

The commission adopts amendments to §327.1 and §327.5, concerning spill prevention and control.

Section 327.1 is adopted with changes to the text as proposed in the July 16, 1996, issue of the *Texas Register* (21 TexReg 6612) and is republished. Section 327.5 is adopted without changes to the text as proposed, and will not be republished.

#### BRIEF EXPLANATION OF ADOPTION

On April 24, 1996, the commission adopted new rules that establish reporting and response action requirements for discharges or spills of hazardous substances, oil, used oil, petroleum product, industrial solid waste, and other substances. The new rules are codified as 30 TAC §327.1 and §327.5 and were published in the May 14, 1996, issue of the *Texas Register* (21 TexReg 4228), and became effective May 23, 1996. Section 327.1 of the new rules establishes applicability, and §327.1(b) explicitly identifies those discharges or spills that are not subject to the new rules. Section 327.5 sets forth actions required by the responsible party in the event of an unauthorized spill or discharge, and §327.5(c) requires a follow-up report not later than 30 days following discovery of the spill or discharge.

The amendment to §327.1 changes §327.1(b)(9) which states that Chapter 327 does not apply to discharges or spills occurring during the normal course of transportation about which carriers are required to give notice and report under United States Department of Transportation (U.S. DOT) regulations in 49 Code of Federal Regulations (CFR) §171.15 and §171.16. Paragraph 327.1(b)(9) is amended to remove the exemption for all transportation except rail transportation. Additionally, to ensure consistency with U.S. DOT regulations concerning hazardous materials, the commission is

amending §327.5(c) to not require the 30-day written follow-up for spills or discharges reported to U.S. DOT under 49 CFR §171.15 and §171.16.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The purpose of the spill rules is to clarify the reporting requirements in the Texas Water Code §26.039, and achieve the policy stated in the Texas Water Code, Texas Hazardous Substances Spill Prevention and Control Act §26.262, which is to prevent the discharge or spill of hazardous substances into the waters in the state and to cause the removal of discharges or spills without undue delay. The rule substantially advances this purpose by establishing clear reporting and response action guidelines, which should improve the timeliness, adequacy, coordination, efficiency, and effectiveness of responses to discharges or spills subject to the commission's regulatory jurisdiction. The changes to this rule further the purpose of the rule by requiring most spills in transportation to be reported and responded to. Promulgation and enforcement of these changes will not burden private real property that is the subject of the rules, because the rules just establish reporting requirements for unauthorized spills or discharges. Also, the following exceptions to the application of the Texas Government Code Chapter 2007 listed in Texas Government Code §2007.003(b) apply to these rules: this section is taken in response to a real and substantial threat to public health and safety; the action significantly advances this health and safety purpose; and the action imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARINGS AND COMMENTERS

The commission did not hold a public hearing on the proposed rule. Written comments were submitted by the following persons during the public comment period: Burlington Northern Santa Fe (BNSF); Texas Chemical Council (TCC); and Union Pacific Railroad Company (UPRC). BNSF and UPRC opposed the proposed amendment, and BNSF supported UPRC's comments. TCC did not generally support or oppose revisions, but requested clarification on notification.

#### ANALYSIS OF TESTIMONY

TCC requested general clarification that Chapter 327 is satisfied by reporting spills to a 911 telephone number, Texas Department of Public Safety, city or county emergency response organizations, or local law enforcement.

**The commission disagrees with this interpretation. The current rules provide three specific methods of reporting: by calling the 1-800 number, or by calling, faxing, or visiting the Texas Natural Resource Conservation Commission (TNRCC) central or regional offices. No other methods were proposed in this rulemaking. Thus, the commission cannot change the rules to allow reporting to other entities.**

UPRC and BNSF asserted that the Hazardous Materials Transportation Act (HMTA) preempts the commission from requiring reporting of hazardous materials spills from transporters.

The commission disagrees with UPRC and BNSF with regard to initial notification. Section 327.1 will no longer exempt spills of hazardous substances that are reported to the U.S. DOT under 49 CFR §171.15 and §171.16, because those regulations require immediate reporting only for spills of extremely hazardous substances. The commission is responsible for ensuring that responses to all spills are timely and properly conducted. Transportation spills are, for the most part, in areas accessible to the public. Additionally, those spills can flow into waters in the state through conduits such as storm drainage systems. Thus, the commission considers timely reporting of all reportable quantity spills or discharges to be critical.

After reviewing the U.S. DOT regulations and inconsistency rulings on incident and spill reporting, the commission has determined that the initial notification required by §327.3(b) can be required for interstate transporters. The U.S. DOT, in several inconsistency rulings, has recognized the authority of states to require immediate reporting of incidents involving hazardous substances to support state emergency response. *Inconsistency Ruling 2 (IR-2)*, 44 FedReg 75566 (Dec. 20, 1979); *appeal of IR-2*, 45 FedReg 71881 (Oct. 30, 1980), *correction to IR-2*, 45 FedReg 76838 (Nov. 20, 1980); *affirmed in National Tank Truck Carriers v. Burke*, 535 F.Supp. 509 (D.R.I. 1982), *aff'd* 698 F.2d 559 (1st Cir. 1983); *Inconsistency Ruling 3 (IR-3)*, 46 FedReg 18918 (Mar. 26, 1981); *appeal of IR-3*, 47 FedReg 18457 (Apr. 29, 1982); *Inconsistency Ruling 28 (IR-28)*, 55 FedReg 8884 (Mar. 8, 1990); *appeal of IR-28* *dism'd*, 57 FedReg 41165 (Sept. 9, 1992); *Inconsistency Ruling 31 (IR-31)*, 55 FedReg 25572 (June 21, 1990); *appeal of IR-31* *dism'd*, 57 FedReg 41165 (Sept. 9, 1992); *Inconsistency Ruling 32 (IR-32)*, 55 FedReg 36736 (Sept. 6, 1990); *appeal of IR-32* *dism'd*, 57 Fed Reg. 41165 (Sept. 9, 1992).

**However, the commission does agree with the commenters that §327.5(c), which addresses the 30-day follow-up to the TNRCC regional manager, may be inconsistent with U.S. DOT's required 30-day written incident notification. See IR-2, *Id.*; IR-3, *Id.*, IR-31, *Id.* Therefore, §327.5(c) does not apply to spills or discharges of hazardous substances for which written reports are filed under 49 CFR 171.16. U.S. DOT's 30-day report includes notice of the incident and a description of the response actions. The commission cannot require interstate transporters reporting under 49 CFR §171.16 to submit written incident reports to the TNRCC regional manager; however, the executive director will request copies from the U.S. DOT. The commission emphasizes that this only applies to those spills for which a written report is filed under 49 CFR §171.16. All other transportation spills are subject to all requirements of Chapter 327.**

Second, UPRC and BNSF claim that the commission is improperly attempting to expand the definition of “hazardous materials.” They commented that the HMTA preempts the commission from requiring notice of transportation spills because the commission has expanded the definition of hazardous materials. Specifically, BNSF and UPRC suggested that by regulating “other substances,” the commission is expanding the definition of “hazardous material.” The commenters also asserted that the inclusion of any substance “designated by the commission,” in the definition of hazardous substance in Chapter 327 expands the definition of hazardous materials.

**The commission disagrees that it is expanding the definition of “hazardous material.” First, the commission is not asserting that other substances are hazardous materials. Rather, these substances are regulated under the Texas Water Code §26.039, which requires reporting of spills**

**of other substances that cause pollution of waters in the state. This is not a declaration that these substances are hazardous materials. Second, the commission has not expanded the definition of hazardous materials. The only substances designated by the commission as hazardous substances are those designated by the United States Environmental Protection Agency under Comprehensive Environmental Responsibility, Compensation and Liability Act and the Clean Water Act. These are federal definitions. The commission has not designated any materials not already designated by federal law. Thus, the commission disagrees with the commenters and believes that the HMTA does not preempt these rules.**

BNSF and UPRC commented that the Federal Railroad Safety Act (FRSA) preempts the commission from requiring railroads to report spills.

**The commission agrees that preemption under the FRSA is much broader than under the HMTA and, thus, will continue to exempt railroads from the spill reporting requirements of this chapter.**

#### STATEMENT OF STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code §5.103, which provides the commission with the authority to adopt any regulation necessary to carry out its powers and duties under the Texas Water Code and other laws of this state, and Texas Water Code §26.264, which provides the commission with the authority to issue rules necessary and convenient to carry out the purposes of Texas Water Code, Chapter 26, Subchapter G.

These amendments are also adopted under Texas Water Code §26.039, which authorizes the commission to issue reasonable rules establishing safety and preventive measures concerning activities that are inherently or potentially capable of causing or resulting in the accidental discharge or spillage of waste or other substances and which pose serious or significant threats of pollution. Further, they are adopted under Texas Health and Safety Code, Solid Waste Disposal Act, §361.024, which authorizes the commission to adopt and promulgate rules consistent with the general intent and purposes of the Act and to establish minimum standards of operation for all aspects of the management and control of municipal hazardous waste and industrial solid waste.

## **SPILL REPORTING**

### **§327.1, §327.5**

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#### **§327.1. Applicability.**

- (a) (No change.)

(b) This chapter does not apply to:

(1) - (8) (No change.)

(9) discharges or spills occurring during the normal course of rail transportation.

**§327.5. Actions Required.**

(a) - (b) (No change.)

(c) Except for discharges or spills occurring during the normal course of transportation about which carriers are required to file a written report with the U.S. Department of Transportation under 49 CFR §171.16, the responsible person shall submit written information, such as a letter, describing the details of the discharge or spill and supporting the adequacy of the response action, to the appropriate TNRCC regional manager within 30 working days of the discovery of the reportable discharge or spill. The regional manager has the discretion to extend the deadline. The documentation shall contain one of the following items:

(1) - (3) (No change.)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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