

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§335.8, 335.341, 335.342, 335.344, 335.348 and 335.551, concerning Industrial Solid Waste and Municipal Hazardous Waste rules. Sections 335.8, 335.341, 335.348, and 335.551 are adopted with changes to the proposed text as published in the March 26, 1999, issue of the *Texas Register* (24 TexReg 2199) and are republished. Sections 335.342 and 335.344 are adopted without changes to the proposed text as published in the March 26, 1999, issue of the *Texas Register* (24 TexReg 2199) 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 adopts amendments to Chapter 335 as a conforming rulemaking to the adopted new Chapter 350. In addition, the commission adopts changes to clarify the existing State Superfund rule.

Section 335.8 of Subchapter A defines the applicability of the existing risk reduction rules to persons who perform closures and remediations at facilities or areas subject to industrial solid waste and municipal hazardous waste regulations. The commission is adding additions to subsection (a) provisions that will establish dates by which persons must terminate their use of the existing risk reduction rules for projects in progress. New closures and remediations reported and initiated after

May 1, 2000 must comply with that chapter. Subsection (b) establishes the closure and remediation obligations which must be completed once a person establishes applicability under subsection (a). The commission is adding provisions to paragraph (2) of subsection (b) to clarify the performance requirement for closure for waste management facility components such as a tank, sump, surface impoundment, etc., and to distinguish the requirements for remediation of unauthorized discharges, which are to be addressed with the procedures of Chapter 350 after the effective date of that chapter. Subsection 350.8(c) is amended to require that persons continuing under the Chapter 335 Risk Reduction Rules follow up with the agency no later than May 1, 2001. The commission received several comments on the proposed amendments to §335.8 similar to comments received on §350.2(h), (m) and §350.134(a)(1) of proposed Chapter 350. Based on public comment, the commission is adopting §335.8 with changes. The commission has revised some aspects of the grandfathering provisions of §350.2(m) and has made conforming changes to §335.8(a) and §335.8(c)(1) to indicate an implementation date of May 1, 2000, and a follow-up date of May 1, 2001, respectively. In addition, the changes to §335.8 clarify that the type of report required to be submitted for grandfathered risk reduction standard no. 3 projects.

Section 335.341 of Subchapter K (relating to Hazardous Substance Facilities Assessment and Remediation) establishes the purpose and scope of the State Superfund Program. Based on comment, the commission has amended portions of Subchapter K to better correlate the State Superfund rules and the Texas Risk Reduction Program. In §335.341(b), the existing rule cites Health and Safety Code, §361.271 as the statutory guidance for determining who is a potentially responsible party. To clarify that other statutory language exists addressing potential liability, the commission is including Health

and Safety Code, §361.275(g) along with §361.271 as statutes that identify potentially responsible parties. New subsection (c) is added to §335.341 to define the applicability of the Texas Risk Reduction Program to the release or threatened release of hazardous substances into the environment that may constitute an imminent and substantial endangerment to the public health and safety or the environment. Chapter 350 shall be applicable to the State Superfund Program unless it conflicts with a statutory requirement or a requirement of Subchapter K. In this instance, the requirements of the statute and Subchapter K shall apply rather than Chapter 350. The commission is adopting proposed §335.341 as proposed excepting that §335.341(c) is clarified to note that the State Superfund statute is Chapter 361, Subchapter F.

Section 335.342 contains definitions for the State Superfund Program. The commission is amending the definitions of “Remedial action” and “Remedial investigation” to note that they are similar to a response action and an affected property assessment, respectively, under the Texas Risk Reduction Program. Also, a reference to “baseline risk assessment” has been removed from the definition of remedial investigation because the Texas Risk Reduction Program no longer uses baseline risk assessments. Instead, proposed Chapter 350 specifies requirements for the development of protective concentration levels including defining human health exposure pathways and points of exposure. The commission is adopting the section as proposed.

Section 335.344 addresses delisting of State Superfund sites from the State Superfund Registry. Subsection §335.344(c) outlines five criteria the executive director will consider in determining whether to delist a site. The commission is adding a sixth criteria to the current five. Specifically,

language is added allowing the executive director to consider whether the site has been deferred to a state or federal agency for further action as a criteria for delisting. The commission did not receive any comments on this section, and the section is adopted as proposed.

The changes to §335.348, General Requirements for Remedial Investigations, remove references to “baseline risk assessment” consistent with changes to §335.342. The commission did not receive any comments specific to this section, however, a number of changes have been made consistent with the goal of better correlating the State Superfund Program and the Texas Risk Reduction Program.

Section 335.551 establishes the purpose, scope and applicability of Chapter 335, Subchapter S (relating to Risk Reduction Standards). Provisions are added to subsection (c) that establish dates by which persons must terminate their use of the existing risk reduction rules for projects in progress. New closures and remediations reported and initiated after May 1, 2000, must comply with the Texas Risk Reduction Rules in Chapter 350. Based on comment similar to comment received on §335.8, the commission has changed the implementation date of the Texas Risk Reduction Program to May 1, 2000.

FINAL REGULATORY IMPACT ANALYSIS

These amendments 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 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 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 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 written comments on the proposed rule from Chevron, Koch Industries (Koch), and the U.S. Air Force Center for Environmental Excellence (USAF).

ANALYSIS OF TESTIMONY

Regarding proposed §335.8, Chevron commented that facilities regulated under the Resource Conservation & Recovery Act (RCRA) have been undergoing RCRA corrective action for a decade or more. Extensive data have been collected pursuant to that program. Unlike the Petroleum Storage Tank (PST) program, the RCRA Facility Investigation (RFI) program has not been grandfathered under the Texas Risk Reduction Program (TRRP). The proposed rules should be revised to clarify that the data collected in accordance with RCRA before the effective date of these regulations may be fully utilized in reports submitted subsequent to the enactment of the regulations. Otherwise, facilities may have to completely redo all of the work that pre-dated the effective date of these new rules. The cost to the regulated community would be staggering, and it appears that this cost has not been factored into the fiscal analysis. Chevron suggested adding the following language: "Notwithstanding anything to the contrary herein, data collected in accordance with a permit or order before the effective date of Chapter 350 of this title may be fully utilized to satisfy the requirements of the permit or order and/or Chapters 335 and 350."

The commission disagrees with the recommendation on two accounts. First, according to §350.2(m), individual RFI projects at a RCRA facility can be grandfathered if it meets the

criteria. This opportunity applies to any closure or remediation projects at RCRA facilities, not just those in the RFI program. Second, the commission does not agree to give a blanket grandfathered status to all data collected prior to the effective date of this chapter such that it may be fully utilized to satisfy the requirements of the permit or order. This could potentially abrogate the commission's ability to evaluate the data for compliance with any performance standards of this or other chapters.

Concerning proposed §§ 335.8(a) and 335.551(c), Chevron commented that the apparent intent of this provision is to prevent the rushed filing of technically inadequate reports by those hoping to be "grandfathered" in order to avoid the expense associated with the reworking workplans and reports under the TRRP. The best way to avoid this problem is to make sensible revisions to the grandfathering provisions, like those suggested below regarding proposed section 350.2, to minimize the need to rework and resubmit work plans and reports. This will significantly reduce the "beat the clock" submittals the TNRCC fears. Chevron noted that if the TNRCC adopts Chevron's proposed revisions to §350.2, the technical inadequacy language in proposed §§335.8(a) and 335.551(c) could be maintained but would apply to the submittal of investigation work plans and reports, not "final reports" as currently contemplated. Regardless of which grandfathering approach it adopts, the TNRCC should clarify that it intends only to subject sites to the new rules if it appears that the technically inadequate submittal was not submitted in good faith. Any other rule would create significant uncertainty and penalize members of the regulated community for submitting only slightly imperfect reports. USAF commented that the rule at §335.8(a) is not clear on the impact that rejection of a final closure plan might have on a pending risk reduction closure. If a person's final closure plan is not approved by the

TNRCC the person should have the opportunity to correct and resubmit the plan for approval rather than being directly subject to the TRRP. Rejection of a closure plan and a requirement that the plan be resubmitted under an entirely new set of rules will result in unnecessary expense to the responding person and needless delay of completion of the remedial action.

In response to numerous comments, the commission has revised some aspects of the grandfathering provisions of §350.2(m) and has made conforming changes to §335.8(a), §335.8(c)(1) and §335.551(c) accordingly to indicate an implementation date of May 1, 2000. Within §335.8(a), a statement has been added to indicate that a person can voluntarily comply with Chapter 350 prior to the implementation date of May 1, 2000. Also, the type of report required to be submitted for grandfathered risk reduction standard no. 3 projects has been clarified as a “final remedial investigation report that fully complies with §335.553(b)(1) of this title.” Within §335.8(c)(1), if a person must resubmit the initial notice of intent as an example of other documentation to satisfy the grandfathering requirements of §335.8(a), the person has up to one year, until May 1, 2001, to accomplish this. The procedure and content of the resubmitted notice remain the same as for the original notice. Within §335.551, the words “closures and” were added to the last sentence to be consistent with the first sentence of the subsection, to make it clear that the section is applicable to closures and remediations.

There were no changes made to the provision within Subsection (a) regarding executive director denial of the final report submitted in response to this subsection. Chevron recommended that the commission clarify its intent regarding denial of final reports based on technical inadequacy.

Chevron suggested that only those reports that were not submitted in good faith while attaining grandfathered status be subjected to the new rule. USAF noted that the impact of rejecting a final report is not clear and recommended that the person should have the opportunity to correct and resubmit the plan for approval rather than being directly subject to the new rule. The commission's intent in this regard is more closely expressed by the USAF comment. The commission will retain its normal practice of allowing at least one notice of deficiency and opportunity to submit a revised report before issuing a denial, unless a report is an obvious bogus filing.

USAF commented that the provisions in §§335.8(a) and 350.2(m) do not clarify the criteria for use of the grandfathering provision for parties wishing to complete response under the existing rules. The rule at §350.2(m)(1) simply states that a person "may request" that the response action be reviewed under the regulations in effect at the time of initial notification, but does not provide guidance on how the TNRCC will determine whether the person's request is granted. USAF commented that a facility should have the choice of whether to continue to comply with existing permits and monitoring plans, and a responding person should be able to complete a response action already initiated under the existing risk reduction rules unless the person does not exercise due diligence in completing the response. Second, USAF recommended providing clear criteria for determining when a facility is required to conduct a response under the TRRP, noting that it is unclear in certain situations whether facilities are subject to existing permits or compliance plans, or if they are subject to the TRRP. Third, USAF recommended expanding the Facility Operations Area definition to apply to facilities in addition to operating chemical manufacturing plants and petroleum refineries.

The commission responds that it has addressed these issues in its response to comments regarding §§350.2(m) and 350.134(a)(1) in the preamble to the Texas Risk Reduction Program Rule (30 TAC Chapter 350). Please refer to the response to comments on §350.2(m) and the response to comments §350.134(a)(1).

Concerning proposed §335.8(c)(1)(C), Koch commented that it may not be appropriate to set an inflexible deadline for the completion or response actions under the existing rules. The proposed grandfathering provision states that for sites to be closed under existing Risk Reduction Standards (RRS) 1 or 2, a Final Report must be submitted within five years after the effective date of the proposed TRRP rule. Koch asked if this Final Report could be similar to a Response Action Effectiveness Report (RAER) submitted three years after a (APAR) and Response Action Plan (RAP). Koch also commented that for any sized site, a person should be allowed to notify the commission's district office and propose a schedule to complete a response action. The commission should have the ability to approve, deny or modify the schedule proposed by the person. Using two different schedules does not create a unified performance-based approach to corrective action

The commission expects the final report to satisfy the requirements of §335.553(a), thereby documenting the attainment of risk reduction standard 1 or 2. The two reports cited by the commenter will not satisfy this requirement. Regarding Koch's second comment, although the commission agrees with some aspects of the commenter's issues, the basis for grandfathering, as explained more fully in response to comments to §350.2(m) in the preamble to Chapter 350, is that standard 1 and 2 actions typically are completed in less than three years and that the

commission does not intend to maintain redundant rules for an indefinite period of time.

Grandfathered response actions using monitored natural attenuation likely will not satisfy the grandfathering requirement of a complete remedy in five years and will be brought in to the TRRP rule. At that time, the RAER and APAR (if an equivalent investigation report has not been submitted already) would apply and the approach would then be consistent with similar actions under this rule.

Concerning the amendments to Chapter 335, Subchapter K affecting the State Superfund Program, Dow commented the proposed amendments to Subchapter K should be modified to reflect more specifically where the TRRP provisions in Chapter 350 will prevail over the current Subchapter K provisions related to assessment of affected property, development of protective concentration levels, and requirements for response actions. Concerning §335.341(c), Dow recommended that the last sentence of this section should be changed to read as follows: "Where there is conflict between the requirements of Chapter 350 of this title and the requirements of Chapter 361, Subchapter F, and this subchapter, the requirements of Chapter 350 shall apply." In addition, Dow suggested amending the definitions for "remedial action" and "remedial investigation" in §335.342 in order to avoid confusion. Specifically, the last sentence of definition for "remedial action" should read as follows: "A remedial action is the same as a response action under the TRRP," and the last sentence on the definition of remedial investigation" should read as follows: "the remedial investigation is the same as an affected property assessment report outlined in the requirements of the TRRP."

The commission disagrees with Dow's comment that §335.341(c) should be amended to state that Chapter 350 should override the requirements of Health and Safety Code, Chapter 361, Subchapter F and Chapter 335, Subchapter K where there are conflicts. Commission rules cannot override the provisions of the Health and Safety Code. Concerning the rules in Chapter 335, Subchapter K, certain technical and administrative requirements are unique to State Superfund sites, and it is, therefore, appropriate that those requirements should supercede Chapter 350 when there is a conflict between the two rules. However, the commission agrees that the proposed amendments to Subchapter K should be modified to reflect more specifically where the TRRP provisions prevail over current Subchapter K requirements, specifically concerning affected property assessment, development of protective concentration levels and requirements for response actions. The commenter suggested making these changes in §350.2(i) of the Texas Risk Reduction Program rule, however, as it is more appropriate and will provide greater clarification, the commission is making the changes in §§335.342 and 335.348. Additionally, the commission is for clarification adding the reference to the applicable subchapters in Chapter 361 of the Texas Health and Safety Code and in Chapter 30 of the Texas Administrative Code, Subchapters F and K, respectively.

STATUTORY AUTHORITY

The amendments 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 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 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: INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE
MANAGEMENT IN GENERAL**

§335.8

§335.8. Closure and Remediation

(a) Applicability. The regulations of this section, in addition to other applicable rules, permits or orders, establish the obligation for persons to perform closures or remediations for facilities or areas containing industrial solid waste or municipal hazardous waste. The person can fulfill this obligation by meeting the risk reduction standards of this section or the remedy standards of Chapter 350 of this title (relating to Texas Risk Reduction Program), depending on the time of initial notification to the executive director of intent to conduct closure or remediation. The regulations of this section will remain in effect for persons who notify the executive director before May 1, 2000, of a closure or remediation in accordance with this section, unless the person elects to comply fully with Chapter 350 of this title prior to that date. Persons who notify of a closure or remediation in response to this section have up to five years from May 1, 2000, within which to submit for executive director review and approval according to this section a final report which demonstrates attainment of risk reduction standards 1 or 2. Persons will automatically qualify for this grandfathering provision if they have received a letter from the agency acknowledging receipt of the initial notification, or submit other forms of documentation by May 1, 2001, that proper and timely notification had been made. The person who has submitted a final remedial investigation report that fully complies with §335.553(b)(1) of this title (relating to Risk Reduction Standard Number 3), as amended, prior to May 1, 2000, may

elect to either continue under these rules or to proceed under Chapter 350 of this title. Any person who qualifies for this grandfathering provision and elects to continue using the provisions of this section may not use any of the provisions of Chapter 350. If the executive director denies approval of the final remedial investigation report under this section for reasons of technical inadequacy, the executive director may require the person to comply with the requirements of Chapter 350 of this title. For closures and remediations initially reported to the executive director on or after May 1, 2000, the person shall use the procedures of Chapter 350 of this title. The regulations in this section supplement but do not replace any requirements for closure or remediation specified in the regulations for the programs subject to these rules and shall continue to apply as specified in paragraphs (1) - (4) of this subsection to persons who qualify for this grandfathering provision.

(1) Any person who stores, processes, or disposes of industrial solid waste or municipal hazardous waste at a facility permitted under §335.2(a) of this title (relating to Permit required), shall, unless specifically modified by other order of the commission, close the facility in accordance with the closing provisions of the permit.

(2) Any person who stores, processes, or disposes of hazardous waste is also subject to the applicable provisions relating to closure and post-closure in Subchapters E and F of this chapter (relating to Interim Standards for Hazardous Waste Storage, Processing, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities, respectively).

(3) Persons who have received approval of closure or remediation plans by the executive director and have either completed or not completed the action prior to the effective date of this section may either maintain or complete the action, as applicable, according to the approved plan and are not subject to the requirements of this section unless a substantial change in circumstances develops at the facility or area which results in an unacceptable threat to human health or the environment as described in §350.35 of this title (relating to Substantial Change in Circumstances). Plans or reports submitted but not approved prior to the effective date of this section will be reviewed according to the regulations in effect at the time of document submittal. If the executive director denies approval of the plan or report under those regulations for reasons of technical inadequacy, the person must then comply with the requirements of Chapter 350 of this title upon receipt of written notice from the executive director that the plan or report is not approved. Closure plans approved as part of an industrial solid or municipal hazardous waste permit which was issued prior to the effective date of this section but not implemented at the time of permit renewal are subject to review for compliance with Chapter 350 of this title as part of the permit renewal process. Persons may resubmit such plans or reports that they have revised voluntarily to conform with the requirements of Chapter 350 of this title, unless such resubmittal would result in noncompliance with a previously approved or imposed schedule of compliance.

(4) The requirements of this section do not apply to substances discharged or spilled from storage tanks regulated by Chapter 334 of this title (relating to Underground Storage Tanks).

(b) Closure and Remediation Obligations. Persons identified in subsection (a) of this section have the obligation to conduct the activities described in paragraphs (1) - (4) of this subsection when performing a closure or remediation. Upon receipt of approval by the executive director of reports demonstrating compliance with all applicable requirements, the person has completed these obligations unless a substantial change in circumstances results in an unacceptable risk to human health or the environment as described in paragraph (5) of this subsection.

(1) Notify the executive director in writing of any closure or remediation activities as is further specified in subsection (c) of this section.

(2) Perform closure or remediation activities at the facility or area of unauthorized discharge which meet one or more of the risk reduction standards specified in subparagraphs (A) - (C) of this paragraph. Unless the requirement to close a waste management facility component is specified by other rule, permit or order, the person will determine the time for initiation of closure. The timely remediation of unauthorized discharges resulting from continuing operation of a waste management facility component does not compel the closure of the component unless closure is a necessary part of the remedy to achieve protection of human health and the environment.

(A) Risk Reduction Standard Number 1. Closure/remediation to background--to remove and/or decontaminate all waste, waste residues, leachate, and contaminated media to background levels unaffected by waste management or industrial activities as further specified in § 335.554 of this title (relating to Attainment of Risk Reduction Standard Number 1); or

(B) Risk Reduction Standard Number 2. Closure/remediation to health-based standards and criteria--to remove and/or decontaminate all waste, waste residues, leachate, and contaminated media to standards and criteria such that any substantial present or future threat to human health or the environment is eliminated as further specified in § 335.555 of this title (relating to Attainment of Risk Reduction Standard Number 2); or

(C) Risk Reduction Standard Number 3. Closure/remediation with controls--to remove, decontaminate, and/or control all waste, waste residues, leachate, and contaminated media to levels and in a manner such that any substantial present or future threat to human health or the environment is eliminated or reduced to the maximum extent practicable, as further specified in §335.561 of this title (relating to Attainment of Risk Reduction Standard Number 3).

(3) Demonstrate in writing to the executive director that closure or remediation has been completed as is further specified in subsection (d) of this section.

(4) Perform any necessary post-closure care and deed certification or recordation activities as required by Subchapter S of this chapter (relating to Risk Reduction Standards).

(5) Respond on a continuing basis pursuant to paragraphs (1)-(4) of this subsection in the event that a substantial change in circumstances at the facility or area results in an

unacceptable threat to human health or the environment. In response to these substantial changes in circumstances, the person shall comply with this subsection utilizing the then-prevailing criteria and perform such actions as necessary to provide protection of human health and the environment. A substantial change in circumstance can include, but is not limited to, the situations described in subparagraphs (A)-(D) of this paragraph.

(c) Notification and Initiation Requirements. Persons who qualify according to subsection (a) of this section for an extended period of time for submittal of a final report to be reviewed according to this section must also respond, as appropriate, to the requirements of paragraphs (1) - (5) of this subsection.

(1) A person who intends to continue any activity of closure or remediation in accordance with subsection (b) of this section shall determine the risk reduction standard(s) to be attained. If required by subsection (a) of this section to resubmit this notification, the person shall notify the executive director and the commission's office in the district where the facility or area is located in writing of the following information by May 1, 2001:

(A) the facility or area to be subject to closure or remediation activities;

(B) the risk reduction standard(s) to be attained; and

(C) the estimated time necessary to complete the activity.

(2) After performing notification in accordance with paragraph (1) of this subsection, the person may initiate the actions necessary to attain Risk Reduction Standard Numbers 1 or 2 without prior approval by the executive director, unless such approval is required by other regulation, order, or permit of the commission. Any plan submitted for prior approval by the executive director shall contain the information specified in § 335.553(a) of this title (relating to Required Information).

(3) If the person intends to attain risk reduction standard number 3, the person shall submit to the executive director the information specified in §335.553(b) of this title (relating to Required Information) for approval prior to beginning, or continuing, as applicable, the closure or remediation activities.

(4) The person may include one or more waste management units or areas in a submittal for the purpose of responding to this subsection and subsection (d) of this section.

(5) Notwithstanding any other requirement, the person shall submit to the executive director upon request such information as may reasonably be required to enable the executive director to determine whether the closure or remediation is compliant with this section.

(d) Demonstration of conformance with risk reduction standards. Upon completion of a closure or remediation, the person shall demonstrate in a form acceptable to the executive director that the activity meets the intended risk reduction standards and any applicable closure criteria listed or referenced in this chapter. Any submittal to the executive director in response to this subsection shall be in the form of a plan or report that contains the information specified in § 335.553 of this title (relating to Required Information).

SUBCHAPTER K: Hazardous Substance Facilities Assessment and Remediation

§§335.341, 335.342, 335.344, 335.348

STATUTORY AUTHORITY

The amendments 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 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 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.

§335.341. Purpose and Scope.

(a) The purpose of this subchapter is to establish an assessment and remediation program to identify and assess facilities that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The provisions of this subchapter supplement and therefore should be read in conjunction with the provisions of Subchapter F of the Texas Solid Waste Disposal Act, Tex. Health

and Safety Code Ann. Chapter 361 (Vernon Supplement), §§361.181 et. seq. as amended, herein referred to as the Act.

(b) This subsection describes the procedures for identifying, proposing, listing, and delisting facilities on the State Registry.

(1) Prior to proposing a facility for inclusion on the State Registry, the executive director shall first determine whether any potential endangerment to public health and safety or the environment at a facility can be resolved by the present owner or operator under the federal Resource Conservation and Recovery Act, 42 United States Code Annotated §6901 *et seq.* (1976), as amended.

(2) If the potential endangerment cannot be fully resolved by the present owner or operator, then the executive director shall determine whether the potential endangerment can be resolved by voluntary cooperation of some or all of the potentially responsible parties (PRPs) identified in the Act, §361.271 or §361.275(g) pursuant to an agreed administrative order issued by the commission or a Voluntary Cleanup Agreement pursuant to Chapter 333 of this title (relating to Voluntary Cleanup Programs). If a facility can be cleaned up pursuant to an agreed administrative order or an executed Voluntary Cleanup Agreement, then it shall not be proposed for listing.

(3) If, after reasonable efforts, the executive director determines that the potential endangerment to public health and safety or the environment cannot be resolved by either of these approaches, the executive director shall evaluate the facility to determine whether it is eligible for

listing on the federal National Priorities List established pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 United States Code Annotated, §9601 et seq. (1980), as amended.

(4) The executive director shall determine whether the facility is eligible for proposed listing on the State Registry only if, based on information available to the executive director, the facility is not eligible for inclusion on the federal National Priorities List.

(5) If the executive director determines that the potential endangerment to public health and safety or the environment can be resolved by any of the approaches described in subsections (b)(1)-(3), then the site will not be proposed for listing on the State Registry. Notice of the approach selected to resolve the apparent endangerment to public health and safety or the environment and the fact that such action is being taken in lieu of listing the facility on the State Registry shall be published in the Texas Register.

(c) A preliminary site investigation, removal action, remedial investigation, and remedial action shall comply with all requirements found in Health and Safety Code, Chapter 361, Subchapter F (relating to Registry and Cleanup of Certain Hazardous Waste Facilities); the requirements of this subchapter; and the requirements of Chapter 350 of this title (relating to Texas Risk Reduction Program) for any release or threatened release of hazardous substances into the environment that may constitute an imminent and substantial endangerment to public health and safety or the environment. Where there is a conflict between the requirements of Chapter 350 of this title and the requirements of

Chapter 361, Subchapter F and this subchapter, the requirements of Chapter 361, Subchapter F and of this subchapter shall apply.

§335.342. Definitions.

Definitions set forth in the Act that are not specifically included in this section shall also apply. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Agreed order or agreed administrative order** - An administrative order issued by the commission and agreed to by one or more PRPs for the purpose of settling potential liability for the remedial investigation and/or remedial action concerning a facility proposed for listing, or listed on, the State Registry.

(2) **Divisible** - Hazardous substance(s) released or threatened to be released at or from a facility that are capable of being managed separately under a remedial action plan.

(3) **Facility** - In accordance with the Act, §361.181(c), a facility means:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer public-owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft); or

(B) any site or area where a hazardous substance has been, deposited, stored, disposed of, or placed or otherwise come to be located, but does not include any consumer product in consumer use or any vessel.

(4) **Feasibility study (FS)** - A study which describes and evaluates a set of remedial action alternatives for effectively mitigating or minimizing damage to, and for providing adequate protection of, the public health and safety and the environment in accordance with the requirements of §335.348 of this title (relating to General Requirements for Remedial Investigations).

(5) **Good faith offer** - A written proposal by one or more PRPs which is not contingent on participation of other PRPs which, in the judgment of the executive director, will:

(A) in the case of a good faith offer to fund or perform a remedial investigation, fully and effectively determine the nature and extent of the release or threatened release of hazardous substances and its impact on air, soils, groundwater, and surface water, both within and beyond the boundaries of the facility. The executive director will not consider an offer a good faith offer unless it is an offer to fully fund or perform the remedial investigation except in a claim of divisibility; or

(B) in the case of a good faith offer to fund or perform a remedial action, fully and effectively mitigate or minimize damage to, and provide adequate protection of, the public health

and safety and the environment. The executive director will not consider an offer a good faith offer unless it is an offer to fully fund or perform the remedial action except in a claim of divisibility.

(6) **Hazard ranking system** - The method used by the Environmental Protection Agency and the agency to evaluate the relative potential of hazardous substance releases to cause health or safety problems, ecological or environmental damage. The scoring system was developed by the United States Environmental Protection Agency as set out in 40 Code of Federal Regulations Part 300, Appendix A, as amended.

(7) **Hazardous and Solid Waste Remediation Fee Account** - The fund as described in the Act, §361.133.

(8) **Health and safety plan** - A document that addresses the protection of on-site personnel and the public from potential hazards associated with implementing the remedial investigation or remedial action at a particular facility. The plan shall conform to applicable Occupational Safety and Health Administrative Rules, including but not limited to relevant portions of 29 Code of Federal Regulations §1910 and §1926.

(9) **Imminent and substantial endangerment** - A danger is imminent if, given the entire circumstances surrounding each case, exposure of persons or the environment to hazardous substances is more likely than not to occur in the absence of preventive action. A danger is substantial

if, given the current state of scientific knowledge, the harm to public health and safety or the environment which would result from exposure could cause adverse environmental or health effects.

(10) **Implementation schedule** - A document describing the sequence, duration and interdependency of each activity to be conducted during a remedial investigation or remedial action.

(11) **Nonparticipating PRPs** - Potentially responsible parties who:

(A) are unwilling or unable to join in the making of a good faith offer;

(B) are unwilling or unable to become a party to an agreed order to perform an RI/FS, similar study, or remedial action; or

(C) intentionally violate the terms of an agreed order so as to substantially interfere with the achievement of the purposes of the agreed order.

(12) **Operation and maintenance plan** - A document detailing the necessary operation and maintenance, inspection, and monitoring activities, including schedules, required to maintain the attainment of performance goals after completion of the implementation phase of the remedial action.

(13) **Oversight costs** - All administrative costs and costs for technical and legal services incurred by the agency, or agents or contractors for the agency, incurred in the determination of superfund eligibility, identification of PRPs, oversight of the remedial investigation and remedial action, plus all such costs incurred in verifying compliance by PRPs with the terms of any agreed order which may be issued and costs incurred by the agency for delisting a site from the State Registry and cost recovery costs.

(14) **Potentially responsible party (PRP)** - A person potentially responsible for solid waste as defined in the Act §361.271 and §361.275(g).

(15) **Presumptive remedy** - A remedy in a commission document titled “Presumptive Remedies” which describes site specific remedial alternatives for a facility in lieu of a full feasibility study as required by §335.348 of this title (relating to General Requirements for Remedial Investigations).

(16) **Quality assurance project plan (QAPP)** - A document describing in comprehensive detail the necessary quality assurance, quality control, and other technical activities that must be implemented to meet the data quality objectives during a remedial investigation or remedial action.

(17) **Remedial action (RA)** - An action, including remedial design and post-closure care, consistent with a remedy taken instead of or in addition to a removal action in the event of a

release or threatened release of hazardous substances into the environment to prevent or minimize the release of a hazardous substance so that the hazardous substance does not cause an imminent and substantial danger to present or future public health and safety or the environment. A remedial action shall be conducted in accordance with 30 TAC 350, Subchapter B (relating to Remedy Standards).

(18) **Remedial action drawings and specifications** - Documents that include the drawings showing the scope, extent, and character of the work to be performed during the remedial action and the written technical descriptions of materials, equipment, remediation systems, standards and workmanship to be applied during the remedial action.

(19) **Remedial design (RD)** - A design consisting of the remedial action drawings and specifications and other documents developed for the remedial action in accordance with the requirements of §335.349(d) of this title (relating to General Requirements For Remedial Activities).

(20) **Remedial investigation (RI)** - An investigative study (i.e., an affected property assessment conducted in accordance with 30 TAC 350, Subchapter C (relating to Affected Property Assessment) which may include removals and/or a feasibility study, in addition to the development of protective concentration levels in accordance with 30 TAC 350, Subchapter D (relating to Development of Protective Concentration Levels) designed to adequately determine the nature and extent of a release or threatened release of hazardous substances and, as appropriate, its impact on air, soils, groundwater, and surface water, both within and beyond the boundaries of the facility in

accordance with the requirements of §335.348 of this title (relating to General Requirements for Remedial Investigations)).

(21) **Responsible party (RP)** - A person responsible for solid waste as defined in the Act, §361.271 and §361.275(g).

(22) **Sampling and analysis plan (SAP)** - A document describing the specific sampling and analytical protocols to be implemented during a remedial investigation or remedial action.

(23) **Settlement offer** - A written offer by a potentially responsible party to fund or perform less than a full and complete remedial investigation and/or remedial action.

(24) **Spill/release contingency plan** - A document describing the sequences, procedures, and requirements to be implemented to protect both workers at the facility and the public from hazardous exposure to releases or spills resulting from the remedial action.

(25) **Substantial change in use** - A physical or functional alteration of a facility, the effect of which is to interfere significantly with a proposed or ongoing remedial investigation, proposed, ongoing, or completed remedial action or to expose public health and safety or the environment to a significantly increased threat of harm. The term includes, but is not limited to, actions such as the erection or razing of a building or other structure at the facility, the use of a facility for agricultural production, the paving over of a facility, the creation of a park or other public or

private recreational use on the facility, and any other alteration of the site or activity which could interfere with the performance of a remedial investigation or remedial action.

§335.344. Delisting and Modifications.

(a) Any PRP of a facility listed or proposed for listing on the State Registry may request the executive director to delete such facility from the Registry, modify the facility's priority ranking within the Registry, or modify any information regarding such facility by submitting a written statement setting forth the grounds of the request. The PRP shall submit to the executive director any information as may be reasonably required to enable the executive director to further evaluate the facility including, but not limited to, information on all factors used to develop a Superfund HRS score and to make a determination on the request. The executive director may initiate the delisting procedures described in this section.

(b) The executive director shall hold a public meeting to receive comment. This meeting is not a contested case hearing within the meaning of Texas Government Code, Chapter 2001. This meeting shall be held upon requests filed with or initiated by the executive director under subsection (a) of this section. At least 30 days prior to the date set forth for the meeting, notice shall be provided by first class mail to all other PRPs, and by publication in a newspaper of general circulation in the county where the facility is located. The person submitting the request, if any, shall bear the cost of publication of the notice.

(c) In making a determination under subsection (a) of this section, the executive director will consider the following:

(1) the extent to which the facility has been remediated under the terms of any removals and remedial action agreed to by the executive director;

(2) what further action, if any, is appropriate;

(3) whether the release no longer poses an imminent and substantial endangerment to public health and safety or the environment and, therefore, taking further action is not appropriate;

(4) whether, because of the nature of any removals and the remedial action implemented at the facility, it is not yet feasible to make a determination that the remedial action has effectively remediated the release or threatened release of hazardous substances;

(5) whether the site has been accepted under the voluntary cleanup program as set out in Chapter 333 of this title (relating to Voluntary Cleanup Programs); or

(6) whether the site has been deferred to a state or federal agency for further action.

(d) With the exception of paragraphs (c)(5) and (c)(6) of this section, no requests for the delisting of a facility from the State Registry or requests to modify information about a facility eligible

for listing on the Registry will be granted unless, at a minimum, the facility has been investigated under the terms of a remedial investigation approved by the executive director.

§335.348. General Requirements for Remedial Investigations.

(a) Unless otherwise directed by the commission, a remedial investigation as approved by the executive director shall be completed before the executive director's selection of the remedial action, except for removals and preliminary site investigations pursuant to §335.346 of this title (relating to Removals and Preliminary Site Investigations).

(b) A similar study may be approved by the executive director as an appropriate alternative to the performance of a full remedial investigation when necessary to avoid delay, to make more effective use of resources or when such similar study is sufficient to adequately characterize a site.

(c) The contents of the remedial investigation as approved by the executive director, will depend on the particular circumstances of each specific facility. Under any remedial investigation; however, sufficient information must be collected and evaluated to allow the executive director to select an appropriate remedial action.

(d) A remedial investigation may include the following, as appropriate to a particular facility, for the purpose of allowing the executive director to select an appropriate remedial action:

(1) investigations of surface water and sediments necessary to characterize hydrologic features such as surface drainage patterns, areas of erosion and sediment deposition, surface waters, floodplains and actual or potential hazardous substance migration routes within these areas. Properties of surface and subsurface sediments which would influence the type and rate of hazardous substance migration or affect the ability to implement alternative remedial actions shall be characterized.

(2) investigations to adequately characterize the nature and extent of hazardous substances in the soils encompassing the facility. Properties associated with the soils which would influence the type and rate of hazardous substance migration or affect the ability to implement alternative remedial actions shall be characterized.

(3) investigations of hydrogeology and geology to adequately characterize the nature and extent of hazardous substances in the ground water and the features which affect the fate and transport of those hazardous substances. This should include, but is not limited to, the physical properties and distribution of bedrock and unconsolidated materials, groundwater flow rate and gradient for contaminated and potentially contaminated aquifers, groundwater divides, areas of groundwater recharge and discharge, and location of public and private groundwater wells.

(4) information regarding local climatological characteristics which are likely to affect the hazardous substance migration such as: rainfall patterns; frequency of storm events; temperature variations; prevailing wind direction; and wind velocity.

(5) an ecological risk assessment

(6) descriptions of the location, quantity, horizontal and vertical extent, concentrations and sources of hazardous substances. Information on the physical and chemical characteristics and the toxicological effects of hazardous substances shall be provided, if available.

(7) a feasibility study.

(e) Protective concentration levels shall be developed in accordance with 30 TAC 350, Subchapter D (relating to Development of Protective Concentration Levels).

(f) A workplan for a remedial investigation shall be submitted to the executive director for final review and possible modifications and shall include the following:

(1) a sampling and analysis plan covering all sampling activities to be undertaken pursuant to the remedial investigation;

(2) a quality assurance project plan to ensure the integrity of all samples taken pursuant to the remedial investigation; and

(3) a health and safety plan to describe steps to be taken to assure the health and safety of all personnel engaged in implementing the remedial investigation; and

(4) an implementation schedule for all aspects of the remedial investigation.

(g) Treatability studies may be required as necessary to provide information to evaluate remedial action alternatives.

(h) In evaluating the acceptability of a remedial investigation, the executive director may require the utilization of published agency and EPA technical guidance documents.

(i) A health and safety plan shall be prepared that addresses the protection of on-site personnel and the public from potential hazards associated with implementing the remedial investigation at a particular facility.

(j) A report shall be prepared at the completion of the remedial investigation and submitted to the executive director for review, possible modification and final approval.

(k) The selection of the remedial alternative shall be made according to the process outlined in the guidance document "Presumptive Remedies for Soils at Texas State Superfund Sites" or other applicable presumptive remedy documents, unless the executive director determines that a feasibility study must be conducted.

(l) The remedial action for a particular facility shall be selected based on the remedial alternative that the executive director determines to be the lowest cost alternative which is

technologically feasible and reliable, effectively mitigates and minimizes damage to the environment, and provides adequate protection of the public health and safety and the environment.

(m) All engineering evaluations, plans, and specifications included in the feasibility study or similar study must be prepared and submitted in accordance with the Texas Engineering Practice Act.