

The Texas Natural Resource Conservation Commission (commission or agency) proposes amendments to §327.1 and §327.5, concerning spill prevention and control.

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 §§327.1-327.5 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.

The proposed amendment to §327.1(b) would remove §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 U.S. Department of Transportation (U.S. DOT) regulations in 49 Code of Federal Regulations (CFR) §§171.15 and 171.16. The agency is responsible for ensuring that responses to all spills are timely and properly conducted. The commission is concerned that transportation spills are, for the most part, in areas accessible to the public, and, if the exemption is retained, the agency will not be informed of potentially dangerous incidents. Unless clearly preempted by federal law, the commission firmly believes that transportation spills should be reported to the State. In order to ensure consistency with U.S. DOT regulations concerning hazardous materials, the commission is proposing to amend §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.

Although initial notification is not preempted by 49 CFR §§171.15 and 171.16 under the Hazardous

Materials Transportation Act, 49 U.S.C. App. §1811(a), the commission is seeking comment to determine if other federal laws, such as the Federal Railway Safety Act, may preempt state reporting regulations for spills or discharges occurring during transportation. The commission requests that persons submitting comments in support of preemptive rights of other federal transportation laws provide specific statutory and regulatory cites, the applicable language from the federal law, and a list of administrative rulings or court cases that address the preemption of state spill reporting requirements under the federal law.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five years the sections as proposed are in effect, there will be fiscal implications as a result of enforcement and administration of the sections. The effect on state government will be an increase in cost. This cost increase, however, is not anticipated to be significant. No increases in revenue to state government are anticipated and any increases in cost will be met within existing financial resources of the state. There are no fiscal implications for local governments anticipated except for those associated with a local government that is a responsible person within the meaning of Chapter 327 and the rules relating to spill prevention and control. To the extent that a local government may be a waste generator or a person responsible for the reporting of and response to a discharge or spill, the fiscal implications would be equivalent to those for any other group or class of affected party.

The proposed rules will extend new spill reporting and response requirements to certain spill incidents by removing the current exemption from the application of Chapter 327 to spills or discharges that are also subject to reporting in accordance with U.S. Department of Transportation regulations. New state regulations relating to spills clarify current policy, strengthen existing regulations and establish more detailed and specific requirements for compliance with existing statutory authority for the prevention,

control and management of discharges and spills. These sections do not represent substantially new or increased compliance efforts, however, and significant cost effects on responsible persons and those affected by these sections are not anticipated. Other potential costs are prospective and based on the occurrence of events subject to the proposed sections, such as a spill or other release of a hazardous substance.

In addition to potential costs, coordinating the proposed rules with the rules for specific-constituent cleanup standards (Risk Reduction Rules, 30 TAC §335.8) may represent significant cost savings. Clarifying the application of site-specific, health-based standards for cleanup of spills will reduce the potential costs of response to such discharges relative to absolute cleanup criteria. Actual cost savings will vary with specific sites and circumstances and cannot be predetermined. The magnitude of these cost savings that may occur will likely exceed the moderate costs that are otherwise anticipated as a result of compliance with these sections.

Businesses affected by these rules will include small businesses. Costs to small business will be equivalent to those imposed on larger concerns and will vary based on the same factors - the size of the facility, the amounts of regulated materials handled and the number of potential sources of release. The effects of these rules, while not considered to be substantial for any class of business, may have some disproportionate impact on small businesses if certain fixed costs must be distributed over a smaller workforce or recovered from lower gross revenues.

Mr. Minick has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcement of and compliance with the sections will be

improvement in the prevention, control and management of spills and releases of hazardous substances; efficiency and effectiveness of actions taken in response to spill events; notification of existing releases of hazardous substances; and compliance with statutory provisions for protection of public health and safety.

There are no anticipated costs to any individual required to comply with these proposed sections except those identified above for parties subject to these rules.

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 proposed changes to this rule further the purpose of the rule by requiring spills in transportation to be reported and responded to. Promulgation and enforcement of these changes should not affect private real property that is the subject of the rules.

Written comments may be mailed to Bettie Bell, TNRCC Office of Policy and Regulatory Development, MC205, P.O. Box 13087, Austin, Texas 78711-3087. All comments should reference Rule Log Number 96133-327-WS. Comments must be received by 5:00 p.m., 30 days from the date of publication of this proposal in the Texas Register. For further information, contact Marianne Baker, Legal Division, at (512) 239-0475 or Stennie Meadours, Pollution Cleanup Division, at (512) 239-2505.

The amendments are proposed 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 proposed 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 proposed 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 transportation about which carriers are required to give notice and report in accordance with 49 CFR §§171.15 and 171.16.]

§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 [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 agency 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 proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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