

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §334.5 and §334.84; and proposes new §334.19.

### **Background and Summary of the Factual Basis for the Proposed Rules**

The TCEQ Sunset legislation, House Bill (HB) 2694, was adopted during the 82nd Legislature, 2011, and signed by the Governor on June 17, 2011. Included in the legislation were statutory changes addressing petroleum storage tank (PST) regulation. This rulemaking is required to address several of the statutory changes: underground storage tank (UST) delivery prohibition; State Lead tank removal authorization; and the setting of the PST delivery fee.

### **Section by Section Discussion**

#### *§334.5, General Prohibitions for Underground Storage Tanks (USTs) and UST Systems*

The commission proposes to amend §334.5(b). The term, "delivery prohibition" refers to the prohibition of persons making deliveries of fuel or other regulated substances into USTs that have not been issued a delivery certificate. A delivery certificate is issued when a tank owner or operator submits a registration and self-certification form to the TCEQ attesting to compliance with administrative and technical requirements for their tanks. Rulemaking on this issue is required to bring Texas into compliance with the federal Energy Policy Act of 2005 (Pub.L. 109-58, August 8, 2005, 119 Stat. 294,

codified at 42 United States Code, §15801) (Energy Act). The Energy Act states:  
"Beginning 2 years after the date of enactment of this section, it shall be unlawful to deliver to, deposit into, or accept a regulated substance into an underground storage tank at a facility which has been identified by the Administrator or a State implementing agency to be ineligible for such delivery, deposit, or acceptance." Since Texas has a federally approved state PST program, it is required to implement delivery prohibition. Assessment of administrative penalties against persons for unlawful deliveries is expected to deter fuel deliveries to out-of-compliance PST facilities.

Delivery prohibition, also referred to as common carrier liability, is not new for Texas, which began January 1, 1990. Although common carrier liability was removed from statute with Texas Senate Bill 485 (79th Legislature, 2005) and from rules on June 2, 2006 (see 31 TexReg 4529), the recent TCEQ Sunset legislation effectively reinstated it. However, the TCEQ Sunset legislation did not replace language removed by Senate Bill 485 in 2005 in Texas Water Code (TWC), §7.156, relating to criminal liability, which had made unauthorized delivery a Class A misdemeanor. Therefore, this proposal reinstates administrative liability for common carriers and does not address criminal or misdemeanor liability.

Although the proposed changes to §334.5 regarding delivery prohibition deletes the term, "owner or operator" and inserts the term, "common carrier " the substantive effect

of this proposed change is not to remove owner/operator liability because existing §334.8(c)(5)(A) states that the owner or operator must make available a valid delivery certificate to a common carrier before delivery of a regulated substance may be accepted. Thus, within Subchapter A, §334.5, actions or obligations of a common carrier with regard to making deliveries are addressed, while §334.8 continues to address owners' and operators' obligations with regard to delivery certificates and acceptance of deliveries. Both aspects of delivery prohibition (delivery and acceptance) are required under the Energy Act.

*§334.19, Fee on Delivery of Petroleum Product*

The commission proposes new §334.19, relating to the setting of the PST delivery fee. Revenue from this fee is deposited to the Petroleum Storage Tank Remediation (PSTR) Account 655, described in TWC, §26.3574. Under that section, a fee is imposed on the delivery of a petroleum product that has been removed from a bulk facility storage tank for delivery directly into a cargo tank or a barge to be transported to another location for distribution or sale in the state. The fee amounts were set as specific dollar amounts in statute to correspond with cargo tank capacity. For example, the current statutory fees are \$3.75 for each delivery into a cargo tank having a capacity of less than 2,500 gallons; \$7.50 for 2,500 to 5,000 gallons; \$11.75 for 5,000 to 8,000 gallons; \$15.00 for 8,000 to 10,000 gallons; and \$7.50 for each increment of 5,000 gallons delivered into a cargo tank having a capacity of more than 10,000 gallons. These fee amounts were adjusted

by statutory changes in prior legislation.

However, in HB 2694, the TCEQ Sunset legislation amended the statutory fees to caps (i.e., *not more than* \$3.75) and directed the commission by rule to, "set the fee in an amount not to exceed the amount necessary to cover the agency's costs of administering this subchapter, as indicated by the amount appropriated by the legislature from the petroleum storage tank remediation account for that purpose. " In the past, the TCEQ was not required to state the PST delivery fee in rule. However, the Texas Comptroller of Public Accounts' (Comptroller's) rules on this subject did state the statutorily-set fee amounts (see 34 TAC §3.151, "Imposition, Collection, and Bonds or Other Security of the Fee"). The TCEQ Sunset legislation directed the TCEQ to set the amount of the fee, with the Comptroller continuing to collect it.

Since the statute requires the TCEQ to set the fees in an amount not to exceed the amount necessary to cover costs of administering the program, the TCEQ must adjust the fee rate on an ongoing basis, as appropriate, to comply with this statutory requirement. Therefore, in this rulemaking, the TCEQ is proposing to set the fee at an amount to secure sufficient revenue to support the current appropriations and other fund obligations, while allowing for the fee to be adjusted based on relevant factors such as anticipated future costs, appropriations, and fund obligations. To account for the expedited timeframe necessary for future fee adjustments within the statutory cap and based on appropriations, the proposed rules would allow the fee to be adjusted in future

years without initiating rulemaking by the TCEQ. Rather, the proposed rule would allow for a process including but not limited to notification in the *Texas Register* with receipt of public comment. In this manner, the Comptroller would be able to rely on an official statement by the TCEQ of the fee amount necessary to achieve the required revenue based on the legislature's appropriation. The TCEQ solicits specific comment on the amount of the fee, and in particular on the proposal reflected in the rule that the agency would adjust the fee as necessary to comply with the statutory requirement through notification in the *Texas Register* and not through a full rulemaking process.

*§334.84, Corrective Action by the Agency*

The commission proposes to amend §334.84, relating to State Lead authorization for removal of UST systems at facilities which meet certain criteria, including a determination of financial inability of the tank owner or operator to remove the tank and the assessment of the potential risk of contamination from the site. This change is being made to implement HB 2694, §4.17 and §4.18. The statutory change to TWC, §26.351 was intended to clarify that section of the statute. Under that section, the commission was clearly authorized to undertake corrective action "in response to a release or a threatened release" under certain conditions. The conditions were: if the owner or operator "is unwilling," "cannot be found," "is unable" or "more expeditious corrective action is necessary." However, the term "threatened release," was not defined. In addition, TWC, §26.351(a), the subsection defining corrective action to

include tank removal, referred only to corrective action being done "in response to a release." This subsection did not mention "threatened release." One interpretation was that the TCEQ State Lead program was authorized to remove tanks only as part of corrective action where a release had already been confirmed (by another party). However, additional ambiguity existed since the statute already defined, "risk-based corrective action" in TWC, §26.342(15) as including "*site assessment* or site remediation (emphasis added)." Thus, it was questionable whether "corrective action" by State Lead could include "assessment" to determine whether tanks had leaked. The TCEQ Sunset legislation clarified the authorization for the TCEQ to undertake corrective action to remove an underground or aboveground storage tank.

In accordance with the legislation, rules will authorize tank system removal when the tank: 1) is not in compliance with the requirements of this chapter; 2) is temporarily out of service or out of operation; 3) presents a contamination risk; and 4) is owned or operated by a person who is financially unable to remove the tank. The proposed rules describe the factors for determining financial inability and for the assessment of the potential risk of contamination from the site. Also, the term, "out of service" in the statute is being clarified in the rule as referring to "temporarily out of service as described in 30 TAC §334.54(a) or out of operation as defined in 30 TAC §334.2(71)." This language is intended to avoid confusion because the phrase "out of service" is not defined; however, commission rules already have several defined terms relating to tank

status, such as "in operation," "in service," "out of operation," "temporary removal from service," and "permanent removal from service."

**Fiscal Note: Costs to State and Local Government**

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency as a result of the administration or enforcement of the proposed rules. The proposed rules implement certain provisions of HB 2694 including the reauthorization of the PST Delivery Fee, which was scheduled to expire August 31, 2011. Other state agencies and units of local government that own or operate PSTs are expected to pay lower PST delivery fees than in previous years as a result of the proposed rules.

This rulemaking would implement HB 2694, §§4.16 - 4.19, 82nd Legislature, by amending Chapter 334. The changes would reinstate common carrier liability; allow the removal of underground or aboveground storage tanks under certain circumstances; set the PST delivery fee; and allow for a process to revise the fee as needed. The proposed rules concerning common carrier liability are required to comply with the federal Energy Policy Act of 2005, and they prohibit the delivery of regulated substances to out of compliance PST facilities.

*PST Delivery Fee*

The PST delivery fee had been set to expire on August 31, 2011. HB 2694 reauthorized the collection of the fee in Account 655 - Petroleum Storage Tank Remediation, and required the agency to set the rates in rule so that revenue collected covers the cost of administering the program. Rates under agency rule could not exceed the maximum rates found in TWC, §23.3574. PST delivery fee rates will continue to correspond to cargo tank capacity as was done in the past, but the rates will be set to only allow the agency to recoup the cost of administering the program, including fund obligations, as well as, the Comptroller's cost of collection. Revenue will be collected by the Comptroller. The rates charged under the proposed rules are expected to be approximately 27% less for the next five years than current rates.

As a result of the proposed rate structure, agency revenue in Account 655 is estimated to be \$28.3 million in Fiscal Year 2012, \$22.4 million in Fiscal Year 2013, \$22.7 million in Fiscal Year 2014, and \$23.1 million in Fiscal Year 2015. Revenue collected under the proposed rules will be less than would have been collected under the previous rate structure. However, since the proposed rules continue the collection of the PST delivery fee, the agency will be able to continue to administer the PST program. In addition, the agency will be allowed to remove non-compliant USTs through the State Lead program since the proposed rules expand the scope of activity for which the PST delivery fee can be used.

*Administrative Penalties*

The proposed rules reinstate common carrier liability and authorize the agency to assess administrative penalties for violations if regulated substances are delivered to out of compliance PST facilities. Federal regulations require the agency to prohibit these types of deliveries. Penalties for violations are set in the agency's penalty policy, and the amount of a penalty depends on the type of violation.

*Impact on Other State Agencies and Units of Local Government*

The agency estimates that there are 1,200 storage tanks owned or operated by other state agencies and 4,800 owned or operated by units of local government. USTs owned by governmental entities would include those used in operating and maintaining vehicle fleets. Under the proposed rules, these governmental entities will continue to pay the PST delivery fee. However, the rates of the delivery fee set in the proposed rules are an estimated 27% lower than the fees established in prior years. The exact amount of reduction in the PST delivery fee for each governmental entity will depend on the cargo tank capacity of the USTs owned or operated. Cumulatively, state agencies are expected to pay \$500,000 less per year under the proposed rate structure, and the statewide reduction in PST delivery fee revenue for units of local government is expected to be \$2 million less once the proposed rates are in effect.

### **Public Benefits and Costs**

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be continued protection of the environment and public health and safety through continued removal of non-compliant USTs and prevention of releases of regulated substances to the environment since owners and operators of PSTs will be required to comply with technical standards in order to receive fuel deliveries.

The proposed rules are not expected to have a fiscal impact on most individuals, but individuals that own or operate PSTs should expect to experience the same fiscal impacts as those experienced by large and small businesses.

The agency estimates that there could be as many as 9,900 USTs owned or operated by large businesses. These large businesses may be affected by the proposed rules to the extent that the PST delivery fee is paid by them. However, the PST delivery fee will be assessed at rates that are approximately 27% lower than rates charged in prior years.

The proposed PST delivery fee imposed on large businesses will depend on cargo tank capacity. Statewide rates for large businesses are expected to be \$4 million less per year once the proposed rates are in effect.

The proposed rules will also benefit owners or operators of non-compliant USTs who are

financially unable to remove them. The proposed rules will allow the PST delivery fee revenues, as appropriated, to be used to remove USTs through the State Lead program if non-compliant owners are financially unable to remove these USTs and there is a risk of contamination.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses under the proposed rules. Approximately 2,030 storage tanks are thought to be owned by small or micro-businesses. Small businesses will continue to pay the PST delivery fee under the proposed rules, but statewide, small businesses are expected to pay \$900,000 less per year than they paid in previous years once the proposed rates are in effect.

### **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 are required to protect the environment, comply with federal regulations, and implement state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

### **Local Employment Impact Statement**

The commission has reviewed this proposed rulemaking and determined that a local

employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to 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 intended 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.

Regarding the first part of that definition, the specific intent of this rulemaking is to "protect the environment or reduce risks to human health from environmental exposure": 1) by ensuring that unauthorized USTs (i.e., tanks which have not been issued a delivery certificate by the TCEQ based on a self-certification of compliance with administrative and technical tank rules) do not receive deliveries of regulated substances by reinstating liability of persons who make deliveries to such tanks; 2) by implementing the petroleum products delivery fee which funds the PSTR account, pursuant to TWC,

§26.3573 and §26.3574, to support the agency's PST regulatory program, whose purpose is to both prevent and remediate releases from USTs into the environment; and 3) by clarifying the agency's authority to address existing releases or prevent future releases by removing out-of service USTs where there is a contamination risk and the tanks are owned or operated by a person who is financially unable.

However, the second part of the definition of a "major environmental rule" is not met: 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. The term, "material" means "having real importance or great consequence" in contrast to incidental or insignificant impact.

With regard to delivery prohibition, the proposed rules do not have an adverse effect, as described, for the reason that no additional cost is imposed on common carriers when they ascertain whether a PST facility has a valid, current delivery certificate. They may view paper copies of the delivery certificate or view the agency's Web site to determine whether a site has a delivery certificate. PST facility owners and operators are already required to ensure that a delivery certificate is made available for the common carrier to view. Thus, there are no costs associated with common carrier compliance with delivery prohibition.

With regard to the setting of the petroleum product delivery fee, there are no adverse effects as described above for the reason that the amount of the fee is being reduced. This reduction will likely benefit the economy, productivity, competition, and jobs, without adversely affecting the environment or public health, since the fee is being continued at a rate sufficient to meet the central PST Program functions of preventing and addressing releases. Under language in the TCEQ Sunset legislation, TWC, §26.3574 (b-1) states that the commission by rule shall set the amount of the fee in an amount not to exceed the amount necessary to cover the agency's costs of administering this subchapter, as indicated by the amount appropriated by the legislature from the PST remediation account for that purpose. Because the legislative intent is that the fee no longer brings in more revenue than is needed to support appropriations and fund obligations, economic savings or benefits will be seen by the payers of the fee, and possibly indirectly by other consumers if savings are passed on.

Lastly, regarding the clarifying of the TCEQ's authority to remove out-of-service USTs when there is a contamination risk and an owner/operator is financially unable, there are no adverse impacts on 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. The TCEQ Sunset legislation added new subsection TWC, §26.351 (c-1), which clarified that the commission may undertake corrective action to remove an underground or aboveground storage tank that: 1) is not in compliance with the

requirements of this chapter; 2) is out of service; 3) presents a contamination risk; and 4) is owned or operated by a person who is financially unable to remove the tank.

Because funding for this authority comes from the appropriation from the PSTR account, no additional or different funds will be required above existing appropriations. Therefore, this aspect of the rule will not cause a material adverse effect on 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. Rather, the removal of non-compliant tanks which pose a risk has a direct beneficial effect on the environment and public health and safety, while indirectly having a possible benefit on the economy by returning properties with potential environmental hazards to productive use.

Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, 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." None of these four elements

is applicable; the proposed rule package does not exceed any federal or state requirements, nor exceed delegation agreements or contracts. The proposed rules are made to implement specific statutory amendments made during the recent TCEQ Sunset legislation and are not proposed solely under the general powers of the agency.

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

### **Takings Impact Assessment**

The commission evaluated the proposed rules and performed an assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007.

The specific purpose of the proposed rules is to implement statutory changes relating to PSTs made with the recent TCEQ Sunset legislation. More specifically, the rule proposal has the purposes of: 1) ensuring that unauthorized USTs (i.e., tanks which have not been issued a delivery certificate by the TCEQ based on a self-certification of compliance with administrative and technical tank rules) do not receive deliveries of regulated substances by reinstating liability of persons who make deliveries to such tanks; 2) implementing the petroleum products delivery fee which funds the PSTR account, pursuant to TWC, §26.3573 and §26.3574, and which is used to support the agency's PST regulatory program, whose purpose is to both prevent and remediate releases from USTs into the

environment; and 3) clarifying the agency's authority to address existing releases or prevent future releases by removing out of service USTs where there is a contamination risk and the tanks are owned or operated by a person who is financially unable. The proposed rules would substantially advance these stated purposes by amending and adding to rule sections to: 1) allow for administrative penalties against persons who deliver to unauthorized tanks; 2) continue the petroleum products delivery fee at appropriate amounts; and 3) allow the agency to remove USTs under the appropriate circumstances.

The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because the proposed rules in total are a government action which: is taken in response to a real and substantial threat to public health and safety; 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.

Regarding the first criterion, the rules are taken in response to a real and substantial threat to public health and safety. First, the storage of regulated substances in USTs poses a potential threat to the environment that must be regulated, and the regulatory changes being proposed in this rulemaking address that potential threat by prohibiting persons from delivering to unauthorized tanks. Second, implementing the statutory

continuation of the petroleum products delivery fee at appropriate amounts is necessary to support the regulatory program that remediates and prevents UST contamination.

Third, the rules implement the statutory authority for the agency to remove USTs when a threat is being posed by a non-compliant, out of service tank whose owner or operator is financially unable.

Regarding the second criterion, the proposed rules are designed to significantly advance the health and safety purpose by creating disincentives for persons making deliveries to unauthorized tanks; by continuing to fund a program which both prevents and cleans up releases; and by allowing for direct action by the commission to remove USTs under certain critical circumstances. Regarding the third criterion, the proposed rules do not impose a greater burden than is necessary to achieve the health and safety purpose because: 1) there is no significant burden to common carriers to check delivery certificate status before making deliveries; 2) there is no burden associated with the measured and carefully tailored reduction of the petroleum products delivery fee; and 3) there is no burden associated with the TCEQ taking direct action to remove tanks under circumstances when private parties are financially unable to do so. In summary, this action is exempt under Texas Government Code, §2007.003(b)(13).

Nevertheless, the commission further performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The

proposed rules implement statutory changes made by the TCEQ Sunset legislation by reinstating the PST delivery prohibition, extending the petroleum products delivery fee, and clarifying the agency's authority to remove non-compliant and out of service USTs which pose a contamination risk and are owned or operated by persons who are financially unable. 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. There are no burdens imposed on private real property from these proposed rules and the benefits to society of implementing the proposed rules are: 1) the effect of decreasing the likelihood of regulated substances being delivered to USTs which may cause releases; 2) the effect of continuing the fee which funds the PST program whose goal is to prevent and remediate releases from tank systems; and 3) the effect of allowing certain USTs which pose a threat to be removed by the commission. 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 proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the

Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include two of the goals listed in 31 TAC §505.12: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs. Because this rulemaking: a) prevents deliveries to unauthorized tanks; b) continues the fee to fund the PST program to prevent and remediate releases from PSTs and; c) allows direct action by the commission to remove USTs which pose a risk in appropriate circumstances, it will therefore aid in ensuring that releases to the environment continue to be addressed. This rulemaking is consistent with the goals of protecting and preserving coastal environments.

None of the CMP policies stated in 31 TAC §501.13 are relevant to, nor are they adversely affected by, the proposed rules for the reason that there are no substantive changes relating to provision of information, monitoring of compliance, or variances.

Additionally, none of the specific policies described in 31 TAC §§501.16 - 501.34 apply to

this rulemaking.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, and because these rules do not create or have a direct or significant adverse effect on any CNRAs.

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 on Wednesday, December 14, 2011 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are

planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Charlotte Horn, MC 205, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-038-334-WS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Jonathan Walling, Petroleum Storage Tank and Dry Cleaner Remediation Program Section, (512) 239-2295.

**SUBCHAPTER A: GENERAL PROVISIONS**  
**§334.5, §334.19**

**Statutory Authority**

The sections are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, 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; TWC, §26.3467(d), which requires the commission to make rules relating to the duty to ensure certification of a tank before delivery; and TWC, §26.3574(b-1), which requires the commission to set the amount of the petroleum products delivery fee.

The proposed sections implement changes in laws of this state made during the 82nd Legislature, 2011, with the passage of the TCEQ Sunset legislation, House Bill 2694, in particular changes made to TWC, §26.3467 and §26.3574.

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

(a) Design prohibitions. On or after September 1, 1987, no person may install or have installed an underground storage tank (UST) system for the purpose of storing or otherwise containing regulated substances unless such UST system, whether of single-wall or double-wall construction, meets the following standards.

(1) The UST system must prevent releases due to corrosion or structural failure for the operational life of the UST system.

(2) All components of the UST system must be either cathodically protected against corrosion, constructed of noncorrodible material, constructed of a steel material which has been clad with a noncorrodible material, or must be otherwise designed and constructed in a manner that prevents the release of any stored substances.

(3) The UST system must be constructed of, or lined with, a material that is compatible with the stored substance.

(b) Delivery prohibitions.

(1) Concerning UST systems which the tank owner or operator must self-certify under §334.8(c) of this title (relating to Certification for Underground Storage Tanks (USTs) and UST Systems), the following applies.

(A) Except as provided under subparagraphs (B) and (C) of this paragraph, no common carrier (as defined in §334.2 of this title (relating to Definitions)) shall deposit any regulated substance into [owner or operator of] a UST system regulated under this chapter [shall allow the deposit of any regulated substance into that UST system] unless that owner or operator has a valid, current delivery certificate issued by the agency covering that UST system.

(B) For new or replacement UST systems, only during the initial period ending 90 days after the date that a regulated substance is first deposited into the new or replacement system(s), a common carrier may accept, as adequate to meet the requirements of subparagraph (A) of this paragraph documentation that the owner or operator has a "temporary delivery authorization," as defined in §334.8(c)(5)(D) of this title, issued by the agency for the facility at which the new or replacement UST system(s) exist. [will be considered adequate to meet the requirements of subparagraph (A) of this paragraph.]

(C) It is an affirmative defense to the imposition of an administrative penalty for a violation of subparagraph (A) of this paragraph that the person delivering a regulated substance into an UST relied on:

(i) a valid paper delivery certificate presented by the owner or operator of the UST or displayed at the facility associated with the UST;

(ii) a temporary delivery authorization presented by the owner or operator of the UST or displayed at the facility associated with the UST; or

(iii) registration and self-certification information for the UST obtained from the commission's Internet Web site not more than 30 days before the date of delivery.

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

(A) Except as provided under subparagraph (B) of this paragraph, no [owner or operator of a] person (as defined in §334.2 of this title) shall deposit any

regulated substance into a UST system regulated under this chapter [shall allow the deposit of any regulated substance into that UST system] unless that owner or operator has a valid, current registration certificate issued by the agency covering that UST system.

(B) The prohibition referenced in subparagraph (A) of this paragraph is not applicable to deliveries into a new or replacement UST system occurring within 30 days of the first deposit of regulated substances.

(3) Concerning both types of delivery prohibition referenced in this subsection, the following documentation is considered adequate:

(A) the original valid, current document issued by the agency; or

(B) a legible copy of the valid, current document issued by the agency.

**§334.19. Fee on Delivery of Petroleum Product.**

(a) A fee is imposed on the delivery of a petroleum product on withdrawal from bulk of that product as provided by this subsection and pursuant to Texas Water Code,

§26.3573. "Withdrawal from bulk means" the removal of a petroleum product from a bulk facility storage tank for delivery directly into a cargo tank or a barge to be transported to another location other than another bulk facility for distribution or sale in this state. Each operator of a bulk facility on withdrawal from bulk of a petroleum product shall collect from the person who orders the withdrawal a fee in an amount determined as follows, subject to future adjustments made under subsection (b) of this section:

(1) \$2.75 for each delivery made after June 30, 2012 into a cargo tank having a capacity of less than 2,500 gallons.

(2) \$5.50 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 2,500 gallons or more but less than 5,000 gallons.

(3) \$8.65 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 5,000 gallons or more but less than 8,000 gallons.

(4) \$11.00 for each delivery made after June 30, 2012 into a cargo tank having a capacity of 8,000 gallons or more but less than 10,000 gallons and;

(5) \$5.50 for each increment of 5,000 gallons or any part thereof delivered after June 30, 2012 into a cargo tank having a capacity of 10,000 gallons or more.

(b) TCEQ may adjust the fee rates in subsection (a) of this section through an appropriate notification process, such as but not limited to *Texas Register* publication with public comment, based on the agency's cost of administering this chapter, but not to exceed the maximum rates set by Texas Water Code, §26.3574. The projected rates will account for the biennial appropriations to the agency from the Petroleum Storage Tank Remediation Account Number 655, as well as fund obligations for Account Number 655, with projected revenue from the fee based on such factors as estimated fuel sales, population growth, consumer price index, and gas production.

**SUBCHAPTER D: RELEASE REPORTING AND CORRECTIVE ACTION**  
**§334.84**

**Statutory Authority**

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, 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); 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; and TWC, §26.351(c-2), which requires the commission to adopt rules to implement rules regarding the commission's undertaking of corrective action to remove a UST.

The proposed amendment implements changes in laws of this state made during the 82nd Legislature, 2011, with the passage of the Sunset Legislation in House Bill 2694, in

particular changes made to TWC, §26.351 and §26.3573.

**§334.84. Corrective Action by the Agency.**

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

(1) the owner or operator of the aboveground storage tank (AST) or underground storage tank (UST) is unwilling to take appropriate corrective action;

(2) the owner or operator of the AST or UST cannot be found;

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

(4) the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571; has been granted such extension by the executive director; has applied to the agency in writing on an agency application form not later than July 1, 2011, to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program administered by the commission; and has

agreed on the application form to allow access to that site to state personnel and state contractors. Once the executive director places such a site in the state lead program, the eligible owner or operator of that site is not liable to the commission for any corrective action costs incurred by the state lead program with regard to the site, unless the statutorily allowable maximum cost per site is exceeded; or

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

(b) The agency may retain agents to perform corrective action it considers necessary to carry out the provisions of this chapter. The agents shall operate under the direction of the executive director.

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

(d) The commission may undertake corrective action to remove a UST or AST that:

(1) is not in compliance with the requirements of this chapter;

(2) is temporarily out of service as described in §334.54(a) of this title (relating to Temporary Removal from Service) or out of operation as defined in §334.2(71) of this title (relating to Definitions);

(3) presents a contamination risk. A determination of the potential risk of contamination from a site may be made by the executive director based on such factors including, but not limited to, estimated age of the tank system; status as secured or non-secured; presence, absence, whether known or unknown, of regulated substances in the tank system; length of time the tank system has been out of service; location, including proximity to sensitive receptors; and any other relevant information regarding the UST system; and

(4) is owned or operated by a person who is financially unable to remove the tank. A determination of financial inability under this section may be made by the executive director based on such factors including, but not limited to, a tank owner or operator's financial statements; federal or state income tax returns; gross and

net income for each of the three preceding years; net worth for each of the three preceding years; current cash flow position; long-term liabilities; the liquidity of assets; and any other data requested by the executive director, which in the opinion of the executive director is relevant to a determination of the ability of the tank owner or operator to fund proper removal of UST systems from service pursuant to §334.55 of this title (relating to Permanent Removal from Service).