii) The owner and operator of USTs regulated under this section must make immediately available, upon request by agency staff, a valid, current TCEQ delivery certificate

(or TCEQ temporary delivery authorization under subparagraph (D) of this paragraph, as applicable) for the USTs at a facility.

(iii) The owner and operator of USTs regulated under this section must ensure that a valid, current TCEQ delivery certificate (or TCEQ temporary delivery authorization under subparagraph (D) of this paragraph, as applicable) is posted at a facility. The posting must be in a location where the document is clearly visible at all times.

(B) Annual delivery certificate renewal.

(i) The initial delivery certificate issued for a tank(s) will be valid until the expiration date indicated on that certificate. The expiration will be based on the last digit of the official TCEQ owner identification number for the registered owner of the tank(s) in question, as described in clause (ii) of this subparagraph. It is the responsibility of the tank owner and operator to ensure that an application for renewal of that certificate is properly and timely filed.

(ii) A delivery certificate is renewed by timely and proper submission of a new UST registration and self-certification form to the agency. For each facility, to allow time for processing of the renewal request, the agency must have received the properly completed form at least 30 days before the expiration date of the delivery certificate in question. The agency will not issue a renewed delivery certificate based on improper submission of renewal documents.

(iii) Annual expiration and renewal dates for delivery certificates are determined by the last digit of the official TCEQ owner identification number for the registered owner of the tank(s) in question, and the first renewal for all owners and operators is due in calendar year 2002, and for each year thereafter on the following dates:

(I) if owner number ends in “1" delivery certificate expires on January 31, and renewal is due February 1;

(II) if owner number ends in “2" delivery certificate expires on the last day of February, and renewal is due March 1;

(III) if owner number ends in “3" delivery certificate expires on March 31, and renewal is due April 1;

(IV) if owner number ends in “4" delivery certificate expires April 30, and renewal is due May 1;

(V) if owner number ends in “5" delivery certificate expires on May 31, and renewal is due June 1;

(VI) if owner number ends in “6" delivery certificate expires on June 30, and renewal is due July 1;

(VII) if owner number ends in “7" delivery certificate expires July 31, and renewal is due August 1;

(VIII) if owner number ends in “8" delivery certificate expires August 31, and renewal is due September 1;

(IX) if owner number ends in “9" delivery certificate expires September 30, and renewal is due October 1; and

(X) if owner number ends in “0" delivery certificate expires October 31, and renewal is due November 1.

(C) Identifying tanks. Within 30 days of the effective date of this section, or within 30 days of a subsequent tank installation, the owner and operator of USTs regulated under this section are responsible for ensuring that a legible tag, label, or marking is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST at the facility. That tag, label, or marking must clearly and legibly show the designated UST identification number of that UST at that facility and that identification number must be identical to the UST identification number listed on the UST registration and self-certification form filed with the agency under this subsection. All UST identification numbers at a given facility must be numeric, must begin with the number one, and must proceed sequentially without skipping numbers (i.e., 1, 2, 3…). In addition, for each compartmented UST where a single UST has a separate fill tube

for each internal compartment, the numeric UST identification number must be the same for each fill tube serving that single UST; however, to allow differentiation between compartments on the UST registration and self-certification form and at the facility, that common UST identification number must also be followed by a single additional alphabetic identifier for each compartment, beginning with the letter "A" and proceeding sequentially without skipping letters (i.e., 1A, 1B, 1C…).

(D) Temporary delivery authorization.

(i) Upon receipt of a TCEQ construction notification form indicating the pending installation of a new or replacement UST system(s), or indicating that a 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 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), 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 UST system at the facility must be attached to the temporary delivery authorization for that facility.

(6) Revocation of delivery certificate.

(A) Grounds for revocation of delivery certificate. The commission may revoke a delivery certificate for reasons including, but not limited to:

(i) when the executive director determines that any of the information contained or referenced in the compliance self-certification portions of the UST registration and self-certification form was inaccurate at the time the self-certification was made;

(ii) when the tank owner and/or operator submits compliance self-certification information to the executive director which he knows, or reasonably should have known, to be false or deceptive; and

(iii) for any other reason which the commission finds to constitute good cause for revocation.

(B) Procedures for revocation of delivery certificate.

(i) A proceeding to revoke a delivery certificate must be commenced by:

(I) the executive director through the filing of a petition; or

(II) the commission on its own motion.

(ii) If the executive director determines good cause exists to revoke a delivery certificate, the executive director shall file a petition with the chief clerk and provide notice to the owner and operator of the tank(s) in question. To the extent possible, the procedures required to assess administrative penalties under Chapter 70 of this title (relating to Enforcement) shall be followed to revoke a delivery certificate under this subchapter.

(iii) In response to a petition, or on its own motion to revoke a delivery certificate, the commission may:

(I) revoke a certificate; and

(II) issue any other orders permitted by law.

(iv) Revocation of a delivery certificate is cumulative of any other remedies available to the agency by law.

§334.9. Seller's Disclosure.

Effective on and after the effective date of this subchapter, any person who sells or otherwise legally conveys a tank (or tank system) which is designed or intended to be installed as an underground

storage tank (UST) or an aboveground storage tank (AST) must provide the purchaser (or grantee) with written notification of a tank owner's obligations relative to the agency's tank registration, compliance self-certification, and construction/installation notification provisions under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems); §334.127 of this title (relating to Registration for Aboveground Storage Tanks (ASTs)); §334.8 of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems); §334.6 of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems); and §334.126 of this title (relating to Installation Notification for Aboveground Storage Tanks (ASTs)).

(1) The written notification must include the names and addresses of the seller (or grantor) and the purchaser (or grantee), the number of tanks involved, a description of each tank (capacity, tank material, and product stored, if applicable), and the agency's designated facility identification number (if the entire facility is being conveyed).

(2) This notification requirement applies to any transfers or conveyances of a new or used tank from one person to another person, and also applies to the sales of real property where USTs and/or ASTs are located.

(3) The written notification must be provided by the seller (or grantor) to the purchaser (or grantee) prior to the conveyance of the tanks, or prior to the time of the real property closing, as applicable.

(4) For the purpose of fulfilling the disclosure requirements of this section as to USTs, the following language (together with the information in paragraph (1) of this section) is deemed sufficient: "The underground storage tank(s) which are included in this conveyance are presumed to be regulated by the Texas Commission on Environmental Quality and may be subject to certain registration, compliance self-certification, construction notification, and other requirements found in Title 30 Texas Administrative Code, Chapter 334."

(5) For the purpose of fulfilling the disclosure requirements of this section as to ASTs, the following language (together with the information in paragraph (1) of this section) is deemed sufficient: "The aboveground storage tank(s) which are included in this conveyance are presumed to be regulated by the Texas Commission on Environmental Quality and may be subject to certain registration, delivery prohibition, installation notification, and other requirements found in Title 30 Texas Administrative Code, Chapter 334."

§334.10. Reporting and Recordkeeping.

(a) Reporting. Owners and operators of underground storage tank (UST) systems must assure that all reporting and filing requirements in this chapter are met, including the following (as applicable):

(1) construction notification, in accordance with §334.6 of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems);

(2) application for approval of any proposed UST system in the Edwards Aquifer recharge or transition zones, in accordance with §334.6(a)(2) of this title and Chapter 213 of this title (relating to Edwards Aquifer);

(3) registration of UST systems and changes in information, in accordance with §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems);

(4) certification of construction activities, financial assurance, and compliance self-certification in accordance with §334.8 of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems);

(5) request for approval of any variance or alternative procedure, in accordance with §334.43 of this title (relating to Variances and Alternative Procedures);

(6) documentation of release determination or site assessment conducted when a UST system is permanently removed from service, in accordance with §334.55(a)(6) of this title (relating to Permanent Removal from Service);

(7) payment of UST fees, in accordance with Subchapter B of this chapter (relating to Underground Storage Tank Fees);

(8) reports, plans, and certifications related to suspected and confirmed releases of regulated substances, including:

(A) release reports and notifications, in accordance with §334.72 of this title (relating to Reporting of Suspected Releases), §334.75 of this title (relating to Reporting and Cleanup of Surface Spills and Overfills), and §334.76 of this title (relating to Initial Response to Releases);

(B) report and certification of site check methods, in accordance with §334.74(c) of this title (relating to Release Investigation and Confirmation Steps);

(C) initial abatement report, in accordance with §334.77(b) of this title (relating to Initial Abatement Measures and Site Check);

(D) initial site assessment report, in accordance with §334.78(b) of this title (relating to Site Assessment);

(E) non-aqueous phase liquid removal report, in accordance with §334.79(d) of this title (relating to Removal of Non-Aqueous Phase Liquids (NAPLs));

(F) soil and groundwater contamination information, in accordance with §334.80(b) of this title (relating to Investigation for Soil and Groundwater Cleanup);

(G) corrective action plan, in accordance with §334.81 of this title (relating to Corrective Action Plan);

(H) notification of cleanup initiation, in accordance with §334.81(e) of this title;

(I) certification of compliance with corrective action plan, in accordance with §334.81(g) of this title; and

(J) public notices related to corrective action plans, in accordance with §334.82(b) of this title (relating to Public Participation);

(9) notifications and reports relating to financial assurance requirements, in accordance with Chapter 37, Subchapter I of this title (relating to Financial Assurance for Petroleum Underground Storage Tank Systems); and

(10) any other reports, filings, notifications, or other submittals required by this chapter, or otherwise required by the agency to demonstrate compliance with the provisions of this chapter. When agency requirements specify documents that must be prepared by, or prepared under, the supervision of a duly licensed professional engineer, a duly licensed professional geoscientist, or a duly licensed professional surveyor, those documents must be prepared in accordance with all requirements of statute and rule applicable to that respective professional.

(b) Recordkeeping.

(1) General recordkeeping requirements.

(A) Owners and operators of UST systems are responsible for developing and maintaining all records required by the provisions of this chapter.

(B) Except as provided in subparagraphs (C) and (D) of this paragraph, legible copies of all required records pertaining to a UST system must be maintained in a secure location on the premises of the UST facility, must be immediately accessible for reference and use by the UST system operator, and must be immediately available for inspection upon request by agency personnel.

(C) Except as provided in clause (v) of this subparagraph, in the event that copies of the required records cannot reasonably be maintained on the premises of the UST facility, then such records may be maintained at a readily accessible alternate site, provided that the following conditions are met.

(i) If the UST system is in operation, the records must be readily accessible for reference and use by the UST system operator.

(ii) The records must be readily accessible and available for inspection upon request by agency personnel.

(iii) The owner or operator must provide the following information (in writing) to the agency's central office and to the agency's appropriate regional office:

(I) the specific location where the required records are maintained; and

(II) the name, address, and telephone number of the authorized custodian of such records.

(iv) The filing of the written information required in clause (iii) of this subparagraph must be accomplished no later than October 29, 1989, 30 days after a UST installation or replacement has been completed, or 30 days after the UST records are moved to an alternate site, whichever is later or applicable, as provided in §334.7(d) of this title.

(v) The conditional authorization otherwise allowed under this subparagraph for records maintenance at an alternative, off-premises location is not applicable to the UST delivery certificate (or temporary delivery authorization, if applicable) issued by the agency under §334.8(c) of this title. This UST delivery certificate must be maintained on the premises of all facilities with regulated USTs, must be posted by the UST system operator, and must be visible to the person(s) performing deliveries to the UST system.

(D) For UST systems which have been permanently removed from service in accordance with the applicable provisions of §334.55 of this title, the facility owner may submit the appropriate records required by this chapter to the agency in lieu of maintaining the records on the premises or at an alternative site, provided that the following conditions are met:

(i) the facility is no longer operated in a manner that requires the underground storage of regulated substances, and all UST systems at the facility have been permanently removed from service;

(ii) the facility owner must provide written justification adequate to explain why such records cannot be maintained on the premises of the UST facility or at a readily accessible alternative site; and

(iii) the records must be submitted at one time in one package for each UST facility, and the records must be appropriately labeled with the UST facility location information and the UST facility identification number.

(2) Required records and documents. Owners and operators of UST systems must assure that all recordkeeping requirements in this chapter are met, including the following records and documentation (as applicable).

(A) Legible copies of the following general records must be maintained for the operational life of the UST system:

(i) original and amended registration documents, in accordance with §334.7 of this title;

(ii) original and amended certifications for UST installations and financial assurance, in accordance with §334.8 of this title;

(iii) notification to UST purchaser, in accordance with §334.9 of this title (relating to Seller's Disclosure).

(B) Legible copies of applicable records and documents related to technical standards for UST systems must be maintained in accordance with the following provisions:

(i) application documents and the agency's approval letter for any variances or alternative procedures, in accordance with §334.43 of this title;

(ii) records demonstrating compliance with technical standards and installation standards for new UST systems, in accordance with §334.45(f) of this title (relating to Technical Standards for New Underground Storage Tank Systems) and §334.46(i) of this title (relating to Installation Standards for New Underground Storage Tank Systems);

(iii) records demonstrating compliance with the minimum upgrading requirements for existing UST systems, in accordance with §334.47(d) of this title (relating to Technical Standards for Existing Underground Storage Tank Systems);

(iv) operation and maintenance records, in accordance with §334.48(g) of this title (relating to General Operating and Management Requirements);

(v) corrosion protection records, in accordance with §334.49(e) of this title (relating to Corrosion Protection);

(vi) release detection records, in accordance with §334.50(e) of this title (relating to Release Detection);

(vii) spill and overfill control records, in accordance with §334.51(c) of this title (relating to Spill and Overfill Prevention and Control);

(viii) records for repairs and relining of a UST system, in accordance with §334.52(d) of this title (relating to Underground Storage Tank System Repairs and Relining);

(ix) records for reuse of used tanks, in accordance with §334.53(c) of this title (relating to Reuse of Used Tanks);

(x) records for temporary removal of UST systems from service, in accordance with §334.54(f)(4) of this title (relating to Temporary Removal from Service);

(xi) records for permanent removal of UST systems from service, in accordance with §334.55(f) of this title.

(C) Legible copies of all required financial assurance records must be maintained in accordance with the applicable provisions of Chapter 37, Subchapter I of this title.

(D) Legible copies of previous and current registration and self-certification forms required to be filed annually with the agency under §334.8(c) of this title, as well as UST delivery certificates, must be maintained for at least five years from the original date of submittal.

§334.12. Other General Provisions.

(a) Other regulations. 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 Commission on Environmental Quality , and any other federal, state, and local governmental agencies or entities having appropriate jurisdiction.

(b) Owner and operator responsibility.

(1) Owners and operators are responsible for any violations or noncompliant activities resulting from the actions or inactions by any installer, contractor, operator, or other person who is employed or otherwise engaged by an owner or operator of a UST or an AST.

(2) The commission shall consider the person who is in day-to-day control of a petroleum storage tank system at a site that is in violation of applicable statute or agency regulations to be the:

(A) person primarily responsible for taking corrective action, for corrective action costs, for receiving a notice of violation, or for paying a penalty assessed; and

(B) primary subject of an enforcement action or order.

(3) The liability of certain taxing units as owners or operators of USTs and ASTs is conditionally and specifically limited, in accordance with the provisions and conditions of Texas Water Code (TWC), §26.3516 (relating to Limits on Liability of Taxing Units).

(4) The liability of certain lenders as owners or operators of USTs and ASTs is conditionally and specifically limited, in accordance with the provisions and conditions of TWC, §26.3514 (relating to Limits on Liability of Lender).

(5) The liability of certain corporate fiduciaries as owners or operators of USTs and ASTs is conditionally and specifically limited, in accordance with the provisions and conditions of TWC, §26.3515 (related to Limits on Liability of Corporate Fiduciary).

(c) Inspections, monitoring, and testing.

(1) For the purposes of developing or assisting in the development of any regulation, conducting any study, or enforcing this chapter, an owner and/or operator of a UST or an AST, on the request of the agency, must:

(A) furnish information relating to the tank, including tank equipment and contents; and

(B) permit a designated agent or employee of the agency at all reasonable times to have access to and to copy all records relating to the tanks.

(2) For the purposes of developing or assisting in the development of a regulation, conducting a study, or enforcing the provisions of this chapter, the agency's designated agent or employee may:

(A) enter at reasonable times an establishment or place in which a UST or an AST is located;

(B) inspect and obtain samples of a regulated substance contained in the tank from any person; and

(C) conduct monitoring or testing of the tanks, associated equipment, contents, or surrounding soils, air, surface water, or groundwater.

(3) The agency may order an owner or operator of a UST or an AST to conduct monitoring and testing if the agency determines that there is reasonable cause to believe that a release has occurred in the area in which the UST or AST is located.

SUBCHAPTER C: TECHNICAL STANDARDS

§§334.46, 334.50, 334.55, 334.56

STATUTORY AUTHORITY

The amendments 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; §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 adopted under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an AST; and §26.3573, which allows the commission to use funds from the PST remediation account to reimburse an eligible owner or operator or insurer for the expenses of corrective action or to pay the claim of a contractor hired by an eligible owner or operator to perform corrective action.

§334.46. Installation Standards for New Underground Storage Tank Systems.

(a) General installation procedures. Any new underground storage tank (UST) system installed on or after the effective date of this subchapter shall be installed in compliance with the provisions of this section.

(1) Standards. All tanks, piping, and associated equipment shall be installed in accordance with at least one of the following standards, as applicable:

(A) PEI Publication RP-100, "Recommended Practices for Installation of Underground Liquid Storage Systems";

(B) API Publication 1615, "Installation of Underground Petroleum Storage Systems";

(C) ANSI Standard B31.3, "Petroleum Refinery Piping" and ANSI Standard B31.4, "Liquid Petroleum Transportation Systems"; or

(D) any other code or standard of practice developed by a nationally recognized association or independent testing laboratory that has been reviewed and determined by the agency to be no less protective of human health and safety and the environment than the standards described in subparagraphs (A) - (C) of this paragraph, in accordance with the procedures in §334.43 of this title (relating to Variances and Alternative Procedures).

(2) Installation personnel. All tanks, piping, and associated equipment shall be installed by personnel possessing the appropriate skills, experience, competence, and, if applicable, any required certification or license to complete the installation in accordance with recognized industry

practices and this chapter, and in a manner designed to minimize the possibility of UST system failures and the releases of regulated substances.

(3) Damages.

(A) All reasonable precautions shall be taken to prevent improper handling and damaging of the tanks and piping during the unloading and installation processes.

(B) Tanks and piping shall be physically inspected by the installer prior to installation.

(C) Any damage shall be repaired in accordance with the manufacturer's specifications; otherwise, damaged tanks and/or piping shall be replaced.

(4) Excavation.

(A) The tank excavation zone and piping trenches shall provide adequate vertical and horizontal space for the tanks, piping, and associated equipment, for the proper placement and compaction of bedding and backfill materials (particularly under the lower quadrant of the tank's circumference), and for adequate cover and paving to accommodate anticipated traffic loads.

(B) Tank excavation shall be performed in a manner that will avoid the undermining of foundations and other existing structures, and shall be constructed not less than three feet from the base of adjacent structures (unless specifically approved by a licensed professional engineer) and not less than three feet from any underground utility easements and property lines.

(5) Bedding and backfill.

(A) The bedding and backfill shall consist of clean, washed, suitably graded, and noncorrosive sand, crushed rock, or pea gravel.

(B) The bedding and backfill material shall be selected and placed in accordance with the tank and piping manufacturer's specifications, and shall be placed and compacted in uniform lifts, as appropriate, to assure proper support and protection of the tank and piping after installation.

(C) Minimum bedding and backfill requirements shall be in accordance with the applicable industry standard for the construction, as prescribed in this subsection.

(D) The placement of tanks or piping directly on native soils, concrete pads or saddles, or any other underlayment except the bedding materials listed in this paragraph is specifically prohibited.

(b) Anchoring systems. Unless otherwise approved by the agency in accordance with §334.43 of this title, all USTs located in areas subject to high water tables or flooding shall be protected from any flotation or movement which could jeopardize the integrity of the UST system.

(1) Methods to prevent tank flotation shall be in accordance with the tank manufacturer's specifications and shall be one (or a combination) of the following methods:

(A) the provision of ample backfill and/or paving on top of the tank to offset the buoyancy forces;

(B) the installation of a properly designed deadman anchoring system, where the concrete beams shall be placed outside the vertical extension of the tank diameter and where the length of the beams shall extend at least one foot beyond the ends of the tank; or

(C) the installation of a properly designed concrete hold-down pad anchoring system beneath the tank, where the pad's width and length shall extend at least one foot beyond the tank sides and ends in all directions.

(2) The installation of anchoring straps or cables shall be in accordance with the tank manufacturer's specifications. All parts of the straps, cables, and hardware shall be of corrosion-resistant material or, if metallic, shall be thoroughly coated or wrapped with a suitable dielectric material.

(c) Piping system installation.

(1) The piping layout shall be designed in a manner that will minimize the crossing of other lines and conduits, and the crossing of tanks and other UST system components. Where such crossing is unavoidable, adequate clearance shall be provided to prevent contact.

(2) Traps, sumps, or sags in the lines shall be avoided, and all piping shall slope at least 1/8 inch per foot in the direction of the tank.

(3) All piping joints shall be accurately cut, deburred, cleaned, and sealed with appropriate piping sealant, bonding agent, or adhesive in accordance with the piping manufacturer's specifications so as to provide liquid-tight connections.

(d) Installation testing for new tanks and piping.

(1) Air testing of new tanks shall be conducted in accordance with the tank manufacturer's specifications.

(A) Air testing for single-wall tanks shall include the soaping of all surfaces, seams, and fittings, pressurizing and gauging with three to five pounds per square inch gauge (psig) air pressure for at least one hour, monitoring the gauge for pressure drops, and inspecting for bubbles.

(B) Air testing for double-wall tanks shall be in accordance with subsection (f)(2)(B) of this section.

(C) Gauges used in air testing procedures shall have a maximum range not exceeding 15 psig. All tanks undergoing air pressure testing shall be equipped with a pressure relief device capable of relieving the total output of the compressed air source at a pressure of not more than six psig.

(2) Air testing of new piping, fittings, and valves shall be conducted in accordance with the manufacturer's specifications. New piping shall be tested before being covered and placed into use. Air testing of piping shall include the soaping of all joints, pressurizing with compressed air to 150% of the maximum piping operating pressure, or a minimum of 50 psig, for at least one hour, and inspecting for bubbles. Air testing for secondary containment piping shall be in accordance with subsection (f)(3)(B) of this section.

(3) In addition to the air tests, a tank tightness test and a piping tightness test meeting the requirements of §334.50(d)(1)(A) and (b)(2)(A)(ii)(I), respectively, of this title (relating to Release Detection) shall be performed after the backfill has been placed but prior to bringing the new UST system into operation.

(4) Additional tests required. In addition to the air tests and tightness tests required in this subsection, the following additional installation tests shall be required, as applicable.

(A) For fiberglass-reinforced plastic tanks, the tank diameter shall be accurately measured prior to and after installation to ascertain the amount of vertical deflection, as specified in the tank manufacturer's installation procedures. Except when specifically authorized in writing by an authorized representative of the tank manufacturer, tanks shall not be placed into operation if the measured vertical deflection exceeds the manufacturer's maximum allowable deflection ratings.

(B) For steel tanks and other underground UST system components which are equipped with factory-installed or field-installed cathodic corrosion protection systems, the cathodic protection systems shall be tested for operability and adequacy of protection by a qualified corrosion technician or qualified corrosion specialist after the UST system installation is completed but prior to placing the system into operation.

(i) If the test indicates that the cathodic protection system is inoperable or inadequate, a qualified corrosion specialist shall review the test results and thoroughly inspect the UST system to ascertain the extent of corrosion protection.

(ii) If the qualified corrosion specialist determines that the UST system component is no longer adequately protected from corrosion, then the owner or operator shall assure that one or more of the following procedures are completed before the UST system is placed into operation.

(I) Appropriate repairs or modifications shall be made to restore the cathodic corrosion protection to the applicable UST system components.

(II) The cathodic protection system shall be replaced with another operable cathodic protection system which will provide adequate corrosion protection to the applicable UST system components, in accordance with the requirements in §334.49(c)(2) of this title (relating to Corrosion Protection).

(e) Installation of cathodic protection systems. The installation of any field-installed cathodic protection system in a new or existing UST system shall be in accordance with the applicable requirements of §334.49(c)(2) of this title.

(f) Installation of secondary containment systems.

(1) Secondary containment. Any secondary containment system shall meet the technical standards of §334.45(d) of this title (relating to Technical Standards for New Underground Storage Tank Systems).

(2) Installation of double-wall tanks.

(A) The installation of double-wall tanks shall be in compliance with the manufacturer's specifications and the applicable tank installation procedures in this section.

(B) Air testing for double-wall tanks shall be in accordance with the manufacturer's specifications or the following procedures.

(i) The primary tank shall be pressurized and gauged with three to five psig of air pressure. The primary tank shall be pressurized for at least one hour, and the gauge pressure shall be periodically monitored for any pressure drops.

(ii) After disconnecting the outside air pressure source, the interstitial area between the tank walls shall be pressurized with air pressure from the primary tank. A second gauge shall be used to measure the pressure in the interstitial space.

(iii) The exterior of the tank shall be soaped, and the integrity of the system shall be inspected by monitoring the gauges and inspecting for air bubbles for at least one hour prior to releasing the pressure.

(iv) Gauges used in air testing procedures shall have a maximum range not exceeding 15 psig. All tanks undergoing air testing shall be equipped with a pressure relief device capable of relieving the total output of the compressed air source at a pressure of not more than six psig.

(3) Installation of double-wall piping.

(A) The installation of double-wall piping shall be in compliance with the manufacturer's specifications and the applicable piping installation procedures in this section.

(B) After successful air testing of the completed primary piping system (in accordance with subsection (d)(2) of this section), the secondary containment piping shall be air tested in accordance with the manufacturer's specifications and the following procedures.

(i) The secondary containment piping shall be pressurized and gauged with three to five psig of air pressure.

(ii) The exterior of the secondary containment piping shall be soaped and the integrity of the system shall be inspected by monitoring for air bubbles for at least one hour.

(iii) The secondary containment piping system shall remain pressurized, and the gauges shall be periodically monitored for pressure losses, until the entire UST system installation is complete in order to monitor for damages during the remaining construction activities.

(4) Installation of external liners.

(A) External liners shall be installed in accordance with the manufacturer's specifications, and in accordance with the requirements in this paragraph.

(B) The installation, field-seaming, and field-repair of any liners shall be performed only by qualified personnel who have been properly trained and certified by the liner manufacturer.

(C) The liner shall be protected from puncture, abrasion, or any other damage during placement and during installation of other UST system components. A protective layer of puncture-resistant filter fabric shall be required when the liner is placed in an excavation area where the presence of sharp paving, rocks, or other debris presents a threat to the liner integrity.

(D) The liner shall be installed in a manner that will allow sufficient enclosure of the secondarily protected component to prevent lateral and vertical migration of any collected regulated substances.

(E) For UST systems which are equipped with cathodic protection equipment, the liner shall be installed so as not to jeopardize or inhibit the proper operation of such cathodic protection equipment.

(F) The liner installation shall include the provision of an appropriate number of recessed collection/detection points, and all portions of the liner shall be sloped toward such points to permit the detection of any releases from the primary storage component.

(G) The installation of the liner shall be performed in a manner that will ensure that groundwater, soil moisture, and stormwater runoff will not adversely affect the liner's ability to collect and contain regulated substances or the ability of the selected release detection methods to operate effectively.

(H) The liner shall be designed and installed to ensure that it will always be situated above the highest groundwater level and outside the 25-year flood plain, unless the liner and the release detection system are properly designed for use under such conditions. The owner or operator may be required to provide documentation of the methods used to determine groundwater and floodplain information.

(I) After completion of the liner installation, but prior to placing the UST system into service, the liner shall be properly tested in accordance with the manufacturer's specifications.

(g) Installation of monitoring wells and observation wells. All monitoring wells and observation wells installed in conjunction with a UST system on or after the effective date of this subchapter shall be constructed and installed in accordance with the requirements of this subsection .

(1) General requirements for both monitoring wells and observation wells.

(A) All monitoring wells and observation wells shall be constructed or installed by personnel possessing the appropriate skills, experience, competence, and, if applicable, any required license or certification to complete the construction or installation in accordance with recognized industry standards and the requirements of this subsection.

(B) Except for observation wells installed under §334.45(e)(4)(B) of this title, the determination of the appropriate number and the appropriate diameters of monitoring wells or observation wells shall be based on the planned purpose of such well and on the specific procedures, methods, and equipment to be utilized in achieving such purpose.

(C) The slotted or screened portion of the monitoring well or observation well casing shall be designed and sized so as to prevent the migration of natural soils, backfill material, or filter pack material into the well, and to allow the unrestricted entry of any released regulated substances (liquid-phase or vapor-phase, as applicable) into the well at all times, regardless of the groundwater levels.

(D) The well casing material shall be sufficiently compatible with the stored regulated substance such that prolonged exposure to such substances will not cause failure or excessive deterioration of the casing.

(E) When installed or constructed for the purposes of compliance with one or more of the release detection methods in §334.50(d) of this title, the specific number and positioning of

the monitoring wells and/or observation wells shall be based on the results of an assessment of the underground areas within and immediately surrounding the UST system excavation zone to assure compliance with the specific criteria and requirements for the applicable release detection method. Such assessment shall be performed by qualified personnel who are familiar with the characteristics of the stored regulated substance and the groundwater, soil, and geologic conditions at the site.

(F) All monitoring wells and observation wells shall be equipped with a properly designed and properly installed bottom cap.

(G) All monitoring well and observation well installations shall include an appropriate access vault or manhole, which shall be equipped with a liquid-tight cover and be designed to divert surface runoff away from the well.

(H) All monitoring wells and observation wells shall be properly capped, labeled, and secured (or locked) to prevent unauthorized access, tampering, and any deliberate or accidental depositing of unauthorized substances.

(2) Additional requirements for monitoring wells. In addition to the general requirements of paragraph (1) of this subsection, all monitoring wells installed in conjunction with a UST system shall be constructed or installed in accordance with the applicable requirements of 16 TAC Chapter 76 (relating to Water Well Drillers), and Texas Water Code (TWC), Chapter 32 (relating to

Water Well Drillers). Any person constructing or installing a monitoring well shall be appropriately licensed as required therein.

(3) Additional requirements for observation wells. In addition to the general requirements of paragraph (1) of this subsection, the following requirements shall be applicable to all observation wells installed in conjunction with a UST system.

(A) All observation wells that are regulated as monitoring wells by the Water Well Drillers Board shall be constructed or installed in accordance with the applicable requirements in 16 TAC Chapter 76, and TWC, Chapter 32. Any person constructing or installing such well shall be appropriately licensed as required therein.

(B) All observation wells that are not regulated as monitoring wells by the Water Well Drillers Board shall be constructed or installed in accordance with the following minimum requirements.

(i) All observation wells shall be designed and installed in general accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(ii) All observation wells shall be constructed or installed within the UST system excavation zone, and shall be completed to a depth of at least two feet below the lowest

part of any monitored tank, or at least one foot below the lowest part of any monitored piping, as applicable.

(iii) For observation wells installed or constructed on or after the effective date of this subchapter in a new or existing UST system where the backfill consists of specialized or select materials (i.e., sand, pea gravel, or crushed rock), the following minimum requirements shall be applicable.

(I) The access vault or manhole shall be properly installed in a concrete encasement which shall extend from the top of the vault to at least one foot below the base of the vault to provide adequate structural support and to prevent surface runoff and pollutants from entering the well.

(II) Beginning at the bottom of the concrete encasement beneath the access vault, the well casing shall be properly sealed with impervious bentonite or a similar impervious material for a minimum distance of either one foot below the bottom of the concrete encasement or to the top of the specialized or select backfill material, whichever is the greater depth.

(iv) For observation wells installed or constructed on or after the effective date of this subchapter in an existing UST system where the backfill consists of materials other than specialized or select materials (e.g., native soils), the well shall be constructed or installed in accordance with the applicable standards in 16 TAC Chapter 76. If the observation well is not

regulated as a monitoring well by the Water Well Drillers Board, the licensing requirements for persons constructing or installing such well shall not be applicable.

(h) Certification of installation.

(1) All owners and operators of new UST systems installed on or after the effective date of this subchapter shall ensure that the installation was completed in accordance with the provisions of this section, and that the following certification criteria applicable to the installation are met.

(A) For all UST system installations commencing on or after the effective date of this subchapter but before February 1, 1990, the owner or operator shall assure that at least one of the following criteria is met:

(i) the installer of the UST system has been properly certified by the tank, piping, and equipment manufacturers;

(ii) the installation has been inspected and certified by a licensed professional engineer with appropriate training and experience in UST system installation procedures;

(iii) all construction and installation activities listed in the equipment manufacturers' checklists have been properly completed; or

(iv) the installation activities have been reviewed and determined by the agency to prevent releases in a manner that is no less protective of human health and the environment than the methods described in clauses (i) - (iii) of this subparagraph. Any alternative methods must be submitted and approved in accordance with the procedures in §334.43 of this title.

(B) For all UST system installations commencing on or after February 1, 1990, the owner or operator shall assure that the UST system installation is conducted by an installer licensed by the agency.

(2) The installer of the UST system shall complete the installation certification section of the agency's authorized form, and shall certify by signature that the installation methods are in compliance with the provisions of this section, as required by §334.8(a) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems).

(i) Installation records.

(1) Owners and operators shall maintain all installation records required 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 relating to the installation activity, including:

(i) date of installation activity;

(ii) names, addresses, and telephone numbers of the persons conducting the installation and performing any associated inspections or testing; 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;

(B) as-built drawings (or plans), which have been drawn to scale and in sufficient detail to accurately depict and describe the sizes, dimensions, and locations of the following:

(i) all pertinent site features, including property boundaries, street and road rights-of-way, easements, utility lines, buildings and other structures, driveways, slabs, and any natural features;

(ii) all pertinent UST system components, including tanks, piping, vent piping, pumps, dispensers, excavation zone (including tank hole and piping trench), monitoring wells, spill and overfill prevention equipment, release detection system components (including monitoring and testing locations), cathodic protection system components (including test stations), secondary containment systems, anchoring systems, and any other pertinent UST system components; and

(iii) any site features or UST system components which have been added, revised, changed, modified, or removed subsequent to the preparation of the original drawings or plans; and

(C) equipment information for all UST system components including:

(i) manufacturers' specifications, installation instructions, operating instruction, warranty information, recommended test procedures, and inspection and maintenance schedules; and

(ii) names, addresses, and telephone numbers of the manufacturers' representatives and local authorized service technicians.

(3) Owners and operators shall maintain the results of all equipment tests, including the air tests and the tightness tests conducted on the tanks and piping at the time of installation, for at least five years after the date of installation.

§334.50. Release Detection.

(a) General requirements.

(1) Owners and operators of new and existing underground storage tank (UST) systems shall provide a method, or combination of methods, of release detection which shall be:

(A) capable of detecting a release from any portion of the UST system which contains regulated substances including the tanks, piping, and other underground ancillary equipment;

(B) installed, calibrated, operated, maintained, utilized, and interpreted (as applicable) in accordance with the manufacturer's and/or methodology provider’s specifications and instructions consistent with the other requirements of this section, and by personnel possessing the necessary experience, training, and competence to accomplish such requirements; and

(C) capable of meeting the particular performance requirements of such method (or methods) as specifically prescribed in this section, based on the performance claims by the equipment manufacturer or methodology provider/vendor, as verified by third-party evaluation conducted by a qualified independent testing organization, using applicable United States Environmental Protection Agency protocol, provided that the following additional requirements shall also be met.

(i) Any performance claims, together with their bases or methods of determination including the summary portion of the independent third-party evaluation, shall be obtained by the owner and/or operator from the equipment manufacturer, methodology provider, or installer and shall be in writing.

(ii) When any of the following release detection methods are used on or after December 22, 1990 (except for methods permanently installed and in operation prior to that date), such method shall be capable of detecting the particular release rate or quantity specified for that method such that the probability of detection shall be at least 95% and the probability of false alarm shall be no greater than 5.0%:

(I) tank tightness testing, as prescribed in subsection (d)(1)(A) of this section;

(II) automatic tank gauging, as prescribed in subsection (d)(4) of this section;

(III) automatic line leak detectors for piping, as prescribed in subsection (b)(2)(A)(i) of this section;

(IV) piping tightness testing, as prescribed in subsection (b)(2)(A)(ii)(I) of this section;

(V) electronic leak monitoring systems for piping, as prescribed in subsection (b)(2)(A)(ii)(III) of this section; and

(VI) statistical inventory reconciliation (SIR), as prescribed in subsection (d)(9) of this section.

(2) When a release detection method operated in accordance with the particular performance standards for that method indicates that a release either has or may have occurred, the owners and operators shall comply with the applicable release reporting, investigation, and corrective action requirements in Subchapter D of this chapter (relating to Release Reporting and Corrective Action).

(3) Owners and operators of all UST systems shall comply with the release detection requirements of this section in accordance with the applicable schedules in §334.44 of this title (relating to Implementation Schedules).

(4) As prescribed in §334.47(a)(2) of this title (relating to Technical Standards for Existing Underground Storage Tank Systems), any existing UST system that cannot be equipped or monitored with a method of release detection that meets the requirements of this section shall be permanently removed from service in accordance with the applicable procedures in §334.55 of this title (relating to Permanent Removal from Service) no later than 60 days after the implementation date for release detection as prescribed by the applicable schedules in §334.44 of this title.

(5) Any owner or operator who plans to install a release detection method for a UST system shall comply with the applicable construction notification requirements in §334.6 of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems), and upon completion of the installation of such method shall also comply with the applicable registration and certification requirements of §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) and §334.8 of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems).

(6) Any equipment installed or used for conducting release detection for a UST system shall be listed, approved, designed, and operated in accordance with standards developed by a nationally recognized association or independent testing laboratory (e.g., UL) for such installation or use, as specified in §334.42(d) of this title (relating to General Standards).

(7) For a UST system to be placed temporarily out-of-service, the owner or operator must comply with the requirements of §334.54(c) of this title (relating to Temporary Removal from Service).

(b) Release detection requirements for all UST systems. Owners and operators of all UST systems shall ensure that release detection equipment or procedures are provided in accordance with the following requirements.

(1) Release detection requirements for tanks.

(A) Except as provided in subparagraphs (B) and (C) of this paragraph and in subsection (d)(9) of this section, all tanks shall be monitored in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods described in subsection (d)(4) - (10) of this section).

(B) A combination of tank tightness testing and inventory control in accordance with subsection (d)(1) of this section may be used as an acceptable release detection method for tanks only until December 22, 1998, and the required frequency of the tank tightness test shall be based on the following criteria.

(i) A tank tightness test shall be conducted at least once each year for any tank in an existing UST system which is not being operated in violation of the upgrading or replacement schedule in §334.44(b) of this title, but has not yet been either:

(I) replaced with a UST system meeting the applicable technical and installation standards in §334.45 of this title (relating to Technical Standards for New Underground Storage Tank Systems) and §334.46 of this title (relating to Installation Standards for New Underground Storage Tank Systems); or

(II) retrofitted or equipped in accordance with the minimum upgrading requirements applicable to existing UST systems in §334.47 of this title.

(ii) A tank tightness test shall be conducted at least once every five years for any tank in a UST system which has been either:

(I) installed in accordance with the applicable technical standards for new UST systems in §334.45 and §334.46 of this title; or

(II) retrofitted or equipped in accordance with the minimum upgrading requirements applicable to existing UST systems in §334.47 of this title.

(C) The manual tank gauging method of release detection, as prescribed in subsection (d)(2) of this section, may be used as the sole release detection system only for a petroleum substance tank with a nominal capacity of 1,000 gallons or less. The monthly tank gauging method of release detection, as prescribed in subsection (d)(3) of this section, may be used as the sole release detection system only for emergency generator tanks.

(D) In addition to the requirements in subparagraphs (A) - (C) of this paragraph, any tank in a hazardous substance UST system shall also be equipped with a secondary containment system and related release detection equipment, as prescribed in subsection (c) of this section.

(2) Release detection for piping. Piping in a UST system shall be monitored in a manner which will detect a release from any portion of the piping system, in accordance with the following requirements.

(A) Requirements for pressurized piping. UST system piping that conveys regulated substances under pressure shall be in compliance with the following requirements.

(i) Each separate pressurized line shall be equipped with an automatic line leak detector meeting the following requirements.

(ii) In addition to the required line leak detector prescribed in clause (i) of this subparagraph, each pressurized line shall also be tested or monitored for releases in accordance with at least one of the following methods.

(I) The piping may be tested at least once per year by means of a piping tightness test conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory. Any such piping tightness test shall be capable of detecting any release from the piping system of 0.1 gallons per hour when the piping pressure is at 150% of normal operating pressure.

(II) The line leak detector shall be capable of alerting the UST system operator of any release within one hour of occurrence either by shutting off the flow of regulated substances, or by substantially restricting the flow of regulated substances.

(III) The line leak detector shall be tested at least once per year for performance and operational reliability and shall be properly calibrated and maintained, in accordance with the manufacturer's specifications and recommended procedures.

(ii) In addition to the required line leak detector prescribed in clause (i) of this subparagraph, each pressurized line shall also be tested or monitored for releases in accordance with at least one of the following methods.

(I) The piping may be tested at least once per year by means of a piping tightness test conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory. Any such piping tightness test shall be capable of detecting any release from the piping system of 0.1 gallons per hour when the piping pressure is at 150% of normal operating pressure.

(II) Except as provided in subsection (d)(9) of this section, the piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in subsection (d)(5) - (10) of this section.

(III) The piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by means of an electronic leak monitoring system capable of detecting any release from the piping system of 0.2 gallons per hour at normal operating pressure.

(B) Requirements for suction piping and gravity flow piping.

(i) Except as provided in clause (ii) of this subparagraph, each separate line in a UST piping system that conveys regulated substances either under suction or by gravity flow shall meet at least one of the following requirements.

(I) Each separate line may be tested at least once every three years by means of a positive or negative pressure tightness test applicable to underground product piping and conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory. Any such piping test shall be capable of detecting any release from the piping system of 0.1 gallons per hour.

(II) Each line may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in subsection (d)(5) - (10) of this section.

(ii) No release detection methods are required to be installed or applied for any piping system that conveys regulated substances under suction when such suction piping system is designed and constructed in accordance with the following standards:

(I) the below-grade piping operates at less than atmospheric pressure;

(II) the below-grade piping is sloped so that all the contents of the pipe will drain back into the storage tank if the suction is released;

(III) only one check valve is included in each suction line;

(IV) the check valve is located aboveground, directly below and as close as practical to the suction pump; and

(V) verification that the requirements under subclauses (I) - (IV) of this clause have been met can be provided in the form of:

(-a-) signed as-built drawings or plans provided by the installer or by a professional engineer who is duly licensed to practice in Texas; or

(-b-) signed written documentation provided by a UST contractor who is properly registered with the agency, by a UST installer who is properly licensed with the agency, or by a professional engineer who is duly licensed to practice in Texas.

(C) Monitoring secondary containment. In addition to the requirements in subparagraphs (A) and (B) of this paragraph, all piping in a hazardous substance UST system shall also be equipped with a secondary containment system and related release detection equipment, as prescribed in subsection (c) of this section.

(c) Additional release detection requirements for hazardous substance UST systems. In addition to the release detection requirements for all UST systems prescribed in subsections (a) and (b) of this section, owners and operators of all hazardous substance UST systems shall also assure compliance with the following additional requirements.

(1) All new hazardous substance UST systems shall be in compliance with the requirements of paragraph (3) of this subsection for the entire operational life of the system.

(2) All existing hazardous substance UST systems shall be brought into compliance with the requirements of paragraph (3) of this subsection no later than December 22, 1998.

(3) Secondary containment and monitoring.

(A) All hazardous substance UST systems (including tanks and piping) shall be equipped with a secondary containment system which shall be designed, constructed, installed, and maintained in accordance with §334.45(d) and §334.46(f) of this title.

(B) All hazardous substance UST systems (including tanks and piping) shall include one or more of the release detection methods or equipment prescribed in subsection (d)(7) - (10) of this section, which shall be capable of monitoring the space between the primary tank and piping walls and the secondary containment wall or barrier.

(d) Allowable methods of release detection. Tanks in a UST system may be monitored for releases using one or more of the methods included in paragraphs (2) - (10) of this subsection. Piping in a 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) Tank tightness test. Any tank tightness test shall be conducted in conformance with the following standards.

(i) The tank tightness test shall be conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(ii) The tank tightness test shall be performed by qualified personnel who possess the requisite experience, training, and competence to conduct the test properly, who are present at the facility and who maintain responsible oversight throughout the entire testing procedure, and who have been certified by the manufacturer or developer of the testing equipment as being qualified to perform the test. The tank tightness test shall be conducted in strict accordance with the testing procedures developed by the system manufacturer or developer.

(iii) The tank tightness test shall be capable of detecting a release of 0.1 gallons per hour from any portion of the tank which contains regulated substances.

(iv) The tank tightness test shall be performed in a manner that will account for the effects of vapor pockets, thermal expansion or contraction of the stored substance, temperature of the stored substance, temperature stratification, evaporation or condensation, groundwater elevation, pressure variations within the system, tank end deflection, tank deformation, and any other factors that could affect the accuracy of the test procedures.

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

(i) All inventory control procedures shall be in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(ii) Reconciliation of detailed inventory control records shall be conducted at least once each month, and shall be sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons.

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

(I) Inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank shall be recorded each operating day.

(II) The equipment used shall be capable of measuring the level of stored substance over the full range of the tank's height to the nearest 1/8 inch.

(III) Substance dispensing shall be metered and recorded within an accuracy of six or less cubic inches for every five gallons of product withdrawn.

(IV) The measurement of any water level in the bottom of the tank shall be made to the nearest 1/8 inch at least once a month, and appropriate adjustments to the inventory records shall be made.

(2) Manual tank gauging. Manual tank gauging may be used as a tank release detection method, subject to the following limitations and requirements.

(A) Manual tank gauging in accordance with this subparagraph may be used as the sole method of tank release detection only for petroleum substance tanks having a nominal capacity of 1,000 gallons or less.

(B) The use of manual tank gauging shall not be considered an acceptable method for meeting the release detection requirements of this section for any tanks with a nominal capacity greater than 1,000 gallons.

(C) When used for compliance with the release detection requirements of this section, the procedures and requirements in the following clauses shall be applicable.

(i) For purposes of this subparagraph only, the following definitions are applicable.

(I) Level measurement - The average of two consecutive liquid level readings from a tank gauge, measuring stick, or other measuring equipment.

(II) Gauging period - A weekly period during which no substance is added to or removed from the tank. The duration of the gauging period is dependant upon tank volume and diameter, as specified in clause (v) of this subparagraph.

(III) Weekly deviation - The variation between the level measurements taken at the beginning and the end of one gauging period, converted to and expressed as gallons.

(IV) Monthly deviation - The arithmetic average of four consecutive weekly deviations, expressed as gallons.

(ii) Any measuring equipment shall be capable of measuring the level of stored substance over the full range of the tank's height to the nearest 1/8 inch.

(iii) Separate liquid level measurements in the tank shall be taken weekly at the beginning and the ending of the gauging period, and the weekly deviation shall be determined from such level measurements.

(iv) Once each month, after four consecutive weekly deviations are determined, a monthly deviation shall be calculated.

(v) For the purposes of the manual tank gauging method of release detection, a release shall be indicated when either the weekly deviation or the monthly deviation exceeds the maximum allowable standards indicated in the following subclauses:

(I) for a tank with a capacity of 550 gallons or less (any tank diameter): minimum duration of gauging period = 36 hours; weekly standard = ten gallons; monthly standard = five gallons;

(II) for a tank with a capacity of 551 gallons to 1,000 gallons (when tank diameter is 64 inches): minimum duration of gauging period = 44 hours; weekly standard = nine gallons; monthly standard = four gallons;

(III) for a tank with a capacity of 551 gallons to 1,000 gallons (when tank diameter is 48 inches): minimum duration of gauging period = 58 hours; weekly standard = 12 gallons; monthly standard = six gallons.

(vi) When either the weekly standard or the monthly standard is exceeded and a suspected release is thereby indicated, the owner or operator shall comply with the

applicable release reporting, investigation, and corrective action requirements of Subchapter D of this chapter.

(3) Monthly tank gauging. Monthly tank gauging may be used as a tank release detection method, subject to the following limitations and requirements.

(A) Monthly tank gauging in accordance with this paragraph may be used as the sole method of tank release detection only for emergency generator tanks.

(B) The use of monthly tank gauging shall not be considered an acceptable method for meeting the release detection requirements of this section for any tanks other than emergency generator tanks.

(C) When used for compliance with the release detection requirements of this section, the procedures and requirements in the following clauses shall be applicable.

(i) For purposes of this paragraph only, the following definitions are applicable.

(I) Level measurement - The average of two consecutive liquid level readings from a tank gauge, measuring stick, or other manual or automatic measuring equipment.

(II) Gauging period - A period of at least 36 hours during which no substance is added to or removed from the tank.

(III) Monthly deviation - The variation between the level measurements taken at the beginning and the end of one gauging period, converted to and expressed as gallons.

(ii) Any measuring equipment (whether operated manually or automatically) shall be capable of measuring the level of a stored substance over the full range of the tank's height to the nearest 1/8 inch.

(iii) Separate liquid level measurements in the tank shall be taken at least once monthly at the beginning and the ending of the gauging period, and the monthly deviation shall be determined from such level measurements.

(iv) For the purposes of the monthly tank gauging method of release detection, a release shall be indicated when the monthly deviation exceeds the maximum allowable standards indicated in the following subclauses:

(I) for a tank with a capacity of 550 gallons or less: monthly standard = five gallons;

(II) for a tank with a capacity of 551 gallons to 1,000 gallons: monthly standard = seven gallons;

(III) for a tank with a capacity of 1,001 gallons to 2,000 gallons: monthly standard = 13 gallons;

(IV) for a tank with a capacity greater than 2,000 gallons: monthly standard = 1.0% of the total tank capacity.

(v) When the monthly standard is exceeded and a suspected release is thereby indicated, the owner or operator shall comply with the applicable release reporting, investigation, and corrective action requirements of Subchapter D of this chapter.

(4) Automatic tank gauging and inventory control.

(A) A combination of automatic tank gauging and inventory control may be used as a tank release detection method, subject to the following requirements.

(i) Inventory control procedures shall be in compliance with paragraph (1)(B) of this subsection.

(ii) The automatic tank gauging equipment shall be capable of:

(I) automatically monitoring the in-tank liquid levels, conducting automatic tests for substance loss, and collecting data for inventory control purposes; and

(II) performing an automatic test for substance loss that can detect a release of 0.2 gallon per hour from any portion of the tank which contains regulated substances.

(B) For emergency generator tanks only, automatic tank gauging may be used as a tank release detection method, provided that the automatic tank gauging equipment shall be capable of:

(i) automatically monitoring the in-tank liquid levels;

(ii) conducting continuous automatic tests for substance loss during the periods when the emergency generator engine is not in operation; and

(iii) performing an automatic test for substance loss that can detect a release of 0.2 gallon per hour from any portion of the tank which contains regulated substances.

(5) Vapor monitoring. Equipment and procedures designed to test or monitor for the presence of vapors from the regulated substance (or from a related tracer substance) in the soil gas of the backfilled excavation zone may be used, subject to the following limitations and requirements.

(A) The bedding and backfill materials in the excavation zone shall be sufficiently porous to allow vapors from any released regulated substance (or related tracer substance) to rapidly diffuse through the excavation zone (e.g., gravel, sand, crushed rock).

(B) The stored regulated substance, or any tracer substance placed in the tank system, shall be sufficiently volatile so that, in the event of a substance release from the UST system, vapors will develop to a level that can be readily detected by the monitoring devices located in the excavation zone.

(C) The capability of the monitoring device to detect vapors from the stored regulated substance shall not be adversely affected by the presence of any groundwater, rainfall, and/or soil moisture in a manner that would allow a release to remain undetected for more than one month (not to exceed 35 days).

(D) Any preexisting background contamination in the excavation zone shall not interfere with the capability of the vapor monitoring equipment to detect releases from the UST system.

(E) The vapor monitoring equipment shall be designed to detect vapors from either the stored regulated substance, a component or components of the stored substance, or a tracer substance placed in the UST system, and shall be capable of detecting any significant increase in vapor concentration above preexisting background levels.

(F) Prior to installation of any vapor monitoring equipment, the site of the UST system (within the excavation zone) shall be assessed by qualified personnel to:

(i) ensure that the requirements in subparagraphs (A) - (D) of this paragraph have been met; and

(ii) determine the appropriate number and positioning of any monitor wells and/or observation wells, so that releases into the excavation zone from any part of the UST system can be detected within one month of the release (not to exceed 35 days).

(G) All monitoring wells and observation wells shall be designed and installed in accordance with the requirements of §334.46(g) of this title.

(6) Groundwater monitoring. Equipment or procedures designed to test or monitor for the presence of regulated substances floating on, or dissolved in, the groundwater in the excavation zone may be used, subject to the following limitations and requirements.

(A) The stored regulated substance shall be immiscible in water and shall have a specific gravity of less than one.

(B) The natural groundwater level shall never be more than 20 feet (vertically) from the ground surface, and the hydraulic conductivity of the soils or backfill between all parts of the

UST system and the monitoring points shall not be less than 0.01 centimeters per second (i.e., the soils or backfill shall consist of gravels, coarse to medium sands, or other similarly permeable material).

(C) Any automatic monitoring devices that are employed shall be capable of detecting the presence of at least 1/8 inch of free product on top of the groundwater in the monitoring well or observation well. Any manual monitoring method shall be capable of detecting a visible sheen or other accumulation of regulated substances in, or on, the groundwater in the monitoring well or observation well.

(D) Any preexisting background contamination in the monitored zone shall not interfere with the capability of the groundwater monitoring equipment or methodology to detect releases from the UST system, and the groundwater monitoring equipment or methodology shall be capable of detecting any significant increase above preexisting background levels in the amount of regulated substance floating on, or dissolved in, the groundwater.

(E) Prior to installation of any groundwater monitoring equipment, the site of the UST system (within and immediately below the excavation zone) shall be assessed by qualified personnel to:

(i) ensure compliance with the requirements of subparagraphs (A) and (B) of this paragraph; and

(ii) determine the appropriate number and positioning of any monitoring wells and/or observation wells, so that releases from any part of the UST system can be detected within one month (not to exceed 35 days) of the release.

(F) All monitoring wells and observation wells shall be designed, installed, and maintained in accordance with the requirements in §334.46(g) of this title.

(7) Interstitial monitoring for double-wall UST systems. Equipment designed to test or monitor for the presence of regulated substance vapors or liquids in the interstitial space between the inner (primary) and outer (secondary) walls of a double-wall UST system may be used, subject to the following conditions and requirements.

(A) Any double-wall UST system using this method of release detection shall be designed, constructed, and installed in accordance with the applicable technical and installation requirements in §334.45(d) and §334.46(f) of this title.

(B) The sampling, testing, or monitoring method shall be capable of detecting any release of stored regulated substances from any portion of the primary tank or piping within one month (not to exceed 35 days) of the release.

(C) The sampling, testing, or monitoring method shall be capable of detecting a breach or failure in the primary wall and the entrance of groundwater into the interstitial space due to

a breach in the secondary wall of the double-wall tank or piping system within one month (not to exceed 35 days) of such breach or failure (whether or not a stored regulated substance has been released into the environment).

(8) Monitoring of UST systems with secondary containment barriers. Equipment designed to test or monitor for the presence of regulated substances (liquids or vapors) in the excavation zone between the UST system and an impermeable secondary containment barrier immediately around the UST system may be used, subject to the following conditions and requirements.

(A) Any secondary containment barrier or liner system at a UST system using this method of release detection shall be designed, constructed, and installed in accordance with the applicable technical and installation requirements in §334.45(d) and §334.46(f) of this title.

(B) The sampling, testing, or monitoring method shall be capable of detecting any release of stored regulated substance from any portion of the UST system into the excavation zone between the UST system and the secondary containment barrier within one month (not to exceed 35 days) of the release.

(C) The sampling, testing, or monitoring method shall be designed and installed in a manner that will ensure that groundwater, soil moisture, and rainfall will not render the method inoperative where a release could remain undetected for more than one month (not to exceed 35 days).

(D) Prior to installation of any secondary containment release monitoring equipment, the site of the UST system shall be assessed by qualified personnel to:

(i) ensure that the secondary containment barrier will be positioned above the groundwater level and outside the designated 25-year flood plain, unless the barrier and the monitoring equipment are designed for use under such conditions; and

(ii) determine the appropriate number and positioning of any observation wells.

(E) All observation wells shall be designed and installed in accordance with the requirements in §334.46(g) of this title.

(9) Statistical inventory reconciliation (SIR) and inventory control.

(A) A combination of SIR and inventory control may be used as a release detection method for UST system tanks and lines, subject to the following requirements.

(i) Inventory control procedures must be in compliance with paragraph (1)(B) of this subsection.

(ii) The SIR methodology as utilized by its provider or vendor, or by its vendor-authorized franchisee or licensee or representative must analyze inventory control records in a manner which can detect a release of 0.2 gallons per hour from any part of the UST system.

(iii) The UST system owner and/or operator must take appropriate steps to assure that they receive a monthly analysis report from the entity which actually performs the SIR analysis (either the SIR provider/vendor or the provider/vendor-authorized franchisee or licensee or representative) in no more than 15 calendar days following the last day of the calendar month for which the analysis is performed. This analysis report must, at minimum:

(I) state the name of the SIR provider/vendor and the name and version of the SIR methodology which was utilized for the analysis as they are listed in the independent third-party evaluation of that methodology;

(II) state the name of the company and the individual (or the name of the individual if no company affiliation) who performed the analysis, if it was performed by a provider/vendor-authorized franchisee or licensee or representative;

(III) state the name and address of the facility at which analysis is performed and provide a description of each UST system for which analysis has been performed;

(IV) quantitatively state in gallons per hour for each UST system being monitored: the leak threshold for the month analyzed, and the minimum detectable leak rate for the month analyzed, and the indicated leak rate for the month analyzed;

(V) qualitatively state one of the following for each UST system being monitored: "pass," or "fail," or "inconclusive."

(iv) Any UST system analysis report result other than "pass" must be reported to the agency by the UST system owner or operator as a suspected release in accordance with §334.72 of this title (relating to Reporting of Suspected Releases).

(v) Any UST system analysis report result of "inconclusive" which has not been investigated and quantified as a "pass" (in the form of a replacement UST system analysis report meeting the requirements of clause (iii) of this subparagraph) must be reported to the agency as a suspected release within 72 hours of the time of receipt of the inconclusive analysis report result by the UST system owner or operator.

(B) At least once per calendar quarter, the SIR provider/vendor must select at random, at least one of the individual UST system analyses performed by each of its authorized franchisees or licensees or representatives during that period and audit that analysis to assure that provider/vendor standards are being maintained with regard to the acceptability of inventory control record data, the acceptability of analysis procedures, and the accuracy of analysis results. The written

result of that audit must be provided to the authorized franchisee or licensee or representative and to the owner and/or operator of the audited UST system(s) by the SIR provider/vendor during that calendar quarter. In addition, within 30 days following each calendar quarter, the SIR provider/vendor must provide to the agency a list containing the name and address of each of its authorized franchisees or licensees or representatives which specifies for each one, the name and address of each facility at which one or more UST system audits were performed during the previous calendar quarter.

(10) Alternative release detection method. Any other release detection method, or combination of methods, may be used if such method has been reviewed and determined by the agency to be capable of detecting a release from any portion of the UST system in a manner that is no less protective of human health and safety and the environment than the methods described in paragraphs (1) - (8) of this subsection, in accordance with the provisions of §334.43 of this title (relating to Variances and Alternative Procedures).

(e) Release detection records.

(1) Owners and operators shall maintain the release detection records 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 records adequate to demonstrate compliance with the release detection requirements in this section, and in accordance with the following minimum requirements.

(A) All appropriate installation records related to the release detection system, as listed in §334.46(i) of this title, shall be maintained for as long as the release detection system is used.

(B) All written performance claims pertaining to any release detection system used, and documentation of the manner in which such claims have been justified, verified, or tested by the equipment manufacturer, methodology provider/vendor, or independent third-party evaluator shall be maintained for as long as the release detection system is used.

(C) Records of the results of all manual and/or automatic methods of sampling, testing, or monitoring for releases (including tank tightness tests) shall be maintained for at least five years after the sampling, testing, or monitoring is conducted.

(D) Records and calculations related to inventory control reconciliation shall be maintained for at least five years from the date of reconciliation.

(E) Written documentation of all service, calibration, maintenance, and repair of release detection equipment permanently located on-site shall be maintained for at least five years

after the work is completed. Any schedules of required calibration and maintenance provided by the release detection equipment manufacturer shall be retained for as long as the release detection system is used.

§334.55. Permanent Removal from Service.

(a) General provisions.

(1) Any owner or operator who intends to permanently remove an underground storage tank (UST) from service (by either removing the tank from the ground, abandoning the tank in-place, or conducting a permanent change-in-service) shall provide prior notice of this activity to the agency in accordance with §334.6 of this title (relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems).

(2) The procedures used in permanently removing the UST from service shall conform with accepted industry practices, and shall be in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory.

(3) The permanent removal from service shall be conducted by qualified personnel possessing the appropriate skills, experience, competence, and, if applicable, any required license or certification to complete the activity in accordance with the provisions of this section and in a manner designed to minimize the possibility of any threats to human health and safety or the environment.

(4) All USTs that are intended for permanent removal from service shall be emptied of all regulated substances and accumulated sludges or residues, and shall be purged of all residual vapors in accordance with accepted industry procedures commonly employed for the stored regulated substance.

(5) The handling, transportation, and disposal of any regulated substances removed from a UST system, and any contaminated soils, backfill material, groundwater, wash water, or other similar materials removed from the system or facility, shall be conducted in a safe and environmentally sound manner, and shall be in accordance with all applicable federal, state, and local regulations in effect for the type, volume, contaminant concentration, and classification of the removed material.

(6) As part of the required procedure for the permanent removal of any UST system from service, the owner or operator shall determine whether or not any prior release of a stored regulated substance has occurred from the system.

(A) This determination shall be performed subsequent to the submittal of notification to the agency as prescribed in §334.6 of this title, but prior to completion of the permanent removal from service.

(B) This determination shall be made by visual inspection of the area in and immediately surrounding the excavation zone for any above-ground releases and for any exposed below-ground releases, and by using one or both of the following methods or procedures:

(i) the continual operation (through the time that the stored regulated substances are removed from the UST system) of one or more of the external release monitoring and detection methods operating in accordance with §334.50(d)(5) - (8) of this title (relating to Release Detection); or

(ii) the performance of a comprehensive site assessment in accordance with the requirements of subsection (e) of this section.

(C) Any methods or procedures used to make this determination shall be capable of detecting any prior release of stored regulated substances from any portion of the UST system.

(D) Upon completion of this determination, the owner or operator shall:

(i) report any confirmed or suspected releases to the agency and comply with all applicable release investigation and corrective action requirements, as prescribed in Subchapter D of this chapter (relating to Release Reporting and Corrective Action);

(ii) prepare or assemble the detailed written records of this determination, which shall include the methods, procedures, results, and names, addresses, and telephone numbers of the persons involved in conducting such determination. Such records shall be maintained in accordance with the applicable provisions in subsection (f) of this section, and a copy of

such records shall be filed with the agency in conjunction with the applicable tank registration requirements of §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems).

(7) For a UST to be considered permanently out-of-service, the owner or operator shall either remove the tank from the ground in accordance with subsection (b) of this section, abandon in-place and fill the tank with an acceptable solid inert material in accordance with subsection (c) of this section, or conduct a permanent change-in-service in accordance with subsection (d) of this section. Unused tanks (i.e., tanks at facilities which are closed or out-of-business) shall be considered temporarily out-of-service, and shall be subject to the provisions of §334.54 of this title (relating to Temporary Removal from Service), unless they have been permanently removed from service in accordance with this section.

(8) The requirements in this section are applicable to all USTs which are permanently removed from service on or after the effective date of this subchapter.

(9) For a UST permanently removed from service prior to the effective date of this subchapter, where the methods previously used for the release determination or the removal from service are unknown or are determined to have been inadequate, the agency may require the owner or operator to conduct any or all of the following additional activities as appropriate:

(A) proper removal of the UST system from service, in accordance with the applicable provisions of this section;

(B) completion of a comprehensive site assessment, in accordance with the requirements of subsection (e) of this section;

(C) release reporting, investigation, and corrective action if a release of a regulated substance has occurred, in accordance with Subchapter D of this chapter; and/or

(D) any other activities necessary to prevent any adverse impacts on human health and safety and the environment.

(b) Removal from the ground. In addition to the requirements of subsection (a) of this section, the following requirements shall be applicable for the removal of USTs from the ground.

(1) Except as provided under paragraph (2) of this subsection, tanks shall be properly emptied, cleaned, and purged of vapors prior to removal from the ground, in accordance with accepted industry procedures commonly employed for the stored regulated substance.

(2) When an owner or operator can demonstrate good cause for removal of a tank from the ground prior to emptying, cleaning, or purging the vapors, the owner or operator shall obtain approval from the manager of the appropriate district office (or the manager's designated

representative) prior to proceeding with the removal. In this situation, the tank removal shall be accomplished only under the direct supervision of agency personnel and/or local fire officials, and all conditions and requirements imposed by such supervisory officials shall be strictly followed.

(3) Prior to removing the tank from the ground, all connected piping and other ancillary equipment shall be emptied, disconnected, and properly plugged, capped, or removed.

(4) Storage of removed tanks.

(A) After removal, a tank shall be transported from the site within 24 hours of removal, unless prior approval of a longer on-site storage period is obtained from the manager of the appropriate district office (or the manager's designated representative).

(B) The on-site storage of tanks for a period of 24 hours or less shall be in a designated temporary storage area which shall be an adequate distance from known ignition sources and which shall be clearly identified with appropriate barriers and warning signs to restrict access by unauthorized persons.

(C) On-site storage of removed tanks for more than 24 hours (when approved by the district manager), and off-site storage for any period, shall only be allowed in locked, securely fenced, or similarly restricted areas where unauthorized persons will not have access.

(D) No later than 24 hours after removal, all removed tanks (regardless of condition) shall be legibly and permanently labeled (in letters at least two inches high) with the name of the former contents, a flammability warning (if applicable), and a warning that the tank is unsuitable for the storage of drinking water or the storage of human or animal food products.

(E) The residual vapor levels in any removed tank which is stored at the UST facility shall be maintained at nonexplosive and nonignitable levels for the entire time that the tank remains at the facility.

(F) Regardless of where the tank is stored, not later than ten days after the tank has been removed from the ground, any residual liquids or vapors shall be permanently removed to render the tank nonignitable and nonexplosive.

(5) Transportation and disposal of removed tanks.

(A) The methods and procedures used for the handling, transporting, and disposing of any removed USTs (and parts of such tanks) shall be protective of human health and safety and the environment, and shall be in accordance with all applicable federal, state, and local regulations.

(B) Removed tanks (and any parts of such tanks) which have been emptied, thoroughly cleaned of all remaining substances and any remaining residues, and permanently purged of

vapors may be appropriately disposed by scrapping, junking, or reusing for purposes unrelated to the underground storage of regulated substances.

(C) Prior to transporting any removed tank from the UST facility, the following minimum preparation procedures shall be followed.

(i) The remaining regulated substances shall be removed, and visible residues or sediments shall be cleaned from the tank as completely as possible, in accordance with commonly used and accepted industry practices.

(ii) Residual vapor levels in the tank shall be reduced to nonexplosive and nonignitable levels, and shall be maintained at such levels during the entire period of transportation.

(iii) All holes and openings shall be properly plugged or capped, except for one 1/8-inch diameter vent hole positioned at the top of the tank during transportation.

(D) The subsequent reuse of any removed tanks for the underground storage of regulated substances (whether on-site or off-site) shall only be allowed under the provisions of §334.53 of this title (relating to Reuse of Used Tanks).

(6) The tank owner shall develop and maintain a permanent record of the prior location of the removed tank; the date of removal; the substance previously stored; the method of conditioning

the tank for removal; the methods of handling, transportation, storing, and disposing of the tank; the names, addresses, and telephone numbers of the person conducting the activities; and any information regarding any known releases from such tank. If the facility owner is not the same person as the tank owner, the tank owner shall provide a copy of such information to the site or facility owner within 30 days after the date of removal.

(c) Abandonment in-place. A UST may be permanently removed from service by abandonment in-place in lieu of actual removal from the ground. In addition to the requirements of subsection (a) of this section, the following requirements shall be applicable to the abandonment in-place of USTs.

(1) When the UST owner is not the owner of the site or facility where such tank is located, the tank owner is prohibited from abandoning such tank in-place unless the following conditions are met.

(A) The tank owner shall provide written notice to the owner of the site or facility for the abandonment in-place prior to initiating the activity.

(B) After completion of the abandonment in-place, the tank owner shall provide to the site or facility owner a legible copy of the permanent record of the abandonment, as described in paragraph (3) of this subsection.

(2) Any tank that is abandoned in-place shall be filled with a solid inert material as prescribed in this paragraph.

(A) Only solid inert materials which are free of any harmful contaminants or pollutants shall be used to fill the tank. Acceptable materials include sand, fine gravel, sand and gravel mixtures, and cement/concrete-based slurries. Other materials such as native soils, drilling muds, and commercially marketed fill materials shall not be used for filling the tank unless the material and filling procedures have been reviewed and approved by the agency in accordance with §334.43 of this title (relating to Variances and Alternative Procedures).

(B) Adequate access openings shall be made in the top of the tank, and the tank shall be filled as completely as possible. Voids and air pockets shall be eliminated.

(C) The fill material and filling procedures shall be adequate to assure that:

(i) the filled tank will not surface after completion of the filling operation;

(ii) any settling or instability of the ground surface subsequent to the abandonment in-place is minimized or eliminated;

(iii) the fill materials will form a permanent solid inert filler that can be expected to remain structurally stable in the ground to prevent cave-ins, even after the subsequent deterioration of the tank walls; and

(iv) the filled tank and associated piping are disconnected and capped or sealed so as to preclude their future use for any storage or disposal purposes.

(3) The tank owner shall develop and maintain a permanent record of the name and address of the tank owner (and site or facility owner, if different); the abandoned tank location; the date of abandonment; the substance previously stored; the method of conditioning the tank for abandonment; release assessment results; the names, addresses, and telephone numbers of the persons conducting the activities; and information regarding the extent of any confirmed releases and any resulting remediation activities.

(A) When the tank owner is not the owner of the facility where the tank is located, the tank owner shall provide to the current facility owner a legible copy of the permanent record of the abandonment in-place. Such information shall be provided no later than 30 days after completion of the abandonment in-place.

(B) The facility owner shall maintain a permanent record of the tank abandonment in-place in accordance with subsection (f) of this section.

(C) Prior to the sale or conveyance of the facility where an abandoned UST is located, the facility owner shall provide written documentation of the tank abandonment information to the succeeding property owner.

(d) Change-in-service. In addition to the requirements of subsection (a) of this section, the following requirements shall be applicable for any change-in-service where a UST system storing regulated substances is converted to a system storing materials other than regulated substances.

(1) Prior to refilling with materials other than regulated substances, the UST shall be properly emptied, cleaned, and purged of vapors in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory for the stored regulated substance. The procedures for emptying, cleaning, and purging the UST shall be designed to remove as much as possible of the previously stored regulated substances, including all liquids, vapors, sludges, and residues, in a manner that is protective of human health and safety or the environment.

(2) A change-in-service where a UST storing regulated substances is to be converted for the storage of either drinking water or food products intended for human consumption is specifically prohibited.

(3) Any change-in-service shall be in accordance with all applicable federal, state, and local regulations.

(4) The owner shall develop and maintain a permanent record of the location of the UST; the date of the change-in-service; the regulated substance previously stored; the method of conditioning the tank for the change-in-service; the names, addresses, and telephone numbers of the persons conducting the activities; and any information regarding any known releases of regulated substances from such tank. If the facility owner is not the same person as the UST owner, the UST owner shall provide a copy of such information to the facility owner within 30 days after the date of the change-in-service.

(5) For the purposes of this section, a UST which has been converted to the storage of materials other than regulated substances (i.e., water) shall be subject to the procedures for temporary removal from service in §334.54 of this title, except when the stored materials are utilized on a regular basis for beneficial purposes.

(e) Site assessment.

(1) A site assessment meeting the requirements of this subsection shall be performed by the owner or operator of a UST system in the following situations to determine whether or not a release has occurred:

(A) when the site assessment is selected as the method to achieve compliance with the release determination requirements of subsection (a)(6) of this section for a UST which is permanently removed from service on or after the effective date of this subchapter;

(B) when the agency determines that a site assessment is necessary at any site or facility where a UST was permanently removed from service prior to the effective date of this subchapter, and where the site assessment or release determination at the time of removal from service was determined to be either nonexistent or inadequate; or

(C) when the agency determines that a site assessment is necessary at any site or facility where a release or suspected release may pose a current or potential threat to human health or safety or the environment.

(2) The site assessment shall be conducted by qualified personnel possessing the appropriate skills, experience, and competence to perform the assessment in accordance with recognized industry practices and the provisions of this section and shall be supervised by a person who is currently licensed by the Texas Commission on Environmental Quality (TCEQ) as a UST installer or on-site supervisor or currently registered with the TCEQ as a corrective action project manager.

(3) Any procedures used for the site assessment must be capable of measuring for the presence of a release from any part of the UST system and, at a minimum, must include measurements for releases at locations where contamination is most likely to be present at the site.

(4) The owner or operator shall assure that in selecting the sampling or measurement methods, the sample types, and the sampling or measurement locations, the persons conducting the

assessment shall take into consideration the following factors to ensure that the presence of any released regulated substances is detected and quantified:

(A) the specific method of removing the UST system from service;

(B) the nature and composition of the stored regulated substance;

(C) the type and characteristics of the backfill material and surrounding soils;

(D) the presence of groundwater, and its depth with relation to the UST system and the surface of the ground; and

(E) any other factors that may affect the reliability or effectiveness of the site assessment procedures or techniques.

(5) One or more of the following methods may be used for conducting the site assessment and release determination required under this section, provided that such methods are in compliance with the performance standards in paragraphs (2) - (4) of this subsection:

(A) collection and analysis of soil samples secured from unsaturated sections of the UST system excavation zone and surrounding soils, where such samples shall be analyzed for major constituents and/or indicator parameters of the stored regulated substance(s);

(B) collection and analysis of groundwater samples secured from the UST system excavation zone and surrounding area, where such samples shall be analyzed for all major constituents or indicator parameters of the stored regulated substance(s); and/or

(C) any other site assessment or release determination method or procedure which has been reviewed and determined by the agency to detect prior releases of the stored regulated substance(s) in a manner that is no less protective of human health and the environment than the methods described in subparagraphs (A) and (B) of this paragraph, as provided under §334.43 of this title.

(D) The owner or operator must report any suspected or confirmed releases indicated by the site assessment to the agency and comply with all applicable release investigation and corrective action requirements, as prescribed in Subchapter D of this chapter.

(f) Records for permanent removal from service.

(1) Owners and operators shall maintain records adequate to demonstrate compliance with the requirements of this section, in accordance with §334.10(b) of this title (relating to Reporting and Recordkeeping).

(2) At a minimum, the following records shall be maintained for as long as any UST remains in service at the facility, or for five years after the UST system is permanently removed from service, whichever is longer:

(A) records of the release determination or site assessment, in accordance with the requirements in subsection (a)(6)(D)(ii) of this section;

(B) records related to the tank removal procedures (as applicable), in accordance with the requirements in subsection (b)(6) of this section;

(C) records related to the abandonment in-place of a UST system (as applicable), in accordance with the requirements in subsection (c)(4) of this section; and

(D) records related to the change-in-service of a UST system (as applicable), in accordance with the requirement in subsection (d)(4) of this section.

§334.56. Change to Exempt or Excluded Status.

(a) Any owner or operator who intends to change the status of an underground storage tank (UST) system from regulated to exempt or excluded status must determine whether the tank(s) size (if applicable) and the current and anticipated use of the UST system will allow reclassification to either exempt status as specified in §334.3 of this title (relating to Exemptions for Underground Storage Tanks

(USTs) and UST Systems), or to excluded status as specified in §334.4 of this title (relating to Exclusions for Underground Storage Tanks (USTs) and UST Systems).

(b) As part of the required procedure for the change in status of any UST system from regulated to exempt or excluded status, the owner or operator shall determine whether or not any prior release of a stored regulated substance has occurred from the system.

(1) This determination shall be made by visual inspection of the area in and immediately surrounding the excavation zone for any above-ground releases and for any exposed below-ground releases, and by using one or both of the following methods or procedures:

(A) the continual operation (through the time that the stored regulated substances are removed from the UST system) of one or more of the external release monitoring and detection methods operated in accordance with §334.50(d)(5) - (8) of this title (relating to Release Detection); or

(B) the performance of a comprehensive site assessment in accordance with the requirements of subsection (c) of this section.

(2) Any methods or procedures used to make this determination shall be capable of detecting any prior release of stored regulated substances from any portion of the UST system. Upon completion of this determination, the owner or operator shall:

(A) report any confirmed or suspected releases to the agency and comply with all applicable release investigation and corrective action requirements, as prescribed in Subchapter D of this chapter (relating to Release Reporting and Corrective Action);

(B) prepare or assemble the detailed written records of this determination, which shall include the methods, procedures, results, names, addresses, and telephone numbers of the persons involved in conducting this determination. These records shall be maintained in accordance with the applicable provisions in subsection (d) of this section, and a copy of these records shall be filed with the agency in conjunction with the applicable tank registration requirements of §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems).

(c) Site assessment.

(1) A comprehensive site assessment meeting the requirements of this subsection shall be performed by the owner or operator of a UST system in the following situations to determine whether or not a release has occurred:

(A) when the site assessment is selected as the method to achieve compliance with the release determination requirements of subsection (b) of this section for a UST which is changed from regulated to exempt or excluded status on or after the effective date of this subchapter;

(B) when the agency determines that a comprehensive site assessment is necessary at any site or facility where a release or suspected release may pose a current or potential threat to human health or safety or the environment.

(2) The site assessment shall be conducted by qualified personnel possessing the appropriate skills, experience, and competence to perform the assessment in accordance with recognized industry practices and the provisions of this section and shall be supervised by a person who is currently licensed by the Texas Commission on Environmental Quality (TCEQ) as a UST installer or on-site supervisor or currently registered with the TCEQ as a corrective action project manager.

(3) Any procedures used for the site assessment must be capable of measuring for the presence of a release from any part of the UST system and, at a minimum, must include measurements for releases at locations where contamination is most likely to be present at the site.

(4) The owner or operator shall assure that in selecting the sampling or measurement methods, the sample types, and the sampling or measurement locations, the persons conducting the assessment shall take into consideration the following factors to ensure that the presence of any released regulated substances is detected and quantified:

(A) the nature and composition of the stored regulated substance;

(B) the type and characteristics of the backfill material and surrounding soils;

(C) the presence of groundwater, and its depth with relation to the UST system and the surface of the ground; and

(D) any other factors that may affect the reliability or effectiveness of the site assessment procedures or techniques.

(5) One or more of the following methods may be used for conducting the site assessment and release determination required under this section, provided that such methods are in compliance with the performance standards in paragraphs (2) - (4) of this subsection:

(A) collection and analysis of soil samples secured from unsaturated sections of the UST system excavation zone and surrounding soils, where such samples shall be analyzed for major constituents and/or indicator parameters of the stored regulated substance(s);

(B) collection and analysis of groundwater samples secured from the UST system excavation zone and surrounding area, where such samples shall be analyzed for all major constituents or indicator parameters of the stored regulated substance(s); and/or

(C) any other site assessment or release determination method or procedure which has been reviewed and determined by the agency to detect prior releases of the stored regulated substance(s) in a manner that is no less protective of human health and the environment than the

methods described in subparagraphs (A) and (B) of this paragraph, as provided under §334.43 of this title (relating to Variances and Alternative Procedures).

(D) The owner or operator must report any suspected or confirmed releases indicated by the site assessment to the agency and comply with all applicable release investigation and corrective action requirements, as prescribed in Subchapter D of this chapter.

(d) Records for change to exempt or excluded status.

(1) Owners and operators shall maintain records adequate to demonstrate compliance with the requirements of this section, in accordance with §334.10(b) of this title (relating to Reporting and Recordkeeping).

(2) At minimum, records of the release determination or site assessment, in accordance with the requirements in subsection (b)(2)(A)(ii) of this section shall be maintained for as long as any UST remains in service at the facility, or for five years after the UST system is changed from regulated to exempt or excluded status, whichever is longer.

SUBCHAPTER H: REIMBURSEMENT PROGRAM

§§334.302, 334.306 - 334.310, 334.313 - 334.315, 334.322

STATUTORY AUTHORITY

The amendments 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; §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 adopted under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an AST; and §26.3573, which allows the commission to use funds from the PST remediation account to reimburse an eligible owner or operator or insurer for the expenses of corrective action or to pay the claim of a contractor hired by an eligible owner or operator to perform corrective action.

§334.302. General Conditions and Limitations Regarding Reimbursement; Assignments.

(a) To be considered for reimbursement under this subchapter, corrective action must be performed either as provided in subsection (b) of this section or in response to a release which:

(1) results in contamination which penetrates beyond the excavation zone of the tank system and which is above action levels determined by the agency;

(2) is ultimately confirmed by the agency, either before or after corrective action commences, provided that it shall be the burden of the person claiming monies under this subchapter to show both that a release which is eligible for reimbursement occurred and the expenses claimed are allowable and reimbursable; and

(3) the confirmed release was initially discovered and reported to the agency on or before December 22, 1998.

(b) Subsection (a) of this section does not apply if the corrective action is specifically required by an order of the commission, or a written request or confirmation by the agency, and the release was initially discovered and reported to the agency on or before December 22, 1998.

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

(1) the owner/operator contribution described in §334.312 of this title (relating to Owner/Operator Contribution), which the agency may apportion in the case of multiple claimants as provided in §334.314(f) of this title (relating to Fund Payment Report);

(2) any expenses for corrective action which exceed $1 million per occurrence;

(3) any expenses relating to compensation for bodily injury or property damage;

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

(5) any expenses related to corrective action performed after September 1, 2005;

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

(7) any expenses on or after September 1, 2006; or

(8) payments to an owner and/or operator, who acts as his own prime contractor or consultant, in the form of markup of amounts paid to subcontractors (see Appendix A Note 1 in "Part 9: Markup" or in excess of the limitation listed in Note 5 in "Part 1: Professional Personnel/Labor Rates" and/or in excess of the limitation listed in Note 2 in "Part 8: Report Generation Costs" of §334.560 of this title (relating to Reimbursable Cost Specifications).

(d) No expenses for which reimbursement is claimed under this subchapter and no expenses which are to be applied to the owner/operator contribution shall be subject to reimbursement or applied to the owner/operator contribution unless the following conditions have been met.

(1) An application for reimbursement must be filed by the owner or operator of a petroleum storage tank or his/her duly authorized agent, as required by §334.304 of this title (relating to Who May File Application).

(2) Unless otherwise approved by the agency, a certification affidavit as provided in the application for reimbursement must be signed by all of the following: owner or operator of a petroleum storage tank, the application preparer, and the prime contractor and/or the prime corrective action specialist, as defined in §334.322 of this title (relating to Subchapter H Definitions).

(3) The application has been filed within the time prescribed in §334.303 of this title (relating to When to File Application).

(4) The person seeking reimbursement must be an eligible owner or operator, as defined in §334.322 and §334.310 of this title (relating to Subchapter H Definitions and Requirements for Eligibility, respectively) or they must be authorized through an assignment by an eligible owner or eligible operator to receive such payment under subsections (i) - (k) of this section.

(5) The expenses for which reimbursement is sought, and those which are to be applied to the owner/operator contribution must be allowable costs, as defined in §334.308 of this title (relating to Allowable Costs and Restrictions on Allowable Costs).

(6) The allowable costs for which reimbursement is sought and those which are to be applied to the owner/operator contribution must be reimbursable, as defined in §334.309 of this title (relating to Reimbursable Costs).

(7) An application for reimbursement has been filed in accordance with this subchapter which contains the information required by this subchapter.

(e) For purposes of this subchapter only, the persons listed in §334.310 of this title may be eligible owners or operators, provided that they meet the other criteria prescribed by this subchapter.

(f) All claims for assistance and reimbursement filed under this subchapter are subject to the availability of funds in the petroleum storage tank remediation fund.

(g) Nothing in this subchapter shall affect the liability or responsibility of an owner or operator of an underground or aboveground storage tank to take corrective action in response to a release in accordance with applicable law.

(h) Nothing in this subchapter shall be construed to create an entitlement to monies in the petroleum storage tank remediation account or any other fund, and the commission reserves the right to amend or repeal without limitation any of the provisions of this subchapter, including provisions regarding eligibility and allowable costs.

(i) Payment made to persons other than the eligible owner or operator may only be made subject to subsections (j) and (k) of this section and may only be made to assignees duly authorized to receive payment on behalf of an eligible owner or operator except as provided by §334.306(f) of this title (relating to Form and Contents of Application).

(j) Authorization for an assignee to receive payment on behalf of an eligible owner or operator must be in writing and signed by the eligible owner or operator who is requesting payment. The authorization must clearly describe what funds the assignee is authorized to receive. If the agency determines that the authorization is not clear as to the disposition of funds to which the eligible owner or operator is entitled, the agency may withhold payment and request written clarification from the eligible owner or operator. The agency may limit the number of assignees who may receive payments for any one occurrence. Notwithstanding any review made or limitations imposed by the agency under this section, neither the State of Texas, nor the agency shall be responsible for ensuring that payment is made to the parties as contemplated by the authorization. It is the responsibility of the eligible owner or operator and the assignee requesting payment to ensure that the agency is supplied with information sufficient to make the proper payments. The right to receive payment under this subchapter is not transferable for any purpose and only the people authorized to receive payment under this section are entitled to do so.

(k) No payment of funds will be made to any person other than the eligible owner or operator under this subchapter, except as follows:

(1) the person assigned the right to accept payment on behalf of an eligible owner or operator. Such assignees are limited to the following:

(A) a Prime Corrective Action Specialist, properly registered under Subchapter J of this chapter (relating to Leaking Petroleum Storage Tank Corrective Action Specialist Registration and Project Manager Licensing), hired by the owner or operator to perform corrective action activities at the leaking petroleum storage tank site in question who also holds a lienhold interest on the real estate or fixture that is attached to the real estate where the release occurred and on which the claim for payment is based; or

(B) a person who has insured the owner or operator of petroleum storage tanks for pollution liability on or after July 17, 1990, and who has paid claims on that policy for remediation costs for which the tank owner may be reimbursed under this subchapter; or

(C) any other person who holds legal or equitable title to the property where the release occurred and on which the claim for payment is based; and

(2) the type of ownership interest required under paragraph (1)(A) and (C) of this subsection is an interest in the surface estate of the property.

§334.306. Form and Contents of Application.

(a) An application for reimbursement filed in accordance with this subchapter shall be on a form approved or provided by the agency.

(b) The application must contain the following:

(1) the name, address, telephone number, and signature of all of the following: the applicant, the application preparer, and the prime contractor and/or prime corrective action specialist required by §334.302 of this title (relating to General Conditions and Limitations Regarding Reimbursement), unless otherwise approved by the agency;

(2) the name, address, and telephone number of:

(A) each owner and operator of the tanks;

(B) the facility owner; and

(C) the owner of the land on which the tank system is located;

(3) the address and zip code of the facility where the release occurred;

(4) the location of the facility at which the corrective action was performed or is to be performed, identified with sufficient clarity and detail to enable a person unfamiliar with the site to locate it and reach it by automobile;

(5) any information required by the agency under §334.307 of this title (relating to Technical Information Required), if not already submitted to the agency;

(6) legible copies of contractor and subcontractor invoices and any other documents required by the executive director to provide a description of:

(A) any work performed;

(B) who performed the work;

(C) where the work was performed;

(D) the dates the work was performed;

(E) the unit cost, using the same breakdown of individual activities as are listed in this subchapter and Subchapter M of this chapter (relating to Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program); and

(F) the total amount paid, or ensured to be paid through the posting of a payment bond;

(7) certification on the designated agency form, either that the amounts described in §334.309(c) of this title (relating to Reimbursable Costs) have been paid in full by the claimant, or have been ensured to be paid in full though the posting of a payment bond in the amount not yet paid in full by the claimant. The certification must include:

(A) for reimbursement(s) to a claimant who is an eligible owner or operator, or an insurer under §334.302(k)(1)(B) of this title, a certification as to payment of the claimant's prime contractor; or

(B) for reimbursement(s) to a claimant who is an assignee contractor described in §334.302(k)(1)(A) of this title, a certification as to payment of the claimant's subcontractors;

(8) if the agency is being requested to honor a reimbursement assignment under §334.302(i) - (k) of this title, the application must include a complete assignment document as described in §334.302(i) - (k) of this title;

(9) if any combination of the owner or operator or the persons performing corrective action activities at, or for, the leaking petroleum storage tank site in question are related parties as the

term is defined in §334.322 of this title (relating to Subchapter H Definitions), the application must contain a full description of all such relationships including applicable documentation; and

(10) any other information which the agency may reasonably require.

(c) An application may be filed at the following times:

(1) after the completion of a phase or pre-approved activity; or

(2) at points during the corrective action process agreed to by the agency and the applicant.

(d) The agency may require the applicant to supplement information already submitted or return the application if the information is not sufficient to review the application.

(e) The applicant must update his application with any information not yet submitted to the agency before processing or payment of claims at any stage begins.

(f) A subcontractor may submit information to the agency to assert a claim that the subcontractor has performed pre-approved work and has not been fully paid for the work. To be considered for direct reimbursement by the commission under this subchapter, each of the following requirements must be met:

(1) the subcontractor requesting to be directly reimbursed by the agency shall have performed work for a person eligible for reimbursement in accordance with §334.310 of this title (relating to Requirements for Eligibility) and performed such work as a subcontractor to a prime corrective action specialist retained by the eligible owner or operator;

(2) a Fund Payment Report that contains the charges for which the subcontractor has not been paid has been issued in accordance with §334.314 of this title (relating to Fund Payment Report);

(3) the prime corrective action specialist has failed to pay the subcontractor, due to insolvency subject to the limitations of 11 United States Code, §365(e)(1), the amount reflected on the Fund Payment Report;

(4) the commission has not paid for the work performed in the Fund Payment Report or the commission has successfully recovered the money paid for the work performed in the Fund Payment Report in accordance with §334.318 of this title (relating to Recovery of Costs) and Texas Water Code, §26.355; and

(5) the subcontractor has filed within 120 days of the effective date of this subchapter the following:

(A) written notice to the agency of the amounts owed on each specific Fund Payment Report that the prime corrective action specialist has failed to pay; and

(B) an affidavit by the subcontractor stating that the prime corrective action specialist has failed to pay the amount being requested by the subcontractor.

(g) For purposes of this subchapter, the following are the phases of corrective action:

(1) initial abatement measures and emergency actions phase;

(2) preliminary site assessment phase;

(3) comprehensive site assessment phase;

(4) risk assessment and remediation planning phase;

(5) remediation phase;

(6) post-remediation monitoring phase; and

(7) site closure.

§334.307. Technical Information Required.

(a) The following information may be required by the agency as part of any application for reimbursement under this subchapter:

(1) any information which the agency may require under Subchapter D of this chapter (relating to Release Reporting and Corrective Action);

(2) a detailed account of what corrective action has been taken, why specific actions were taken, when, by whom, and with what results;

(3) an estimate of what other corrective action measures may be required to remediate the facility and the estimated time required to complete such measures.

(b) The agency may require the applicant to supplement information already submitted, or may return the application if the information is not sufficient to allow for proper application review.

§334.308. Allowable Costs and Restrictions on Allowable Costs.

(a) Only those costs that are allowable costs under the terms of this section shall be subject to reimbursement under this subchapter.

(b) Allowable costs are those costs and expenses directly required for the performance of necessary corrective action in accordance with commission rules.

(c) Unless otherwise specified in subsection (g) of this section, allowable costs shall include, but not be limited to, the following:

(1) abatement of impacts and immediate threats of impact to human health, safety, and the environment, including measures necessary to prevent further releases and to identify and mitigate all fire, explosion, and human exposure hazards associated with a release;

(2) removal of phase-separated product;

(3) temporary provision of an alternate water supply. The agency shall determine the length of time during which the cost of water supply may be allowable, the amounts of water which may be allowable, the uses for which water supply may be allowable, and other conditions of approval;

(4) collection and analysis of surface and subsurface soil and water, phase-separated product, and vapor samples;

(5) emplacement of monitor wells;

(6) removal, storage, treatment, recycling, transport, and disposal of phase-separated product, sludges, vapors, contaminated soils, contaminated water, and other wastes and contaminated articles, in accordance with applicable laws;

(7) removal, disposal, and replacement (including transport) of soils and pavement where removal is necessary to the performance of corrective action;

(8) tank system integrity testing in accordance with the methods prescribed by this chapter when such testing:

(A) is necessary to the performance of corrective action;

(B) has been specifically requested by the agency staff on or after May 31, 1989; or

(C) has been specifically ordered by the commission on or after May 31, 1989;

(9) identification and testing of affected or potentially affected drinking water sources;

(10) design of plans for site assessment and remediation;

(11) acquisition, installation, startup, operation, and maintenance of remediation systems, including monitoring;

(12) removal, transport, and disposal of the piping, pumps, and dispensers associated with the underground or aboveground tank when necessary for performance of corrective action, and when removed after October 1, 1992, and before June 6, 1993;

(13) tank removal (as defined in this subchapter), transport, and disposal of the components of the underground or aboveground tank, including compliance with applicable requirements under Subchapter D of this chapter (relating to Release Reporting and Corrective Action), in accordance with applicable law when necessary for the performance of corrective action and performed before March 12, 1993;

(14) a portion of costs, as specified in this section, of tank removals, transport, and disposal of the components of the underground or aboveground tank, including compliance with applicable requirements under Subchapter D of this chapter, when necessary for the performance of corrective action and performed on or after March 12, 1993. Reimbursement under this paragraph performed on or after March 12, 1993, shall be based on the volume of the tank and shall have a maximum reimbursable limit of $8,000 per leaking petroleum storage tank site. For underground storage tanks (USTs) having a volume of 5,000 gallons or less, the portion of reimbursable costs under this paragraph for each such tank is $1,000. For USTs having a volume of greater than 5,000 gallons, the portion of reimbursable costs under this paragraph for each such tank is $2,000;

(15) permanent abandonment in-place, of a tank system, including compliance with applicable requirements under Subchapter D of this chapter, where abandonment in-place rather than tank system removal is deemed by the agency to be necessary to avoid destruction of substantial or significant surface improvements and conducted before June 6, 1993;

(16) temporary relocation of utility structures when necessary to the performance of corrective action;

(17) preparation of technical reports required in accordance with the requirements of Subchapter D of this chapter;

(18) the reasonable, as determined by the agency and as limited by the reimbursable cost specifications, value of necessary time to obtain access to property outside of the facility boundaries where such access is necessary for the performance of corrective action;

(19) the reasonable value, as determined by the agency and as limited by the reimbursable cost specifications, of necessary time spent by the applicant in planning and administering the applicant's corrective action plan;

(20) performance of any corrective action measure which is specifically required by an order of the commission or a written request by agency staff on or after September 1, 1987;

(21) state and federal sales taxes applicable to items which are otherwise allowable costs under this section; and

(22) any other costs determined by the agency to be allowable in accordance with the provisions of this subchapter.

(d) The costs of abatement or corrective action taken in response to a release of hydraulic fluid from a hydraulic lift system are allowable costs in situations where:

(1) the hydraulic fluid was released from a hydraulic lift system located at a vehicle service and fueling facility where the hydraulic lift system was used in conjunction with and contemporaneously with a vehicle service and fueling facility; and

(2) upon request by the agency, the eligible owner or operator demonstrates that a release from the hydraulic lift system is not mixed with any substance except for petroleum products from a petroleum storage tank system, spent oil from a spent oil tank located at a vehicle service and fueling facility (or another substance contained in such spent oil tank), or another substance that was contained in the hydraulic lift system owned or operated by the person claiming reimbursement.

(e) The costs of abatement or corrective action taken in response to a release of spent oil from a spent oil tank are allowable costs under the following:

(1) the spent oil was released from a spent oil tank located at a vehicle service and fueling facility where the spent oil tank was used in conjunction with and contemporaneously with a vehicle service and fueling facility; and

(2) upon request by the agency, the eligible owner or operator demonstrates that a release of spent oil is not mixed with any substance except for petroleum products from a petroleum storage tank system, or hydraulic fluid (or another substance that was contained in the hydraulic lift system) or another substance that was contained in the spent oil tank owned or operated by the person claiming reimbursement.

(f) The costs of excavation, disposal, or treatment of backfill material generated during the tank removal process and any additional sampling and reporting required under Subchapter D of this chapter required because of the disposal or treatment of the backfill material are allowable costs where the concentration of constituents of any substance listed in §334.301(a) of this title (relating to Applicability of this Subchapter) in the backfill material exceed a standard for which the agency will permit the backfill material to be returned to the original tank pit excavation and a prior written directive is obtained from the agency prior to implementation.

(g) The following types of costs are those which will not be considered allowable costs under this subchapter:

(1) the cost of replacement, repair, and maintenance of affected tanks and associated piping;

(2) the cost of upgrading existing affected tanks and associated piping, including, but not limited to, the costs of corrosion protection, release detection, spill and overfill protection, or any other upgrading required by Subchapter C of this chapter (relating to Technical Standards);

(3) removal, transport, and disposal of the piping, pumps, and dispensers associated with the underground or aboveground tank when removed prior to October 1, 1992, or on or after March 12, 1993;

(4) tank removal (as defined in this subchapter) and transport, and disposal of the components of the underground or aboveground tank, unless otherwise specified in subsection (c)(13) and (14) of this section;

(5) permanent abandonment in-place of a tank system, where abandonment in-place rather than tank system removal is deemed by the agency to be necessary to avoid destruction of substantial or significant surface improvements when conducted on or after March 12, 1993;

(6) loss of income or profits, including without limitation, the loss of business income arising out of the review, processing, or payment of an application or request for assistance under this subchapter;

(7) decreased property values;

(8) bodily injury or property damage;

(9) attorney's fees;

(10) any costs associated with preparing, filing, and prosecuting an application for reimbursement or assistance under this subchapter;

(11) the costs of making improvements to the facility beyond those that are required for corrective action;

(12) costs associated with corrective action performed for any purpose where no release of petroleum product above action levels is discovered, except when the corrective action has been ordered by the commission;

(13) costs of compiling and storing records relating to costs of corrective action;

(14) costs of corrective action taken in response to the release of a substance which is not a petroleum product as defined in §334.322 of this title (relating to Subchapter H Definitions);

(15) costs of tank integrity testing when it is not specifically required by this chapter, requested by the agency staff, or ordered by the commission;

(16) costs of any corrective action incurred by an owner or operator on or after the date that the executive director commences corrective action at the owner's or the operator's facility under §334.84 of this title (relating to Corrective Action by the Agency), unless authorized in writing by the agency;

(17) costs incurred as a result of a release from a storage tank system owned, operated, or maintained by a common-carrier railroad;

(18) any activities, including those required by this chapter, which are not conducted in compliance with applicable state and federal environmental laws or laws relating to the transport and disposal of waste;

(19) interest on monies;

(20) excluding releases identified under subsections (d) and (e) of this section, the cost of abatement or corrective action taken in response to a release of:

(A) a regulated substance, which is not a petroleum product; and

(B) a release of a petroleum product that has commingled with a regulated substance, that is not a petroleum product;

(21) the costs of the installation or construction of on-site equipment, structures, or systems used in the extraction or management of wastes, except soil excavation, landfill disposal, well sampling, or monitoring, unless:

(A) the plans and specification for such equipment, structures, or systems are properly sealed by a licensed professional engineer; and

(B) the construction and installation of such equipment, structures, or systems are performed under the supervision of a licensed professional engineer;

(22) work not pre-approved under §334.310(f) of this title (relating to Requirements for Eligibility) or pre-approved work performed incorrectly and rejected by the agency; or

(23) costs attributable to fraud.

§334.309. Reimbursable Costs.

(a) The agency will utilize the reimbursable cost specifications, as outlined in §334.560 of this title (relating to Reimbursable Cost Specifications), to evaluate the reimbursability of claims related to the cleanup of leaking petroleum storage tank sites.

(b) No cost shall be reimbursed unless it is also an allowable cost under §334.308 of this title (relating to Allowable Costs and Restrictions on Allowable Costs).

(c) For reimbursements appropriate to be made under this subchapter, the amount reimbursed will be the lower of the invoiced amount or the line-item amount (adjusted for scope of work) for that activity specified in Subchapter M of this chapter (relating to Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program). An exception to this subsection is made for items under Subchapter M of this chapter requiring bidding, where reimbursements requests are processed as described in Subchapter M of this chapter. For those activities that require pre-approval under §334.310(f) of this title (relating to Requirements for Eligibility), the agency may also, at its discretion, limit the amount reimbursed to the pre-approved amount.

(d) A cost is not reimbursable if a contractor fails to pay its subcontractors for subcontracted work or if there is a failure to perform the work claimed as technically required. The audit of reimbursable costs is addressed in §§334.530 - 334.535 of this title (relating to Purpose and Applicability of the Subchapter, Cooperation with Audit; False Submittals, Payments, Audits, Notice of Overpayment, and Objections to the Notice of Overpayment and Formal Petition for Hearing).

§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) an owner or an operator of a petroleum storage tank, hydraulic lift system, or a spent oil tank which is subject to the requirements of Subchapter D of this chapter (relating to Release Reporting and Corrective Action);

(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 in response to a release of petroleum products from such tank;

(C) an owner of land who can clearly prove that the land has been contaminated by a release of petroleum products from a tank described in subparagraph (A) of this paragraph which is or was located on said land and who performed corrective action in response to a release of petroleum products from such tank;

(D) a lender who has a bona fide security or lienhold interest in or mortgage lien on any property where a tank described in subparagraph (A) of this paragraph is or was located and who performed corrective action in response to a release of petroleum products from such tank;

(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

(F) an adjacent landowner who can clearly prove that the land has been contaminated by a release of petroleum products from a tank described in subparagraph (A) of this paragraph which is not located on said land, and who performed corrective action in response to a release of petroleum products from such tank, and either:

(i) performed emergency abatement actions by completing all the following:

(I) notifying the agency within 24 hours of discovery that the emergency condition exists;

(II) notifying the local fire marshall (or state fire marshall if no local authority is available) within 24 hours;

(III) taking actions necessary to protect against imminent danger to human health and safety by mitigating fire, explosion, and vapor hazards, by removing phase-separated product from structures, basements, sumps, etc., or performing other actions as deemed necessary by the executive director. Restoration of site to preexisting conditions, cost of relocating utility structures, site assessment, and remediation are not considered part of emergency abatement activities. Any expenses incurred after 72 hours from commencement of the action must be approved by the agency in writing; and

(IV) having the release and threat ultimately confirmed by the agency; or

(ii) committed to undertake the entire cleanup of the leak and contamination from the tank on his property and on all other property by:

(I) obtaining prior approval in writing from the agency;

(II) performing a site assessment to define the extent of the vertical and horizontal contamination at the time of the agreement;

(III) entering into a legal agreement with the owner of the tank whereby the adjacent landowner agrees to indemnify and hold harmless the owner, operator, and other

affected landowners for any corrective action or third-party liability effective from the date of the agreement; and

(IV) performing all corrective action in conformance with this chapter, and all other applicable rules and regulations. The applicable deductible for reimbursement under §334.312 of this title (relating to Owner/Operator Contribution) for cleanups undertaken by adjacent landowners under this subsection shall be the same as that applicable to the registered owner of the tank.

(2) An underground and aboveground storage tank installed prior to December 1, 1995, which is required to be registered under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) or §334.127 of this title (relating to Registration for Aboveground Storage Tanks (ASTs)) must be registered with the agency on or before December 31, 1995, or the owner or operator is not eligible to receive reimbursement for that tank, except for:

(A) an owner or operator of a registered facility who discovers an unregistered tank while removing, upgrading, or replacing a tank or while performing a site assessment;

(B) a state or local governmental agency that discovers an unregistered storage tank in a right-of-way during construction; or

(C) a property owner who reasonably could not have known that a tank was located on the property because a title search or the previous use of the property does not indicate a tank on the property.

(3) The owner or operator of an underground and aboveground storage tank installed on or after December 1, 1995, must be registered with the agency under §334.7 or §334.127 of this title no later than the 30th day after the date the installation is completed to be eligible for reimbursement for such tank.

(4) All annual facility fees due since September 1, 1987, under §334.21 of this title (relating to Fee Assessment), and since September 1, 1989, under §334.128 of this title (relating to Annual Facility Fees for Aboveground Storage Tanks (ASTs)) for all underground and aboveground storage tanks which they own or operate must be paid to the agency, except for those tanks which the owner or operator, upon reasonable inquiry, could not have known existed. All fees which come due up until the time that reimbursement funds are released to the claimant must be paid.

(5) Any release on which a claim under this subchapter is based must be discovered and reported to the agency on or before December 22, 1998, and must subsequently be confirmed by the agency.

(b) If an otherwise eligible owner or operator misses a deadline under §334.71(b) of this title (relating to Applicability and Deadlines), and that missed deadline is the fault of that person or his agent

or contractor, then that person shall no longer be eligible for reimbursement for those or future corrective action expenses at that site.

(c) Agency eligibility determinations must be done in accordance with the standards of Texas Water Code, §26.3571.

(d) Compliance with Texas Water Code, Chapter 26, Subchapter I, for the purposes of determining eligibility under this subchapter and Texas Water Code, §26.3571, does not mean that an eligible owner or operator has not violated a statute or a rule or order of the commission. Eligibility of an owner or operator under this subchapter does not preclude the issuance of an enforcement order or the assessment of administrative penalties against an eligible owner or operator.

(e) In no case will reimbursement be made under subsection (a)(1)(F) of this section for duplication of assessment and remediation activities involving the same contamination plume. There will be no reimbursement for adjacent landowner cleanup allowed under subsection (a)(1)(F) of this section for activities at a site which occur after the site has been designated for state lead cleanup under §334.84 of this title (relating to Corrective Action by the Agency).

(f) Unless otherwise approved by the executive director, all corrective action activities, including activities proposed in corrective action plans, must be approved in writing by the executive director prior to implementation. Pre-approval of proposed corrective action activities and costs does not create an entitlement to reimbursement for any corrective action task, at the amount pre-approved or

a different amount. For reimbursement of emergency, initial abatement measures and phase-separated product recovery as required by §334.77 of this title (relating to Initial Abatement Measures and Site Check), approval by the executive director is not required prior to implementation, unless the emergency action extends beyond 72 hours, then written approval will be required for all activities.

§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) an application submitted will be reviewed by the staff for completeness. To be considered complete, an application must contain the following information:

(i) a completed application form, which has been provided or approved by the agency, containing the information required under §334.306(a) and (b)(1) - (4) of this title (relating to Form and Contents of Application);

(ii) legible copies as required under §334.306(b)(6) of this title and by certification of payment as required under §334.306(b) (7) of this title;

(iii) copies of pre-approval documentation and technical information requested in the application form, provided or approved by the agency, under §334.306(b)(5) of this title and §334.307(a) of this title (relating to Technical Information Required); and

(iv) an Application Checklist, provided with the application form, verifying that the applicant and application preparer have reviewed the application for completeness;

(B) if it is determined that an otherwise complete application contains any costs which required prior agency approval prior to implementation as required by §334.310(f) of this title (relating to Requirements for Eligibility), and such prior approval was not obtained, the applicant will be notified in a fund payment report that those costs will not be forwarded for further review until such time as the agency completes reviews of applications with pre-approved costs as allowed under subsection (d) of this section;

(C) if it has been determined that an otherwise complete application contains costs for a corrective action activity which the agency determines to have been performed improperly, the applicant will be notified in a fund payment report that those costs are denied as not allowable under §334.308(g)(22) of this title (relating to Allowable Costs and Restrictions on Allowable Costs); and

(D) the received date of the application is considered to be the date which the complete application was received by the agency, or the date which the required additional information was received by the agency; and

(2) to examine the substance of the application, including, without limitation:

(A) the cost effectiveness and fiscal merits of the corrective action taken at the facility; and

(B) the technical merits of the corrective action taken at the facility.

(b) If, during review, the agency determines that additional information is required to assess the validity of the claim under Subchapters H and M of this chapter (relating to Reimbursement Program; and Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program), it may either:

(1) require the applicant to provide such additional information. Further review of the application will be postponed until such information is received by the agency. The received date for the complete claim will be considered the date on which the agency received such additional required information; or

(2) issue the fund payment report, but withhold payment of those portions of the claim for which additional information has been requested.

(c) An application for reimbursement or supplemental application filed under this subchapter shall be subject to audit by the agency.

(d) The executive director may not consider, process, or pay a claim for reimbursement for corrective action work begun after September 1, 1993, and without prior agency approval until all claims for reimbursement for corrective action work pre-approved by the agency have been considered, processed, and paid.

§334.314. Fund Payment Report.

(a) Upon completion of the review of an application, the agency shall prepare a fund payment report, indicating which of the applicant's claims the executive director believes should be reimbursed and which claims should not be reimbursed. If the executive director finds that any claim should not be paid or not paid to the full amount claimed, he shall briefly state the reasons in his report. The executive director shall submit a copy of his report to the applicant.

(b) The applicant shall review the fund payment report and shall file a written response with the agency within 60 days of the date on the report. The response shall be on a form provided or approved by the agency. The applicant may consent or object to all or any part of the report. If the agency has not received a response from the applicant within 60 days from the date of the report, the following shall occur:

(1) all claims approved for reimbursement in the fund payment report shall be eligible for payment;

(2) any claim addressed in the fund payment report shall be deemed satisfied in full; and

(3) the applicant will have waived his right to object to any item addressed in the fund payment report.

(c) Any item recommended for payment in the fund payment report to which the applicant objects shall not be eligible for payment until the agency and the applicant agree on an amount for payment or until the commission orders payment in a prescribed amount, whichever occurs first.

(d) Any item recommended for payment in the fund payment report to which the applicant consents by filing a timely response to the fund payment report shall be eligible for reimbursement when the agency receives the applicant's consent form. The consent of the applicant to any item recommended for payment shall mean that any claim covered by that item is considered satisfied in full.

(e) The agency may in its discretion pay claims which it has approved for payment by sending payment with the fund payment report.

(f) In cases where there are two or more applicants filing claims for one occurrence, the executive director may make an equitable apportionment of the owner/operator contribution described in §334.312 of this title (relating to Owner/Operator Contribution).

§334.315. Protest of Fund Payment Report.

(a) If the applicant disagrees with any conclusion in the fund payment report, the applicant may file a protest with the executive director within 60 days of the date on the fund payment report.

(b) The protest must be in writing and signed by the applicant. It must be on a form prescribed or approved by the agency. It must contain the following:

(1) the name and address of the applicant;

(2) the address of the facility in question and the Texas Commission on Environmental Quality facility number, if any;

(3) a copy of the fund payment report which is the subject of the protest, or the application number which appears on the fund payment report; and

(4) a clear statement of each item which the applicant disputes on the fund payment report and any other documentation necessary to support the protest.

(c) The protest shall be filed with the executive director by sending or delivering it to the office indicated in the fund payment report materials.

(d) The applicant and the staff of the executive director shall attempt to resolve informally any disputes over the fund payment report. If no resolution is reached by the staff and the applicant, the applicant may file a petition requesting the commission to grant relief. Within 60 days of receipt of written notification from the agency that informal negotiations have ceased and the final informal fund protest meeting has been held, the applicant shall file a petition as specified in §334.316 of this title (relating to Formal Petition).

§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) **Adjacent landowner** - A person who owns legal title to land which is within reasonably close proximity to property where a regulated underground storage tank (UST) or aboveground storage tank is located whether or not the land is contiguous to the property containing the tank.

(2) **Application preparer** - Any person responsible for preparing the application for reimbursement.

(3) **Commingled** - See definition in §334.2 of this title (relating to Definitions).

(4) **Confirmed** - In the context of a release being confirmed by the agency under this subchapter, means that the executive director has determined that sufficient evidence exists to prove that a release of petroleum products has occurred from a petroleum storage tank subject to regulation under this chapter.

(5) **Eligible aboveground storage tank** - A non-vehicular device with a capacity of more than 1,100 gallons, and all connecting piping both above and below ground, that is made of non-earthen materials; located on or above the surface of the ground or on or above the surface of the floor of a structure below ground, such as a mineworking basement, or vault; and designed to contain an accumulation of petroleum.

(6) **Eligible operator** - Any person in control of or having the responsibility for the daily operation of a petroleum storage tank who meets the eligibility requirements prescribed in §334.310 of this title (relating to Requirements for Eligibility).

(7) **Eligible owner** - Any person who meets the eligibility requirements prescribed in §334.310 of this title (relating to Requirements for Eligibility) and who held or currently holds legal possession or ownership of an interest in a petroleum storage tank. For the purposes of this subchapter, if the actual ownership of the petroleum storage tank is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the petroleum storage tank is located is considered the petroleum storage tank owner unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means

that the petroleum storage tank is owned by another person. A person who 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 transfered 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.

(8) **Emergency** - Any existing or potential fire, explosion, or vapor hazards which pose an imminent threat to human health and safety, or any imminent threat at the point of actual use to drinking water supplies actually being used.

(9) **Emergency abatement** - Taking mitigating actions necessary in an emergency to protect against imminent danger to human health and safety by removing phase-separated product from structures, basements, sumps, etc., or performing other actions as deemed necessary by the agency. Restoration of site to preexisting conditions, cost of relocating utility structures, site assessment, and remediation are not considered part of emergency abatement activities.

(10) **Initial abatement measures** - The mitigation of all existing or potential fire, explosion, or vapor hazards, including the removal of phase-separated product, to provide adequate

protection of human health, safety, and the environment in emergency situations or other situations where emergency actions must be implemented to prevent further impacts to the environment. Restoration of site to preexisting conditions, cost of relocating utility structures, site assessment, and remediation are not considered part of initial abatement measures.

(11) **Petroleum product** - See definition in §334.2 of this title (relating to Definitions).

(12) **Petroleum storage tank** - See definition in §334.2 of this title (relating to Definitions).

(13) **Phase-separated product** - See Free-product as defined in §334.2 (relating to Definitions) of this title.

(14) **Prime contractor** - Any natural person, firm, or any entity responsible for the contracting of any corrective action services.

(15) **Prime corrective action specialist** - A natural person, consulting firm, or any entity engaging in corrective action services, or acting as coordinator of others engaged in corrective action services.

(16) **Related parties -** An eligible owner, an eligible operator, a prime corrective action specialist, or a subcontractor (collectively “parties” or individually “party” in this definition) are

related parties to the extent that any one of them holds any legal or beneficial ownership in another party, or is owned in whole or in part, legally or beneficially, by any person or entity who also owns all or part of the legal or beneficial interest in another party, or is party to an exclusive dealing agreement with another party regarding the performance of corrective action at leaking petroleum storage tank sites in Texas. Ownership by one member of a family shall be attributed to all those within the second degree by consanguinity or affinity. In addition, any of the parties listed in this paragraph are related parties if they share common employees, common offices, or centralized accounting; if they operate under a common business name; or if one party pays the wages of another party's employees, makes undocumented transfers of funds to the other party, or allows its employees to render services on behalf of another party.

(17) **Spent oil** - A regulated substance that is a lubricating oil or similar petroleum substance which has been refined from crude oil, used for its designed or intended purposes, and contaminated as a result of that use by physical or chemical impurities, including spent motor vehicle lubricating oils, transmission fluid, or brake fluid.

(18) **Tank removal** - The physical removal of a petroleum storage tank from the subsurface. Tank removals include removal and replacement of surface material, excavation and disposal of backfill material, petroleum storage tank removal and disposal, backfilling and compaction of backfilled material, and any other activities typically associated with the tank removal process.

(19) **Vehicle service and fueling facility** - A facility where motor vehicles are serviced or repaired and where petroleum products are stored and dispensed from fixed equipment into the fuel tanks of motor vehicles.

SUBCHAPTER L: OVERPAYMENT PREVENTION

§§334.530 - 334.535

STATUTORY AUTHORITY

The amendments 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; §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 adopted under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an AST; and §26.3573, which allows the commission to use funds from the PST remediation account to reimburse an eligible owner or operator or insurer for the expenses of corrective action or to pay the claim of a contractor hired by an eligible owner or operator to perform corrective action.

§334.530. Purpose and Applicability of the Subchapter.

(a) Purpose. The purpose of this subchapter is to establish procedures regarding the audit of money expended from the Petroleum Storage Tank Remediation Account, to assure the most efficient use of the money available and to provide the most effective protection to the environment and public health and safety.

(b) Applicability. This subchapter applies to all corrective actions, paid for in whole or in part by the Petroleum Storage Tank Remediation Account.

§334.531. Cooperation with Audit; False Submittals.

(a) The party who has entered into a contract with the agency in accordance with this chapter to perform corrective action work, eligible owner or operator, and any party who received reimbursement under §334.302(k) of this title (relating to General Conditions and Limitations Regarding Reimbursement), any Registered Corrective Action Specialist, and any contractor or subcontractor whose invoices or other documents are submitted, or are required to be submitted, with the Application for Reimbursement shall cooperate fully with any audit or investigation by the agency regarding the work performed, the costs charged, and/or amounts paid and shall provide copies of all documents relating to an audited claim to the agency on request and at no charge.

(b) If the documentation or information requested by the agency under subsection (a) of this section to support an audited claim is not provided, the unsupported portion of the claim will be the subject of a Notice of Overpayment under §334.534 of this title (relating to Notice of Overpayment).

(c) No person shall knowingly submit false information to the agency as part of any materials required to be submitted under this subchapter.

§334.532. Payments.

(a) Payment by the agency of a claim for money from the Petroleum Storage Tank Remediation Account means that the claim is subject to post-payment audit.

(b) By making payment of claims to eligible persons (see §334.310 of this title (relating to Requirements for Eligibility)), the executive director makes no statement or admission that the payments are for necessary, reimbursable, or allowable costs, as those terms are defined by this chapter, nor that the corrective action taken was not in excess of agency cleanup standards for effective protection of the environment and public health and safety.

§334.533. Audits.

(a) Audits of claims and associated documents will be conducted in accordance with auditing standards as provided by Texas Water Code, §26.35735. Such audits may occur prior to or after claims have been paid. Such audits may include an investigation into whether activities performed and/or the amounts claimed were:

(1) eligible to be paid as provided by Texas Water Code, §26.3573, and allowable under Subchapters H and M of this chapter (relating to Reimbursement Program; and Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program);

(2) reimbursable under Subchapter H of this chapter, §334.560 of this title (relating to Reimbursable Cost Specifications), and §334.309 of this title (relating to Reimbursable Cost) (for work performed on or after June 6, 1993), or reasonable (for work performed prior to June 6, 1993) ;and

(3) actual costs in §334.306(b)(6) of this title (relating to Form and Contents of Application). For the purposes of this subchapter, actual cost is the actual amount paid for actual work performed, net of any discounts, offsets, or other reductions to the amount paid. Actual cost includes associated overhead and reasonable profit.

(b) An audit may also include an investigation into whether, and by what means, the amounts claimed have been paid in full by the claimant to the person(s) who actually performed the corrective action work for the claimed amount. The investigation may include a review of any and all documents relating to the payment of any amounts claimed, including those of any subcontractors who performed any of the corrective action work. Upon conclusion of the audit, any amounts the audit reveals have not been actually paid to the person(s) performing the corrective action work, rather than evidenced only by a promise to pay, must be included in the Notice of Overpayment issued under §334.534 of this title (relating to Notice of Overpayment).

§334.534. Notice of Overpayment.

(a) If the agency conducts an audit or investigation and concludes that payment of a claim was for an amount which exceeded the amount provided for under this chapter, the agency shall prepare a

notice of overpayment. The notice of overpayment shall briefly summarize the findings of the audit and identify the amounts which were overpaid. If the executive director determines that the overpayment was the result of incorrect, incomplete, or inaccurate documentation submitted by the claimant, then the executive director may include in the notice of overpayment a charge for the claimant to pay interest, calculated at New York Prime, plus two points, dating from the date of overpayment by the Texas Commission on Environmental Quality (TCEQ), or its predecessor agency, to the date of repayment to the TCEQ. Interest shall be calculated each month using the interest rate determined on the first business day of each month.

(b) The notice of overpayment will be delivered to the claimant (either the party who contracted directly with the TCEQ for corrective action work, the eligible owner or operator, or the party assigned the reimbursement right under §334.302(i) - (k) of this title (relating to General Conditions and Limitations Regarding Reimbursements; Assignments).

(c) Upon receipt of a notice of overpayment, the recipient shall submit a check returning the amount of overpayment to the TCEQ.

(d) All checks rendered to return overpayments shall be made out to "The State of Texas-Petroleum Storage Tank Remediation Account" and mailed to the address specified on the notice of overpayment.

§334.535. Objections to the Notice of Overpayment and Formal Petition for Hearing.

(a) If any person receiving the notice of overpayment disputes any portion of the amount to be repaid to the commission, he or she must, within 30 days of receipt of the notice of overpayment, file a petition for hearing with the chief clerk in the manner prescribed generally by this title for filing petitions with the commission and shall serve a copy of the petition on the executive director.

(b) The petition must assert which funds the party is entitled to retain, and why such funds represent claims paid under the requirements of this chapter. At hearing, the petitioner must prove that the audited claims or portions of claims were for amounts paid under the requirements of this chapter.

(c) If a person does not object to a notice of overpayment, in whole or in part, as prescribed by this section, then all objections to the notice are waived.

(d) Any amount not specifically disputed in accordance with this section must be returned within 30 days of receipt of the notice of overpayment.

SUBCHAPTER M: REIMBURSABLE COST SPECIFICATIONS FOR THE PETROLEUM STORAGE TANK REIMBURSEMENT PROGRAM

§334.560

STATUTORY AUTHORITY

The amendment is 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; §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 section is also adopted under TWC, §26.345, which provides the commission authority to develop a regulatory program and to adopt rules regarding USTs; §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or an AST; and §26.3573, which allows the commission to use funds from the PST remediation account to reimburse an eligible owner or operator or insurer for the expenses of corrective action or to pay the claim of a contractor hired by an eligible owner or operator to perform corrective action.

§334.560. Reimbursable Cost Specifications.

The following Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program are in effect as of November 18, 2004.

Figure: 30 TAC §334.560