

The Texas Commission on Environmental Quality (commission or agency) proposes amendments to §§337.3, 337.4, 337.11, 337.13, 337.14, 337.31, 337.32, and 337.51. The commission also proposes new §§337.16 - 337.18, 337.52, 337.53 and 337.64.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the proposed rules is to implement House Bill (HB) 3220, 80th Legislature, 2007, and to provide for more efficient administration and enforcement of Texas Health and Safety Code (THSC), Chapter 374. HB 3220 revises statutes relating to the dry cleaner environmental response program created by the 78th Legislature, 2003, and codified in THSC, Chapter 374. HB 3220 amends THSC, §§374.102 - 104, 374.154, and 374.207. HB 3220 also adds the following new sections to THSC, Chapter 374: §§374.1022 – 374.1023, and 374.1535. HB 3220 establishes new requirements for registration of dry cleaner property owners and preceding property owners who wish to obtain eligibility for Dry Cleaning Facility Release Fund (Fund) benefits. Additionally, the bill allows an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status. The bill also prohibits the use of perchloroethylene at sites where the commission has completed corrective action. In addition to rule changes proposed for the purpose of implementing these provisions of HB 3220, certain rule changes are being proposed for the purpose of more efficient administration and enforcement of THSC, Chapter 374. These include: a provision prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station; provisions expanding the basis of and procedures for revocation or denial of a dry cleaner or distributor registration certificate; a provision clarifying that annual registration fee billing dates are established by the executive director; a provision requiring that once corrective action under the Fund has begun at a site, the site must remain in the Dry

Cleaner Remediation Program (Program) until corrective action is completed at the site; and additional definitions, a section title change, and other changes to phrasing made for the purpose of clarity and for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

In addition, the commission is soliciting comments on a rule prohibiting the use of perchloroethylene at a site once corrective action has begun at that site under the Dry Cleaning Facility Release Fund. Based on comments that may be received on this issue, such a rule may be incorporated into the adopted version of these rules.

SECTION BY SECTION DISCUSSION

The commission proposes to amend Chapter 337, Dry Cleaner Environmental Response, to establish the procedures to administer and enforce HB 3220, and to provide for more efficient administration and enforcement of THSC, Chapter 374.

The commission proposes to amend §337.3, Definitions, to add definitions for Property Owner and Preceding Property Owner. The additional definitions are necessary to clarify that the meaning of these terms is consistent with the meaning set out in THSC, §374.1022. Renumbering of two additional definitions will be necessary in order to accommodate this change.

The commission proposes to amend §337.4, General Prohibitions and Requirements, to clarify, in §337.4(b), that a dry cleaning facility must have a registration certificate issued pursuant to §337.11 in order for a distributor to distribute dry cleaning solvent to the facility. The purpose of this change is to distinguish a registration certificate issued pursuant to §337.11, which qualifies a facility to receive dry

cleaning solvent, from a registration certificate issued pursuant to the newly proposed §337.17, which does not qualify a facility to receive dry cleaning solvent. In addition, §337.4(h) is proposed to prohibit a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for a dry cleaning facility unless the facility has a registration certificate issued pursuant to §337.11. Finally, §337.4(i) is proposed to prohibit a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for a dry cleaning drop station. Subsections (h) and (i) are amended to provide an enforcement mechanism in the event that persons, in addition to distributors, obtain solvent for drop stations or unregistered dry cleaning facilities.

The commission proposes to amend §337.11, Dry Cleaner Registration Certificates, to expand the basis of and procedures for revocation or denial of a dry cleaner registration certificate. With this amendment, the basis for revocation or denial of a dry cleaner registration certificate becomes more consistent with the basis for revocation or denial that is set out in rules for similar program areas, such as the Petroleum Storage Tank program. In addition, the expanded basis of and procedures for revocation or denial of a dry cleaner registration certificate will allow needed flexibility for revocation or denial of a certificate based on circumstances other than the very limited ones contemplated by the existing rule. For example, the proposed amendment would allow the commission to revoke a dry cleaner registration certificate in the event that a facility owner fails to respond to the executive director upon initiation of an enforcement action, neglecting to pay penalties assessed and/or to take measures necessary to correct the violation that resulted in the enforcement action.

The commission proposes to amend §337.13, Distributor Registration Certificate, to expand the basis of and procedures for revocation or denial of a distributor registration certificate. With this amendment, the

basis for revocation or denial of a distributor registration certificate becomes more consistent with the basis for revocation or denial that is set out in rules for similar program areas, such as the Petroleum Storage Tank program. In addition, the expanded basis of and procedures for revocation or denial of a distributor registration certificate will allow needed flexibility for revocation or denial of a certificate based on circumstances other than the very limited ones contemplated by the existing rule. For example, the proposed amendment would allow the commission to revoke a distributor registration certificate in the event that a distributor fails to respond to the executive director upon initiation of an enforcement action, neglecting to pay penalties assessed, and/or to take measures necessary to correct the violation that resulted in the enforcement action.

The commission proposes to amend §337.14, Registration Fees, to add, “for Dry Cleaning Facilities and Drop Stations” to the section title. This is to differentiate this section from §337.18, the new property owner and preceding property owner registration fee section. In addition, §337.14(c) is also amended to clarify that the annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. Finally, §337.14(c) is amended to delete the phrase, “of registration fees” to improve readability.

New §337.16, Registration by Property Owner or Preceding Property Owner, sets forth the registration requirements for property owners and preceding property owners. All owners and preceding owners of real property on which a dry cleaning facility or drop station is or was located, who wish to obtain eligibility for Fund benefits, must be registered with the commission in accordance with THSC, §374.1022. This section sets out the required registration procedures, including when to register, how to register, when to update information, and who may complete and submit registration forms.

New §337.17, Property Owner or Preceding Property Owner Registration Certificate, sets forth the procedures related to registration certificates for property owners or preceding property owners, including obtaining and displaying a certificate, as well as the process for revocation or denial of a certificate. A property owner or preceding property owner must have a valid registration certificate issued pursuant to this section in order to apply for corrective action under the Fund.

New §337.18, Registration Fees for Property Owners and Preceding Property Owners, sets forth the procedures and requirements for property owners and preceding property owners to pay the registration fees required by THSC, §374.1022. The annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. However, past annual registration and late fees must be paid in full at the time of registration and may not be divided into quarterly payments. The proposed rule also requires payment of penalties and interest in accordance with 30 TAC Chapter 12, Payment of Fees, for payments that are not made by the due date. Registration certificates will not be issued until all registration and any late fees due pursuant to THSC, §374.1022, in addition to any penalties and interest assessed, are paid in full. The proposed rule requires that a property owner or preceding property owner who has registered a site pursuant to §337.16 must continue to pay annual registration fees in accordance with THSC, §374.1022 for the duration of corrective action at the site under the Fund.

The commission proposes to amend §337.31, Ranking of Sites, by deleting the phrase, “including former owners of dry cleaning facilities and owners of real property on which a dry cleaning facility was

formerly located that meet the eligibility criteria” from §337.31(a)(2). This change is proposed for the sake of consistency within the rule, as well as between the rule and THSC, Chapter 374.

The commission proposes to amend §337.32, Denial and Removal of Sites from Ranking, by deleting the phrase, “for any dry cleaning facility or dry cleaning drop station” and adding the phrase, “pursuant to this chapter” in §337.32(a)(3). These changes are proposed for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

The commission proposes to amend §337.51, Eligibility for Corrective Action, by deleting the phrase, “for any dry cleaning facilities or dry cleaning drop station that the person owns” from §337.51(3). This change is proposed for the purpose of clarity and for consistency within the rule, as well as between the rule and THSC, Chapter 374.

New §337.52, Deed Notice of Site Restrictions After Corrective Action, states that following the completion of corrective action under Chapter 337, a notice will be filed in the real property records of the county or counties in which the site is located, notifying future property owners that, pursuant to THSC, §374.1535, perchloroethylene may not be used at that site. The purpose of this proposed rule is to implement THSC, §374.1535.

New §337.53, Withdrawal of Site from the Dry Cleaner Remediation Program, sets forth the requirement that once corrective action costs have been incurred at a site by the Program, an applicant may not withdraw the site from the Program prior to completion of corrective action at the site. Exceptions to this requirement may be allowed upon approval of the executive director in the event that corrective action

has been suspended, postponed, or terminated at a site in accordance with §337.30 or §337.50. This rule is proposed for the purpose of implementing THSC, §374.1535. Under this rule, when costs are incurred by the Program for corrective action at a site, the site must stay in the Program until the completion of corrective action under the Fund, and, therefore, become subject to the requirement that perchloroethylene may no longer be used at the site. This rule aims to avoid the situation of a site being withdrawn from the Program after corrective action has begun under the Fund, but prior to the completion of corrective action. By requiring that sites remain in the Program until the completion of corrective action, this rule reduces the risk of continued use of perchloroethylene and possible re-contamination of a site where money from the Fund has been expended for corrective action. In addition to implementation of THSC, §374.1535, therefore, this rule also ensures responsible management of the Fund.

New §337.64, Retaining Nonparticipating Status for a Drop Station Moved to a New Location, sets forth the procedures and requirements for drop station owners who move a drop station to a new location to be able to retain the drop station's nonparticipating status. The proposed rule requires that the owner submit the same type of documentation for the new location that was required for the original nonparticipating drop station, including property owner consent and an affidavit attesting that perchloroethylene has never been used at the new location and that the owner will not ever use or allow the use of perchloroethylene at the new location. The rule also states that a registration certificate issued for a nonparticipating drop station is valid for only one location. Once the drop station moves to a new location, the original site will no longer be considered nonparticipating.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Chris Hayden, Analyst, Chief Financial Officer Division, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the commission as a result of the administration or enforcement of the proposed rules. No fiscal implications are anticipated for other units of state or local governments. The proposed rules are anticipated to result in an increase in revenue for the Fund, though the level of this increase is not expected to be significant. Any costs to the commission to implement the proposed rules will be absorbed using current commission resources.

The purpose of the proposed rules is to implement House Bill (HB) 3220, 80th Legislature, Regular Session, and to facilitate more efficient administration and enforcement of THSC, Chapter 374. The proposed rules establish new registration and fee requirements for owners and preceding owners of real property on which a dry cleaning facility or drop station is or was located, who wish to obtain eligibility for Fund benefits. Property owners and preceding property owners who wish to apply for a site to be addressed under the Fund must pay an annual registration fee prior to applying for Fund benefits and must continue to pay an annual fee for the duration of any corrective action on the affected property. The proposed rules allow an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status. The proposed rules would also provide that, following the completion of corrective action at a site under Chapter 337, a written notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that, pursuant to THSC, §374.1535, perchloroethylene may not be used at that site. In addition, certain amendments are being proposed to facilitate more efficient administration and enforcement of THSC, Chapter 374. Property owners and preceding property owners who want to be eligible for Fund benefits will be assessed an annual registration fee of \$1,500 per year. The statutory

deadline for registration is December 31, 2007. Property owners and preceding property owners can register after the deadline but must pay all back fees and a \$100 per month late fee. There are approximately 4,000 registered dry cleaner locations and not all sites eligible for Fund benefits are required to register. It is unknown how many property owners or preceding property owners exist or would want Fund eligibility, and therefore it is not known how much in additional revenue the new fee will generate. Annual registration fees can be divided into quarterly payments. Although HB 3220 requires the refund of fee credits to dry cleaners that elected not to participate in the program, it is not anticipated that there will be a significant number of refunds that would significantly reduce the amount of revenue available in the Fund.

While the proposed rules do not address solvent fees, HB 3220 increases the delivery fee for perchloroethylene from \$15 to \$20 per gallon and reduces the fee for other solvents from \$5 to \$3 per gallon. This fee change is expected to result in an estimated additional revenue amount of \$400,000 each year to the Fund. Also, HB 3220 imposes a lien against the real property that is subject to a corrective action taken under THSC, Chapter 374 if a property owner or preceding property owner does not pay a registration fee under THSC, §374.1022 that is due while the corrective action is ongoing.

Local government and state agencies are not expected to experience fiscal implications because of the proposed rules.

PUBLIC BENEFITS AND COSTS

Mr. Hayden 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 compliance with state law

and the expansion of Fund benefits to include dry cleaning property owners and preceding property owners.

Individuals and businesses are not expected to experience significant fiscal implications due to the implementation of the proposed rules. It is anticipated that the fiscal impact of the proposed rules would be limited to property owners or preceding property owners who wish to obtain eligibility for Fund benefits. These owners will have to pay an annual registration fee of \$1,500 each year. If they do not meet the December 31, 2007 deadline to register, they must pay all back fees and a \$100 per month late fee. Of the estimated 4,000 registered dry cleaner locations, it is unknown how many property owners or preceding property owners exist or how many would want Fund eligibility. HB 3220 imposes a lien on the property for the costs of the corrective action, plus the amount of unpaid fees that accrue during the period of the corrective action, for property owners or preceding property owners who fail to pay registration fees while corrective action is ongoing.

The proposed rules allow an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status. Non-participating drop station owners who relocate must complete an affidavit and obtain property owner consent. There are currently 110 non-participating drop stations, and it is unknown how many will choose to relocate, but it is estimated to be a small percentage. There is no fee for an affidavit.

The changes to solvent fee rates are provided in statute and are not part of this proposed rulemaking. They are estimated to generate an additional \$100,000 per quarter, or \$400,000 per year, in revenue. This equates to \$100 per year, per dry cleaner location. The cost per dry cleaner will depend on how much

perchloroethylene is used each year. According to registration data collected by the commission, approximately 62% of dry cleaner facilities use perchloroethylene. Any increased cost to a dry cleaner as a result of solvent fees will be passed on to the consumer and is estimated to be minimal.

HB 3220 prohibits the use of perchloroethylene at sites where the commission has completed corrective action. The proposed rules implement this prohibition by providing that, following the completion of corrective action at a site under Chapter 337, a written notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that, pursuant to THSC, §374.1535, perchloroethylene may not be used at that site.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The proposed rules are not anticipated to have adverse fiscal implications for small or micro-businesses. Based on reported gross receipts from past years, it is estimated that most of the dry cleaning facilities and drop stations in the state are small or micro-businesses.

The fiscal impact of the proposed rules would be limited to those property owners or preceding property owners who wish to obtain eligibility for Fund benefits. These owners will have to pay an annual registration fee of \$1,500 each year to receive Fund eligibility. If they do not meet the December 31, 2007 deadline to register, they must pay all back fees and a \$100 per month late fee. Of the estimated 4,000 registered dry cleaner locations, it is unknown how many property owners or preceding property owners exist or how many would want Fund eligibility. HB 3220 imposes a lien on the property for the costs of the corrective action, plus the amount of unpaid fees that accrue during the period of the

corrective action, for property owners or preceding property owners who fail to pay registration fees while corrective action is ongoing.

Although fee rate changes are not in these proposed rules, it is estimated that an additional \$100,000 per quarter, or \$400,000 per year, in solvent fee revenue will occur. This analysis anticipates that any increase in cost to small and micro-businesses will be passed on to the consumer and is estimated to be minimal.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect small or micro businesses for the first five years the proposed rules are in effect and the proposed rules are needed to comply with state law.

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 proposed 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. Although the

intent of the proposed rules is to protect the environment or reduce risks to human health from environmental exposure, the proposed rules would 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 proposed 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 commission instead of under a specific state law. These proposed rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225 even if they did meet the definition of a major environmental law. Specifically, the proposed rules are necessary to implement recent changes to state law and to more effectively administer and enforce state law, are not proposed solely under the general powers of the commission, 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.

The commission invites public comment on this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The proposed rules implement HB 3220, which amends THSC, Chapter 374. The proposed rules also include certain amendments to Chapter 337, which are proposed for the purpose of more effective administration and enforcement of THSC, Chapter 374. THSC, Chapter 374 addresses the environmental regulation and remediation program for dry cleaning facilities and dry cleaning drop stations. Under the program, certain dry cleaners pay registration and solvent fees into a fund that is then used by the commission to investigate and clean up eligible contaminated dry cleaning sites. Contamination from dry cleaning facilities is a real and substantial threat to public health and safety, and the legislation and proposed rules respond to this threat in three ways. First, the legislation and proposed rules respond to the threat of contamination by requiring that property owners and preceding property owners who wish to apply for a site to be addressed under the Fund must pay an annual registration fee prior to applying and must continue to pay an annual fee for the duration of corrective action under the Fund. This requirement is expected to increase the amount of money in the Fund, thereby maximizing the number of contaminated dry cleaning sites within the state that can be addressed under the Fund. Second, the legislation responds to the threat of contamination by prohibiting the use of perchloroethylene at sites where corrective action has been completed under the Fund. This prohibition alleviates the possibility of

future contamination from the dry cleaning solvent perchloroethylene at a site that has been addressed under the Fund. Implementing the legislation, the proposed rules respond to the threat of contamination by providing that a written notice will be filed in the real property records of the county in which the site is located, notifying future property owners that, pursuant to the legislation, perchloroethylene may not be used at that site. Third, the rules respond to the threat of contamination by prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station. The legislation and rules do not allow such facilities to obtain dry cleaning solvent, and providing for enforcement against any person who circumvents the rules in this way will help to advance the legislation's purpose of preserving, protecting, and maintaining the water and other natural resources of this state.

The proposed rules significantly advance a health and safety purpose by providing the framework within which the commission processes property owner and preceding property owner registrations, and collects the funds for corrective action, so that those funds can be utilized to address health and safety concerns at sites around the state. Furthermore, as previously discussed, the proposed rules significantly advance a health and safety purpose by providing for written notice of the statutory prohibition against the use of perchloroethylene at sites addressed under the Fund and by providing an additional enforcement mechanism in the event that a person obtains dry cleaning solvent for drop stations or unregistered dry cleaning facilities. Finally, the proposed rules significantly advance a health and safety purpose by requiring that, once corrective action costs have been incurred at a site by the Program, an applicant may not withdraw the site from the Program prior to completion of corrective action at the site. Exceptions to this requirement may be allowed upon approval of the executive director in the event that corrective action has been suspended, postponed, or terminated at a site in accordance with §337.30 or §337.50.

These rules ensure that sites addressed under the Fund will become subject to the requirement that perchloroethylene may no longer be used at the site, and therefore reduce the risk of continued use of perchloroethylene and possible re-contamination of a site where money from the Fund has been expended for corrective action.

The proposed rules are narrowly tailored to implement HB 3220 and provide for more efficient administration and enforcement of THSC, Chapter 374, and do not impose a greater burden than is necessary to achieve the health and safety purpose as previously stated.

Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to implement HB 3220 and to provide for more efficient administration and enforcement of THSC, Chapter 374 by setting forth: 1) procedures governing registration and certificates for, and collection of fees from, property owners and preceding property owners who wish to obtain eligibility for Fund benefits; 2) procedures allowing an owner of a non-participating drop station to move the business to another location and retain the drop station's non-participating status; 3) the provision that, once corrective action has been completed under the Fund, a written notice will be filed in the real property records of the county in which the site is located to notify future property owners of the statutory prohibition against the use of perchloroethylene at the site; 4) a provision prohibiting a person, in addition to a distributor, from purchasing or otherwise obtaining dry cleaning solvent for an unregistered dry cleaning facility or for a dry cleaning drop station; 5) amended procedures for revocation or denial of a dry cleaner or distributor registration certificate; 6) clarified procedure for administration of dry cleaning facility and drop station registration fee billing and payment;

7) a prohibition against withdrawal of a site from the Program once the Program has incurred corrective action costs at the site; and 8) two additional definitions, one section title change, and other similar changes to phrasing made for the purpose of clarity and for the purpose of consistency within the rule, as well as between the rule and THSC, Chapter 374.

Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed 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 proposed rules. For example, though a deed notice is proposed in §337.52, it does not burden property or restrict or limit an owner's right to property. The deed notice is a notice of a statutory prohibition against the use of perchloroethylene at sites addressed under the Fund. The prohibition would exist with or without the filing of any deed notice. The notice itself places no burden, restriction, or limitation on property. Nor does the notice devalue property, given that the statutory prohibition exists independently of the notice.

The proposed rules implement HB 3220 and provide for more efficient administration and enforcement of THSC, Chapter 374. There are no burdens imposed on private real property from these proposed rules and the benefits to society are the proposed rules' specific procedures and requirements for a program that addresses dry cleaning contamination and seeks to prevent future contamination.

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), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature as it pertains to the CMP, and will have no substantive effect on commission actions subject to the CMP, and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin, Texas, on March 11, 2008, at 10:00 a.m., in Building E, Room 201S, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons planning to attend the hearing, who have special communication or other accommodation needs, should contact John Gaete, Office of Legal Services, at (512) 239-6091. Requests should be made as far in

advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to John Gaete, 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. Electronic comments may be submitted at:

<http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-035-337-PR. The comment period closes March 17, 2008. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Don Kennedy, Permitting and Remediation Support Division, (512) 239-2154 or Barbara Watson, Litigation Division (512) 239-2044.

SUBCHAPTER A: GENERAL PROVISIONS
§337.3 and §337.4

STATUTORY AUTHORITY

The amended sections are proposed under the authority granted to the commission by the 80th Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended sections are also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and HB 3220, 80th Legislature, 2007.

The proposed amended sections implement THSC, Chapter 374.

§337.3. Definitions.

Definitions set forth in Texas Health and Safety Code, Chapter 374 and §3.2 of this title (relating to Definitions) that are not specifically included in this section also apply. The following words and terms, when used in this chapter, have the following meanings.

(1) **Application for ranking**--The form approved by the executive director for an applicant to provide information pertaining to a dry cleaning facility and which is used, in part, for the prioritization of sites for corrective action.

(2) **Distributor**--A person that:

(A) maintains or uses, permanently or temporarily, directly or indirectly, or through an agent, by whatever name called, an office, place of distribution, sales or sample room, warehouse or storage place, or other place of business that is used, in whole or part, for selling, distributing, or delivering dry cleaning solvent;

(B) has any representative, agent, salesperson, canvasser, or solicitor who operates in Texas under the authority of the distributor to sell, deliver, or take orders for dry cleaning solvent;

(C) uses independent contractors in direct sales, distribution, or delivery of dry cleaning solvent in Texas;

(D) allows a franchisee or licensee to operate under its trade name if the franchisee or licensee is required to collect Texas fees on dry cleaning solvent;

(E) conducts business in Texas through employees, agents, or independent contractors for the purpose of selling, distributing, or delivering dry cleaning solvent; or

(F) otherwise distributes dry cleaning solvent to dry cleaning facilities or dry cleaning drop stations doing business in Texas.

(3) **Dry cleaning machine**--The equipment used for the purpose of cleaning garments or other fabrics using a process that involves any use of dry cleaning solvents; a dry cleaning unit.

(4) **Dry cleaning waste**--The waste, including dry cleaning wastewater, that is generated at a dry cleaning facility and that contains dry cleaning solvents.

(5) **Dry cleaning wastewater**--The separator water and all other water that is generated during the dry cleaning process and that contains dry cleaning solvents.

(6) **Empty**--The status of a dry cleaning machine in which all solvents have been removed as completely as possible by the use of commonly employed and accepted industry procedures.

(7) **Gross annual receipts**--The sum of all payments or compensation, including payments or compensation from laundry and other revenue generating activities, received by a dry cleaning facility or drop station, less any returns, discounts, or allowances. The calculation of gross annual receipts must not be reduced for cost of goods sold, general and administrative expenses, depreciation and amortization, or other operating expenses. Gross annual receipts do not include any taxes imposed on the services provided by any municipality, state, or other governmental unit and collected by the dry cleaning facility or drop station for such governmental unit.

(8) **In service**--The status of a dry cleaning machine that it is being used for cleaning garments or other fabrics with a process that involves any use of dry cleaning solvents.

(9) **Nonparticipating non-perchloroethylene user registration certificate**--A registration certificate issued by the executive director to a facility designated as a nonparticipating facility in accordance with Texas Health and Safety Code, §374.104.

(10) **Operating dry cleaning drop station**--A dry cleaning drop station that has accepted clothes for dry cleaning anytime during the state fiscal year.

(11) **Operating dry cleaning facility**--A dry cleaning facility in which there is at least one operating dry cleaning machine in service anytime during the state fiscal year.

(12) **Participating non-perchloroethylene user registration certificate**--A registration certificate issued by the executive director to an owner designated as a nonuser of perchloroethylene in accordance with Texas Health and Safety Code, §374.103(b)(1) as that subsection existed from September 1, 2003, until August 31, 2005.

(13) **Permanently removed from service**--The status of a dry cleaning machine when its use is terminated by removal from the dry cleaning facility in accordance with this chapter.

(14) **Preceding Property Owner**--a preceding owner of real property as described in Texas Health and Safety Code, §374.1022(a)(2).

(15) **Property Owner**--an owner of real property as described in Texas Health and Safety Code, §374.1022(a)(1).

(16) [14] **Secondary containment**--A containment method by which a continuous barrier is installed around and under the primary storage vessel (e.g., tank or piping) in a manner designed to prevent a release from migrating beyond the secondary barrier.

(17) [15] **Temporarily removed from service**--The status of a dry cleaning machine that is not being used for cleaning garments or other fabrics for a time period not to exceed one year and that has not been permanently removed from service.

§337.4. General Prohibitions and Requirements.

(a) New dry cleaning facilities must meet the performance standards in §337.20 of this title (relating to Performance Standards).

(b) A distributor is prohibited from selling, delivering, or otherwise distributing any dry cleaning solvent to a dry cleaning facility unless the dry cleaning facility has a valid, current registration certificate issued by the executive director pursuant to §337.11 of this title (relating to Dry Cleaner Registration Certificates). Prior to sale, delivery, or other distribution of the dry cleaning solvent, the distributor must

obtain and record the registration number and registration expiration date of the dry cleaning facility's registration certificate.

(c) A distributor shall not sell, deliver, or otherwise distribute the dry cleaning solvent perchloroethylene to a dry cleaning facility with a nonparticipating non-perchloroethylene user registration certificate or a participating non-perchloroethylene user registration certificate.

(d) A person is prohibited from purchasing dry cleaning solvent from a distributor that does not have a valid, current distributor registration certificate issued by the executive director.

(e) A distributor is prohibited from selling or otherwise distributing dry cleaning solvent to a dry cleaning facility unless the distributor has a valid, current distributor registration certificate issued by the executive director.

(f) A person is prohibited from purchasing the dry cleaning solvent perchloroethylene for a dry cleaning facility with a nonparticipating non-perchloroethylene user registration certificate or a participating non-perchloroethylene user registration certificate.

(g) A distributor is prohibited from selling, delivering, or otherwise distributing any dry cleaning solvent to a dry cleaning drop station.

(h) A person is prohibited from purchasing or otherwise obtaining any dry cleaning solvent for a dry cleaning facility unless the dry cleaning facility has a valid, current registration certificate issued by the executive director pursuant to §337.11 of this title.

(i) A person is prohibited from purchasing or otherwise obtaining any dry cleaning solvent for a dry cleaning drop station.

SUBCHAPTER B: REGISTRATION, CERTIFICATES, AND FEES
§§337.11, 337.13, 337.14, 337.16 - 337.18

STATUTORY AUTHORITY

The amended and new sections are proposed under the authority granted to the commission by the Texas Legislature in THSC, Chapter 374. The amended and new sections are also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and HB 3220, 80th Legislature, 2007.

The proposed amended and new sections implement THSC, Chapter 374.

§337.11. Dry Cleaner Registration Certificates.

(a) Before the executive director evaluates a registration to determine if a registration certificate should be issued, each registration must be administratively complete. A registration is not administratively complete if:

(1) the registration form has not been completed and submitted to the agency in accordance with this chapter;

(2) the registration form does not contain all requested information with clear, legible, and true responses;

(3) all fees, penalties, and interest owed to the agency have not been paid; or

(4) the comptroller reports to the executive director that the owner is not in good standing with the state or that the owner's application information does not agree with the comptroller's information. However, if the comptroller does not respond to the agency's request for verification within three business days in accordance with Texas Health and Safety Code, §374.102(f), the executive director shall not be prohibited from determining that the registration is administratively complete.

(b) Upon the executive director's determination that a submitted registration is administratively complete, a registration certificate will be issued for the dry cleaning facility or dry cleaning drop station, as applicable, as long as the executive director has no reason to deny the registration certificate under [subsection (f) of] this section. This certificate is necessary to receive the delivery of dry cleaning solvents under §337.4(b) of this title (relating to General Prohibitions and Requirements).

(c) The agency's issuance of a registration certificate for a dry cleaning facility or dry cleaning drop station does not constitute agency certification or affirmation of the compliance status of the location in question with this chapter, the Texas Water Code, or the Texas Health and Safety Code; and this

issuance does not preclude the agency from investigating these locations and pursuing enforcement actions when apparent violations are discovered.

(d) Certificate availability.

(1) The owner of a dry cleaning facility or dry cleaning drop station shall make available to a person delivering dry cleaning solvent a valid, current agency registration certificate for that establishment before the delivery of dry cleaning solvent can be made or accepted.

(2) The owner of the dry cleaning facility or drop station shall immediately display, upon request by agency staff, a valid, current agency registration certificate for that establishment.

(3) The dry cleaning facility or dry cleaning drop station owner shall ensure that a valid, current agency registration certificate is displayed at a facility or drop station. The original registration certificate must be posted in a public area where the document is clearly visible.

(4) In the event of the sale of a dry cleaning facility or a dry cleaning drop station, the previous owner's valid, current certificate may be used to purchase dry cleaning solvent for 30 days after the effective date of sale.

(e) Annual registration certificate renewal.

(1) The initial registration certificate issued for a dry cleaning facility or dry cleaning drop station will be valid until the expiration date indicated on that certificate. It is the responsibility of

the owner to ensure that an application for renewal of that certificate is properly and timely submitted to the agency.

(2) A registration certificate is renewed by timely and proper submission of a new registration form to the agency. The agency will not issue a new registration certificate for registration forms that are determined by the executive director to be incomplete or inaccurate.

(3) A new registration form must be completed by the owner of a dry cleaning facility or dry cleaning drop station and submitted to the agency by August 1st of each year.

(f) Revocation or denial of a certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate [if]:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information; [or]

(B) if the owner of a dry cleaning facility or dry cleaning drop station is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374; or

(C) for any reason the executive director determines constitutes good cause for denial or revocation.

(2) Prior to revocation or denial of a certificate pursuant to this subsection, the executive director shall provide notice to the owner of the dry cleaning facility or dry cleaning drop station of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the owner five days after mailing when:

(A) the notice was sent to the address indicated on the owner's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The owner shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the owner.

(4) The owner may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the owner must file with the Office of the Chief Clerk the original and 11 copies by

mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the owner shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) An appeal filed under this subsection must:

(i) provide a copy of the owner's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection [section] is not a contested case for purposes of Texas Government Code, Chapter 2001.

(g) In addition to subsection (f) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (f)(1) of this section exist.

(h) Revocation of a certificate under subsection (f) or (g) of this section is cumulative of any other remedies available to the agency by law.

§337.13. Distributor Registration Certificate.

(a) Completion of the dry cleaning solvent distributor report form. Upon the executive director's determination that a submitted dry cleaning solvent distributor report form has been completed in accordance with this chapter and that all fees, penalties, and interest owed to the agency have been paid, a distributor registration certificate will be issued for the place of business covered by that registration. This certificate is necessary for the delivery of dry cleaning solvent under §337.4 of this title (relating to General Prohibitions and Requirements).

(b) Incomplete or inaccurate dry cleaning solvent distributor report form or nonpayment. The executive director will not issue a distributor registration certificate for dry cleaning solvent distributor report forms determined by the executive director to be incomplete or inaccurate (including illegible or

unclear information) or if any fees, penalties, or interest are owed to the agency. In order for a form to be complete, the form must contain all requested information with clear, legible, and true responses.

(c) Issuance of a registration certificate. The executive director's issuance of a registration certificate for a distributor does not constitute agency certification or affirmation of the compliance status of a location with this chapter, the Texas Water Code, or the Texas Health and Safety Code; or preclude the agency from investigating a location and pursuing enforcement action when apparent violations are discovered.

(d) Registration certificate availability.

(1) Prior to delivery of any dry cleaning solvent, a distributor shall make available to a person purchasing dry cleaning solvent a valid, current agency distributor registration certificate, or a legible copy of the certificate.

(2) A distributor shall immediately display, upon request by agency staff a valid, current agency registration certificate for a place of business.

(3) A distributor shall display the original agency registration certificate at the place of business. The original registration certificate must be posted in a public area where the certificate is clearly visible.

(e) Revocation or denial of certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate [if]:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information; [or]

(B) if the distributor is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374, including late remittance of solvent fees and non-remittance of solvent fees; or

(C) for any reason the executive director determines constitutes good cause for denial or revocation.

(2) Prior to the revocation or denial of a certificate in accordance with subsection, the executive director shall provide notice to the distributor of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the distributor five days after mailing when:

(A) the notice was sent to the address indicated on the distributor's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The distributor shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the distributor.

(4) The distributor may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the distributor must file with the Office of the Chief Clerk the original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the distributor [owner] shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) An appeal filed under this subsection [section] must:

(i) provide a copy of the distributor's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection [section] is not a contested case for purposes of Texas Government Code, Chapter 2001

(f) In addition to subsection (e) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (e)(1) of this section exist.

(g) Revocation of a certificate under subsection (e) or (f) of this section is cumulative of any other remedies available to the agency by law.

§337.14. Registration Fees for Dry Cleaning Facilities and Drop Stations.

(a) Except for registration fees payable for operations conducted before September 1, 2005, each owner of an operating dry cleaning facility or dry cleaning drop station shall pay the registration fees set forth in Texas Health and Safety Code, §374.102. The owner of the dry cleaning facility or dry cleaning drop station on or after September 1 of each state fiscal year is responsible for the registration fees owed for the state fiscal year beginning on September 1. However, if a person acquires a dry cleaning facility or dry cleaning drop station that does not have a current registration certificate, the facility or drop station would have to be registered and the fee paid before a current registration certificate would be issued.

(b) Registration fees payable for operation of a facility or drop station before September 1, 2005, will be assessed and payable at the rates in effect before September 1, 2005.

(c) The annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. Payment in full [of registration fees] is due within 30 days of the agency invoice date. The fees must be paid by check, certified check, money order, or electronic funds transfer made payable to the “Texas Commission on Environmental Quality.”

(d) The registration certificate will not be issued until registration fees, penalties, and interest assessed are paid in full.

(e) Owners that fail to pay registration fees when due shall pay penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

§337.16. Registration by Property Owner or Preceding Property Owner.

(a) Registration.

(1) To be eligible to participate in Dry Cleaning Facility Release Fund benefits, a property owner or preceding property owner must register with the agency in accordance with this section.

(2) Prior to applying for corrective action at a site under the Dry Cleaning Facility Release Fund, a property owner or preceding property owner must register the site in accordance with subsection (c) of this section and hold a registration certificate in accordance with §337.17 of this title (relating to Property Owner or Preceding Property Owner Registration Certificate).

(3) Registration under this section is due by December 31, 2007. In order to register a site after December 31, 2007, a property owner or preceding property owner must first pay all past annual registration fees and any late fees due pursuant to Texas Health and Safety Code, §374.1022(c).

(4) A property owner or preceding property owner who registers a site under this section is responsible for compliance with the registration requirements of this section. A property owner or preceding property owner may designate a legally authorized representative to complete and submit the required registration information. However, the property owner or preceding property owner remains responsible for compliance with the provisions of this section by such representative.

(5) All sites registered under this section are subject to the fee and payment requirements of §337.18 of this title (relating to Registration Fees for Property Owners and Preceding Property Owners).

(b) Changes or additional information.

(1) Once a site is registered under this section, the property owner or preceding property owner shall provide written notice to the executive director of any changes or additional information concerning the site. Types of changes or additional information subject to this requirement include the following:

(A) change in owner or change in owner information (e.g. legally authorized representative, mailing address, or telephone number);

(B) change in site information (e.g. address or telephone number); and

(C) change in location of records for the site.

(2) Notice of any change or additional information must be submitted on the appropriate agency form that has been completed in accordance with this section. The agency's registration numbers for the site must be included in the appropriate spaces on the form.

(3) Notice of any change or additional information must be submitted to the agency

within 30 days from the date of the occurrence of the change or addition.

(c) Required form for providing site registration information.

(1) A property owner or preceding property owner submitting registration information to the executive director shall provide the required information on the current agency registration form.

(2) The property owner or preceding property owner is responsible for ensuring that the registration form is fully complete and accurate. The form must be dated and signed by the property owner or preceding property owner or a legally authorized representative, and must be submitted to the executive director prior to applying for corrective action under the Dry Cleaning Facility Release Fund.

(3) The property owner or preceding property owner shall complete and submit a separate registration form for each site.

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

(5) When any of the required registration information submitted to the executive director is determined to be incomplete or inaccurate (including illegible or unclear information), the executive director may require the property owner or preceding property owner to submit additional information. A

property owner or preceding property owner shall submit any required additional information within 30 days of receipt of such request.

§337.17. Property Owner or Preceding Property Owner Registration Certificate.

(a) Before the executive director evaluates a registration to determine if a registration certificate should be issued, each registration must be administratively complete. A registration is not administratively complete if:

(1) the registration form has not been completed and submitted to the agency in accordance with this chapter;

(2) the registration form does not contain all requested information with clear, legible, and true responses; or

(3) all fees, penalties, and interest owed to the agency have not been paid.

(b) Upon the executive director's determination that a submitted registration is administratively complete, a registration certificate will be issued to the property owner or preceding property owner, as applicable, for the site covered by the registration form, as long as the executive director has no reason to deny the registration certificate under this section. This certificate is necessary for a property owner or preceding property owner to apply for corrective action under the Dry Cleaning Facility Release Fund.

(c) A property owner or preceding property owner shall immediately display, upon request by agency staff, a valid agency registration certificate for a property.

(d) Revocation or denial of certificate by the executive director.

(1) The executive director may revoke or deny issuance of a certificate:

(A) if the certificate was acquired by fraud, misrepresentation, or knowing failure to disclose material information;

(B) if the property owner or preceding property owner is in violation of any of the requirements of this chapter or Texas Health and Safety Code, Chapter 374, including late remittance and non-remittance of fees; or

(C) for any reason the executive director determines constitutes good cause for denial or revocation.

(2) Prior to the revocation or denial of a certificate pursuant to this subsection, the executive director shall provide notice to the property owner or preceding property owner of the facts alleged to warrant revocation or denial. The notice must be in writing and sent via certified mail, return receipt requested. If the certified mail is returned to the executive director as unclaimed, notice is presumed to be received by the property owner or preceding property owner five days after mailing when:

(A) the notice was sent to the address indicated on the property owner or preceding property owner's most current registration; and

(B) the notice was sent simultaneously via first class mail, postage paid.

(3) The property owner or preceding property owner shall have 30 days after receipt of notice to demonstrate to the executive director whether or not compliance has been maintained with all requirements of law for the retention of the certificate. The executive director shall make a determination whether to revoke or deny the certificate and shall provide such determination in writing to the property owner or preceding property owner.

(4) The property owner or preceding property owner may appeal for commission review of the executive director's determination to revoke or deny a certificate pursuant to this subsection. An appeal must be in writing and filed by United States mail, facsimile, or hand delivery with the commission's Office of the Chief Clerk no later than 23 days after the date the agency mails notice of the executive director's determination to revoke or deny a certificate. The original and 11 copies of the appeal must be filed. If the appeal is filed by facsimile, the property owner or preceding property owner must file with the Office of the Chief Clerk the original and 11 copies by mail or hand delivery within three days. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's determination is final.

(A) In addition to filing the appeal with the Office of the Chief Clerk, the property owner or preceding property owner shall mail or deliver a copy of the appeal to:

(i) the executive director; and

(ii) the Office of the Public Interest Counsel.

(B) The appeal filed under this subsection must:

(i) include a copy of the property owner or preceding property owner's registration information;

(ii) specify the executive director determination for which commission review is being sought;

(iii) request commission consideration of the executive director determination; and

(iv) explain the basis for the appeal.

(C) A proceeding based upon an appeal filed under this subsection is not a contested case for purposes of Texas Government Code, Chapter 2001.

(e) In addition to subsection (d) of this section, the executive director may seek to revoke a certificate by filing a petition in accordance with the procedures set forth in Chapter 70 of this title (relating to Enforcement) if the executive director determines that any of the reasons in subsection (d)(1) of this section exist.

(f) Revocation of a certificate under subsection (d) or (e) of this section is cumulative of any other remedies available to the agency by law.

§337.18. Registration Fees for Property Owners and Preceding Property Owners.

(a) A property owner or preceding property owner who registers a site pursuant to §337.16 of this title (relating to Registration by Property Owner or Preceding Property Owner) shall pay the annual registration fee and any applicable past annual registration fees and late fees set forth in Texas Health and Safety Code (THSC), §374.1022 for each registered site.

(b) The annual registration fee may be divided into quarterly payments and billed on dates established by the executive director. A property owner or preceding property owner who registers a site pursuant to §337.16 of this title on or after the first day of a billing quarter is responsible for the registration fee due for the entire billing quarter.

(c) Past annual registration fees and late fees must be paid in full at the time of registration and may not be divided into quarterly payments.

(d) Payment in full is due within 30 days of the agency invoice date. The fees must be paid by check, certified check, money order, or electronic funds transfer made payable to the “Texas Commission on Environmental Quality.”

(e) The registration certificate will not be issued until all registration fees and any late fees due pursuant to THSC, §374.1022, in addition to any penalties and interest assessed, are paid in full.

(f) Property owners or preceding property owners who fail to pay registration fees when due shall pay penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

(g) A property owner or preceding property owner who has registered a site pursuant to §337.16 of this title must continue to pay annual registration fees in accordance with THSC, §374.1022 for the duration of corrective action at the site under the Dry Cleaning Facility Release Fund.

SUBCHAPTER D: PRIORITIZATION AND RANKING

§337.31 and §337.32

STATUTORY AUTHORITY

The amended sections are proposed under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended sections are also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The proposed amended sections implement THSC, Chapter 374.

§337.31. Ranking of Sites.

(a) Dry cleaning site ranking system.

(1) The dry cleaning site ranking system is a methodology designed to determine a numerical score for a facility based on the executive director's judgment regarding various factors that may impact human health or the environment.

(2) The executive director will rank dry cleaning sites based on information provided in an application for ranking package. An application for ranking will be accepted from persons eligible to apply for a site to be ranked under Texas Health and Safety Code, §374.154(b)[, including former owners of dry cleaning facilities and owners of real property on which a dry cleaning facility was formerly located that meet the eligibility criteria].

(3) An application for ranking package must contain:

(A) a completed application for ranking;

(B) proof that an owner of the real property has been notified of the application if the applicant is not an owner of the real property;

(C) proof that a lessee has been notified of the application if the applicant is an owner of the real property and the facility is leased;

(D) evidence that the deductible has been met in accordance with Subchapter E of this chapter (relating to Deductible);

(E) laboratory analyses of at least one groundwater sample (soil analyses may be substituted with written approval of the executive director);

(F) geologic well log(s) from a monitoring or supply well or hydrogeologic information from the contaminated site where the groundwater or soil sample was taken;

(G) field survey to locate potential receptors, including water wells and surface waters to at least 500 feet beyond the boundary of the property;

(H) a records survey to identify all water wells and surface water bodies within 1/2 mile of the boundary of the property;

(I) a full operational history of the facility including types of solvent currently and previously used; and

(J) any other information or evidence the executive director considers necessary.

(4) Application for ranking packages that are not administratively and technically complete as determined by the executive director will not be ranked. The executive director will notify the applicant in writing of such a determination.

(5) Factors the executive director may consider in ranking sites include:

(A) types of solvent currently in use;

(B) types of solvent used in the past;

(C) operational history of the facility;

(D) risk to drinking water supplies;

(E) surface water:

(i) demonstrated impact to surface water;

(ii) distance to surface water; and

(iii) probability of contamination;

(F) groundwater:

(i) aquifer impacted;

(ii) depth to groundwater;

(iii) distance to nearest known groundwater wells;

(iv) areal extent of groundwater contaminated;

(v) subsurface geology as it affects contamination migration;

(vi) concentrations of dry cleaning solvent in the groundwater;

(vii) probability of contamination; and

(viii) institutional controls prohibiting the use of groundwater for potable purposes;

(G) alternative water source availability;

(H) soil:

(i) soil type;

(ii) depth to groundwater;

(iii) depth of contamination;

(iv) concentrations of dry cleaning solvent in the soil;

(v) quantity of soil contaminated;

(vi) potential for exposure to the contaminated soils; and

(vii) soil on the outcrop of a major or minor aquifer, or the Edwards
Aquifer recharge or transition zone;

(I) current and future land use; and

(J) air contamination:

(i) potential for exposure to vapors; and

(ii) potential for vapors to migrate into buildings or other receptors.

(6) For all applications that are technically and administratively complete, the executive director will rank the site and notify an applicant of the relative ranking assigned to the applicant's site on or before the 90th day after the date the application is received by the executive director.

(7) If a site has already been ranked by the executive director, an applicant may submit an updated application for ranking to reflect changes in site conditions as a result of corrective action or other circumstances. Such updates will be limited to one per site per state fiscal year.

(8) The executive director may re-rank sites where corrective action has occurred using monies from the Dry Cleaning Facility Release Fund to reflect changes in site conditions as a result of corrective action or other circumstances.

(b) Even if a site has been ranked, a person may take corrective action at the person's own expense at any time in accordance with commission rules. The resulting expenses will not be reimbursed by the commission. In addition to any other notice required, an applicant shall give the executive director notice of such corrective action within 30 days after the action is completed.

§337.32. Denial and Removal of Sites from Ranking.

(a) The executive director may deny or remove from ranking a site if:

(1) the owner of the dry cleaning facility or dry cleaning drop station is held responsible for the costs of corrective action under Texas Health and Safety Code, §374.202;

(2) the applicant denies access or unreasonably hinders or delays corrective action at the site;

(3) the applicant has failed to pay fees, penalties, and interest [for any dry cleaning facility or dry cleaning drop station] that the applicant is required to pay pursuant to this chapter;

(4) the applicant has failed to register any dry cleaning facility or dry cleaning drop station that the applicant was required to register; or

(5) the applicant does not pay the deductible or provide satisfactory proof of expenditures to apply against the deductible in accordance with Subchapter E of this chapter (relating to Deductible) within the required time frames.

(b) An applicant who has been denied or removed from ranking may address the cause for denial or removal from ranking, provide additional information, and reapply for ranking.

SUBCHAPTER F: CORRECTIVE ACTION
§§337.51 - 337.53

STATUTORY AUTHORITY

The amended and new sections are proposed under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. The amended and new sections are also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The proposed amended and new sections implement THSC, Chapter 374.

§337.51. Eligibility for Corrective Action.

An owner or other person is eligible to have corrective action costs paid by the Dry Cleaning Facility Release Fund if:

(1) the owner or other person is eligible to apply for a site to be ranked under §337.31(a)(2) of this title (relating to Ranking of Sites);

(2) an application for ranking package under §337.31(a)(3) of this title has been properly submitted to, and accepted by, the executive director as administratively and technically complete;

(3) the owner or other person is not currently in violation of this chapter [for any dry cleaning facilities or dry cleaning drop station that the person owns]; and

(4) the owner or other person is not otherwise ineligible for corrective action under this chapter or Texas Health and Safety Code, Chapter 374.

§337.52. Deed Notice of Site Restrictions After Corrective Action.

Following the completion of corrective action under this chapter, a written notice will be filed in the real property records of the county or counties in which the site is located to notify future property owners that, pursuant to Texas Health and Safety Code, §374.1535, perchloroethylene may not be used at that site.

§337.53. Withdrawal of Site from the Dry Cleaner Remediation Program.

(a) Once corrective action costs have been incurred at a site by the Dry Cleaner Remediation Program (the commission program that administers the Dry Cleaning Facility Release Fund), an applicant may not withdraw the site from the Dry Cleaner Remediation Program prior to completion of corrective action at the site.

(b) Notwithstanding subsection (a) of this section, in the event that corrective action has been suspended, postponed, or terminated at a site pursuant to §337.30 of this title (relating to Prioritization of Sites) or §337.50 of this title (relating to Corrective Action), an applicant may request to withdraw the site from the Dry Cleaner Remediation Program. An applicant may withdraw a site pursuant to this subsection only upon the express approval of the executive director.

SUBCHAPTER G: NON-PERCHLOROETHYLENE USERS, FACILITIES, AND DROP STATIONS
§337.64

STATUTORY AUTHORITY

This new section is proposed under the authority granted to the commission by the Texas Legislature in Texas Health and Safety Code (THSC), Chapter 374. This new section is also proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC; TWC, §26.011, which provides the commission the powers necessary or convenient to carry out its responsibilities; THSC, §361.017, which provides the commission the powers necessary or convenient to carry out its responsibilities under the Solid Waste Disposal Act (SWDA); THSC, §361.024, which authorizes the commission to adopt rules consistent with the SWDA and establish minimum standards of operation for the management and control of solid waste; and House Bill 3220, 80th Legislature, 2007.

The proposed new section implements THSC, Chapter 374.

§337.64. Retaining Nonparticipating Status for a Drop Station Moved to a New Location.

(a) To retain the nonparticipating status of a drop station when that drop station is moved to a new location, the owner of the drop station must:

(1) Hold a current nonparticipating non-perchloroethylene user registration certificate for the drop station pursuant to §337.61 of this title (relating to Nonparticipating Non-Perchloroethylene User Registration Certificate);

(2) Submit updated registration information for the drop station pursuant to §337.10 of this title (relating to Registration for Dry Cleaning Facilities and Drop Stations);

(3) Continue to meet all requirements of Texas Health and Safety Code, §374.104 and of this subchapter; and

(4) Swear in an affidavit approved by the executive director that:

(A) the dry cleaning solvent perchloroethylene has never been used at the new location to which the nonparticipating non-perchloroethylene user registration certificate would now apply; and

(B) the owner will not now or ever use or allow the use of perchloroethylene at the new location to which the nonparticipating non-perchloroethylene user registration certificate would now apply.

(b) All provisions of this subchapter apply to any new drop station location that retains its nonparticipating status pursuant to this section.

(c) A nonparticipating non-perchloroethylene user registration certificate issued pursuant to §337.61 of this title may only apply to one drop station location at a time.