

The Texas Commission on Environmental Quality (commission) adopts new §§37.9201, 37.9205, 37.9210, 37.9215, and 37.9220 *without changes* to the proposed text as published in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10442) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the rules is to implement House Bill (HB) 1366, 78th Legislature, 2003. HB 1366 amends the Texas Health and Safety Code (THSC) by adding a new Chapter 374. HB 1366 requires rules to be adopted that are necessary to administer and enforce the new chapter. Specifically, these adopted rules set forth procedures for administering and enforcing THSC, §374.105, which requires owners of certain dry cleaning facilities to furnish a bond or other financial assurance to the commission.

An adopted new 30 TAC Chapter 337, Dry Cleaner Environmental Response, is also published in this issue of the *Texas Register* to correspond with the adopted changes in this chapter.

SECTION BY SECTION DISCUSSION

The commission adopts new Subchapter W, Financial Assurance for Dry Cleaning Facilities, to establish the procedures to administer and enforce HB 1366.

New §37.9201, Applicability, states that the subchapter applies to an owner of a dry cleaning facility required to provide evidence of financial assurance under adopted new Chapter 337 and establishes requirements and mechanisms for demonstrating financial assurance for corrective action.

New §37.9205, Submission of Documents, states that an owner required to provide financial assurance shall submit an originally signed financial assurance mechanism for corrective action with the affidavit of nonparticipation in fund benefits. The signed financial assurance mechanism must be in effect at the time of submission.

New §37.9210, Financial Assurance Requirements for Corrective Action, sets forth the financial assurance requirements for corrective action at dry cleaning facilities. An owner of a dry cleaning facility shall establish financial assurance for the corrective action of the facility that meets the requirements of the adopted rule, in addition to the requirements specified under Subchapters A, C, and D of this chapter. In addition, an owner may use a fully funded trust, a surety bond guaranteeing payment, an irrevocable standby letter of credit, and insurance as specified in Subchapter C of this chapter to demonstrate financial assurance for corrective action.

New §37.9215, Continuous Financial Assurance Required, states that the owner of a facility required to provide financial assurance for corrective action shall provide continuous financial assurance until the executive director provides written consent to termination. Upon written request by the owner, the executive director shall provide written consent to termination of a financial assurance mechanism when an owner substitutes and receives approval from the executive director for alternate financial assurance as specified in this chapter or on the second anniversary of the date the facility closes for use as a dry cleaning facility, if the executive director has certified that corrective action is not required at the facility.

New §37.9220, Drawing on the Financial Assurance Mechanisms, states that the executive director may call on the financial assurance mechanism(s) when an owner who is required to comply with this chapter has failed to perform corrective action, when required; failed to provide an alternate financial assurance mechanism, when required; or failed to provide continuous financial assurance coverage.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

While the specific intent of a major environmental rule is to protect the environment or reduce the risks to human health from environmental exposure, the specific intent of the adopted rules is to provide the framework within which the agency will administer the requirement in THSC, §374.105 for owners of certain dry cleaning facilities to furnish a bond or other financial assurance. Thus, the specific intent of the adopted rules is not to protect the environment nor reduce the risks to human health from environmental exposure. Additionally, the adopted rules do not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, even if the adopted rules did meet the definition of a major environmental rule, Texas Government Code, §2001.0225 only applies to a major environmental rule if the result of the rule is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of

the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. These adopted rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of §2001.0225 even if they did meet the definition of a major environmental law. Specifically, the adopted rules are required by state law, are not adopted solely under the general powers of the agency, and do not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

TAKINGS IMPACT ASSESSMENT

The commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to implement HB 1366, specifically the requirement in THSC, §374.105 for owners of certain dry cleaning facilities to furnish a bond or other financial assurance to the commission. The adopted rules significantly advance this stated purpose by providing the framework within which the agency will administer this financial assurance requirement.

Promulgation and enforcement of the adopted rules is neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the adopted rules.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

A public hearing on this proposal was held in Austin on December 6, 2004. The public comment period ended at 5:00 p.m. on December 13, 2004.

RESPONSE TO COMMENTS

Public comments were not submitted during the comment period pertaining specifically to this chapter. Comments were received concerning adopted new Chapter 337, which is also published in this issue of the *Texas Register*.

SUBCHAPTER W: FINANCIAL ASSURANCE FOR DRY CLEANING FACILITIES

§§37.9201, 37.9205, 37.9210, 37.9215, 37.9220

STATUTORY AUTHORITY

The new sections are adopted under the authority granted to the commission by the Texas Legislature in THSC, Chapter 374. The new sections are also adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of TWC and THSC; and HB 1366, 78th Legislature, 2003.

The adopted new sections implement THSC, Chapter 374.

§37.9201. Applicability.

This subchapter applies to an owner of a dry cleaning facility required to provide evidence of financial assurance under §337.60 of this title (relating to Nonparticipating Dry Cleaning Facility Financial Assurance). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for corrective action.

§37.9205. Submission of Documents.

An owner of a dry cleaning facility required by this subchapter to provide financial assurance shall submit an originally signed financial assurance mechanism for corrective action with the affidavit of nonparticipation in fund benefits. The signed financial assurance mechanism must be in effect at the time of submission.

§37.9210. Financial Assurance Requirements for Corrective Action.

(a) An owner of a dry cleaning facility subject to this subchapter shall establish financial assurance for the corrective action of the facility that meets the requirements of this subchapter, in addition to the requirements specified under Subchapters A, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

(b) An owner of a dry cleaning facility subject to this subchapter may use a fully funded trust, a surety bond guaranteeing payment, an irrevocable standby letter of credit, and insurance as specified in Subchapter C of this chapter to demonstrate financial assurance for corrective action.

§37.9215. Continuous Financial Assurance Required.

The owner of a dry cleaning facility required by this subchapter to provide financial assurance for corrective action shall provide continuous financial assurance until the executive director provides written consent to termination. Upon written request by the owner, the executive director shall provide written consent to termination of a financial assurance mechanism when:

(1) an owner substitutes and receives approval from the executive director for alternate financial assurance as specified in this chapter; or

(2) on the second anniversary of the date the facility closes for use as a dry cleaning facility, if the executive director has certified that corrective action is not required at the facility.

§37.9220. Drawing on the Financial Assurance Mechanisms.

The executive director may call on the financial assurance mechanism(s) when an owner of a dry cleaning facility required to comply with this chapter has:

(1) failed to perform corrective action, when required;

(2) failed to provide an alternate financial assurance mechanism, when required; or

(3) failed to provide continuous financial assurance coverage.