

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) proposes amendments to §§334.2, 334.5, 334.8, 334.71, 334.84, 334.301, 334.302, 334.303, 334.306, 334.310, and 334.313.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed amendments is to incorporate into agency rules, changes to statute which were effective September 1, 2005, based on language in Senate Bill 485, House Bill 1987, and Senate Bill 1863 (Article 5) from the 79th Legislature, 2005, and to incorporate changes suggested by stakeholders during and following a meeting of the Petroleum Storage Tank (PST) Rules Advisory Group held November 29, 2005.

SECTION BY SECTION DISCUSSION

Throughout this rulemaking package, administrative changes have been made as necessary in accordance with *Texas Register* requirements.

Subchapter A - General Provisions

The following amendments are proposed to comply with statutory changes. Proposed §334.2 amends paragraph (41), the definition of "Free-product" by specifying that the term has the same meaning with or without a hyphen, and amends paragraph (92), the definition of "Release" by adding language defining the term "subsurface soils" as used in that definition to reflect the inclusion of the term "subsurface soil" in statutory definitions. Proposed §334.5(b)(1)(A), (B), and (C), (2)(A), and (3) are amended by adding and/or deleting language as necessary to reflect the statutory removal of common carrier liability with respect to deliveries into underground storage tanks and to specify clearly that

liability regarding such deliveries rests entirely with underground storage tanks (USTs) system owners and operators. Proposed §334.8(c)(2) is amended to add the insertion of a descriptive opening sentence to provide textual consistency. Proposed §334.8(c)(5)(A)(i) is amended to add language applicable to delivery prohibitions to reflect statutory language which allows a UST owner/operator to provide verification to a common carrier of compliance with UST certification requirements by obtaining or by directing the common carrier to view a copy of the delivery certificate for a site from the agency's Web site.

Subchapter D - Release Reporting and Corrective Action

The following amendments are proposed to comply with statutory changes. Proposed §334.71(a) is amended by adding the phrase "unless otherwise provided in §350.2(g) of this title (relating to Applicability)" at the end of the subsection to provide reference to that section for possible exceptions to §334.71(a). Proposed §334.71(b)(6) is amended to change the language and extend the deadline applicable to the submission of site closure requests for eligible sites that require either a corrective action plan or groundwater monitoring to reflect statutory amendments. Proposed §334.84(a)(4) is added to provide language in accordance with statute allowing owners or operators who are eligible for an extension for corrective action reimbursement to apply to the agency to have their sites placed in the Petroleum Storage Tank State Lead Program administered by the commission and the word "or" is moved from the end of paragraph (3) to the end of the new paragraph (4). The subsequent paragraph is renumbered accordingly.

The following amendment is proposed to comply with stakeholder requests. A proposed new §334.84(c) is added to place a practicable time limit on the agency with regard to response to a proper

written application to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program.

Subchapter H - Reimbursement Program

The following amendments are proposed to comply with statutory changes. Proposed §334.301(c) is amended by adding language in accordance with statute which extends the deadline for the performance of corrective action from September 1, 2005, to August 31, 2007, for eligible owners/operators who have been granted an extension for corrective action reimbursement by the agency; by amending in accordance with statute the deadline for filing a claim for reimbursement from March 1, 2006, to March 1, 2008; and by amending in accordance with statute the final deadline for payment of reimbursements from September 1, 2006, to September 1, 2008. Proposed §334.301(f) and (h) are each amended to add the insertion of a descriptive opening sentence to provide textual consistency. Proposed §334.301(h)(2) is amended by adding language which allows the executive director to postpone considering, processing, or paying claims for reimbursement for corrective action work which was begun without prior commission approval and deletes language which prevents such claims from being considered, processed, or paid until all agency pre-approved claims for reimbursement have been completed. Proposed §334.302(c)(5) is amended by adding language in accordance with statute which provides an extension of the final deadline for the performance of corrective action from September 1, 2005, to August 31, 2007, with regard to the reimbursement of related corrective action expenses to an eligible owner or operator from the Petroleum Storage Tank Remediation Account. Proposed §334.302(c)(6) is amended by changing in accordance with statute the deadline for filing a claim for corrective action reimbursement with the agency from March 1, 2006, to March 1, 2008. Proposed §334.302(c)(7) is amended by changing the final deadline for payment of any expenses related to

corrective action reimbursements from September 1, 2006, to September 1, 2008. Proposed §334.303(a) is amended by changing the deadline for filing an application (claim) for reimbursement from March 1, 2006, to March 1, 2008. Proposed §334.306(b)(7) is amended to change the word "though" to the word "through" to correct an error. Proposed §334.306(f)(5) is amended by changing the phrase "within 120 days of the effective date of this subchapter" to the actual beginning and ending dates of that period to prevent confusion when current proposed amendments become effective. Proposed §334.310(f) is amended by adding a reference to language in §334.301(h)(2) and §334.313(d) as an additional exception. Proposed §334.313(d) is amended by adding language which allows the executive director to postpone considering, processing, or paying claims for reimbursement for corrective action work which was begun without prior commission approval and deletes language which prevents such claims from being considered, processed, or paid until all agency pre-approved claims for reimbursement have been completed.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect significant fiscal implications are anticipated for the agency and other units of federal, state, and local governments. The proposed rules implement changes to statute made by Senate Bill 485, House Bill 1987, and Senate Bill 1863, 79th Legislature, 2005, which relate to Petroleum Storage Tank (PST) fuel deliveries, remediation, and remediation cost reimbursement.

Some of the more significant statutory changes to the Petroleum Storage Tank (PST) Reimbursement Program include: removing liability from common carriers with regard to the physical delivery of

petroleum products into an underground storage tank (UST); extending the PST reimbursement program expiration date until September 1, 2008; eliminating the biennial reduction for the bulk delivery fee which provides funds for the Petroleum Storage Tank Remediation (PSTR) Account and maintaining that fee at Fiscal Year (FY) 2005 levels; removing the limit the agency can spend on administrative costs from the PSTR Account; enhancing the ability of eligible owners/operators to transfer PST sites to the state lead program; and exempting owners/operators of PST sites transferred to the state lead program from any further liability for costs the agency would incur to take corrective action at these sites.

Liability for Common Carriers

The proposed rules will have a beneficial fiscal impact on common carriers delivering products to underground storage tanks (USTs). These carriers will no longer be liable for delivering fuel to uncertified USTs and may experience lower insurance costs if they currently purchase insurance. These costs would vary greatly depending on the carrier, the amount of liability insurance purchased, and the insurance company. Future federal regulations will likely reinstate the liability requirements for common carriers.

Extending deadlines

It is anticipated that 1,260 sites will be remediated by responsible parties by September 1, 2008. It is estimated that the PSTR Account (0655) will spend an estimated \$58 million in FY 2006 and an estimated \$58 million in FY 2007 to reimburse the remediation costs at these sites. Reimbursements for these sites could cost as much as \$45 million in 2008. The total estimated reimbursement costs of \$161 million for FY 2006, FY 2007, and FY 2008 would include: costs for eligible cleanup activities

at the 1,260 sites until September 1, 2008; costs for the payment of protested claims that have arisen during that period; and costs for the payment of claims submitted during that period, for work performed in previous years for which claims had not been previously filed.

Collection of Bulk Delivery Fee and Administrative Costs

The agency received appropriations of approximately \$7.4 million in FY 2006 and \$2.9 million in FY 2007 to administer PST cleanups, but collection of the bulk delivery fee, which funds the major portion of the PST Reimbursement program, is scheduled to expire at the end of FY 2007. Some administrative and cleanup activities in FY 2008 will be funded through balances in the PSTR Account (0655), but staff anticipates that balances in this account will be insufficient to meet the administrative and cleanup costs of all the sites expected to transfer to the state lead program and the cost of PST cleanup and emergency response activities for future spills and releases threatening public health. Cleanup costs alone for transfers to the state lead program, coupled with the sites already in the state lead program are estimated to be \$12 million in FY 2007, \$36 million in FY 2008, \$30 million in FY 2009, and \$24 million in FY 2010, totaling \$102 million for the period. Projected reimbursement of remediation costs to responsible parties, continued administrative costs at current levels, and projected state lead program remediation costs are expected to exceed available PSTR Account (0655) balances in FY 2008. Unless a revenue source to fund the continuing program and administrative activities is determined in future legislative sessions, the agency would experience a significant fiscal impact, and other agency programs could be compromised.

Transfer of Sites to State Lead Program and Exemption from Liability

Staff estimates that 500 PST sites will elect to transfer (opt-in) to the state lead program by July 1, 2007. This transfer will be in addition to the state lead program's current inventory of 213 sites. In addition, approximately 300 more sites are expected to be added to the state lead program over the next five years, based on routine criteria. These 300 sites are currently not in the reimbursement program and not eligible to opt-in to the state lead program. These anticipated transfers coupled with the sites already in the state lead program could cost as much as \$12 million in FY 2007, \$36 million in FY 2008, \$30 million in FY 2009, and \$24 million in FY 2010. Thus, total state lead program cleanup costs from FY 2007 through FY 2010 are estimated to be \$102 million, and it is not known how many of these sites will be fully remediated by that time. In addition, once sites which are eligible to opt-in are transferred to the state lead program, owners or operators of those sites are exempted from any further liability for costs related to site cleanup.

Units of federal, state, or local governments owning petroleum storage tanks (PSTs) will experience beneficial fiscal impact as a result of administration or enforcement of the proposed rules. It is estimated that 70 local governments and 38 state and federal agencies will benefit from extending the expiration date of the PST Reimbursement Program and from allowing PST sites to be more easily transferred to the state lead program.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be continued environmental cleanup of contaminated PST sites.

The proposed rules will benefit eligible owners/operators of PSTs in two ways. By extending the time they can file for reimbursement of cleanup costs, owners/operators have longer to recoup cleanup expenses. Besides making it easier to transfer eligible sites to the state lead program, the proposed rules benefit those owners/operators by exempting them from any further liability for costs related to site cleanup.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Staff estimates that 1,464 small or micro-businesses will benefit from the extension of the PST Reimbursement Program and easier transfer of PST sites to the state lead program. This could save small or micro-businesses as much as \$45,000 per site per year. In addition, once small or micro-business sites which are eligible to opt-in are transferred to the state lead program, owners or operators of those sites are exempted from any further liability for costs related to site cleanup.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the 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. The

rule changes proposed in this package are either minor definitional or procedural changes, or they are changes which benefit the regulated community in the form of such things as extended reimbursement deadlines, expanded opportunity for the transfer of sites to the state lead program, and removal of liability for common carriers regarding delivery certificates. The changes do not increase burdens on regulated entities in particular or the economy in general.

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). That section states: "*(a) This section applies only to a major environmental rule adopted by a state agency, the result of which 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.*" The rulemaking does not exceed any of the requirements as previously described.

Written comments on the draft regulatory impact analysis determination of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The rulemaking incorporates statutory changes which will not create a burden on private real property. The statutory changes being incorporated basically extend the deadlines related to reimbursements from the Petroleum Storage Tank Remediation (PSTR) Account. This should result in the cleanup of more contaminated property in Texas. As a whole, this rulemaking will not be the cause of a reduction in market value of private real property, does not create a burden on private real property, and will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules (31 TAC §505.11(b)(2)) subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

CMP Goals: 31 TAC §501.12 states in part that "*the goals of the Texas Coastal Management Program (CMP) are: (1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); (2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; (3) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs;*" and "*(5) to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the*

benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone."

The previously stated goals will not be adversely affected by the rule changes described in this preamble for the reason that although changes in rule language are proposed to incorporate statutory changes and changes requested by stakeholders, none of these changes will ease or lessen regulatory requirements for regulated underground or aboveground storage tanks. In fact, statutory changes which provide for extension of the sunset date of the PSTR Account and provide enhanced opportunity for owners/operators of eligible leaking petroleum storage tank (LPST) sites to transfer them into the agency's state lead program will result in the proper cleanup of a greater number of contaminated LPST sites.

CMP Policies: 31 TAC §501.13, "Administrative Policies," states in relevant part: *"(a) Agency and subdivision rules and ordinances subject to §501.10 of this title (relating to Compliance with Goals and Policies) shall: (1) require applicants to provide information necessary for an agency or subdivision to make an informed decision on a proposed action listed in §505.11 of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §505.60 of this title (relating to Local Government Actions Subject to the Coastal Management Program); (2) identify the monitoring established to ensure that activities authorized by actions listed in §505.11 of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §505.60 of this title (relating to Local Government Actions Subject to the Coastal Management Program) comply with all applicable requirements; (3) identify circumstances in which agencies and subdivisions have the authority to issue*

variances from standards or requirements for the protection of CNRAs, including the grounds for granting variances."

The previously stated policies will not be adversely affected by the rule changes described in this preamble for the reason that there are no substantive changes relating to provision of information, monitoring of compliance, or variances.

The commission is seeking public comment on the consistency of the proposed rulemaking with the proposed CMP. Written comments may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

SUBMITTAL OF COMMENTS

Comments may be submitted to Holly Vierk, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-056-334-PR. Comments must be received by 5:00 p.m., July 3, 2006. For further information, please contact Anton E. Rozsypal, Jr., P.E., Remediation Division, at (512) 239-5755 or Cullen McMorrow, Litigation Division, at (512) 239-0607.

SUBCHAPTER A: GENERAL PROVISIONS

§§334.2, 334.5, 334.8

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST); and §26.3573, which allows the commission to use funds from the Petroleum Storage Tank Remediation (PSTR) 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 amended sections are also proposed under the general authority of Texas Water Code, §5.103, which authorizes the commission 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 directs 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 proposed rule package implements changes in laws of this state made during the 79th Legislature, 2005, with the passage of Senate Bill 485, House Bill 1987, and Senate Bill 1863 (Article 5).

§334.2. Definitions.

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

(1) - (6) (No change.)

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

(8) - (18) (No change.)

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

(20) - (40) (No change.)

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

(42) - (72) (No change.)

(73) **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 UST system or an [a] AST is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the UST system or the AST is located is considered the UST system or AST owner unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the UST system or AST is owned by another person. A person who has registered as an owner of a UST system or AST with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration. This definition is subject to the limitations found in Texas Water Code [TWC], §26.3514, Limits on Liability of Lender; §26.3515, Limits on Liability of Corporate Fiduciary; and §25.3516, Limits on Liability of Taxing Unit.

(74) - (91) (No change.)

(92) **Release**--Any spilling including overfills, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank or aboveground storage tank into groundwater, surface water, or subsurface soils. In this definition, the term "subsurface soils" does not include backfill or native material in the tank hole that is placed immediately adjacent to or surrounding

an underground storage tank system when the system is installed or the system's individual components are replaced unless petroleum free product is present in the backfill or native material.

(93) - (123) (No change.)

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

(a) (No change.)

(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 owner or operator of a [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 shall allow the deposit of any regulated substance into that UST system 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 will be considered adequate to meet the requirements of subparagraph (A) of this paragraph.

[(C) If in the exercise of good faith, a common carrier who deposits a regulated substance into a UST system is first presented with an apparently valid, current Texas Commission on Environmental Quality delivery certificate (or temporary delivery authorization, if applicable) represented by the UST system owner or operator to meet the requirements of subsection (a) of this section, this will be considered prima facie evidence of compliance by that common carrier with this subparagraph.]

(2) Concerning UST systems which are not required to be self-certified compliant at a given time under §334.8(c) of this title, but which are required to be registered under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems), the following applies.

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

(B) (No change.)

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

(A) - (B) (No change.)

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

(a) - (b) (No change.)

(c) UST compliance self-certification requirements.

(1) (No change.)

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

(3) - (4) (No change.)

(5) UST delivery certificate.

(A) Certificate availability.

(i) The owner and operator of USTs regulated under this section must make available to a common carrier a valid, current Texas Commission on Environmental Quality (TCEQ) delivery certificate (or TCEQ temporary delivery authorization under subparagraph (D) of this paragraph, as applicable) before delivery of a regulated substance into the UST(s) can be accepted. The delivery certificate must cover each UST at the facility accepting a delivery. (The owner or operator may comply with this requirement by obtaining or by directing the common carrier to view a current copy of the delivery certificate from the agency's Internet Web site.) 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) - (iii) (No change.)

(B) - (D) (No change.)

(6) (No change.)

SUBCHAPTER D: RELEASE REPORTING AND CORRECTIVE ACTION

§334.71, §334.84

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST); and §26.3573, which allows the commission to use funds from the Petroleum Storage Tank Remediation (PSTR) 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 amended sections are also proposed under the general authority of Texas Water Code, §5.103, which authorizes the commission 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 directs 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 proposed rule package implements changes in laws of this state made during the 79th Legislature, 2005, with the passage of Senate Bill 485, House Bill 1987, and Senate Bill 1863 (Article 5).

§334.71. Applicability and Deadlines.

(a) For releases discovered and reported to the executive director on or before August 31, 2003, the provisions of this subchapter are applicable to owners and operators of all underground storage tanks (USTs) and all petroleum product aboveground storage tanks (ASTs) unless otherwise specified in Subchapters A or F of this chapter (relating to General Provisions and Aboveground Storage Tanks, respectively). For releases reported to the agency on or after September 1, 2003, the provisions of this subchapter are applicable to owners and operators of all USTs and all petroleum product ASTs, except that Chapter 350 of this title (relating to Texas Risk Reduction Program) shall be used in lieu of §§334.78 - 334.81 of this title (relating to Site Assessment, Removal of Non-Aqueous Phase Liquids (NAPLs), Investigation for Soil and Groundwater Cleanup, and Corrective Action Plan [Plans], respectively) unless otherwise provided in §350.2(g) of this title (relating to Applicability).

(b) If the release was reported to the agency on or before December 22, 1998, the person performing the corrective action shall meet the following deadlines:

(1) - (5) (No change.)

(6) for sites that require either a corrective action plan or groundwater monitoring, have met all other deadlines under this subsection, and have submitted annual progress reports that demonstrate progress toward meeting closure requirements, a site closure request must be submitted to the executive director [site closure requests for all sites where the executive director agreed in writing

that no corrective action plan was required must be received by the agency] no later than September 1, 2007 [2005]. The request must be complete, as judged by the executive director.

(c) (No change.)

§334.84. Corrective Action by the Agency.

(a) The agency may undertake corrective action in response to a release or a threatened release if:

(1) - (2) (No change.)

(3) the owner or operator of the AST or UST, in the opinion of the agency, is unable to take the corrective action necessary to protect the public health and safety and/or the environment; [or]

(4) the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571; has been granted such extension by the executive director; has applied to the agency in writing on an agency application form not later than July 1, 2007, to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program administered by the commission; and has agreed on the application form to allow access to that site to state personnel and state contractors. Once the executive director places such a site in the state lead program, the eligible owner or operator of that site is not liable to the commission for any corrective

action costs incurred by the state lead program with regard to the site, unless the statutorily allowable maximum cost per site is exceeded; or

(5) [(4)] notwithstanding any other provision of this subchapter, the executive director determines that more expeditious corrective action than is provided by this subchapter is necessary to protect the public health and safety or the environment.

(b) (No change.)

(c) The agency shall generate a written response either accepting or denying the application of an eligible owner or operator, who has applied to the agency in accordance with the requirements of subsection (a)(4) of this section to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program, within 30 calendar days, as practicable, of the date that application is received by the agency's state lead program.

SUBCHAPTER H: REIMBURSEMENT PROGRAM

§§334.301 - 334.303, 334.306, 334.310, 334.313

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank (AST); and §26.3573, which allows the commission to use funds from the Petroleum Storage Tank Remediation (PSTR) 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 amended sections are also proposed under the general authority of Texas Water Code, §5.103, which authorizes the commission 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 directs 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 proposed rule package implements changes in laws of this state made during the 79th Legislature, 2005, with the passage of Senate Bill 485, House Bill 1987, and Senate Bill 1863 (Article 5).

§334.301. Applicability of this Subchapter.

(a) - (b) (No change.)

(c) Expenses considered for payment--time frame in which corrective action performed.

Subject to the other requirements of this subchapter, the expenses which may be considered for payment from the petroleum storage tank remediation fund [(PSTR)] are limited to expenses of corrective action which was performed for the owner or operator on or after September 1, 1987, and conducted in response to a confirmed release that was initially discovered and reported to the agency on or before December 22, 1998. Expenses for corrective action performed prior to September 1, 1987, are not subject to reimbursement or payment. No expenses for corrective action performed after September 1, 2005 will be reimbursed unless the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571 and has been granted such an extension by the executive director. The Petroleum Storage Tank Remediation (PSTR) Account may be used to reimburse an eligible owner or operator for corrective action performed under an extension before August 31, 2007. No reimbursements will be made for corrective action expenses sought in claims submitted to the agency after March 1, 2008 [2006]. Under no circumstances will any reimbursements be made on or after September 1, 2008 [2006].

(d) - (e) (No change.)

(f) Possibility of invalidity. If any section, subsection, paragraph, subparagraph, clause, or subclause of this subchapter is held invalid, such invalidity shall not affect any other section,

subsection, paragraph, subparagraph, clause, or subclause which can be given effect without the invalid provision, and to this end the provisions of this subchapter are declared to be severable.

(g) (No change.)

(h) Order of consideration, processing, and payment of claims. Effective September 1, 1995, the executive director shall consider and process a claim by an eligible owner or operator for reimbursement from the PSTR fund in the order in which it is received, with the following provisions:

(1) (No change.)

(2) The executive director may postpone considering, processing, or paying a claim for reimbursement for corrective action work begun without prior commission approval after September 1, 1993, that is filed with the commission before January 1, 2005. [not consider, process, or pay a claim for reimbursement from the PSTR fund for corrective action work begun after September 1, 1993, and without prior approval until all claims for reimbursement for preapproved corrective action work have been considered, processed, and paid.]

§334.302. General Conditions and Limitations Regarding Reimbursement; Assignments.

(a) - (b) (No change.)

(c) No payments shall be made by the agency under this subchapter for:

(1) - (4) (No change.)

(5) any expenses related to corrective action performed after September 1, 2005, unless the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571 and has been granted such an extension by the executive director. The Petroleum Storage Tank Remediation (PSTR) Account may be used to reimburse an eligible owner or operator for corrective action performed under an extension before August 31, 2007;

(6) any expenses related to corrective action contained in a reimbursement claim filed with the agency after March 1, 2008 [2006];

(7) any expenses on or after September 1, 2008 [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) - (k) (No change.)

§334.303. When to File Application.

(a) An application for reimbursement under this subchapter must be filed on or after January 17, 1990, but not after March 1, 2008 [2006].

(b) - (c) (No change.)

§334.306. Form and Contents of Application.

(a) (No change.)

(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; Assignments), unless otherwise approved by the agency;

(2) - (6) (No change.)

(7) certification on the designated agency form, either that the amounts described in §334.309(c) of this title (relating to Reimbursable Costs) have been paid in full by the claimant, or have been ensured to be paid in full through [though] the posting of a payment bond in the amount not yet paid in full by the claimant. The certification must include:

(A) - (B) (No change.)

(8) - (10) (No change.)

(c) - (e) (No change.)

(f) A subcontractor may submit information to the agency to assert a claim that the subcontractor has performed pre-approved work and has not been fully paid for the work. To be considered for direct reimbursement by the commission under this subchapter, each of the following requirements must be met:

(1) - (4) (No change.)

(5) between November 18, 2004, and March 18, 2005, inclusive, the subcontractor has filed [within 120 days of the effective date of this subchapter] the following:

(A) - (B) (No change.)

(g) (No change.)

§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; Assignments)) and must be:

(A) - (F) (No change.)

(2) - (5) (No change.)

(b) - (e) (No change.)

(f) Unless otherwise approved by the executive director and except as provided in §334.301(h)(2) and §334.313(d) of this title (relating to Applicability of this Subchapter and Review of Application), 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) - (c) (No change.)

(d) The executive director may postpone considering, processing, or paying a claim for reimbursement for corrective action work begun without prior commission approval after September 1, 1993, that is filed with the commission before January 1, 2005. [not consider, process, or pay a claim for reimbursement for corrective action work begun after September 1, 1993, and without prior agency approval until all claims for reimbursement for corrective action work pre-approved by the agency have been considered, processed, and paid.]