

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§333.2, 333.7-333.10 and the repeal of §333.11, concerning the Voluntary Cleanup Program (VCP). The amendments and repeal are adopted without changes to the proposed text as published in the March 26, 1999, issue of the *Texas Register* (24 TexReg 2186) and will not be republished.

EXPLANATION OF THE ADOPTED RULES

The commission is adopting a new rule, commonly referred to as the Texas Risk Reduction Program (TRRP) rule, that will establish a uniform set of risk-based performance-oriented technical standards to guide response actions at affected properties regulated via the agency's Office of Waste Management program areas and other applicable program areas. The rule is promulgated as new 30 Texas Administrative Code (TAC) Chapter 350. The commission is adopting the amendments and repeal to sections in Chapter 333 as a conforming rulemaking to the proposed new Chapter 350.

Section 333.2 contains definitions. The commission adopts amendments to the definitions for "Change in Land Use" and "Completion." The definitions are amended so that terms used within the definitions are consistent with terminology in the TRRP rule. The definition of "Exposure assessment model" is deleted because the TRRP rule prescribes exposure pathways and points of exposure rather than the use of exposure assessment models. In addition, the commission is adding paragraph numbers to the definitions to comply with 1 TAC §91.23 of the *Texas Register* Rules. The commission did not receive any comments on this section, and the section is adopted as proposed.

Section 333.7 sets forth requirements for voluntary cleanup work plans and reports. Because proposed Chapter 350 establishes clear requirements for site investigation and reports, the commission amends §333.7(a) to reference the requirements in Chapter 350. Also references to "exposure assessment model" are removed. The commission did not receive any comments on this section, and the section is adopted as proposed.

Section 333.8 sets forth response action standards for the VCP, §333.9 discusses deed recordation, and §333.10 establishes standards for the certificate of completion. The changes to §333.8 identify Chapter 350, Subchapters D and B for the development of protective concentration levels and response action standards. Amendments to §333.9 make the deed recordation requirements of the VCP the same as for other programs governed by the TRRP. Section 333.10 is amended to make terminology consistent with the TRRP rule terminology. The commission did not receive any comments on these sections, and the sections are adopted as proposed.

Section 333.11 addressed public notice requirements for sites entering the VCP. The commission is repealing the section because the TRRP rule contains requirements for notice to owners of off-site properties and leased lands. The commission did not receive any comments on this section, and the section is adopted as proposed.

FINAL REGULATORY IMPACT ANALYSIS

These amendments and repeal are adopted as a conforming rulemaking to the Texas Risk Reduction Program Rule. Please refer to the Final Regulatory Impact Analysis in the adoption preamble for the Texas Risk Reduction Program Rule, 30 TAC Chapter 350, in the *Adopted Rules Section*.

STATEMENT OF THE EFFECT OF THE ADOPTED RULE ON SMALL BUSINESSES

These amendments and repeal are adopted as a conforming rulemaking to the Texas Risk Reduction Program Rule. Please refer to the Statement of the Effect of the Adopted Rule on Small Businesses in the adoption preamble for the Texas Risk Reduction Program Rule, 30 TAC Chapter 350, in the *Adopted Rules Section*.

TAKINGS IMPACT ASSESSMENT

These amendments and repeal are adopted as a conforming rulemaking to the Texas Risk Reduction Program Rule. Please refer to the Takings Impact Assessment in the adoption preamble for the Texas Risk Reduction Program Rule, 30 TAC Chapter 350, in the *Adopted Rules Section*.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

These amendments and repeal are adopted as a conforming rulemaking to the Texas Risk Reduction Program Rule. Please refer to the Coastal Management Program Consistency Review in the adoption preamble for the Texas Risk Reduction Program Rule, 30 TAC Chapter 350, in the *Adopted Rules Section*.

HEARINGS AND COMMENTERS

The commission held two public hearings on the proposed rule. The first public hearing was held on April 19, 1999 at 1:30 p.m. at the City of Houston Pollution Control Building Auditorium, 7411 Park Place Boulevard, Houston, Texas. A second public hearing on the proposal was held on April 22, 1999, at 10:00 a.m. in Building E, Room 201S, of Texas Natural Resource Conservation Commission complex, located at 12100 North IH-35, Park 35 Technology Center, Austin. No persons commented on the proposed rule at the public hearings. The comment period for the proposed rules closed at 5:00 p.m. on May 11, 1999, and the commission received no written comments on the proposed rule.

ANALYSIS OF TESTIMONY

The commission did not receive any testimony on the proposed amendments to Chapter 333.

STATUTORY AUTHORITY

The amendments and repeal are adopted under the following statutory authority: Texas Water Code, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state, Texas Water Code, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017, and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities.

In addition, the amendments and repeal are adopted under Texas Water Code, §26.039, which states that

activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; Texas Water Code, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; Texas Water Code, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and Texas Water Code, §26.264, which provides the commission with authority to issue rules necessary and convenient to carry out the policy referenced in §26.262. Authority to adopt the amendments and repeal is also provided by Texas Water Code, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; Texas Water Code, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in §26.341; and Texas Water Code, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

SUBCHAPTER A : VOLUNTARY CLEANUP PROGRAM SECTION

§§333.2, 333.7-333.10

§333.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) **Change in land use** - A change in use from a less protective risk classification to a more protective risk classification (e.g., commercial/industrial to residential) or not maintaining a physical control, remediation system, or post-response action care or non-permanent institutional control as set out in the conditional Certificate.

(2) **Completion** - No more response actions are necessary or the applicant is satisfactorily maintaining the physical controls, remediation systems, or post-response action care or non-permanent institutional controls are utilized pursuant to the Voluntary Cleanup agreement.

(3) **Initiate an enforcement action** - The issuance of a notice of violation by the executive director or referral to the United States Environmental Protection Agency or Attorney General's Office for a possible enforcement action.

(4) **Partial response action** - A response action which is limited to an areal portion of the site and off-site areas, if any, contaminated due to releases which have migrated from the partial response action area onto property owned or controlled by others, inclusive of all media.

(5) **Partial response action area** - The area of the site and off-site within which the partial response action will be conducted in accordance with a plan approved by the executive director.

(6) **Pending enforcement action** - Concerning the remediation of the hazardous substance or contaminant described in the application, a notice of violation has been issued and further administrative, state, or federal enforcement action is under evaluation or an enforcement action is required by federal grant, or the state has incurred unreimbursed costs under the Texas Health and Safety Code, Chapter 361, Subchapter F.

(7) **Response action objectives** - The goals of the response actions, which may include both qualitative and quantitative goals.

(8) **Site** - The property as described in the legal description provided in the voluntary cleanup agreement.

(9) **Site subject to a commission permit or order** - A site or portion of a site concerning which an order or permit has been issued by the commission. These also include hazardous waste facilities, which are operating under interim status.

§333.7. Voluntary Cleanup Work Plans and Reports.

(a) Voluntary cleanup work plans and reports shall meet all the requirements for work plans and reports set forth in 30 TAC 350 of this title (relating to Texas Risk Reduction Program). Contaminated media within the investigation area shall be addressed according to the appropriate established technical standards.

(b) The requirements of subsection (a) of this section apply to a partial response action when a contaminant release originating from a partial response action area has migrated onto property owned or controlled by others.

(c) The requirements of subsection (a) of this section apply to all voluntary cleanup response actions with the following exceptions:

(1) when a person demonstrates to the satisfaction of the executive director that the source of contamination is from off-site and the person did not cause the release, the person may address only contamination on the site or the partial response action area within the site according to the appropriate established technical standards.

(2) when a contaminant release is present outside the site or partial response action area, but on property owned or otherwise controlled by the applicant, addressing the areal extent of contamination outside the site or partial response action area is not required under the Voluntary Cleanup

Program; however, the contaminant release within the partial response action area shall be addressed according to the appropriate established technical standards.

§333.8. Response Action Standards.

(a) Excepting areal limitations with partial response actions, all environmental media which exceed the critical protective concentration levels developed in accordance with Subchapter D of Chapter 350 of this title (relating to Development of Protective Concentration Levels) shall be addressed through the appropriate response actions as required in Chapter 350, Subchapter B of this title (relating to Remedy Standards).

(b) State or local permits are not required for removal or remedial action under the Voluntary Cleanup Program. The person conducting the voluntary cleanup shall comply with any federal or state standard, requirement, criterion, or limitation to which the response action would otherwise be subject if a permit were required unless such commission rule requirements are inconsistent with a specific provision of this subchapter.

§333.9. Deed Certification.

The filing of the certificate of completion including all appropriate exhibits, into the real property records shall satisfy the requirements of Chapter 350 of this title (relating to Texas Risk Reduction

Program) to file institutional controls in the real property records for the areas covered by the certificate of completion.

§333.10. Certificate of Completion.

(a) If reports acceptable to the executive director that are submitted under this subchapter demonstrate that no further action is required to protect human health and the environment, the executive director shall certify such facts by issuing the person a final certificate of completion. If the applicant is satisfactorily maintaining the physical controls, remediation systems, or post-response action care, or if non-permanent institutional controls are utilized pursuant to an agreement, the executive director shall certify such facts by issuing the applicant a conditional certificate of completion. The executive director may authorize an applicant to conduct a phased response action only when, in the executive director's evaluation, the schedule is reasonable.

(b) For partial response actions, the certificate of completion shall pertain only to the partial response action area and shall include a legal description of that area.

(c) For sites approved prior to the effective date of this rule, agency will issue a certificate of completion for sites only if currently appropriate response actions for all contaminants within the area described in the certificate of completion have been completed.

(d) The executive director may allow the applicant to file the copy of the certificate of completion into the site deed record on the executive director's behalf if the applicant provides subsequent documentation of the filing. The applicant must file the copy of the certificate of completion prior to the sale or transfer of the property, but not later than 90 days after the date of issuance of the certificate of completion.

(e) The executive director may allow the applicant to file a statement in the deed records stating that the certificate of completion supersedes prior deed certification requirements.

SUBCHAPTER A : VOLUNTARY CLEANUP PROGRAM SECTION

§333.11

STATUTORY AUTHORITY

The repeal is adopted under the following statutory authority: Texas Water Code, §5.103 and §26.011, which provide the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state, Texas Water Code, §5.103(c), which states the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the practice and procedure requirements of the agency, and Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017, and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. In addition, the repeal is adopted under Texas Water Code, §26.039, which states that activities which are inherently or potentially capable of causing or resulting in the spillage or accidental discharge of waste or other substances and which pose serious or significant threats of pollution are subject to reasonable rules establishing safety and preventive measures which the commission may adopt or issue; Texas Water Code, §26.121, which prohibits persons from discharging wastes into or adjacent to any water in the state unless authorized to do so and prohibits persons from committing any other act or engaging in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state; Texas Water Code, §26.262, which states that it is the policy of this state to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay; and Texas Water Code, §26.264,

which provides the commission with authority to issue rules necessary and convenient to carry out the policy referenced in §26.262. Authority to adopt the repeal is also provided by Texas Water Code, §26.341, which states that it is the policy of this state to maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources, and requires the use of all reasonable methods, including risk-based corrective action to implement this policy; Texas Water Code, §26.345, which provides the commission with the authority to adopt rules necessary to carry out the policy referenced in §26.341; and Texas Water Code, §26.401, which states that it is the policy of this state that discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard, and that the quality of groundwater be restored if feasible.

§333.11. Public Notice.