

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) proposes 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.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 proposed to be 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 are proposed 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 is specifically soliciting comments and suggested alternatives with regard to each of the following issues in this proposed rulemaking: 1) considering the proposed 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 proposed language overly limit the agency's audit authority as described in §334.309(d) and §334.533; and 3) considering the proposed 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 proposed 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.

Section 334.2, Definitions, is proposed to be amended. Paragraph (6) is proposed to be added to insert a definition of action level. The term is proposed to be 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 (also see discussion of §334.322 in this preamble). Subsequent definitions are proposed to be renumbered accordingly. The definition of corrosion technician is proposed as renumbered paragraph (28) and the word "is" inserted

into the last line to improve readability; the phrase “has been” is proposed to be deleted from subparagraph (A) to improve readability; the word “is” is proposed to be deleted from subparagraph (B) to improve readability; and subparagraph (C) is proposed to be 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 proposed as renumbered paragraph (41), with the parenthetical clarified to match the definitions in Subchapter M of this chapter. A definition of petroleum storage tank is proposed to be 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, Chapter 26, Subchapter I, §26.342(12). The definition of petroleum substance is proposed as renumbered paragraph (81) and amended by adding “e.g.,” as a precedent to each set of examples enclosed in parentheses to specify that they are examples and not a restricted list. The definition of retail service station is proposed as renumbered paragraph (95) and amended by changing the term “retail sale” to “selling goods to consumers.” The definition of “Spill” is proposed as renumbered paragraph (99) and amended by adding reference to ASTs as a correction. Throughout the section, the acronyms “AST” and “UST” are proposed to be spelled out to be consistent with other commission rules.

Section 334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.5(b)(1)(C) is proposed to be amended to reflect the current name of the agency.

Section 334.7, Registration for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.7(d)(1)(A)(i) and (ii) concerning tank registration updates is proposed to be reinserted after accidental deletion in an administrative error in a recent PST rulemaking.

Section 334.8, Certification for Underground Storage Tanks (USTs) and UST Systems, is proposed to be amended. Section 334.8(c)(5)(C) is proposed to be amended by inserting 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) are proposed to be amended to reflect the current name of the agency.

Section 334.9, Seller’s Disclosure, is proposed to be amended. The required disclosure is proposed to be 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, would also be realized for ASTs under the proposed change. Parallel provisions for ASTs are inserted in the introductory language and in paragraphs (2) and (5). Subsection (4) is proposed to be amended by adding the phrase “as to USTs” to make the paragraph specific to USTs, adding the phrase “and other” before the word “requirements” to reference other Texas Administrative Code requirements, and replacing “Texas Natural Resource Conservation Commission” with “Texas Commission on Environmental Quality” to reflect the current

name of the agency. Paragraph (5) is proposed to be added to provide language similar to paragraph (4), but altered to be specific to ASTs.

Section 334.10, Reporting and Recordkeeping, is proposed to be amended. Section 334.310(a)(6) is proposed to be 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.

Section 334.12, Other General Provisions, is proposed to be amended. Section 334.12(a) is proposed to be amended to reflect the current name of the agency.

Section 334.14, Memorandum of Understanding Between the Attorney General of Texas and the Texas Natural Resource Conservation Commission, is proposed to be amended. Section 334.14 is proposed to be amended to reflect the current name of the agency in the section title and throughout the section. In §334.14(a)(5) an outdated reference is proposed to be deleted. Section 334.14(c) is proposed to be amended to list the actual effective date of the memorandum of understanding.

Subchapter C - Technical Standards

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

Section 334.46, Installation Standards for New Underground Storage Tank Systems, is proposed to be 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) is proposed to be amended by deleting 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) is proposed to be amended by changing the word "and" to the word "or" to allow a choice in allowable procedure.

Section 334.50, Release Detection, is proposed to be amended. Section 334.50(a)(1)(C)(ii)(V) is proposed to be amended by deleting 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) is proposed to be amended by correcting the spelling of the word "course" to "coarse."

Section 334.55, Permanent Removal from Service, is proposed to be amended. Section 334.55(a)(6)(B)(i) is proposed to be amended to remove 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, Change to Exempt or Excluded Status, is proposed to be amended. Section 334.56(b)(1)(A) is proposed to be amended to remove 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 external release monitoring and detection method. Section 334.56(c)(2) is

proposed to be amended by replacing “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 proposed to be revised to move away from an “actual cost”-based system. Reimbursement would 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 are proposed to be added in the reimbursement rules to better fulfill the stewardship role the agency has for the PSTR Account under Texas Water Code, §26.3573(h). These changes are proposed based on experience the agency has gained in conducting numerous PST reimbursement audits over the last several years. In addition to these changes, it is also proposed that the rules concerning assignment of reimbursement rights, including associated paperwork requirements, be 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 proposes to update and clarify existing program rules, and make corrections to rule language to improve rule consistency.

Section 334.302, General Conditions and Limitations Regarding Reimbursement, is proposed to be amended. The title of the section is proposed to be amended 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) is proposed to be amended to change the word “one” to “\$1” to conform with *Texas Register* formatting. Section 334.302(c)(6) is proposed to be amended to delete the word “or” and move it to paragraph (7), to reflect that another item is proposed to be added to this list of regulations. Section 334.302(c)(7) is proposed to be amended by adding the phrase “any expenses” to clarify the requirement and improve readability. A new §334.302(c)(8) is proposed to be 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.

Section 334.302(d)(1) is proposed to be amended by replacing the term “his duly authorized representative” with the term “his/her agent” to clarify the term. The phrase “through an assignment” is proposed to be 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 proposed to be deleted from §334.302(i) and (j) to clarify that it is only through an assignment of reimbursement rights under these regulations that the agency will pay anyone other than the owner or operator in a reimbursement situation. In §334.302(j), the word “agent” is proposed to be replaced with the word “assignee” to clarify and reiterate that it is only through an assignment of reimbursement rights under these regulations that the agency will pay anyone other than the owner or

operator in a reimbursement situation, and the words “insuring” and “insure” are proposed to be replaced with the words “ensuring” and “ensure” to correct spelling errors.

Section 334.302(k) is proposed to be amended by adding 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 proposed to be 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 proposed to be 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 proposed 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 proposed to be deleted because an amended version of the existing language has been incorporated into the proposed new §334.302(k)(1)(A). Current language in §334.302(k)(1)(C) is proposed to be 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 proposed to be relettered as §334.302(k)(1)(C) to reflect the deletion of current §334.302(k)(1)(B).

Section 334.302(k)(2) is proposed to be amended to provide reference changes given other proposed changes to this subsection. Section 334.302(l) is proposed to be deleted as part of simplifying the assignment process by no longer requiring a contract of subrogation to be submitted by the claimant.

Section 334.306, Form and Contents of Application, is proposed to be amended. In §334.306(b)(6), the phrase “legible copies of invoices providing a description of:” is proposed to be replaced 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 proposed to be 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 proposal should speed up agency processing of applications. In

§334.306(b)(6)(F), the phrase “or legally obligated to be paid” is proposed to be added to provide clarification and to provide continuity with proposed language in §334.306(b)(7).

There is currently no rule requiring 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 proposed 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 proposed change would likely encourage subcontractors to stay in the business of performing corrective action in reimbursement situations. Therefore, §334.306(b)(7) is proposed to be amended to read “certification on the designated agency form that the amounts described in §334.309(c) of this title (relating to Requirements for Eligibility) have either been paid in full by the claimant or that the claimant is legally obligated to pay the amount in full. 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 is legally obligated to do so. Section 334.306(b)(7)(A) is proposed to be amended to provide 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) is proposed to be amended to provide details of what is being certified in situations where the claimant is an assignee contractor under §334.302(k)(1)(A). Language is proposed to be 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 proposed to be deleted as no longer relevant in the change from a “proof” demonstration to a certification.

Current language in §334.306(b)(8) is proposed to be deleted as an outdated and unnecessary requirement. New language is proposed 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. A new §334.306(b)(9) is proposed which 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 proposed 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 proposed language would help prevent unjust enrichment from the PSTR Account, and would be part of fulfilling the agency’s statutory duty of good stewardship of that account under Texas Water Code, §26.3573(h). The existing §334.306(b)(9) is proposed to be renumbered as §334.306(b)(10). A new §334.306(f) is proposed, which 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. Upon submission of this information, the agency may file an interpleader with a court of competent jurisdiction and deposit funds associated with the claim into the registry of the court, so that the court may determine the appropriate distribution of the funds. The proposed language would

provide a mechanism for the subcontractor to be paid for services rendered to the claimant, and indirectly to the state. The existing §334.306(f) is proposed to be relettered as §334.306(g).

Section 334.307, Technical Information Required, is proposed to be amended. Section 334.307(a)(3) is proposed to be amended by replacing the word “which” with the word “what” to improve readability. Section 334.307(b) is proposed to be amended by adding the word “may” and the phrase “allow for proper application” and by deleting “the application” to provide clarification and to improve readability.

Section 334.308, Allowable Costs and Restrictions on Allowable Costs, is proposed to be amended. Section 334.308(a) is proposed to be amended by replacing the word “which” with the word “that” to improve readability and by replacing the word “section” with the word “chapter” to clarify the scope of the subsection. Section 334.308(b) is proposed to be amended by replacing the phrase “which arise directly from” with the phrase “directly required for” and by replacing 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) is proposed to be amended by inserting the phrase “under this paragraph” at three different places, and deleting “of tank removals,” “removed,” and “of removal” to provide clarification and improve readability. Section 334.308(c)(18) and (19) is proposed to be amended by changing the word “guidelines” to the word “specifications” to reflect the proposed new title of Subchapter M. Section 334.308(f) is proposed to be amended by adding 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) is proposed to be amended by adding the word “product” after the word “petroleum” to clarify what category of substances the paragraph is referencing. Section 334.308(g)(20)(B) is proposed to be amended by replacing the word “which” with the word “that” to improve readability. Section 334.308(g)(22) is proposed to be 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 proposed to be added to explicitly state that no reimbursements are allowed in instances where fraud is shown.

Section 334.309, Reimbursable Costs, is proposed to be amended. Section 334.309(a) is proposed to be amended by changing the word “guidelines” to the word “specifications” to reflect the proposed new title of Subchapter M.

Section 334.309(c) is proposed to be amended as follows. Current language states: “For those activities that require preapproval, pursuant to §334.310(f) of this title (relating to Requirements for Eligibility), the agency will consider the pre-approved cost or the actual cost, whichever is lower, as the reimbursable cost.” Proposed new language 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 would 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 (Texas Water Code, §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 proposes to change 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 would also allow the payment of as many eligible valid non-pre-approved claims as possible before PSTR Account sunset, as statute (Texas Water Code, §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 which are filed, saving time for both applicants and agency staff.

A new §334.309(d) is proposed to be added to: 1) do away with actual-cost review on the effective date of the rule amendment, no matter when the work was pre-approved; 2) maintain in effect, during the claims review process and any audits, the numerical cost limitations then in existence for work pre-approved before the effective date of the rule amendment; and 3) retain, at least for work pre-approved before the effective date of the rule amendment, the TCEQ's right to issue notices of overpayment to contractors or eligible owners/operators based on nonpayment of subcontractors.

The proposed move away from most “actual cost” reviews has the potential to remove many of the apparent incentives for fraud that exist in the current system. Staff resources are insufficient to

adequately police all “actual cost” submissions to prevent such fraud. The PST program has noted over time that contractors seem to be increasingly claiming actual costs that are the same as the Subchapter M amounts. Therefore, actual cost reviews are increasingly saving the Account less money, but remain very time consuming for staff to perform. Under these proposed amended rules, there would still be areas of financial inquiry appropriate for the agency to make (e.g., Are subcontractors “related parties” to the prime contractor in a way that should disallow markup of the subcontractor’s bill for reimbursement purposes?), but fewer are anticipated. It should also be noted that, under these proposed amended rules, there will still be an element of bidding in Subchapter M for certain items that do not lend themselves to set line-item amounts. The subcontractor work which requires bidding under Subchapter M (e.g., drilling) prevents undue drain on the PSTR Account through the requirement to solicit and submit to the agency three bids, with the agency able to reject all three on technical grounds, or if the proposal is believed not to be cost effective.

Section 334.310, Requirements for Eligibility, is proposed to be amended. Section 334.310(c) is proposed to be amended by adding the phrase “Agency eligibility determinations must” and deleting 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) is proposed to be amended by adding 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).

Section 334.313, Review of Application, is proposed to be amended. Section 334.313(a)(1)(A)(ii) is proposed to be amended by deleting the phrase “be accompanied by”; deleting the phrase “of invoices (contractor and subcontractor)”; deleting the existing reference to §334.306(b)(6); and adding 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 by adding the phrase “by certification of” before the word “proof” to reflect proposed new language in §334.306(b)(7). Section 334.313(a)(1)(A)(iii) is proposed to be amended by deleting the phrase “be accompanied by” to eliminate redundant language. Section 334.313(a)(1)(A)(iv) is proposed to be amended by deleting the phrase “the completion of” to eliminate unnecessary language. Existing language in §334.313(a)(1)(B) - (D) is proposed to be deleted because the agency’s treatment of incomplete applications is proposed to be consolidated and clarified in a proposed new §334.313(b). Existing language in §334.313(a)(1)(E) is proposed to be relettered as §334.313(a)(1)(B), with the phrase “in a fund payment report that those costs” proposed to be added and the phrase “and the application” proposed to be deleted to clarify that a fund payment report will be the mechanism of notification; the words “completes” and “of” proposed to be added to provide clarification; and the existing reference to §334.313(f) proposed to be changed to reference §334.313(d) to reflect the relettering of this paragraph. Existing language in §334.313(a)(1)(F) is proposed to be relettered as §334.313(a)(1)(C) and 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 has 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 proposed to be amended to delete an unnecessary reference and relettered as

§334.313(a)(1)(D). Existing language in §334.313(b) and (c) is proposed to be deleted because the agency's treatment of incomplete applications is proposed to be consolidated and clarified in a proposed 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 proposed to be relettered as §334.313(b) and amended to provide a consolidated statement of the agency's treatment of incomplete claims. Under the proposed 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 would not be held back for a small deficiency in another part of the claim. In the proposed §334.313(b) language, changes are proposed 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. Proposed §334.313(b)(2) is to be 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" is proposed to replace 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 proposed to be relettered as §334.313(c) and §334.313(f) is proposed to be relettered as §334.313(d) to reflect changes proposed earlier in this section that require the reformatting.

Section 334.314, Fund Payment Report, is proposed to be amended. Section 334.314(b)(1) is proposed to be amended by deleting the phrase ", provided a signed subrogation contract is submitted, when

required” as an outdated provision. Section 334.314(d) is proposed to be amended by deleting 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.

Section 334.315, Protest of Fund Payment Report, is proposed to be amended. Section 334.315(b)(2) is proposed to be amended to reflect the current name of the agency.

Section 334.322, Subchapter H Definitions, is proposed to be amended. The definition of action level in §334.322(1) is proposed to be amended to provide simplification and clarification and to be moved 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 proposed to be renumbered accordingly. The definition of contract of subrogation in §334.322(6) is proposed to be deleted as outdated, since the regulations which use the term “contract of subrogation” are proposed for deletion 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 proposed to be added as §334.322(16) to support the proposed 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 proposed to be renumbered as §334.322(18) and to be 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 proposed to be 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.

Section 334.530, Purpose and Applicability of the Subchapter, is proposed to be amended. Section 334.530(a) and (b) is proposed to be amended to change the word “Fund” to the word “Account” as a correction.

Section 334.531, Responsibility of Recipients of Money from the PSTR Fund and Persons Paid by Recipients of Money from the Petroleum Storage Tank Remediation Fund, is proposed to be amended. The title of the section is proposed to be changed to “Cooperation with Audit; False Submittals” to better reflect the section’s contents with the proposed changes. Section 334.531(a) is proposed to be amended to define the parties who must cooperate with an audit of a claim(s) and to explicitly state that the agency is not to be charged for copies of required documents. Section 334.531(b) is proposed to be amended to more clearly state 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 proposed to be deleted and existing subsection (d) is proposed to be relettered as subsection (c).

Section 334.532, Payments, is proposed to be amended. Section 334.532(a) is proposed to be amended to change the word “Fund” to the word “Account” as a correction.

Section 334.533, Audits, is proposed to be amended. Current language is proposed to be relettered as subsection (a) to allow insertion of a new subsection (b). The phrase “of claims and associated documents” is proposed to be added as a clarification of what is being audited. Section 334.533(1) is proposed to be amended by adding the phrase “under Subchapters H and M of this chapter” to clarify the meaning of the word “allowable” and existing paragraphs (2) and (3) language is proposed to be deleted as unnecessary given that the proposed new language cross-references the subject matter of an audit. Paragraph (4) is proposed to be renumbered as paragraph (2), with the proposed clarifying phrase “Subchapter H of this chapter and” added to cross-reference the meaning of the term “reimbursable” in the existing language and a date corrected in two places to provide continuity with Subchapter H language. Subsection (b) is proposed to be 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.

Section 334.534, Notice of Overpayment, is proposed to be amended. Section 334.534(a) is proposed to be amended by deleting the phrase “necessary, allowable, or reimbursable cost of corrective action” and replacing it with the phrase “amount provided for under this chapter” to more clearly reference the various regulatory standards that must be met and by adding 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 or inaccurate documentation submitted by the claimant. Section 334.534(b) is

proposed to be amended by replacing 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 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 would only be initiated against a reimbursement claimant. Section 334.534(c) is proposed to be amended to reflect the current name of the agency. Section 334.534(d) is proposed to be amended by changing the word “Fund” to the word “Account” as a correction. Section 334.534(e) is proposed to be deleted and an amended version of the original language of this subsection moved to subsection (a).

Section 334.535, Objections to the Notice of Overpayment and Formal Petition for Hearing, is proposed to be amended. Section 334.535(a) is proposed to be amended by replacing the phrase “the party” with the phrase “any person” to better express the entity covered by this subsection. Section 334.535(b) is proposed to be amended to more clearly reference the various regulatory standards at issue and to match proposed language in §334.533 and §334.534. Section 334.535(b) is also proposed to be amended by adding the phrase “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 proposal 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 which 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 Texas Water Code, 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 proposed 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 proposed to be changed to “Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program.” In addition, this subchapter is proposed to be 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 proposal also removes most language associated with “actual cost” reviews (see §334.309 previously discussed in this preamble).

Also, language is proposed for this subchapter to match similar language proposed 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).

Section 334.560, Reimbursable Cost Guidelines, is proposed to be amended. The title of this section is proposed to be amended 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 proposed to be amended to change the word "Guidelines" to "Specifications" because the word “Guidelines” is misleading, given that the referenced figure contains rules and not guidelines, and to change the effective date of the proposed specifications. The referenced separate figure comprises the actual Reimbursable Cost Specifications (RCSs) and is proposed to be amended as follows.

On the cover page of the figure, the title is proposed to be amended to “Reimbursable Cost Specifications” because the word “Guidelines” could be misleading given that these are rules and not guidelines; the word “Division” is proposed to be changed to “Reimbursement Program” to reflect current agency alignment; and “Texas Natural Resource Conservation Commission” is proposed to be 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 proposed to be changed to read “Introductory Requirements” to reflect the proposed new title of that item; the page numbers are proposed to be renumbered to correspond with proposed changes in the document; and a new “Part 11: Allowable Reimbursable Costs for the Risk Evaluation of Individual Exposure Pathways” is proposed as an addition to the document in Section 2, Appendix A.

The “Introduction” section of the RCSs is proposed to be renamed as “Introductory Requirements” to better reflect its purpose and proposed new language. Changes are proposed 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 proposed to be added as clarifying language. The phrase “in all but extraordinary cases” is proposed to be 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 proposed 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” is proposed to be 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 proposed to be added to reflect the proposed language in §334.309(c) (see §334.309(c) previously discussed in this preamble). The last sentence of the second paragraph is proposed to be deleted as unnecessary, given the language provided by proposed additions which precede it. A new third paragraph is proposed to be added to require prime contractors for LPST sites to submit a Site Closure Schedule to help ensure that there will be an ongoing dialog 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 proposed to be deleted as unnecessary, given the new language proposed for paragraph two. The paragraph that begins with “The format of this document. . .” is proposed to be deleted as unnecessary language. A new paragraph is proposed to be 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 proposed 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 proposed to be 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 proposed to be amended. In the first paragraph, the term “TNRCC” is proposed to be changed to “agency” to be consistent with the remainder of this chapter. In the second paragraph, the workplan/cost proposal amount is proposed to be changed in this section and throughout the proposed 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 a Exit Criteria Flow Chart and Site Closure Schedule with the cost proposal is proposed to provide the agency additional information as to the current site status to conduct a more thorough appraisal of cost proposals; and “TNRCC” is proposed to be changed to “agency” to be consistent with the remainder of this chapter.

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

changed to "your agency Site Coordinator" to simplify the terms and provide consistency in terminology.

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

ACTIVITY 02: PHASE-SEPARATED HYDROCARBON (PSH) RECOVERY is proposed to be amended. The use of capitalization for the term "Initial Abatement" is proposed to be eliminated as a correction; language addressing pre-approval and referencing §334.310(f) is proposed to be clarified by adding the phrase "written agency approval for"; the term "TNRCC Central Office Project Coordinator" is proposed to be changed to "agency Site Coordinator" to simplify the term and provide consistency in terminology; and the term "TNRCC Region inspector" is proposed to be changed to "agency Regional Inspector" to provide consistency in terminology. Additional language is proposed, 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 proposed to be eliminated and replaced with

the term "next phase of work." The Note block at the end of the paragraph is proposed to be amended to add the term "MDPE" to reference the definition of this technology as it has been added to the proposed RCSs.

In the worksheet for this activity the word "Manual" in the title block is proposed to be 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 proposed.

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 have been 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 proposed to be 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 proposed for this item. This would apply in cases where extensive site alterations would be required to perform an MDPE event(s). (Site changes envisioned would include trenching, construction of fencing, and possibly waste disposal and would apply to MDPE events lasting 14 days or more.) The existing cumulative Total for Section 1 (\$1,825) is proposed to be deleted as no longer applicable.

In Activity 02, Part A, Section 2: Office Costs, it is proposed that costs to allow a Registered Corrective Action Specialist (RCAS) to prepare and submit reports following MDPE events be included and a differentiation be made between MDPE and non-MDPE report preparation. The section title is proposed to be amended to add 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 proposed to be removed as unnecessary and the term "Report Preparation" is proposed to be added to provide clarity. The term "Project Manager" is proposed to be deleted and the term "Data Review" is proposed to be 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 proposed to be added to "Management Regulatory Interaction" in the activity segment for the PM item to clarify the item. PM time allotted per month is proposed to be 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 proposed to be deleted as no longer necessary due to the proposed increase in allowable PM time in this section. The term "Cost Proposal/Workplan" is proposed to be changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is proposed to be 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 proposed to address this new technology. The first proposed item is PI-7 Standard Exemption Form (MDPE Events

only); the corresponding proposed activity is Preparation and Submission; the corresponding proposed Hours/Units is 1; and the corresponding proposed Rate and Total are \$195 and \$195, respectively. The second proposed item is MDPE Report Preparation - (8-hour event); the corresponding proposed activity is Report Preparation and Submission; the corresponding proposed Hours/Units is 1; and the corresponding proposed Rate and Total are \$260 and \$260, respectively. The third proposed item is MDPE Report Preparation - (24-hour event); the corresponding proposed activity is Report Preparation and Submission (includes periodic reporting to the agency, as required); the corresponding proposed Hours/Units is 1; and the corresponding proposed Rate and Total are \$330 and \$330, respectively. The fourth proposed item is MDPE Report Preparation - (72-hour event); the corresponding proposed activity is Report Preparation and Submission (includes periodic reporting to the agency, as required); the corresponding proposed Hours/Units is 1; and the corresponding proposed Rate and Total are \$395 and \$395, respectively. The fifth proposed item is MDPE Report Preparation - (7-day event); the corresponding proposed activity is Report Preparation and Submission (includes periodic reporting to the agency, as required); the corresponding proposed Hours/Units is 1; and the corresponding proposed Rate and Total are \$535 and \$535, respectively. The sixth proposed item and corresponding proposed activity is Workplan and Cost Proposal; the corresponding proposed Hours/Units is 1; and the corresponding proposed 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 proposed to be amended by renumbering the section from "3" to "4" to reflect the insertion of the previous new section and by

changing the section title 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 proposed as a new section to address the time required in the field for overseeing an MDPE event. Proposed Units are specified as (# of events/hours). Each proposed item contains a referral to a specific section note which contains applicable details pertinent to that event. The first proposed item is "MDPE 8-hour event (See Note 6)" with a corresponding proposed Rate of \$1,115. The second proposed item is MDPE 24-hour event (See Note 7) with a corresponding proposed Rate of \$2,250. The third proposed item is MDPE 72-hour event (See Note 8) with a corresponding proposed Rate of \$1,940. The fourth proposed item is MDPE 72-hour event (See Note 10) and is specific to security needs for that event; the proposed corresponding activity is Security Personnel; the proposed corresponding number of hours is 35; the proposed corresponding Rate is \$20; and the proposed corresponding Total is \$700. The fifth proposed item is MDPE 7-day event (See Note 9) with a corresponding proposed Rate of \$3,540. The sixth proposed item is MDPE 7-day event (See Note 10) and is specific to security needs for that event; the proposed corresponding activity is Security Personnel; the proposed corresponding number of hours is 96; the proposed corresponding Rate is \$20, and the proposed corresponding Total is \$1,920. If this field activity is subcontracted out, a 15% markup is allowed.

In Activity 02, Part B: Equipment Costs, it is proposed that the original Part B be made a section and titled "Section 1: Equipment Costs - (Non-MDPE)" and that a second section be 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 proposed within the new Section 1. A new Part B, Section 2: Equipment Costs - MDPE, is proposed to address 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 would be the most straightforward to implement. Proposed 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 proposed MDPE event item contains a referral to a specific section note which contains applicable details pertinent to that event. The first proposed item is MDPE - All Technologies - (8-hour event) - See Note 6 with a corresponding proposed Rate of \$1,885. The second proposed item is MDPE All Technologies - (24-hour event) - See Note 7 with a corresponding proposed Rate of \$2,860. The third proposed item is MDPE All Technologies - (72-hour event) - See Note 8 with a corresponding proposed Rate of \$5,710. The fourth proposed item is MDPE All Technologies - (7-day event) - See Note 9 with a corresponding proposed Rate of \$13,280. The remaining three proposed 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 proposed item is Construction costs - See Note 11 with no stated Units, Rate, or Total; the sixth proposed item is Additional holding tank with no stated Units, Rate, or Total; and the seventh proposed item is Other with no stated Units, Rate, or Total. Since this field work may be contracted, a markup of 15% is proposed that would follow the conditions set in Appendix A, Part 9, Markup.

A new Activity 02, Part C: Analytical Costs - See Note 12, is proposed to be 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 proposed for Part C: Analytical Costs shown in this section are identical to those listed in Appendix A, Part 2: Laboratory Analysis Costs and specific line item comments are provided in the portion of this preamble which addresses that part.

The existing Activity 02, Part C: Waste Management Costs, is proposed to be renamed as Part D to reflect the addition of the new Part C. The hourly rate for Vacuum Truck fluids transport for disposal is proposed to be 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 proposed to be amended to reflect Part D instead of Part C.

The existing Activity 02, Part D: Travel Costs, is proposed to be renamed as Part E to reflect the addition of the new Part C. The rate per mile for mileage is proposed to be increased from \$.31 to \$.35, as mileage rate is proposed to be 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. It is also proposed that the per diem rate be raised from \$80 per day to \$90 per day to reflect increases in motel and meal rates. Also, the Total Activity Costs block is proposed to be amended to reflect Part E instead of Part D.

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

The Notes for Activity 02 are proposed to be amended to address the proposed changes to various line items within the activity. Note 1 is proposed to be amended to reference Part 8 of Appendix A, to provide a more specific point of reference and an explanation of when the agency will approve a 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 is proposed to be amended to reference 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 is proposed to be amended to delete the phrase "for subcontracted expenses only" because it is redundant in the proposed RCSs and to provide specific reference to Appendix A, Part 9 for further information with respect to markup. Note 4 is proposed to be amended to provide a more specific reference to Appendix A, Part 4 for a breakdown of travel costs. Notes 5 - 12 are proposed new additions that explain the components which define MDPE treatment for reimbursement consideration and provide specific detail with respect to each separate duration event addressed by the proposed 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. Proposed 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. Proposed 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. Proposed Note 10 addresses site security. Proposed Note 11 addresses construction costs and refers the reader to Activity 09 of the proposed RCSs for the detail calculation of associated construction costs, the total of which is to then be reflected in Activity 02, Section 2. Proposed Note 12 provides a specific reference to Appendix A, Part 2 for additional information concerning laboratory analyses and costs.

ACTIVITY 03: EXCAVATION/WASTE MANAGEMENT is proposed to be amended. Proposed modifications to line items costs were made in Part A: Personnel Costs, and reasons for the proposed changes are discussed in this preamble in Activity 02. The changes for Part A include: the term "Cost Proposal/Workplan" is proposed to be changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs; the Workplan and Cost Proposal amount is proposed to be changed in this section and throughout the RCSs from \$115 to \$195 as discussed in this preamble in Section 1, Activities; and a corresponding proposed 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 proposed to be 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 proposed to be decreased 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 proposed to be specified to provide clarity. In Part E: Travel Costs, the

rate per mile for mileage is proposed to be increased from \$.31 to \$.35, as mileage rate is proposed 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. It is also proposed that the per diem rate be raised from \$80 per day to \$90 per day to reflect increases in motel and meal rates.

The following changes are proposed for the Notes. In Note 1, the term “standard work day” is proposed to replace the term “10-hour day” to prevent the specification of the length of a work day. Note 2 is proposed to be amended by deleting the phrase "allowed on subcontracted costs" because it is redundant in the proposed RCSs and by adding specific reference to Appendix A, Part 9 for further information with respect to markup. Note 4 is proposed to be amended by deleting specifics which are addressed in Appendix A of the RCSs and by adding a specific reference to Appendix A, Part 7 of the RCSs.

ACTIVITY 04: SITE ASSESSMENT is proposed to be amended. In the opening paragraph, “TNRCC” is proposed to be 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 proposed to be changed to "Workplan and Cost Proposal” to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is proposed to be changed in this section and throughout the RCSs from \$115 to \$195 as discussed in this preamble in Section 1, Activities. A new line item (Licenses/Permits) is proposed to address in rule the reimbursement of the cost of licensing and

permitting fees charged for monitor wells on municipal and government property with a proposed 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 proposed to be 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 proposes that the Unit Cost amount for the "Submit Results (Labs and Drillers' Logs) Only" activity be 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 proposed to be added to the item "Plan B Risk Assessment" and the item "RA Update" is proposed to be changed to "RA Update/Preparation." Unit Cost amounts are proposed to be 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 proposed to be 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 proposed.

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 proposed to be increased from \$245 to \$300 to reflect current and anticipated costs for this activity. The Drill Crew Per Diem is proposed to be 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 proposed to be 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 proposed to be 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 proposed to be changed and two are proposed to be deleted. In addition, analytical descriptions have been 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 proposed to be increased from \$.31 to \$.35, as mileage rate is proposed 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. It is also proposed that the per diem rate be raised from \$80 per day to \$90 per day to reflect increases in motel and meal rates.

The following changes are proposed 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 proposed to be added. This addition would place 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 proposed to be added to provide clarity; "TNRCC" is proposed to be 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 proposed to be added because frequently the agency coordinator can facilitate access to state property, saving time and effort. Note 5 is proposed to be amended by deleting the phrase "may only be applied to subcontracted costs" because it is redundant in the proposed RCSs and by adding specific reference to Appendix A, Part 9 of the RCSs for further information with respect to markup. Note 6 is proposed to be amended by adding the phrase "per Appendix A, Part 9" to provide a more specific reference. Note 9 is proposed to be 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 is proposed to be added to specify 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 is proposed to be amended. The Plan B Risk Assessment Report Generation Costs title is proposed to be amended to change the reference from "Note 1" to "Note 2" to reflect a proposed change in the applicability of Note 1. The number of hours for a Draftsperson II is proposed to be 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 proposed to be increased by a commensurate \$50 from a maximum of \$5,715 to a maximum of \$5,765. Note 1 is proposed to be amended to change the Workplan and Cost Proposal amount from \$115 to \$195 for the reasons discussed in this preamble in Section 1, Activities; to add the term "Plan A" for clarification; and to delete the second sentence which refers to guidance manuals, as unnecessary. Note 2 is proposed to be 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 is proposed to be amended. In Part A: Personnel Costs, Section 1: Slug and Bail Testing, the number of hours allotted to a Field Engineer/Geologist is proposed to be increased from 10 hours to 15 hours and the total amount for that activity is thereby proposed to be 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. It is proposed to increase the amount applicable to the

preparation of a PI-7 Standard Exemption Form 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 proposed to be changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is proposed to be 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 proposed to be increased from 10 hours to 20 hours and the total amount for that activity is thereby proposed to be increased from \$650 to \$1,300. Reasoning is the same as that provided in Part A, Section 1 of this activity. It is proposed to increase the amount applicable to the preparation of a PI-7 Standard Exemption Form 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 proposed to be changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is proposed to be 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, it is proposed to increase the amount applicable to the preparation of a PI-7 Standard Exemption Form 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 proposed to be changed to

"Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is proposed to be 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 proposed to be increased from 15 hours to 25 hours and the total amount for that activity is thereby proposed to be increased from \$975 to \$1,625. Reasoning is the same as that provided in Part A, Section 1 of this activity. It is proposed to increase the amount applicable to the preparation of a PI-7 Standard Exemption Form 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 proposed to be changed to "Workplan and Cost Proposal" to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is proposed to be 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 proposed to be 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 proposed to be changed and one (TPH (Air)) has been added. In addition, analytical descriptions are proposed to be 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 proposed to be increased from \$.31 to \$.35, as mileage rate is proposed 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. It is also proposed that the per diem rate be raised from \$80 per day to \$90 per day to reflect increases in motel and meal rates.

Activity 06, Notes, is proposed to be amended as follows. Note 1 is proposed to be amended to provide 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 is proposed to be amended by also adding a reference to Appendix A, Part 9 of the RCSs to provide clarification.

ACTIVITY 07: GROUNDWATER MONITORING is proposed to be amended. 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 proposed to be increased from 5 to 12, resulting in a proposed 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 proposed and are fully discussed in this preamble in Appendix A, Part 8. The term "Workplan & Cost Proposal" is proposed to be changed to "Workplan and Cost

Proposal” to be consistent with the remainder of the RCSs, and the Workplan and Cost Proposal amount is proposed to be 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 proposed to be added to each of these sections. The proposed 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 proposed to be deleted to remove that depth limit.

In Activity 07, Part B: Equipment Costs, a new line item for “Field Instruments - Natural Attenuation Testing” is proposed to replace the item “(Other)” and a Unit Cost for that item of \$75 is proposed to be 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 has been 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 proposed to be changed and one is proposed to be deleted. In addition, Analytical Test descriptions have been 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 proposed to be increased from \$.31 to \$.35, as mileage rate is proposed 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. It is also proposed that the per diem rate be raised from \$80 per day to \$90 per day to reflect increases in motel and meal rates.

Activity 07, Notes, is proposed to be amended as follows. Notes 2 and 4 are proposed to be amended by adding a reference to Appendix A, Part 9 of the RCSs for clarification. In Note 5 "TNRCC" is proposed to be changed to "agency" to be consistent with the remainder of this chapter. Note 6 is proposed to be 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 proposed to be 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 is proposed to be amended.

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

In Activity 08, Part B: Corrective Action Plan - With Remediation System, total report generation cost is proposed to be increased by \$1,485 from \$6,660 to \$8,145. This increase is due to proposed 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 were decreased from 10 hours to 5 hours. Commensurate changes in total line item amounts are also proposed. These changes are proposed 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, being proposed.

Activity 08: Part C: Travel Costs, is proposed to be 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 would ultimately provide savings in construction costs and in operation of the system. Four line items are proposed to be included in Part C. A 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 proposed to be added to this activity which serves to total Parts A - C.

Activity 08, Notes, is proposed to be amended. Note 1 reflects the proposed 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 proposed to be 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 which are demonstrated by the RCAS as requiring an increased level of technical effort. Such situations would 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 is proposed to be amended. In the second paragraph of the introduction, "TNRCC" is proposed to be 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 proposed to be added to state specific requirements related to items being quoted. In the third paragraph, the word “should” is proposed to be 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 proposed to be 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 is proposed to increase 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 Workplan and Cost Proposal amount is proposed to be changed in these sections and throughout the RCSs from \$115 to \$195 as discussed in this preamble in Section 1, Activities.

In Activity 09, Part B: Capital Equipment Costs, the word “Catalytic” in the line item “Catalytic Oxidizer” is proposed to be removed to avoid preclusion of other types of oxidizers. Also, the line item for “(Other)” is proposed to be 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 proposed to be added to the Unit Cost amount for Trenching and for Plumbing as a correction. The amount for the line item Remediation compound fence is proposed to be removed as it is proposed to require bidding 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 proposed to be 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 would facilitate bidding and the review of reimbursement costs by listing it separately. Likewise, the addition of a System Integration Costs line item would 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 would 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 proposed to be 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 proposed to be changed and one line item, TPH (Air) (EPA 8015) Standard Rate/Rush, added at a proposed Unit Cost of \$60/\$90. In addition, Analytical descriptions have been 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, is proposed to be amended by adding the parenthetical (Truck used by Technician II) to add specificity. A line item for vehicle mileage for a Staff Engineer is proposed to be 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 proposed to be \$.35, as mileage rate is proposed 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 cents per mile. It is also proposed that the per diem rate be increased from \$80 to \$90 per day to reflect increases in motel and meal rates. The original line item for Travel Time is proposed to be amended and a new line item for Travel Time 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, is proposed to be amended. In Note 2 the existing language is proposed to be deleted and new language is proposed to be 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 would 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 it should not inhibit the use of

innovative technology and should encourage its development if employing such equipment may significantly reduce the length of time for remediation.

Note 3 is proposed to be amended by adding 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 which benefits the PSTR Account. A reference to Appendix A, Part 9 of the RCSs is proposed to be added to existing markup language, and language addressing unit costs per linear foot is proposed to be added.

Note 5 is proposed to be amended by adding 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 is made that markup is applied only as stated in Appendix A, Part 9 of the RCSs.

Note 6 is proposed to be amended by deleting 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 is proposed to be amended. In the opening paragraphs, the term "OM&P" is proposed to be 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 proposed to be 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 proposed to be 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 proposed to be changed from \$500 to \$750. An increase in allowable PM hours from 12 hours to 21 hours is also proposed 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 proposed to be 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 proposed for the reasoning given in this preamble in Appendix A, Part 8. A new line item and total has been proposed 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 proposed is considered an average amount. The Workplan and Cost Proposal

amount is proposed to be 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 proposed to be 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 proposed 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 proposed to be 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 proposed to be increased from \$75 to \$100, since stakeholders expressed concern that not enough time is allotted for the technician to collect weekly samples, inspect the system, and perform minor maintenance when required. The agency agreed that a 33% increase in unit cost would be 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 proposed to be 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 proposed to be 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 would be that the cleanup goals would be more quickly achieved with

remediation of the site ending quicker than anticipated, hence, a long-term savings in OMP costs could be realized.

Proposed 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 would determine how many visits would be necessary for maintenance purposes only. Routine maintenance would 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 “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. Proposed 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 would 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 proposed to be removed to allow greater flexibility. Three

additional items, “Fencing”; “Soundproofing”; and “Winterization” are proposed to be 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 proposed to be added. Since the quantities and types of these items are variable, the agency believes that acquiring bids for the purchase of materials and installation would be best to be protective of the Account. The monthly amount allowed for the item “Small Items for System Maintenance” is proposed to be 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. Oral and written comments from 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 the reimbursement of small items should be more equitable and would expect 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 proposed to be changed to Note 5 as a correction. In Activity 10, Part C: Analytical Costs, Section 1: Groundwater Testing, three line item costs are proposed to be changed and Analytical Test descriptions are proposed to be 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 proposed to be changed, one is proposed to be deleted, and two air analyses line items are proposed to be added. In addition, analytical descriptions are proposed to be 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 proposed to be changed from "Note 5" to "Note 6" as a correction. Also, the hourly rate for Vacuum Truck fluids transport for disposal is proposed to be 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 proposed to be changed from "Note 6" to "Note 7" as a correction. The parenthetical (Truck used by Technician III) is proposed to be 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 proposed to be increased to \$.35, as mileage rate is proposed 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. Two new line items are proposed to be 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 proposed to be added. Also, since time for a trained technician to visit the site

is proposed to be added, a line item for “Travel Time - Technician III - electrical/mechanical” is proposed to be 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. It is also proposed that the per diem rate be increased from \$80 to \$90 per day to reflect increases in motel and meal rates.

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

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

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

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

A new Note 8 is proposed to be 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 proposed to be added to provide clarification as to when reimbursement claims can be submitted and what information needs to be provided with regard to sites which have been approved for an OMP activity.

A new Note 10 is proposed to be 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 is proposed to be amended. In the sentence below the activity title, “TNRCC” is proposed to be 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 proposed to be 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 proposed, as during stakeholders meetings, it was noted that two 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 two additional hours is reasonable and these proposed changes are also reflected in the total for this line item, which is proposed to be 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 proposed and is addressed in this preamble in Appendix A, Part 8. The Workplan and Cost Proposal amount is proposed to be changed

in this section and throughout the RCSs from \$115 to \$195 as discussed in this preamble in Section 1, Activities. All individual totals are proposed to be increased commensurate with the previous proposed individual increases and the overall total is proposed to be 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 proposed to be 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 proposed to be 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 would be best to have bids for the removal services.

In Activity 11, Part B: Rig Costs, the title is proposed to be amended to replace 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 proposed to be 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 proposed to be 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 proposed to be \$.35, as mileage rate is proposed 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. It is also proposed that the average per diem rate be raised from \$80 per day to \$90 per day to reflect increases in motel and meal rates.

Activity 11, Notes, is proposed to be amended. Note 2 is proposed to be amended by adding 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 for regarding capital equipment ownership.

Note 3 is proposed to be amended by deleting the phrase "for subcontracted costs only" as it is redundant in the proposed RCSs; by adding specific reference to Appendix A, Part 9 of the RCSs for further information with respect to markup; and by adding 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 proposed to be 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, Notes, is proposed to be amended as follows. Note 3 is proposed to be 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 proposed to be 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 proposed to be 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 felt it would 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 decided it would 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, is proposed to be amended. In general, proposed 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.

Proposed 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 was 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 proposed to be added that place in rule the agency's internal reimbursement policy of reimbursing for costs associated with TPH analysis. These proposed additions are "TPH-TX 1005" for "Soil"; "Water"; and "TPH Air (8015)." Listed prices for these were obtained as described in the previous paragraph.

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

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

Proposed changes to testing for PAH - EPA 8270. The analytical method 8270C is proposed to replace the outdated analytical method 8270 and reimbursable prices are proposed to be lowered for reasons previously described.

Proposed changes to testing for Soil Parameters. The reimbursable price is proposed to be raised for reasons previously described.

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

Proposed changes to testing for Semi-VOCs - EPA 8270. The analytical method 8270C is proposed to replace the outdated analytical method 8270 and the standard rate reimbursable prices are proposed to be adjusted downward for reasons previously described.

Proposed changes to testing for TCLP Benzene - EPA 1311 w 8020. The analytical method "8021B" is proposed to replace the outdated EPA method 8020.

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

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

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

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

Note 6 is proposed to be 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, is proposed to be amended. The term "Water Well Report generation costs" is proposed to replace the term "Water Well Report Generation" in the opening paragraph for clarification purposes.

In Appendix A, Part 3, Section A: Conventional Drilling, it is proposed that in each of first three separate blocks of Section A: the Depth Interval “51' to 100'” be replaced with “>50'” and a reference to Note 6 added, and the Depth Interval “>100'” be 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 would not be cost effective to administer and would 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 would require bidding that would focus on these types of wells while paying up to an RCSs amount for the shallower wells drilled in the eastern, central, or southern portions of the state. The agency decided that a workable arrangement would 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 would be eligible up to RCSs amounts. For drilling projects that would exceed this, bidding would 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 proposed to be 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 proposed to be increased from \$245 to \$300. The phrase "450 additional miles" is proposed to be 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 proposed to be 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 proposed to be 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 proposed to be 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 proposed to be amended as follows. In Note 1, “TNRCC” is proposed to be changed to “agency” to be consistent with the remainder of this chapter. To ensure that bids received are reasonable, a sentence is proposed to be added to Note 1 that 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 proposed to be deleted as redundant.

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

A new Note 5 is proposed to be 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 proposed note further states that the bids must be independent and that the agency may reject any proposal on technical grounds, or if the proposal is believed not to be cost effective. This note was added to allow the agency to be protective of the PSTR fund 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 proposed to be 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 proposed to be 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 where 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 proposed for these lighter drilling rigs to more closely align the drilling rates allowed in the RCSs with the market rates.

Also proposed 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 proposed to be amended. In the section entitled "Travel by Air vs. Travel by Surface Vehicle, in the first paragraph the term "TNRCC" is proposed to be changed to "agency" to be consistent with the remainder of this chapter. Wording in Paragraph 2 is proposed to be 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 proposed to update the reference date and amount that the mileage reimbursement rate is tied to. A new Paragraph 3 is proposed which 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. The agency should encourage this rather than discourage it, if it is protective of the fund.

In the section entitled "Per Diem and Non-reimbursable Costs," proposed 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 proposed to be 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 proposed to be deleted in the first paragraph as 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 which were previously unavailable. One new line item, Fencing and Enclosures, is proposed to reflect the addition of this item in the Remediation Installation Activity. Specifically, "Fencing and Enclosures" is proposed to replace "Fences" with an added reference to a new Note 8 that will require bidding. Since bidding is proposed to be required for fencing and enclosures, the line item amounts for "Compound Fence (Wood/Chain)" and "Chain Link, \$/Foot" are proposed to be removed. In special situations, winterizing and soundproofing of remediation is necessary and have been added in this section for completeness. Bidding is proposed 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 is proposed to address the common use of this equipment. A reference to a new Note 9 is proposed to be added to the line item "Traffic Control Components."

Appendix A, Part 5, Notes, is proposed to be amended as follows. In Note 1, the word "quote" is proposed to be replaced with the word "bid"; specific requirements related to bids are proposed to be included; language addressing the use of innovative remedial technologies is proposed to be 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 proposed to be added; and language stating that the agency may restrict reimbursable amounts for capital equipment

items to prorated amounts which consider usage is proposed to be added. Also, “TNRCC” is proposed to be changed to “agency” to be consistent with the remainder of this chapter.

A new Note 7 is proposed to be 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 proposed to be added to provide detailed conditions for bidding and acceptance of bids with regard to fencing.

A new Note 9 is proposed to be 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 proposed.

A new Note 10 is proposed to be 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, is proposed to be amended. In Note 1, the phrase “A TCEQ coordinator” is proposed to be 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, is proposed to be amended. The hourly rate for the Truck under the activity "Load Haul, & Dispose" is proposed to be 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 proposed to be amended as follows. In Note 1, nearly all the existing language is proposed to be deleted and replaced with a reference to Appendix A, Part 9 for an allowable markup to provide simplification.

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

A new Note 3 is proposed to be 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 fund. There is proposed language that will reimburse 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. Proposed 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 proposed to be renumbered as Note 4 to reflect the insertion of the proposed new Note 3 and “TNRCC” is proposed to be changed to “agency” to be consistent with the remainder of this chapter.

A new Note 5 is proposed to be 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 fund and has proposed that RCAS can prorate costs to multiple sites, thus recouping its costs.

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

Appendix A, Part 8: Report Generation Costs, is proposed to be amended. An increase in the amount allowed for preparation of most reports listed in this part is proposed. 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 would translate into reports with clearer data presentation and more concise conclusions and recommendations that would allow agency coordinators less time for review.

RELEASE DETERMINATION REPORT. The hours for a PM are proposed to be increased from two to four hours. The report requires additional information 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 word processor to finalize reports and prepare files and the hours for a Word Processor (WP) are proposed to be increased from one to two. These proposed 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 proposed to be amended to "Field Activity Report (FAR) - Groundwater Monitoring - One-time Event" to provide clarification. The hours for a Staff Engineer/Geologist (SF)

are proposed to be increased from two to four hours with a commensurate increase in the total amount for the SF from \$140 to \$280. The hours for a WP are proposed to be increased from one to two with a commensurate increase in the total amount for the WP from \$35 to \$70. The Total for the report is proposed to be 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 FOR 8-HOUR AND 24-HOUR EVENTS. These are new proposed 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 proposed to be one hour for each event with a commensurate total amount for the P1 of \$85 for each event. The hours for an SF are proposed to be two hours for the 8-hour event and three hours for the 24-hour event with a commensurate total amount for the SF of \$140 and \$210. The hours for a WP are proposed to be one hour for each event with a commensurate total amount for the WP of \$35 for each event. The total for the report is proposed to be \$260 for the 8-hour event and \$330 for the 24-hour event.

MDPE REPORTS FOR 72-HOUR/7-DAY EVENTS. These are new proposed 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 proposed to be one 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 proposed to be four hours for a 72-hour event and six 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 proposed to be one 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 proposed to be \$395 for a 72-hour event and \$535 for a 7-day event.

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

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

RISK ASSESSMENT UPDATE OR FAR-SITE ASSESSMENT. A reference to Note 1 is proposed to be added. Hours for an SF are proposed to be increased from four to eight hours, with a commensurate increase in the total for an SF from \$280 to \$560. The proposed 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 proposed to be 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 proposed to be increased from four to six hours, with a commensurate increase in the total for an SF from \$280 to \$420. The proposed 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 proposed to be increased from six to 14 hours, with a commensurate increase in the total for an SF from \$420 to \$980. Hours for a WP are proposed to be increased from three to five hours, with a commensurate increase in the total for a WP from \$105 to \$175. The proposed 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 proposed to be increased from three to six with a commensurate increase in the total for a PM from \$240 to \$480. Hours for a WP are proposed to be increased from one to two hours, with a commensurate increase in the total for a WP from \$35 to \$70. The proposed 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 proposed to be increased from one to two hours, with a commensurate increase in the total for a WP from \$35 to \$70. The proposed 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 proposed to be amended as follows. Note 1 is proposed to be amended to remove the hourly rate for a PM "\$80.00" as a correction and add a reference to Activity 03 for costs applicable to FAR Preparation and Submission.

A new Note 2 is proposed to be 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 felt it would 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 decided it would 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 proposed to be added 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 is proposed to be amended to change the item "All Other Subcontractor Invoices" to "All Other Allowable Subcontractor Costs" for clarification.

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

Note 2 is proposed to be amended to clarify that though a Prime may not mark up in-house costs, there are in-house costs incurred by a Prime which the Prime is entitled to. 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, is proposed to be amended. In the second paragraph under Field Activity Change Orders, and in the first paragraph under General Change Orders, “TNRCC” is proposed to be 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 proposed to be 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 proposed to be amended as follows. Part 1: Definitions, is proposed to be amended by deleting and adding language to clarify the definition of "Free Product."

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

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, determined that for the first five-year period the proposed rules are in effect, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The proposed amendments are intended to simplify and clarify the process for reimbursing claims for the remediation of LPST sites for the regulated community and agency staff. Efficiencies realized through the proposed changes are expected to help ensure that all eligible reimbursement claims are paid and that the maximum number of contaminated sites are remediated before the statutorily required expiration of the program on September 1, 2006. In addition, the proposed amendments are intended to

improve the accountability of the Petroleum Storage Tank Reimbursement Program through the addition of provisions designed to prevent fraud and abuse of the PSTR Account.

The proposed amendments revise the procedures for reimbursing eligible expenses for the remediation of LPST sites. The new procedures eliminate the actual cost-based system currently used, and replace it with a system that is based on the lesser of either invoiced amounts or line-item amounts listed in the RCSs (Subchapter M, currently titled Reimbursable Cost Guidelines), with updates to those figures. The title of Subchapter M is proposed to be amended by changing the word "Guidelines" to "Specifications" because the word "Guidelines" is misleading given that these are rules and not guidelines.

Under current PST program rules, agency staff are essentially required to perform two separate reviews of each reimbursement claim for the remediation of a LPST site. The first involves determining the activities that were pre-approved (at or below costs listed in the Reimbursable Cost Guidelines unless site-specific justification for costs exceeding the guidelines is submitted and approved) to document that the tasks were actually done as pre-approved, then adjusting for changes in scope of work.

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, and other information whereby the applicant demonstrates which pre-approved work was performed and how much it actually cost to perform. Following these reviews, the agency reimburses the lower of the amounts calculated in the two reviews for each claim. Under the proposed

amendments, 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 the proposed RCSs.

The elimination of the actual cost review will allow the agency staff to direct resources towards processing an increasing number of reimbursement applications and is expected to reduce the number of new protests filed regarding reimbursement claims. House Bill 2687, 77th Legislature, 2001, made several significant changes to the Petroleum Storage Tank Reimbursement Program that affect the administration of the program. The bill specifies that March 1, 2006 is the last day to submit a claim for reimbursement and that on or after September 1, 2006, the commission may not use money from the PSTR Account to reimburse an eligible owner or operator. These approaching deadlines have resulted in an increase in the volume of corrective action activities performed at LPST sites in order for sites to remain in the program. This factor is thought to have resulted in an unexpected increase in reimbursement application claims submitted to the agency (33% increase in fiscal year 2003, compared to fiscal year 2002). In addition, LPST sites have not been closing as quickly as projected.

Because actual cost reviews are very time-consuming (reviewers must scrutinize the actual cost of labor and materials, and spend additional time communicating with claimants), the elimination of the actual cost review is expected to result in savings in staff resources, which will be allocated to processing the increased number of reimbursement applications. In addition, a number of the current in-house reimbursement protests (estimated to be 2,000 with some going back prior to fiscal year 2001) are based on controversies involving actual cost reviews. The elimination of the actual cost reviews is expected to reduce agency work load by reducing the number of new protests filed and by reducing the

amount of litigation associated with protested claims. The savings in staff resources would be used to reduce the number of backlogged protested claims and to more efficiently process the payment of all eligible, valid claims before the PSTR Account expires.

The proposed amendments make 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. Proposed changes to these line-item amounts include reimbursement increases in some corrective action activities (e.g., allowable personnel hours per activity) and decreases in others (e.g., certain testing costs) to reflect applicable changes in market pricing and costs of services. It is roughly estimated that line-item updates may result in a very slight increase in reimbursable amounts of 1% or less over current amounts paid out (estimated to be an additional \$677,700 for the 2004-05 biennium). This estimate is based upon projected remediation activity costs for 4,400 LPST sites remaining in the program in fiscal year 2004, and 2,900 sites remaining in the program in fiscal year 2005. Given estimated payout costs of \$78 million for the 2004-05 biennium, this increase in payout is not considered significant.

The changes in Subchapter M line-item amounts reflect agency efforts to adjust reimbursement costs in light of current market prices, cost of services, and new remedial technologies while making every attempt to ensure that projected reimbursement expenditures do not exceed current petroleum product delivery fee revenue estimates and legislative appropriations to address remaining LPST sites before the expiration of the program.

Some state agencies or local governments have been designated owners/operators for the assessment and remediation of LPST sites and are expected to be affected by the proposed rules. The elimination of actual cost reviews is expected to reduce the number of new protests filed, and therefore could reduce the amount of litigation associated with protested claims filed by claimants. State agencies or local governments that own or operate LPST sites may benefit from a reduction in protested claims and any associated litigation costs, though any cost savings cannot be quantified or estimated by agency staff at this time.

Agencies and local governments that have been designated LPST owners/operators for the assessment and remediation of LPST sites will be affected by proposed changes to the reimbursable costs in Subchapter M. It is roughly estimated that the line-item updates may result in a very slight increase in reimbursable amounts of 1% or less over current amounts received for corrective action activities.

The proposed amendments contain other administrative changes and requirements that will affect the PST program. Owners of ASTs will be required to comply with the same Seller's Disclosure requirements as now required for owners of USTs. The Seller's Disclosure is proposed to be expanded to include ASTs as well as USTs, to add ASTs to the seller's obligation to disclose in property conveyances. This should help ensure that purchasers of real property are aware if ASTs are present on property they are considering buying (the requirement already exists for 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.

State agencies and local units of government that are LPST owners and operators will be affected by proposed changes to the process by which an owner or operator may assign his reimbursement rights. These proposed changes are intended to simplify and clarify the process by which owners/operators seek to transfer their reimbursement rights to another, and should save claimants application preparation time. Any associated cost savings cannot at this time be quantified, but would not be anticipated to be significant. Greater clarity in this process could also reduce the agency's liability to suit based on an allegation that reimbursement funds were sent to a person other than the one authorized by the owner/operator. Cost savings to the agency could be realized indirectly as a result of reduced staff time necessary to address questions, protests, and possible litigation associated with reimbursement claims, though potential cost savings cannot be estimated at this time.

In addition, stronger accountability provisions are being proposed to work in tandem with the elimination of the actual cost system, resulting in more effective use of PSTR funds. Some of the provisions intended to strengthen accountability of the use of funds in the PSTR Account include:

- 1) clearly defining who can receive reimbursement payments on behalf of an owner/operator, by removing the term "agent/s" and retaining the term "assignee/s," and by clarifying who can be an assignee;
- 2) disallowing Promissory Notes for the required demonstration of costs paid in full and instead require certification on a designated agency form, that reimbursable amounts have either been paid in full by the claimant or that the claimant is legally obligated to pay the amount in full. This

requires certification as to payment of prime contractors by claimants who are eligible owners, operators, or insurers, and certification as to payment of subcontractors by claimants who are eligible assignee contractors; 3) requiring disclosure of related-party status between or among owner/operator, contractor, and subcontractor; 4) amending the section relating to Allowable Costs and Restrictions on Allowable Costs to add two items to the list of costs not considered allowable, specifically, non pre-approved work and costs attributable to fraud; 5) adding to the list of items for which the agency will not provide reimbursement; “any expenses” on or after September 1, 2006, and items such as markup of amounts paid to subcontractors by owners/operators who act as their own prime cleanup contractors; and 6) making changes to clarify that only reimbursement claimants can receive a notice of overpayment, but that all persons must fully cooperate with an audit investigation.

These proposed changes, among others, are intended to protect funds in the PSTR Account from abuses that have been noted in audit findings and to ensure that funds are available for legitimate claims.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the enforcement of and compliance with the proposed rules will be an increased probability that the maximum possible number of contaminated LPST sites are cleaned up before the September 1, 2006 expiration date of the reimbursement fund. Streamlining, updating, and clarifying the reimbursement process is expected to make it more efficient, and the public will benefit from better accountability provisions in the proposed amendments relating to the PSTR Account, better assuring that PSTR funding will be appropriately used for the remediation of LPST sites.

The proposed amendments will affect businesses and individuals who apply for reimbursement after the proposed effective date of these rules, as well as applicants with claims and/or protests, and formal petitions that are open as of the effective date of these rules. Licensed contractors and tank owners and operators, in general, would be affected as well as owners of ASTs and Cathodic Protection Testers, and contractors who install tanks.

Overall, fiscal implications to these businesses and individuals are expected to be positive, with slightly higher amounts reimbursed for corrective action activities (less than 1% overall increase), and cost savings due to increased efficiencies and simplification of the reimbursement process, including reduced paperwork and reduced reimbursement application preparation time. Any positive fiscal implications to these businesses and individuals as a whole are not expected to be significant.

The proposed amendments provide changes applicable to cathodic protection testing, which will result in a decrease in cost to cathodic protection testers and an increase in availability with regard to obtaining the training required to become a certified cathodic protection tester. Currently, a certification course costs about \$1,500 and takes 5-1/2 days. The proposed changes will allow an additional provider who can make available a shorter course (about three days) at a projected course cost of \$425 to \$525. Proposed changes applicable to air testing requirements for new tank installations will eliminate the need for such tests on certain double-walled tanks at the time of installation, however, no increase or decrease in installation cost is anticipated.

Proposed changes concerning reimbursement procedures will affect eligible owners/operators for LPST sites. Changes to simplify the reimbursement process are expected to result in positive fiscal implications for reimbursement claimants due to the anticipated reduction in reimbursement application preparation time and required paperwork (such as elimination of subrogation contracts). The agency is not able to estimate or quantify any anticipated savings at this time, though any savings would not be anticipated to be significant.

The proposed amendments are expected to provide improved accountability for the expenditure of PSTR Account funds. Proposed changes concerning auditing procedures will affect reimbursement claimants. The proposed amendments will simplify and clarify who is subject to receive notices of overpayment versus who must merely cooperate with an audit investigation and will specify that only reimbursement claimants can receive a notice of overpayment. All persons must fully cooperate with an audit investigation. These proposed changes, among others, are intended to protect funds in the PSTR Account from abuses that have been noted in audit findings and to ensure that funds are available for legitimate claims. No fiscal impact is anticipated to claimants as a result of these changes.

Proposed changes concerning reimbursement amounts and other parts of the reimbursement process in Subchapter M will affect eligible owners/operators for LPST sites and contractors/consultants who perform corrective action activities at these sites.

Under the existing rules the agency will reimburse the pre-approved eligible cost or the actual eligible cost of an activity, whichever is lower, while under the proposed rules the agency will reimburse the

lesser of the eligible Subchapter M line-item amount or the eligible invoiced amount for each activity.

The agency does not anticipate significant changes in overall reimbursement amounts. To the extent that any individual line-item costs are increased or decreased in this subchapter, these revisions are reflective of current average market prices. It is roughly estimated that line-item updates may result in a very slight increase in reimbursable amounts of 1% or less over current amounts paid out.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed rules for small or micro-businesses. It is not known how many small or micro-businesses may be affected by the proposed amendments, but overall, fiscal implications are expected to be positive, with slightly higher amounts reimbursed for corrective action activities (less than 1% overall increase), and cost savings due to increased efficiencies and simplification of the reimbursement process, including reduced paperwork and reimbursement application preparation time. Any positive fiscal implications to small or micro-businesses are not expected to be significant.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory 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 proposed 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 Texas Water Code, §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 proposed rule amendments would 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 Texas Water Code, 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 proposed amendments would 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 §334.315, are based on controversies involving actual cost reviews. The elimination of these reviews under proposed §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 proposed 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 more quickly which leads to payments going out more quickly.

This rulemaking package proposes to make 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 Texas Water Code, 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 proposed 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 proposed 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 proposal 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 Texas Water Code, §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 proposed rule was to be considered a “major environmental rule,” a draft regulatory impact statement is not required because the proposed 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 proposed to be adopted solely under the general powers of the agency.

This proposal does exceed one standard set by federal law, that being the proposed increase in impressed current cathodic protection testing frequency; however, it does not exceed a requirement of a delegation agreement. 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 the United States Environmental Protection Agency requires TCEQ to have an effective program in place to bring these sites to timely closure (see 40 Code of Federal Regulations §281.34). This proposal also does not exceed an express requirement of state law. Texas Water Code, §26.3573(h) requires the agency to be a good steward of the PSTR Account, and as part of this obligation this rulemaking proposes to improve accountability in the reimbursement process. Texas Water Code, §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 Texas Water Code, 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 proposed 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 proposed rulemaking is authorized as described in the STATUTORY AUTHORITY section of this preamble. It is not proposed to be 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 proposed 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 proposed to be revised to move away from an “actual cost”-based system. Reimbursement would

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 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 PST audit cases over the last few years. The rulemaking package also proposes to update and clarify 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 Texas Water Code, 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 proposed 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 would 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 the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action and/or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6).

The commission prepared a consistency determination for the proposed rules under 31 TAC §505.22 and found that the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the proposed rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). The CMP policy applicable to the proposed rulemaking is governing emissions of air pollutants to protect and enhance air quality in the coastal area so as to protect CNRAs and promote the public health, safety, and welfare. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because the proposed rule changes do not modify or alter standards set forth in existing rules. The proposed rulemaking would revise the standard for the reimbursement of eligible cleanup expenses related to LPST sites to move away from an “actual cost”-based system. Reimbursement would 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 proposed in this rulemaking. In addition, better accountability provisions are proposed to be added in the reimbursement rules. Administrative changes are also proposed in accordance with *Texas Register* requirements and to be consistent with other agency rules.

The commission seeks public comment on the consistency of the proposed rules with the CMP.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on May 25, 2004, at 10:00 a.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

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

Comments must be received by 5:00 p.m., June 1, 2004, and should reference Rule Project Number 2002-071-334-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

SUBCHAPTER A: GENERAL PROVISIONS

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

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amended sections are also proposed under Texas Water Code, §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 an UST or 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.

The proposed amendments implement Texas Water Code, Chapter 26, Subchapter I, Underground Storage Tanks.

§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 [(UST)] 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 [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) [UST] system and releases associated with overfills and transfer operations during the dispensing, delivering, or removal of regulated substances into or out of a [an] 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) [(6)] **Allowable cost** - As defined by [Subchapter H], §334.308 of this title (relating to Allowable Costs and Restrictions on Allowable Costs).

(8) [(7)] **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) [UST], including, but not limited to, piping, fittings, flanges, valves, and pumps.

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

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

(11) [(10)] **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 [UST] system or aboveground storage tank [AST] system is located.

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

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

(14) [(13)] **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) [UST] system and releases associated with overfills and transfer operations during the dispensing, delivering, or removal of regulated substances into or out of a [an] UST system.

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

(16) [(15)] **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) [(16)] **CERCLA** - The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(18) [(17)] **Change-in-service** - A method of permanent removal from service involving the permanent conversion of a regulated underground storage tank [UST] 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) [(18)] **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) [(19)] **Commingled** - A combination or mixture of a petroleum product and a substance other than a petroleum product (excluding soil and/or water).

(21) [(20)] **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

[UST] 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) [(21)] **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) [(22)] **Consumptive use** - (With respect to heating oil) the utilization and consumption of heating oil on the premises where stored.

(24) [(23)] **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) [(24)] **Corrective action** - Any assessment, monitoring, and remedial activities undertaken to investigate the extent of, and to remediate, contamination.

(26) [(25)] **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) [(26)] **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) [(27)] **Corrosion technician** - A person who can demonstrate an understanding of the principals of soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements related [as relate] to corrosion protection and control on buried or submerged metal tanks and metal piping systems; who is qualified by appropriate training and experience to engage

in the practice of inspection and testing for corrosion protection and control on such systems, including the inspection and testing of all common types of cathodic protection systems; and who is either:

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

(B) [is] 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 [has been officially qualified] as a cathodic protection tester, in a manner satisfactory to the agency, [strict accordance with the assessment and examination procedures prescribed] by either NACE International or the Steel Tank Institute (STI).

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

(30) [(29)] **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 [UST] systems.

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

(32) [(31)] **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) [(32)] **Excavation zone [zon]** - The space containing the underground storage tank (UST) [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) [(33)] **Existing underground storage tank (UST) [UST] system** - A [An] 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) [(34)] **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 [UST] system.

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

(37) [(36)] **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) [(37)] **Farm tank** - A tank located on a farm where the stored regulated substance is or will be utilized directly in the farm activities.

(39) [(38)] **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) [(39)] **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) [(40)] **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 [e.g., liquid] not dissolved in water or adhering to soil).

(42) [(41)] **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) [(42)] **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. [§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.* [§6921, et seq.]).

~~(44)~~ [(43)] **Hazardous substance underground storage tank (UST) [UST] system** -
A [An] 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)~~ [(44)] **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 [above] fuel oils or residual fuel oil derivatives listed in this paragraph.

~~(46)~~ [(45)] **Hydraulic fluid** - Any regulated substance that is normally used in a hydraulic lift system.

~~(47)~~ [(46)] **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) [(47)] **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) [(48)] **In operation** - The description of an in-service underground storage tank [UST] which is currently being used on a regular basis for its intended purpose.

(50) [(49)] **In service** - The status of an underground storage tank (UST) [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) [(50)] **Installer** - A person who participates in or supervises the installation, repair, or removal of underground storage tanks [USTs].

(52) [(51)] **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) [(52)] **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) [(53)] **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 [pursuant to] 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) [(54)] **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) [(55)] **Leaking petroleum storage tank (LPST) site** - A site at which a confirmed release of a petroleum substance from an underground storage tank [UST] or aboveground

storage tank [AST] has occurred. Petroleum substance contamination which results from multiple sources may be deemed as one LPST site by the agency.

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

(58) [(57)] **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) [(58)] **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) [(59)] **NACE** - NACE International (formerly National Association of Corrosion Engineers), a nationally recognized organization which provides certifications and standards for corrosion protection services.

(61) [(60)] **New underground storage tank (UST) [UST] system** - A [An] 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) [(61)] **NFPA** - National Fire Protection Association, a nationally recognized organization which provides certifications and standards for fire protection equipment and services.

(63) [(62)] **Non-aqueous phase liquid (NAPL)** - See “Free product (or non-aqueous phase liquid)” as defined in this section.

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

(65) [(64)] **Noncorrodible material** - A material used in the construction, maintenance, or upgrading of any component of an underground storage tank (UST) [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) [(65)] **Observation well** - A monitoring well or other vertical tubular structure which is constructed, installed, or placed within any portion of an underground storage tank [a UST]

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)~~ [(66)] **Occurrence** - An incident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank [UST] or aboveground storage tank [AST] or tank system.

~~(68)~~ [(67)] **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)~~ [(68)] **Operational life** - The actual or anticipated service life of an underground storage tank [UST] 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)~~ [(69)] **Operator** - Any person in day-to-day control of, and having responsibility for, the daily operation of the underground storage tank [UST] system or the aboveground storage tank [AST] system, as applicable.

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

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

(73) [(72)] **Owner** - Any person who holds legal possession or ownership of an interest in an underground storage tank [UST] system or an aboveground storage tank [AST]. For the purposes of this chapter, if the actual ownership of a [an] UST system or a [an] 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 [legally-acceptable] means that the UST system or AST is owned by another person. A person who [that] has registered as an owner of a [an] UST system or AST with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred [transferred] to a different person subsequent to the date of the tank registration. This definition is subject to the limitations found in Texas Water Code, §26.3514, Limits on Liability of Lender;

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

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

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

(76) [(75)] **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) [(76)] **Petroleum marketing facilities [facilitie]** - 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) [(77)] **Petroleum marketing firms** - All firms owning petroleum marketing facilities. Firms owning other types of facilities with underground storage tanks [USTs] as well as petroleum marketing facilities are considered to be petroleum marketing firms.

(79) [(78)] **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) [(79)] **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.* [§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 [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 [used] oil" in this section).

(82) [(80)] **Petroleum underground storage tank (UST) [UST] system** - A [An] 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 [an] 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) [(81)] 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) [(82)] Piping - All underground pipes in an underground storage tank [UST] 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) [(83)] Piping trench - The portion of the excavation zone at an underground storage tank [UST] facility which contains the piping system and associated backfill materials.

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

(87) [(85)] 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) [(86)] **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.

(89) [(87)] **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. [§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. [§6921, et seq.]

(90) [(88)] **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.

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

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

(93) [(91)] **Repair** - The restoration, renovation, or mending of a damaged or malfunctioning tank or underground storage tank [UST] system component.

(94) [(92)] **Residential tank** - A tank located on property used primarily for dwelling purposes.

(95) [(93)] **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 selling goods to consumers [retail sale].

(96) [(94)] **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 [UST] or aboveground storage tank [AST].

(97) [(95)] **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, [and] impervious liners, jackets, containment boots, sumps, or vaults surrounding a primary (single-wall) tank and/or piping system.

(98) [(96)] **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.

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

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

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

(102) [(100)] **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.

(103) [(101)] **Suction piping** - Product or delivery piping in an underground storage tank [UST] system which typically operates below atmospheric pressure.

(104) [(102)] **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.

(105) [(103)] **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.

(106) [(104)] **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.

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

(108) [(106)] **Tank system** - An underground storage tank [UST] system.

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

(110) [(108)] **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.

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

(112) [(110)] **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.

(113) [(111)] **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.

(114) [(112)] **Underground storage tank system** - An underground storage tank [UST], all associated underground piping and underground ancillary equipment, spill and overflow prevention equipment, release detection equipment, corrosion protection system, secondary containment equipment (as applicable), and all other related systems and equipment.

(115) [(113)] **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).

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

(117) [(115)] **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.

(118) [(116)] **UST** - An underground storage tank (as defined in this section).

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

(120) [(118)] **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 [UST] to the atmosphere.

(121) [(119)] **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.

(122) [(120)] **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 [an] UST system is first presented with an apparently valid, current Texas Commission on Environmental Quality [TNRCC] delivery certificate (or temporary delivery authorization, if applicable) represented by the UST system owner or operator to meet the requirements of subsection (a) of this section, this will be considered prima facie 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. [§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 [an] 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 [at] §334.5(b)(2) of this title (relating to General Prohibitions [Certification] for Underground Storage Tanks (USTs) and UST Systems).

(b) Existing tanks. Any person who owns a [an] 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 [an] 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 [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 [Chapter 37, Subchapter I,] §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 [an] UST owner or operator to install or replace a [an] UST system must also certify by signature that the installation methods are in compliance with §334.46 of this title (relating [related] to Installation Standards for New Underground Storage Tank [UST] 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 [an] 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 [an] 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 [an] 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) [Texas Natural Resource Conservation Commission (TNRCC)] delivery certificate (or TCEQ [TNRCC] 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 [TNRCC] delivery certificate (or TCEQ [TNRCC] 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 [TNRCC] delivery certificate (or TCEQ [TNRCC] 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 [TNRCC] 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 [TNRCC] 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 [indicated below]:

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

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

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

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

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

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

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

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

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

(X) if [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, [(1)] 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 [TNRCC] construction notification form indicating the pending installation of a new or replacement UST system(s), or indicating that a [an] UST system temporarily out-of-service under §334.54 of this title will be returned to service, the agency will issue a temporary delivery authorization for those tank systems.

(ii) The temporary delivery authorization is valid for no more than 90 days after the first delivery of regulated substance into the 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 [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 [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); [and] §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 [Texas Natural Resource Conservation Commission] and may be subject to certain registration, compliance self-certification, [and] 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)~~ request for extension of time for an UST system that is temporarily out of service, in accordance with §334.54 of this title (relating to Temporary Removal from Service);]

~~[(6)~~ ~~[(7)]~~ 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)~~ ~~[(8)]~~ payment of UST [underground storage tank] fees, in accordance with Subchapter B of this chapter (relating to Underground Storage Tank Fees);

~~[(8)~~ ~~[(9)]~~ 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)~~ [(10)] 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) [Systems]; and

~~(10)~~ [(11)] 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.

(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 [an] 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 [an] 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 [(relating to Permanent Removal from Service)], 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 [UST] Systems) and §334.46(i) of this title (relating to Installation Standards for New Underground Storage Tank [UST] 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 [UST] 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 [UST] 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 [Texas Natural Resource Conservation Commission], 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 [an] 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) [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 [an] 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 [an] 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 [an] 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.

§334.14. Memorandum of Understanding between the Attorney General of Texas and the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission].

(a) Applicability. This memorandum of understanding (MOU) [MOU] applies to civil enforcement proceedings and complaints filed on storage tanks subject to this chapter. Under [Pursuant to the] Texas Water Code, §5.104, the Texas Commission on Environmental Quality (TCEQ) [Texas Natural Resource Conservation Commission] adopts an MOU between the TCEQ [Texas Natural Resource Conservation Commission (TNRCC)] and the attorney general of Texas. The MOU contains the TCEQ's [TNRCC's] and the attorney general's interpretation concerning intervention in the civil enforcement process under the Texas Water Code. This section applies as follows.

(1) The Texas Water Commission (now the TCEQ [Texas Natural Resource Conservation Commission, TNRCC]) was designated as the state agency for the regulation of underground storage tanks by enactment of Senate Bill 779 of the 70th Texas Legislature, 1987.

(2) The Texas Water Code authorizes the TCEQ [Texas Natural Resource Conservation Commission] to have instituted civil suits for injunctive relief and the assessment and recovery of a civil penalty, whenever it appears that a person has violated, or is violating or threatening

to violate, any provision of the Texas Water Code, or of any rule, permit, or other order of the TCEQ [Texas Natural Resource Conservation Commission].

(3) The Texas Water Code provides that at the request of the executive director of the TCEQ [Texas Natural Resource Conservation Commission], the attorney general of Texas shall institute and conduct a suit in the name of the State of Texas for injunctive relief or to recover a civil penalty, or for both injunctive relief and penalty.

(4) Federal regulations promulgated by the United States Environmental Protection Agency under [pursuant to] the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, Subtitle I, require that any state agency administering the Underground Storage Tank Program authorized under that Act provide for public participation in the state enforcement process.

(5) All citizen complaints filed, either orally or in writing, that relate to underground storage tanks will be investigated timely and thoroughly by the TCEQ [Texas Natural Resource Conservation Commission]. Citizen complaint responses will be first initiated by attempting to establish telephone contact with the complainant within 48 hours of receipt of the complaint, and concurrently beginning whatever records review is necessary. Upon completion of the investigation, the complainant will be informed, in writing, of the results. In addition, the complainant will be apprised of the ultimate resolution of the problem. The executive director of the TCEQ [Texas Natural Resource Conservation Commission] shall keep a complaint file [in accordance with §337.4 of this title (relating to Enforcement)].

(6) Notice of proposed settlements of civil enforcement actions that relate to underground storage tanks will be published by the attorney general of Texas in the *Texas Register* (except where immediate action is necessary to adequately protect human health and the environment) and that opportunity will be provided for the public to comment on such proposed settlements.

(7) Nothing in this agreement shall be construed to limit or impair the attorney general's right to control and direct litigation on behalf of the state.

(8) The attorney general will not oppose intervention where permissive intervention may be authorized by statute, rule, or regulation into any civil suit involving the State of Texas relating to violations of the Underground Storage Tank Program by any citizen having an interest which is, or may be, adversely affected.

(9) The attorney general, on behalf of the State of Texas, will consent to a proposed judgment in an action to enjoin violations of the Underground Storage Tank Program only after the publication of notice which provides at least 30 days for public comment on the proposed judgment prior to its entry by the court, provided that the attorney general may permit an exception to the 30-day comment period if a settlement or judgment is required to avoid delays that would adversely affect public health or the environment.

(b) Execution by all signatories. After execution by all signatories, this agreement shall remain in effect until rescinded by formal action of either agency.

(c) Effective date. The effective date of the memorandum of understanding is September 5, 1999 [the effective date of this rule adoption].

SUBCHAPTER C: TECHNICAL STANDARDS

§§334.46, 334.50, 334.55, 334.56

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amended sections are also proposed under Texas Water Code, §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 an UST or 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.

The proposed amendments implement Texas Water Code, Chapter 26, Subchapter I, Underground Storage Tanks.

§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 [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 [registered] 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 [manufacturers'] 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. [New tanks shall be air tested before they are installed.]

(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) [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 [and] 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 [an] UST system on or after the effective date of this subchapter shall be constructed and installed in accordance with the requirements of this subsection [paragraph].

(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 [pursuant to] §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 [an] 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 [an] 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 [(relating to Water Well Drillers)]. 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 [registered] 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, [and] 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 [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 [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 [subsections] (b)(2)(A)(ii)(III) [and (B)(i)(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 [UST] 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 [an] 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 [an] 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 [an] UST system to be placed temporarily out-of-service [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 [an] UST system meeting the applicable technical and installation standards in §334.45 of this title (relating to Technical Standards for New Underground Storage Tank [UST] Systems) and §334.46 of this title (relating to Installation Standards for New Underground Storage Tank [UST] 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 [an] UST system which has been either:

(I) installed in accordance with the applicable technical standards for new UST systems in §334.45 [of this title] 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 [an] 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.

(I) The line leak detector shall be capable of detecting any release from the piping system of three gallons per hour when the piping pressure is at ten pounds per square inch.

(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 [national] 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 [an] 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 [The] below-grade piping operates at less than atmospheric pressure;

(II) the [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 [Only] one check valve is included in each suction line;

(IV) the [The] check valve is located aboveground, directly below and as close as practical to the suction pump; and

(V) verification [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 [an] UST contractor who is properly registered with the agency, [or] by a [an] 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) [of this title] 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 [an] UST system may be monitored for releases using one or more of the methods included in paragraphs (2) - (10) of this subsection. Piping in a [an] UST system may be monitored for releases using one or more of the methods included in paragraphs (5) - (10) of this subsection. Any method of release detection for tanks and/or piping in this section shall be allowable only when installed (or applied), operated, calibrated, and maintained in accordance with the particular requirements specified for such method in this subsection.

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

(A) 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 [one-eighth of an 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 [one-eighth of an 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 subsection.

(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 [one-eighth of an 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~~ [10] 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 [one-eighth of an 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 on₂ or dissolved in₂ 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 [course] 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 in₂ or on₂ 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 on₂ or dissolved in₂ 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) [of this title] 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 [an] 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) [of this title] 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) SIR [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 [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) [(vi)] 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 [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 [an] 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 [(relating to Construction Notification for Underground Storage Tanks (USTs) and UST Systems)], 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)~~ [(10)] 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 [an] UST to be considered permanently out-of-service [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 [out of

business]) shall be considered temporarily out-of-service [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 [an] 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 [An] 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 [an] 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 [an] 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 [an] 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 [(relating to Temporary Removal from Service)], 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 [an] 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 [an] 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 [an] 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 or the commission 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) [Texas Natural Resource Conservation Commission (TNRCC)] as a [an] UST installer or on-site supervisor or currently registered with the TCEQ [TNRCC] 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 [an] 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 [an] 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 [chapter] (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)~~ [(10)] 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.

[(A)] Upon completion of this determination, the owner or operator shall:

(A) [(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);

(B) [(ii)] 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 [an] 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) [Texas Natural Resource Conservation Commission (TNRCC)] as a [an]UST installer or on-site supervisor or currently registered with the TCEQ [TNRCC] 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 proposed under Texas Water Code, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amended sections are also proposed under Texas Water Code, §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 an UST or 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.

The proposed amendments implement Texas Water Code, Chapter 26, Subchapter I, Underground Storage Tanks.

§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 [one] 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; [or]

(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 [his duly authorized representative], 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 [pursuant to] 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 [pursuant to] applicable law.

(h) Nothing in this subchapter shall be construed to create an entitlement to monies in the petroleum storage tank remediation fund 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 [agents or] assignees duly authorized to receive payment on behalf of an eligible owner or operator.

(j) Authorization for an [agent or] 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 [agent or] 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 [agents or] assignees who may receive payments for any one occurrence. Notwithstanding any review made or limitations imposed by the agency under [pursuant to] this section, neither the State of Texas, nor the agency shall be responsible for ensuring [insuring] 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 [agent] requesting payment to ensure [insure] 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 [authorized] to accept payment on behalf of an eligible owner or operator [is:]. 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 hold 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 [a purchaser of the property where the release occurred and on which the claim for payment is based;]

[~~(B)~~ a person who holds a security interest in personal property or in fixture that is not attached to the real estate or 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;]

~~(B)~~ [(C)] 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)~~ [(D)] 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) [(1)(A), (B), and (D)] of this subsection is an interest in the surface estate of the property.

[(1) The agency may require the execution of a contract of subrogation prior to the disbursement of payment.]

§334.306. Form and Contents of Application.

(a) An application for reimbursement filed in accordance with [pursuant to] 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 [, providing] 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 legally obligated to be paid;

(7) certification on the designated agency form, either [proof] that the amounts described in §334.309(c) of this title (relating to Reimbursable Costs) [shown on the invoices for which reimbursement is requested] have been paid in full by the claimant, or that the claimant is legally obligated to pay the amounts in full. The certification [submission] must include [either]:

(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 [business receipts or invoices from the person who performed the work, indicating payments received;]

(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; [canceled checks;]

[(C) the certification of a certified public accountant that the expenses for which reimbursement is requested have been paid in full;]

[(D) a notarized affidavit signed by the person who performed the corrective action, affirming that the amounts which the applicant represents as being paid to the person who performed the corrective action were paid in full; or]

[(E) a promissory note issued by the eligible owner or operator to the person who performed the corrective action for the claimed amount accompanied by a notarized affidavit signed by the person who performed the corrective action, affirming that the amounts which the applicant represents as being paid to person who performed the corrective action, were paid in full, via the promissory note;]

(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; [an estimate of the costs, if any, of corrective action which has not yet been completed, but for which reimbursement ultimately may be claimed. This estimate may be used for planning purposes only and will not be binding on the owner or operator for the purposes of payments from the petroleum storage tank remediation fund; and]

(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) [(9)] 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. Upon submission of this information, the agency may file an interpleader with a court of competent jurisdiction and deposit funds associated with the claim into the registry of the court, so that the court may determine the appropriate distribution of the funds.

~~(g)~~ [(f)] 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 [pursuant to] 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 [which] 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 [the application].

§334.308. Allowable Costs and Restrictions on Allowable Costs.

(a) Only those costs that [which] are allowable costs under [pursuant to] the terms of this section shall be subject to reimbursement under this subchapter.

(b) Allowable costs are those costs and expenses [which arise] directly required for [from] the performance of necessary corrective action in accordance with commission rules [the requirements of the agency, subject to the limitations prescribed by this section].

(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 [pursuant to] 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 [pursuant to] 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 [of tank removals] performed on or after March 12, 1993, shall be based on the volume of the tank [removed] 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 [of removal] 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 [of removal] for each such tank is \$2,000;

(15) permanent abandonment in-place, of a tank system, including compliance with applicable requirements under [pursuant to] 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 [pursuant to] the requirements of Subchapter D of this chapter;

(18) the reasonable, as determined by the agency and as limited by the reimbursable cost specifications [guidelines], 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 [guidelines], 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 [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 [pursuant to] §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 [which] is not a petroleum product; [and,]

(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 [registered] 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 [guidelines], as outlined in §334.560 of this title (relating to Reimbursable Cost Specifications [Guidelines]), 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 [pursuant to] §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. [For those activities that require preapproval, pursuant to §334.310(f) of this title (relating to Requirements for Eligibility), the agency will consider the pre-approved cost or the actual cost, whichever is lower, as the reimbursable cost.]

(d) On and after the effective date of this subsection, agency review of claims or protests under §§334.313 - 334.315 of this title (relating to Review of Application; Fund Payment Report; and Protest of Fund Payment Report), and any agency audit findings issued under §334.533 and §334.534 of this

title (relating to Audits; and Notice of Overpayment), will be governed by subsection (c) of this section, except that failure of a contractor to pay its subcontractors for subcontracted work, and failure to perform the work claimed as technically required, shall continue to be bases on which the agency may issue notices of overpayment under Subchapter L of this chapter (relating to Overpayment Prevention). For work pre-approved under §334.310(f) of this title (relating to Requirements for Eligibility) before the effective date of this subsection, reimbursement will be limited to the lower of the invoiced amount or the pre-approved amount.

§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 [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 [pursuant] §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) [(“USTs”)] and UST Systems) or §334.127 of this title (relating to Registration for Aboveground Storage Tanks (ASTs) [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 [pursuant] §334.7 [of this title] 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 [pursuant to] §334.21 of this title (relating to Fee Assessment), and since September 1, 1989, under [pursuant to] §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 [The agency may determine other persons to be eligible owners or operators] in accordance with the standards of [the] Texas Water Code, §26.3571.

(d) Compliance with [the] Texas Water Code, Chapter 26, Subchapter I, for the purposes of determining eligibility under this subchapter and [the] 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) [be accompanied by] legible copies as required under §334.306(b)(6) of this title [of invoices (contractor and subcontractor)] and by certification of [proof of] payment as required under §334.306(b)[(6) and] (7) of this title;

(iii) [be accompanied by] copies of pre-approval [preapproval] 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) [the completion of] an Application Checklist, provided with the application form, verifying that the applicant and application preparer have reviewed the application for completeness;

[(B) if an application is received which is not complete, the agency shall notify the applicant of the deficiencies by mail. If the required information is not received within 30 days of the date of the deficiency notice, the applicant must reapply;]

[(C) if 30 days is insufficient time to prepare an adequate response, the applicant may request one extension of 30 days to supply the required information. If the extension is

granted and the required information is not received from the applicant within that 30 days, the applicant must reapply;]

[(D) after an application is determined by the agency to be complete, the agency will then commence a substantive (technical and financial) review of the application;]

(B) [(E)] 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 [and the application] will not be forwarded for further review until such time as the agency completes reviews of applications with pre-approved [non-preapproved] costs as allowed under subsection (d) [(f)] of this section;

(C) [(F)] if it has been determined that an otherwise complete application contains costs for a corrective action activity which has been performed improperly, [or the information or report that documents the activity has been determined to be deficient or defective by the agency under Subchapter D of this chapter (relating to Release Reporting and Corrective Action),] the applicant will be notified 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 [and the application will not be forwarded for further review. The applicant may resubmit the application after the defects or deficiencies have been resolved and the agency concurs that the corrective action activity or documentation is acceptable under Subchapter D of this chapter (though no reimbursement applications may be filed after March 1, 2006);]

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

[(c) The agency is not required to commence the substantive review of an application until he has received all of the information this subchapter requires the applicant to submit in order for the executive director to review a claim for payment.]

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

(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 [for the insufficiently documented costs or insufficiently documented corrective action activity].

(c) [(e)] An application for reimbursement or supplemental application filed under this subchapter shall be subject to audit by the agency.

(d) [(f)] 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 [preapproved] 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[, provided a signed subrogation contract is submitted, when required];

(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[, which may include the submission of a signed subrogation contract, when required]. 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 [Texas Natural Resource Conservation Commission] 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) **Action level** - The concentration of constituents in the native soil or water at which corrective action will be required. Exceeding an action level warrants further assessment of the site, but does not mandate that site cleanup be required. Based upon the results of the site assessment, the need for site cleanup will then be determined and cleanup levels will be set. Action levels should not be used as cleanup levels; they are simply levels which signal the need for additional assessment.]

(1) (2) **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) (3) **Application preparer** - Any person responsible for preparing the application for reimbursement.

(3) (4) **Commingled** - See definition in §334.2 of this title (relating to Definitions).

(4) (5) **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.

[(6) Contract of subrogation - A document of agreement between the executive director and the eligible tank owner and operator which authorizes the executive director to recover costs reimbursed from persons who performed corrective action activities at leaking petroleum storage tank sites.]

(5) [(7)] 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) [(8)] 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) [(9)] 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 [that] has registered as an owner of a petroleum storage tank with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding [preceeding] rule section concerning tank registration) after September 1, 1987, shall be considered the petroleum storage tank owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the petroleum storage tank was transferred to a different person subsequent to the date of the tank registration. This definition is subject to the limitations found in Texas Water Code, §26.3514, Limits on Liability of Lender; §26.3515, Limits on Liability of Corporate Fiduciary; and §25.3516, Limits on Liability of Taxing Unit.

(8) [(10)] **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) [(11)] **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) [(12)] **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) [(13)] **Petroleum product** - See definition in §334.2 of this title (relating to Definitions).

(12) [(14)] **Petroleum storage tank** - See definition in §334.2 of this title (relating to Definitions).

(13) [(15)] **Phase-separated product** - See Free-product as defined in §334.2 (relating to Definitions) of this title.

(14) [(16)] **Prime contractor** - Any natural person, firm, or any entity responsible for the contracting of any corrective action services.

(15) [(17)] **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) [(18)] **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) [(19)] **Tank removal** - The physical removal of a petroleum storage tank [an UST] 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 [excavation], and any other activities typically associated with the tank removal process.

(19) [(20)] **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 proposed under Texas Water Code, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §26.011, which requires the commission to control the quality of water by rule. The amended sections are also proposed under Texas Water Code, §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 an UST or 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.

The proposed amendments implement Texas Water Code, Chapter 26, Subchapter I, Underground Storage Tanks.

§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 [Fund], 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 [Fund].

§334.531. Cooperation with Audit; False Submittals [Responsibility of Recipients of Money from the PSTR Fund and Persons Paid by Recipients of Money from the Petroleum Storage Tank Remediation Fund].

(a) The [recipient of reimbursement] 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, [and/or] the costs charged, and/or [and] 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).

[Each person who performs work at a leaking petroleum storage tank site, who is paid by a person who anticipates being, or actually is, reimbursed from the Petroleum Storage Tank Remediation Fund, shall cooperate fully with any audit or investigation by the executive director regarding the work performed and/or the costs charged.]

[(c) Failure to provide the documentation or information requested by the agency to support the work performed, the costs charged, and/or amounts paid may result in a denial of the costs.]

(c) [(d)] 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 [Fund] 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) allowable under Subchapters H and M of this chapter (relating to Reimbursement Program; and Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program); and

[(2) technically necessary;]

[(3) cost effective; and]

(2) [(4)] reimbursable under Subchapter H of this chapter, §334.560 of this title (relating to Reimbursable Cost Specifications [Guidelines]),¹ and §334.309 of this title (relating to Reimbursable Cost) (for work performed on or after June 6 [7], 1993), or reasonable (for work performed prior to June 6 [7], 1993).

(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 reimbursement of a claim was for an amount which exceeded the amount provided for under this chapter [necessary, allowable, or reimbursable cost of corrective action], 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 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 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) [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].

(c) Upon receipt of a notice of overpayment, the recipient shall submit a check returning the amount of overpayment to the TCEQ [Texas Natural Resource Conservation Commission].

(d) All checks rendered to return overpayments shall be made out to "The State of Texas- Petroleum Storage Tank Remediation Account [Fund]" [,] and mailed to the address specified on the notice of overpayment.

[(e) In cases where the agency demonstrates fraud on the PSTR Fund, the recipient of a notice of overpayment may also be required to pay interest, calculated at New York Prime, plus two points, dating from the date of overpayment by the Texas Natural Resource Conservation Commission (or predecessor agency), to the date of repayment to the Texas Natural Resource Conservation Commission.]

§334.535. Objections to the Notice of Overpayment and Formal Petition for Hearing.

(a) If any person [the party] 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 appropriately paid under the requirements of this chapter [for allowable, necessary, cost-effective, and/or reimbursable amounts or activities]. 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.

(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 [GUIDELINES] FOR THE
PETROLEUM STORAGE TANK REIMBURSEMENT PROGRAM**

§334.560

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §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 proposed under Texas Water Code, §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 an UST or 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.

The proposed amendment implements Texas Water Code, Chapter 26, Subchapter I, Underground Storage Tanks.

§334.560. Reimbursable Cost Specifications [Guidelines].

On or after the effective date of this section, the [The] commission [hereby] adopts the following Reimbursable Cost Specifications [Guidelines] for the Petroleum Storage Tank Reimbursement Program [which are in effect as of October 22, 1997].

Figure: 30 TAC §334.560