

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts amendments to §§37.825, 37.830, 37.835, 37.840, 37.845, 37.855, 37.870, and 37.885. The commission also adopts new §37.867.

Sections 37.825, 37.830, 37.835, 37.840, 37.845, 37.855, 37.870 and 37.885, and new 37.867 are adopted *without changes* as published in the December 21, 2007 issue of the *Texas Register* (32 *TexReg* 9527) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments is to incorporate into agency rules, changes to statute which were effective September 1, 2007, based on language in House Bill (HB) 1956, 80th Legislature, 2007.

SECTION BY SECTION DISCUSSION

Subchapter I – Financial Assurance for Petroleum Underground Storage Tank Systems

Existing §§37.825, 37.830, 37.835, 37.840, 37.845, and 37.855 are being amended to clarify and simplify the figures containing the required wordings for each of these financial assurance mechanisms. Each amended figure will now clearly indicate that each mechanism is covering both corrective action and compensating third parties for bodily injury and property damage caused by accidental releases as is already required by rule. Prior to December 22, 1998, corrective action coverage in many situations could be provided by using the State's Reimbursement Fund, meaning the owner or operator may have only been required to provide financial assurance for third party liability claims. Accordingly, existing mechanism wordings require mechanism providers to indicate which of the coverages was provided.

Since that date, owners or operators are required to provide financial assurance for both types of coverage. The adopted wordings should limit confusion by mechanism providers as to which language should be included.

In addition, the adopted mechanism wording requirements will require that the TCEQ facility identification number be reflected on each mechanism for Texas located facilities. This change will more clearly associate the coverage provided with an individual facility and greatly assist the agency's ability to monitor financial assurance.

Finally, wording of the Chief Financial Officer's Letter in the adopted amendment to §37.825 have been changed to require disclosure of the fiscal year-end date for the most recent audited financial statements upon which the financial test is based. This will help ensure that the test is prepared using current financial information.

New §37.867 is adopted to comply with passage of HB 1956, which added a new subsection (e-2) to Texas Water Code (TWC), §26.352. TWC, §26.352(e-2) states the following: "The owner or operator of a tank for which insurance coverage or other financial assurance has terminated shall dispose of any regulated substance in the tank at a properly licensed facility not later than the 90th day after the coverage terminates, unless the owner or operator provides the commission proof that the owner or operator maintains evidence of financial responsibility as required under Subsection (a)."

Adopted new §37.867 implements TWC, §26.352(e-2), while adding clarifications of how it will interact with existing agency rules. Adopted new §37.867(a) uses the term "empty" while placing the term

"dispose" in subsection (b). This is intended to clarify the statutory requirement in TWC, §26.352(e-2) that regulated substances be "disposed of," so that it is clear that valuable petroleum product need not necessarily be sent to a waste disposal facility, when there may be a more productive course of action available, such as selling it back to a distributor, or to some other licensed transporter. The rule clarifies that the primary intent is simply that the tank be properly emptied. However, if the regulated substance is disposed of, then disposal must be done in accordance with all applicable requirements.

Adopted §37.867(c) addresses how the new section interacts with existing financial assurance requirements. Most importantly, the new rule does not create a "90-day window" where a tank owner/operator is exempt from the basic requirement of maintaining financial assurance. Rather, §37.867 addresses the specific issue of tanks being empty, by stating that tanks must be emptied by the 90th day after coverage terminates. The exception to this requirement would be that the owner or operator has re-obtained acceptable financial assurance within the 90-day period. A tank owner or operator could still have a general financial assurance violation during the 90-day period, but he or she would not receive a citation under §37.867 until after the 90-day period.

Adopted §37.867(d) addresses how the new rule interacts with existing §37.885. Tank owners or operators may avail themselves of this provision as they would have in the past, with the exception that they are still required to follow adopted §37.867 by ensuring that the tanks are empty within 90 days of financial assurance termination. For tank owners or operators where financial assurance has not terminated, existing §334.54 still applies: tanks may remain properly temporarily removed from service, with fuel in the tanks, indefinitely.

Adopted §37.867(e) ensures that the section as a whole does not affect the commission's authority to require a shutdown of a facility under TWC, §26.3475(e), nor any other sections, rules, or statutes, with regard to financial assurance.

In accordance with passage of HB 1956, this rulemaking adoption amends §37.870(b) to require that owners or operators of Underground Storage Tanks (USTs) must attach to the agency's self-certification form the appropriate document which constitutes evidence of current financial assurance, i.e., for example, an insurance certificate. Currently, tank owners or operators merely sign the self-certification form which contains a declaration that they have current financial assurance.

This rulemaking adoption also amends §37.885 to clarify the circumstances under which an owner or operator is released from financial assurance requirements. The insertion of the phrase "properly temporarily removed from service, in accordance with the requirements of §334.54 of this title (relating to Temporary Removal from Service)" does not create a new substantive requirement. Rather, it is a clarification of existing language which used the phrase "removed from service" without specifying whether reference was being made to temporary or permanent removal from service, or both. The existing interpretation has been that reference was being made to both: either form of removal from service, if done properly, would release an owner or operator from financial assurance requirements.

Finally, §37.885 is amended to add subsection (b), which states that in order to be released from financial assurance requirements under this section, the owner or operator must notify the commission of the change in status in accordance with §334.7. This notification is not a new requirement; rather, it is a clarification of something that is already required under §§334.54(e)(2), 334.55(f)(1), and 334.7(d)(1)(B).

A tank owner or operator who is nearing the end of his or her financial assurance term, but intends to close operations and no longer use his or her tanks, would need to comply with the removal from service provisions and notify the commission, before the tank owner or operator would be released from financial assurance requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Although the specific intent of this rule is to "protect the environment" by tightening regulations which ensure that there are private funds available for clean up and liability for releases from underground storage tanks, the second prong of the definition of a "major environmental rule" is not met: The adopted 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.

Further, it does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a).

Texas Government Code, §2001.0225(a) states: "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." These adopted 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 adopted rules are required by state law, are not adopted solely under the general powers of the agency, and do not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

The commission invited public comments of the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted 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 adopted 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; that 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 adopted rules are an "action taken in response to a real and substantial threat to public health and safety" in that contamination from releases from underground storage tanks pose a threat to both soils and

groundwater with which the public may come into contact. The adopted rules are "designed to significantly advance the health and safety purpose" by tightening regulations that ensure that private funds are available for addressing contamination from releases from underground storage tanks. The adopted rules "do not impose a greater burden than is necessary to achieve the health and safety purpose" because they are narrowly tailored to the class of tank owners or operators and narrowly tailored to specific conditions or events, such as termination of financial assurance coverage.

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The adopted rules implement HB 1956, which amended TWC, §26.352, concerning Financial Responsibility.

Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the adopted rules. There are no burdens imposed on private real property from these adopted rules and the benefits to society are the adopted rules' specific procedures and requirements for ensuring that underground storage tanks have financial assurance coverage. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption 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 the rulemaking provides for increased enforcement of financial assurance requirements for underground storage tank owners or operators.

CMP Policies: 31 TAC §501.13, "Administrative Policies," states in relevant part: "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.

PUBLIC COMMENT

The commission held a public hearing on the proposed rulemaking in Austin on January 17, 2008. The comment period closed on January 22, 2008. No comments were received.

**SUBCHAPTER I: FINANCIAL ASSURANCE FOR PETROLEUM UNDERGROUND STORAGE
TANK SYSTEMS**

§§37.825, 37.830, 37.835, 37.840, 37.845, 37.855, 37.867, 37.870, 37.885

STATUTORY AUTHORITY

The amendments and new section are adopted 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, 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; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.352, which directs the commission to adopt rules establishing the requirements for maintaining evidence of financial responsibility for taking corrective action in response to a release from a UST.

The adopted amendments and new section implement changes in laws of this state made during the 80th Legislature, 2007, with the passage of House Bill 1956.

§37.825. Financial Test of Self-Insurance.

(a) An owner, operator, and/or guarantor, may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Assurance) by passing a financial test as specified

in this section. To pass the financial test of self-insurance, the owner, operator, and/or guarantor must meet the criteria of subsections (b) or (c) of this section based on year-end financial statements for the latest completed fiscal year.

(b) The owner, operator, and/or guarantor must meet the requirements of this subsection referred to as Alternative 1. The owner, operator, and/or guarantor must:

(1) have a tangible net worth of at least ten times:

(A) the total of the applicable aggregate amount required by §37.815 of this title based on the number of underground storage tanks for which a financial test is used to demonstrate financial assurance to the agency under this section;

(B) the sum of the corrective action cost estimates, the current closure and post-closure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial assurance to the agency under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), 40 Code of Federal Regulations (CFR) Parts 264, 265, or state equivalent;

(C) the sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial assurance to the agency under Chapter 331 of this title (relating to Underground Injection Control), 40 CFR Part 144 or state equivalent;

(D) the sum of municipal solid waste cost estimates for which a financial test is used to demonstrate financial assurance to the agency under Chapter 330 (relating to Municipal Solid Waste), 40 CFR Part 258 or state equivalent;

(E) the sum of current polychlorinated biphenyl (PCB) cost estimates for which a financial test is used to demonstrate financial assurance to the EPA under 40 CFR Part 761; and

(F) the sum of additional financial assurance obligations not identified in subparagraphs (A) - (E) of this paragraph and for which a financial test or other form of self-insurance is used to meet financial assurance obligations under the commission or other federal or state environmental regulations;

(2) have a tangible net worth of at least \$10 million;

(3) have a letter signed by the chief financial officer as specified in subsection (d) of this section;

(4) either:

(A) file financial statements annually with the United States Securities and Exchange Commission (SEC), the Energy Information Administration, or the Rural Electrification Administration; or

(B) report annually the firm's tangible net worth to Dun and Bradstreet, and Dun and Bradstreet must have assigned the firm a financial strength rating of 4A or 5A;

(5) the firm's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(c) The owner, operator, and/or guarantor must meet the requirements of this subsection referred to as Alternative 2.

(1) The owner, operator, and/or guarantor must meet the financial test requirements of §37.541(a) and (b) of this title (relating to Financial Test for Liability), substituting the appropriate amounts specified in §37.815(b)(1) and (2) of this title for the "amount of liability coverage" each time specified in that section.

(2) The fiscal year-end financial statements of the owner or operator, and/or guarantor, must be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination.

(A) The firm's year-end financial statements cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(B) The owner, operator, and/or guarantor, must have a letter signed by the chief financial officer as specified in subsection (d) of this section.

(3) If the financial statements of the owner, operator, and/or guarantor, are not submitted annually to the SEC, the Energy Information Administration or the Rural Electrification Administration, the owner, operator, and/or guarantor, must obtain a special report by an independent certified public accountant stating that:

(A) the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the independent certified public accountant which indicated that the specified data should be adjusted.

(d) To demonstrate that it meets the financial test under subsection (b) or (c) of this section, the chief financial officer of the owner, operator, and/or guarantor, must sign, within 120 days of the close of each financial reporting year, as defined by the 12-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in parentheses are to be replaced by the relevant information and the parentheses deleted.

Figure: 30 TAC §37.825(d)

LETTER FROM CHIEF FINANCIAL OFFICER

I am the chief financial officer of (insert: name and address of the owner, operator, or guarantor). This letter is in support of the use of (insert: "the financial test of self-insurance," and/or "guarantee") to demonstrate financial assurance for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases in the amount of at least (insert: dollar amount) annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this (insert: "owner or operator," and/or "guarantor"): (List for each facility: the name, address of the facility where tanks assured by this financial test are located and, for those facilities located in Texas, the TCEQ facility identification number. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the registration information submitted under §334.7 of this title (relating to Registration for USTs)).

This firm is the owner, operator, or guarantor of the following facilities for which financial assurance is being demonstrated under other TCEQ, EPA regulations, or state program authorized by EPA through a financial test or guarantee. (For each program area identify: the facility name, physical and mailing addresses, federal or state equivalent regulations, permit number, current cost estimate, and liability coverage. Identify for each current cost estimate the amount designated for closure, post closure, corrective action, or liability coverage.)

- (a) Municipal solid waste management facilities under 30 TAC Chapter 330, 40 Code of Federal Regulations (CFR) Part 258 or equivalent \$ _____
- (b) Underground injection control facilities under 30 TAC Chapter 331, 40 CFR Part 144 or equivalent \$ _____
- (c) PCB storage facilities under 40 CFR Part 761 or equivalent \$ _____
- (d) Hazardous waste treatment, storage, and disposal facilities under 30 TAC Chapter 335, 40 CFR Parts 264 and 265 or equivalent \$ _____
- (e) Additional environmental obligations not shown above \$ _____
- Total (a)-(e) \$ _____

This (insert "owner or operator," or "guarantor") has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on its financial statements for the latest completed fiscal year, which was (insert latest fiscal year-end date).

(Fill in the information for Alternative I if the criteria of §37.825(b) of this title (relating to Financial Test of Self-Insurance) are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of §37.825(c) of this title are being used to demonstrate compliance with the financial test requirements.)

ALTERNATIVE I

1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee \$ _____
 2. Sum of current cost estimates for closure, post closure, corrective action, and liability coverage (total of (a)-(e) directly above) \$ _____
 3. Sum of lines 1 and 2 \$ _____
 4. Total tangible assets \$ _____
 5. Total liabilities (if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6) \$ _____
 6. Tangible net worth (subtract line 5 from line 4) \$ _____
- | | Yes | No |
|---|-------|-------|
| 7. Is line 6 at least \$10 million? | _____ | _____ |
| 8. Is line 6 at least 10 times line 3? | _____ | _____ |
| 9. Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission? | _____ | _____ |
| 10. Have financial statements for the latest fiscal year been filed with the Energy Information Administration? | _____ | _____ |
| 11. Have financial statements for the latest fiscal year been filed with the Rural Electrification Administration? | _____ | _____ |
| 12. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating of 4A or 5A? | | |

(Answer "Yes" only if both criteria have been met.)

ALTERNATIVE II

1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee \$_____

2. Sum of current cost estimates for closure, post closure, corrective action and liability coverage (total of (a)-(e) directly above) \$_____

3. Sum of lines 1 and 2 \$_____

4. Total tangible assets \$_____

5. Total liabilities (if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6) \$_____

6. Tangible net worth (subtract line 5 from line 4) \$_____

7. Total assets in the U.S. (required only if less than 90 percent of assets are located in the U.S.) \$_____

Yes No

8. Is line 6 at least \$10 million? _____

9. Is line 6 at least 6 times line 3? _____

10. Are at least 90 percent of assets located in the U.S.? (If "No," complete line 11.) _____

11. Is line 7 at least 6 times line 3? _____

(Fill in either lines 12-15 or lines 16-18)

12. Current assets \$_____

13. Current liabilities \$_____

14. Net working capital (subtract line 13 from 12) \$_____

Yes No

15. Is line 14 at least 6 times line 3? _____

16. Current bond rating of most recent bond issue _____

17. Name of rating service _____

18. Date of maturity of bond _____

	Yes	No
19. Have financial statements for the latest fiscal year been filed with the SEC, the Energy Information Administration, or the Rural Electrification Administration?	_____	_____

(If "No," please attach a report from an independent certified public accountant certifying that there are no material differences between the data as reported in lines 4-18 above and the financial statements for the latest fiscal year.)

(For both Alternative I and Alternative II complete the certification with this statement.)

I hereby certify that the wording of this letter is identical to the wording specified in §37.825, as this regulation was constituted on the date shown immediately below.

(Insert signature) _____

(Insert name) _____

(Insert title) _____

(Insert date) _____

(e) If an owner or operator using the test to provide financial assurance finds that he or she no longer meets the requirements of the financial test based on the year-end financial statements, the owner or operator must obtain alternative coverage within 150 days of the end of the year for which financial statements have been prepared.

(f) The agency may require reports of financial condition at any time from the owner, operator, and/or guarantor. If the agency finds, on the basis of these reports or other information, that the owner, operator, and/or guarantor, no longer meets the financial test requirements of subsections (b) or (c) and (d) of this section, the owner or operator must obtain alternative coverage within 30 days after notification of this finding.

(g) If the owner or operator fails to obtain alternate financial assurance within 150 days of finding that he or she no longer meets the requirements of the financial test based on the year-end financial statements, or within 30 days of notification by the executive director that he or she no longer meets the requirements of the financial test, the owner or operator must notify the executive director of this failure within ten days.

§37.830. Guarantee.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be:

(1) a firm that:

(A) possesses a controlling interest in the owner or operator;

(B) possesses a controlling interest in a firm described under subparagraph (A) of this paragraph; or

(C) is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or

(2) a firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship.

(b) Within 120 days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of §37.825 of this title (relating to Financial Test of Self-Insurance) based on year-end financial statements for the latest completed financial reporting year by completing the letter from the chief financial officer described in §37.825(d) of this title and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within 120 days of the end of that financial reporting year the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. If the agency notifies the guarantor that he or she no longer meets the requirements of the financial test of §37.825(b) or (c) and (d) of this title the guarantor must notify the owner or operator within ten days of receiving this notification from the agency. In both cases, the guarantee will terminate no less than 120 days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternate coverage as specified in §37.890(c) of this title (relating to Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance).

(c) The guarantee must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.830(c)

GUARANTEE

Guarantee made this (insert date) by (insert name of guaranteeing entity), a business entity organized under the laws of the state of (insert name of state), herein referred to as guarantor, to the Texas Commission on Environmental Quality (TCEQ) and to any and all third parties, and obligees, on behalf of (insert owner or operator) of (insert business address).

Recitals

1. Guarantor meets or exceeds the financial test criteria of 30 TAC §37.825(b) or (c) and (d) and agrees to comply with the requirements for guarantors as specified in 30 TAC, §37.830(b).

2. (Insert owner or operator) owns or operates the following underground storage tank(s) covered by this guarantee: (List the number of tanks at each facility, the names(s) and address(es) and, for those facilities located in Texas, the TCEQ facility identification number of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under 30 TAC §334.7, and the name and address of the facility.) This guarantee satisfies Chapter 37, Subchapter I of this title (relating to Financial Assurance for Petroleum Underground Storage Tank Systems) requirements for assuring funding for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from operating the above-identified underground storage tank(s) in the amount of (insert dollar amount) per occurrence and (insert dollar amount) annual aggregate.

3. (Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator) or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)) (insert owner or operator), guarantor guarantees to the TCEQ and to any and all third parties that:

In the event that (insert owner or operator) fails to provide alternate coverage within 60 days after receipt of a notice of cancellation of this guarantee and the Executive Director of the TCEQ has determined or suspects that a release has occurred at an underground storage tank covered by this

guarantee, the guarantor, upon instructions from the Executive Director of the TCEQ, shall fund a standby trust fund in accordance with the provisions of §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms), in an amount not to exceed the coverage limits specified above.

In the event that the Executive Director of the TCEQ determines that (insert owner or operator) has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with Chapter 334, Subchapter D of this title (relating to Release Reporting and Corrective Action) of the guarantor upon written instructions from the executive director of the TCEQ shall fund a standby trust in accordance with the provisions of 30 TAC §37.880, in an amount not to exceed the coverage limits specified above.

If (insert owner or operator) fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from injury or damage, the guarantor, upon written instructions from the Executive Director of the TCEQ, shall fund a standby trust in accordance with the provisions of 30 TAC §37.880 to satisfy these judgement(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

4. Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of 30 TAC §37.825(b) or (c) and (d), the guarantor shall send within 120 days of this failure, by certified mail, notice to (insert owner or operator). The guarantee will terminate 120 days from the date of receipt of the notice by (insert owner or operator), as evidenced by the return receipt.

5. Guarantor agrees to notify (insert owner or operator) and the Executive Director of the TCEQ by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

6. Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of (insert owner or operator) under 30 TAC Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks).

7. Guarantor agrees to remain bound under this guarantee for so long as (insert owner or operator) must comply with the applicable financial responsibility requirements of 30 TAC Chapter 37, Subchapter I for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to (insert owner or operator), this cancellation to become effective no earlier than 120 days after receipt of the notice by (insert owner or operator), as evidenced by the return receipt.

8. The guarantor's obligation does not apply to any of the following:

a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);

c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank;

e. Bodily damage or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 30 TAC §37.815.

9. Guarantor expressly waived notice of acceptance of this guarantee by the TCEQ, by any or all third parties, or by (insert owner or operator).

I hereby certify that the wording of this guarantee is identical to the wording specified in 30 TAC §37.830(c), as this regulation was constituted on the effective date shown immediately below.

Effective date: _____

(Insert name of guarantor) _____

(Insert authorized signature for guarantor) _____

(Insert name of person signing) _____

(Insert title of person signing) _____

Signature of witness or notary: _____

(d) An owner or operator who uses a guarantee to satisfy the requirements of §37.815 of this title must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the executive director under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

§37.835. Insurance and Risk Retention Group Coverage.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. This insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.

(b) Each insurance policy must be amended by an endorsement as specified in paragraph (1) of this subsection or evidenced by a certificate of insurance as specified in paragraph (2) of this subsection, except that instructions in parentheses must be replaced with the relevant information and the parentheses deleted.

(1) Endorsement.

Figure: 30 TAC §37.835(b)(1)

ENDORSEMENT

Name: (Insert name of each covered location) _____

Address: (Insert address of each covered location) _____

Policy Number: _____

Period of Coverage: (Insert current policy period) _____

Name of Insurer or Risk Retention Group: _____

Address of Insurer or Risk Retention Group: _____

Name of Insured: _____

Address of Insured: _____

Endorsement:

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

(List the number of tanks at each facility, the names(s) and address(es) of the facility(ies) where the tanks are located and, for those facilities located in Texas, the TCEQ facility identification number. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under §334.7 of this title (relating to Registration for USTs), and the name and address of the facility.) for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy arising from operating the underground storage tank(s) identified in this paragraph.

The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location), exclusive of legal defense costs. This coverage is provided under (insert policy number). The effective date of said policy is (insert date).

2. The insurance afforded with respect to these occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subparagraphs (a) - (e) of this paragraph are to be amended to conform with these subparagraphs:

- a. Bankruptcy or insolvency of the insured shall not relieve the (insert "Insurer" or "Group") of its obligations under the policy to which this endorsement is attached.

- b. The (insert "Insurer" or "Group") is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any payment made by the (insert "Insurer" or "Group"). This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in §37.825 of this title (relating to Financial Test of Self-Insurance), §37.830 of this title (relating to Guarantee), §37.835 of this title (relating to Insurance and Risk Retention Group Coverage), §37.840 of this title (relating to Surety Bond), §37.845 of this title (relating to Letter of Credit), and §37.850 of this title (relating to Trust Fund).

c. Whenever requested by the Executive Director of the Texas Commission on Environmental Quality (TCEQ), the (insert "Insurer" or "Group") agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the (insert "Insurer" or "Group"), except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of this written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

(Insert for claims-made policies:

e. The insurance covers claims otherwise covered by the policy that are reported to the (insert "Insurer" or "Group") within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.)

I hereby certify that the wording of this instrument is identical to the wording in §37.835(b)(1) of this title (relating to Insurance and Risk Retention Group Coverage) and that the (insert "Insurer" or "Group") is (insert "licensed to transact the business of insurance" or "eligible to provide insurance as an excess or surplus lines insurer") in Texas.

(Insert signature of authorized representative of Insurer or Risk Retention Group)_____

(Insert name of person signing) _____

(Insert title of person signing) _____,
Authorized Representative of (Insert name of Insurer or Risk Retention Group)

(Insert address of Representative) _____

(2) Certificate of Insurance.

Figure: 30 TAC §37.835(b)(2)

CERTIFICATE OF INSURANCE

Name: (Insert name of each covered location) _____

Address: (Insert address of each covered location) _____

Policy Number: _____

Endorsement (if applicable): _____

Period of Coverage: (Insert current policy period) _____

Name of Insurer or Risk Retention Group: _____

Address of Insurer or Risk Retention Group: _____

Name of Insured: _____

Address of Insured: _____

Certification:

1. (Insert name of Insurer or Risk Retention Group), (insert the "Insurer" or "Group"), as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s): (List the number of tanks at each facility, the name(s) and address(es) of the facility(ies) where the tanks are located and, for those facilities located in Texas, the TCEQ facility identification number. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under §334.7 of this title (relating to Registration for USTs), and the name and address of the facility.) for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy arising from operating the underground storage tank(s) identified above.

The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location), exclusive of legal defense costs. This coverage is provided under (insert policy number). The effective date of said policy is (insert date).

2. The (insert "Insurer" or "Group") further certifies the following with respect to the insurance described in paragraph 1:

a. Bankruptcy or insolvency of the insured shall not relieve the (insert "Insurer" or "Group") of its obligations under the policy to which this certificate applies.

b. The (insert "Insurer" or "Group") is liable for the payment of amounts within any deductible applicable to the policy, to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any payment made by the (insert "Insurer" or "Group"). This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in §37.825 of this title (relating to Financial Test of Self-Insurance), §37.830 of this title (relating to Guarantee), §37.835 of this title (relating to Insurance and Risk Retention Group Coverage), §37.840 of this title (relating to Surety Bond), §37.845 of this title (relating to Letter of Credit), and §37.850 of this title (relating to Trust Fund).

c. Whenever requested by the Executive Director of the TCEQ, the (insert "Insurer" or "Group") agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the (insert "Insurer" or "Group"), except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of this written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

(Insert for claims-made policies:

e. The insurance covers claims otherwise covered by the policy that are reported to the (insert "Insurer" or "Group") within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.)

I hereby certify that the wording of this instrument is identical to the wording in 30 TAC §37.835(b)(2), and that the (insert "Insurer" or "Group") is (insert "licensed to transact the business of insurance" or "eligible to provide insurance as an excess or surplus lines insurer") in Texas.

(Insert signature of authorized representative of Insurer) _____

(Type name) _____

(Insert title) _____,

Authorized Representative of (insert name of Insurer or Risk Retention Group)

(Insert address of representative) _____

(c) Each insurance policy must be issued by an insurer or a risk retention group that, at a minimum, is licensed to transact the business of insurance or is eligible to provide insurance as an excess or surplus lines insurer in Texas.

§37.840. Surety Bond.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining a surety bond that conforms to the requirements of this section. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the United States Department of the Treasury.

(b) The surety bond must be worded as follows, except that instructions in parentheses must be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.840(b)

PERFORMANCE BOND

Date bond executed: _____

Period of coverage: _____

Principal: (insert legal name and business address of owner or operator) _____

Type of organization: (insert "individual," "joint venture," "partnership," or "corporation") _____

State of incorporation (if applicable): _____

Surety(ies): (insert name(s) and business address(es)) _____

Scope of Coverage: (List the number of tanks at each facility, the name(s) and address(es) of the facility(ies) where the tanks are located and, for those facilities located in Texas, the TCEQ facility identification number. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the name and address of the facility and the tank identification number provided in the registration information submitted under §334.7 of this title (relating to Registration for USTs). List the coverage guaranteed by the bond for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from operating the underground storage tank.)

Penal sums of bond: Per occurrence \$ _____ Annual aggregate \$ _____

Surety's bond number: _____

Know All Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to the Texas Commission on Environmental Quality (TCEQ) in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in these sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of these sums only as is set forth opposite the name of this Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under Texas Water Code, Chapter 26, Subchapter I, as amended, to provide financial assurance for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from operating the underground storage tanks identified above; and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide this financial assurance;

Now, therefore, the conditions of the obligation are that if the Principal shall faithfully take corrective action, in accordance with Chapter 334, Subchapter D of this title (relating to Release Reporting and Corrective Action) and the Executive Director of the TCEQ's instructions, and compensate injured third parties for bodily injury and property damage caused by accidental releases arising from operating the tank(s) identified above, or if the Principal shall provide alternate financial assurance, as specified in Chapter 37, Subchapter I of this title (relating to Financial Assurance for Petroleum Underground Storage Tank Systems) within 120 days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

This obligation does not apply to any of the following:

- a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);
- c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or
- e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 30 TAC §37.815.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by the Executive Director of the TCEQ that the Principal has failed to take corrective action, in accordance with 30 TAC Chapter 334, Subchapter D and the executive director's instructions, and/or compensate injured third parties as guaranteed by this bond, the Surety(ies) shall either perform corrective action in accordance with 30 TAC Chapter 334, Subchapter D and the executive director's instructions, and provide third-party liability compensation or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by the Executive Director of the TCEQ under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms).

Upon notification by the TCEQ Executive Director that the Principal has failed to provide alternate financial assurance within 60 days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that the executive director has determined or suspects that a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by the executive director under 30 TAC §37.880.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until this payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Whereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in §37.840(b) of this title (relating to Surety Bond), as this regulation was constituted on the date this bond was executed.

PRINCIPAL

(Insert signature(s)) _____

(Insert name(s)) _____

(Insert title(s)) _____

(Insert corporate seal)

CORPORATE SURETY(IES)

(Insert name and address) _____

State of Incorporation: _____

Liability limit: \$_____

(Insert signature(s)) _____

(Insert name(s) and titles(s)) _____

(Insert corporate seal)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

Bond premium: \$_____

(c) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums.

(d) The owner or operator who uses a surety bond to satisfy the requirements of §37.815 of this title must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the executive director under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

§37.845. Letter of Credit.

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section. The issuing institution must be an entity that has the authority to issue letters of credit in Texas and whose letter of credit operations are regulated and examined by a federal or state agency.

(b) The letter of credit must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.845(b)

IRREVOCABLE STANDBY LETTER OF CREDIT

(Insert name and address of issuing institution)

(Insert name and address of Executive Director of the Texas Commission on Environmental Quality)

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the account of (insert owner or operator name) of (insert address) up to the aggregate amount of (insert in words) U.S. dollars (\$(insert dollar amount)), available upon presentation of:

1. your sight draft, bearing reference to this letter of credit, No. _____; and
2. your signed statement reading as follows: "I certify that the amount of the draft is payable under regulations issued under authority of Texas Water Code, Chapter 26, Subchapter I, as amended".

This letter of credit may be drawn on to cover taking corrective action and/or "compensating third parties for bodily injury and property damage caused by accidental releases arising from operating the underground storage tank(s) identified below in the amount of (insert in words), \$(insert dollar amount), per occurrence and (insert in words), \$(insert dollar amount), annual aggregate:

(List the number of tanks at each facility, the name(s) and address(es) of the facility(ies) where the tanks are located and, for those facilities located in Texas, the TCEQ facility identification number. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the name and address of the facility and the tank identification number provided in the registration information submitted under §334.7 of this title (relating to Registration for USTs).)

The letter of credit may not be drawn on to cover any of the following:

- a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);
- c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or

e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility).

This letter of credit is effective as of (insert date) and shall expire on (insert date), but this expiration date shall be automatically extended for a period of (insert at least the length of the original term) on (insert expiration date) and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify (insert owner or operator) by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event the (insert owner or operator) is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by (insert owner or operator), as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor this draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of (insert owner or operator) in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in §37.845(b) of this title (relating to Letter of Credit) as this regulation was constituted on the date shown immediately below.

(Insert signature(s) and title(s) of official(s) of issuing institution) _____

(Insert date) _____

This credit is subject to (insert " the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code").

(c) An owner or operator who uses a letter of credit to satisfy the requirements of §37.815 of this title must also establish a standby trust fund when the letter of credit is acquired. Under the terms of the letter of credit, all amounts paid under a draft by the executive director will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the executive director

under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

(d) The letter of credit must be irrevocable with a term specified by the issuing institution. The letter of credit must provide that credit be automatically renewed for the same term as the original term, unless, at least 120 days before the current expiration date, the issuing institution notifies the owner or operator by certified mail of its decision not to renew the letter of credit. Under the terms of the letter of credit, the 120 days will begin on the date when the owner or operator receives the notice, as evidenced by the return receipt.

§37.855. Standby Trust Fund.

(a) An owner or operator using any one of the mechanisms authorized by §37.830 of this title (relating to Guarantee), §37.840 of this title (relating to Surety Bond), or §37.845 of this title (relating to Letter of Credit) must establish a standby trust fund when the mechanism is acquired. The trustee of the standby trust fund must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the State of Texas.

(b) The standby trust agreement or trust agreement must be worded as follows, except the instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.855(b)

TRUST AGREEMENT

Trust agreement, the "Agreement," entered into as of (insert date) by and between (insert name of the owner or operator), a (insert name of state) (insert "corporation," "partnership," "association," or "proprietorship"), the "Grantor," and (insert name of corporate trustee), (insert "Incorporated in the state of _____" or "a national bank"), the "Trustee."

Whereas, the Texas Commission on Environmental Quality (TCEQ) has established certain regulations applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed or corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached Schedule A lists the number of tanks at each facility, the name(s) and address(es) of the facility(ies) where the tanks are located and, for those facilities located in Texas, the TCEQ facility identification number that are covered by the standby trust agreement;

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee.

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

- a. The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.
- b. The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.
- c. The term "Executive Director" means the Executive Director of the TCEQ.

Section 2. Identification of the Financial Assurance Mechanism. This Agreement pertains to the (insert the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments). (This paragraph is only applicable to the standby trust agreement.)

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the TCEQ. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. (Note: The Fund is established initially as a standby to receive payments and shall not consist of any property.) Payments made by the provider of financial assurance under the Executive Director's instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee under this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the TCEQ.

Section 4. Payment for Corrective Action and Third-Party Liability Claims. The Trustee shall make payments from the Fund as the Executive Director shall direct, in writing, to provide for the payment of the costs of taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);

c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or water craft;

d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or

e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Assurance).

The Trustee shall reimburse the Grantor, or other persons as specified by the Executive Director, from the Fund for corrective action expenditures and/or third-party liability claims in amounts as the Executive Director specifies in writing. In addition, the Trustee shall refund to the Grantor such amounts as the Executive Director specifies in writing. Upon refund, these funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with these matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

a. Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 United States Code §80A-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;

b. The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and

c. The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

a. To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

b. To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 USC §80a-1 *et seq.*, including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote these shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

a. To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any sale or other disposition;

b. To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

c. To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing these securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of these securities in a qualified central depository even though, when so deposited, these securities may be merged and held in bulk in the name of the nominee of this depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all these securities are part of the Fund;

d. To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and

e. To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 11. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 12. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but this resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee and this successor accepts the appointment. The successor Trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor Trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of successor Trustee or for instructions. The successor Trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by certified mail 10 days before this change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 13. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by persons as are designated in the attached Schedule B or other designees as the Grantor may designate by amendment to Schedule B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Executive Director to the Trustee shall be in writing, signed by the Executive Director or the Executive Director's designee, and the Trustee shall act and shall be fully protected in acting in accordance with these orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Executive Director hereunder has occurred. The Trustee shall have no duty to act in the absence of these orders, requests, and instructions from the Grantor and/or the Executive Director, except as provided for herein.

Section 14. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and the Executive Director if the Grantor ceases to exist.

Section 15. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the Executive Director, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 16. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Executive Director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide this defense.

Section 17. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the state of Texas, or the Comptroller of the Currency in the case of National Association banks.

Section 18. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in §37.855(b) of this title (relating to Standby Trust Fund), as this regulation was constituted on the date written above.

(Insert signature of grantor) _____

(Insert name of the grantor) _____

(Insert title) _____

Attest:

(Insert signature of trustee) _____

(Insert name of the trustee) _____

(Insert title) _____

(Insert seal)

Attest:

(Insert signature of witness) _____

(Insert name of witness) _____

(Insert title) _____

(Insert seal)

(c) The standby trust agreement or trust agreement must be accompanied by a formal certification of acknowledgment similar to the following:

Figure: 30 TAC §37.855(c)

CERTIFICATION

State of _____ County of _____

On this (insert date), before me personally came (insert owner or operator) to me known, who, being by me duly sworn, did depose and say that she/he resides at (insert address), that she/he is (insert title) of (insert corporation), the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to this instrument is this corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that she/he signed her/his name thereto by like order.

(Insert signature of Notary Public)(Insert name of Notary Public)

(d) The executive director will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the executive director determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.

(e) An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this rule.

§37.867. Duty to Empty Tanks After Termination of Financial Assurance.

(a) The owner or operator of a tank for which insurance coverage or other financial assurance has terminated shall ensure that the tank is empty, as defined in §334.54(d) of this title (relating to Temporary Removal from Service), not later than the 90th day after the coverage terminates, unless the owner or operator provides the commission proof that the owner or operator maintains evidence of financial responsibility. The owner or operator shall demonstrate that the tank is empty by submitting evidence satisfactory to the executive director if requested by the executive director.

(b) Any regulated substances removed from the tank must be handled properly, in accordance with agency requirements. If the regulated substances are disposed of, disposal must be at a properly licensed facility.

(c) Failure to empty a tank, or to demonstrate to the executive director that it has been emptied as required under subsection (a) of this section may be considered by the commission to be a separate violation in addition to a violation for failure to maintain financial assurance as required by §37.815 of this title (relating to Amount and Scope of Required Financial Assurance).

(d) An owner or operator may demonstrate that the owner or operator had been released from financial assurance requirements by having met all the requirements of §37.885 of this title (relating to Release from the Requirements) prior to the date of financial assurance termination. However, even in the case where a tank has been properly temporarily removed from service by having met all the requirements of §334.54 of this title, including corrosion protection and leak detection, regulated substances may not remain in the tank longer than 90 days, in accordance with subsection (a) of this section.

(e) Subsection (a) of this section does not affect the commission's authority to require a shutdown of a facility under Texas Water Code, §26.3475(e), nor any other sections, rules, or statutes, with regard to financial assurance.

§37.870. Reporting, Registration, and Certification.

(a) Reporting. An owner or operator must submit the appropriate forms listed in §37.875(b) of this title (relating to Financial Assurance Recordkeeping) documenting current proof of financial assurance to the executive director:

(1) within 30 days after the owner or operator identifies a release from an underground storage tank (UST) required to be reported under Chapter 334, Subchapter D of this title (relating to Release Reporting and Corrective Action), unless current financial assurance documentation is already on file with the agency;

(2) if the owner or operator fails to obtain alternate coverage as required by this subchapter, within 30 days after the owner or operator receives notice of:

(A) commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming a provider of financial assurance as a debtor;

(B) suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism;

(C) failure of a guarantor to meet the requirements of the financial test; or

(D) other incapacity of a provider of financial assurance;

(3) as required by §37.825 of this title (relating to Financial Test of Self Insurance) and §37.865 of this title (relating to Cancellation or Non-renewal by a Provider of Financial Assurance); or

(4) when requested by the agency.

(b) Registration. An owner or operator must register and update the registration whenever there is a change in the financial assurance mechanism or coverage amount, as specified in §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems). The owner or operator must identify, in the appropriate space on the authorized agency form, the financial assurance mechanisms used to demonstrate compliance with corrective action and third party liability as described

in this subchapter. The owner or operator must submit with the form documentation evidencing current financial assurance. Appropriate documentation is that described in this subchapter, or otherwise indicated by the commission in instructions on the form.

(c) For certification requirements for petroleum USTs, refer to §334.8(b) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems).

§37.885. Release from the Requirements.

(a) An owner or operator is no longer required to maintain financial assurance under this subchapter for an underground storage tank after the tank has been:

(1) properly temporarily removed from service, in accordance with the requirements of §334.54 of this title (relating to Temporary Removal from Service);

(2) properly permanently removed from service in accordance with the requirements of §334.55 of this title (relating to Permanent Removal from Service); or

(3) if corrective action is required, after corrective action has been completed and the tank has been properly removed from service in accordance with the requirements of §334.55 of this title.

(b) In order to be released from financial assurance requirements under this section, the owner or operator must notify the commission of the change in status in accordance with §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems).