

The commission proposes amendments to Subchapter H, §§334.309, 334.310, and 334.322, concerning the Reimbursement Program; the repeal of Subchapter M, §334.560, concerning Reimbursable Cost Guidelines for the Petroleum Storage Tank Reimbursement Program; and new Subchapter M, §334.560, concerning Reimbursable Cost Guidelines for the Petroleum Storage Tank Reimbursement Program.

EXPLANATION OF PROPOSED RULES

The primary purpose of the proposed amendments, repeal, and new section is to update the Reimbursable Cost Guidelines to reflect current market costs for corrective action activities and make minor amendments to clarify and streamline the rules regarding the reimbursement of corrective action activities in the petroleum storage tank program. The proposed amendments, repeal, and new section should assure fair reimbursement of costs for corrective action activities due to leaking storage tanks.

Amendments are proposed to §334.309, concerning Reimbursable Costs. Subsection (a) is proposed to be amended to add a cross-reference to the Reimbursement Cost Guidelines adopted in §334.560.

Subsection (c) is amended to correct the cross-reference to §334.310(f), concerning Requirements for Eligibility.

Amendments are proposed to §334.310, concerning Requirements for Eligibility. Subsection (a) is proposed to be amended to delete some unnecessary words and to add a comma. Subsection (a)(1) is proposed to be amended to streamline the wording. Subsection (a)(1)(F)(i)(III) is proposed to be amended to increase the amount of time, from 48 hours to 72 hours, that an adjacent property owner

may continue with emergency abatement activities prior to needing written approval from the executive director to incur additional expenses. Subsection (f) is proposed to be amended to increase the amount of time, from 48 hours to 72 hours, that a tank owner or operator may continue with emergency abatement activities prior to needing written approval from the executive director to continue emergency abatement and corrective action activities; additionally, an amendment is proposed to eliminate the exception to preapproval for continuous phase-separated product recovery.

Amendments are proposed to §334.322, concerning Subchapter H Definitions. The commission proposes to add a new definition for “Emergency abatement” to clarify the meaning and intent of an emergency action. Also, a revision is proposed to the definition of “Initial abatement measures” to clarify what is not included in the meaning of this term. Additionally, the commission proposes a new definition for “Phase-separated product” that cross-references the definition of “Free-product” in 30 TAC §334.2, concerning Definitions, which are applicable to the entire chapter.

The commission also proposes the repeal of §334.560 and new §334.560, concerning Reimbursable Cost Guidelines for the Petroleum Storage Tank Reimbursement Program. In the new section, one change is proposed to remove the obsolete reference to the Texas Water Commission and another to change the effective date of the Reimbursable Cost Guidelines. The Reimbursable Cost Guidelines are published as a graphic following the rule, and because the commission has made several changes to update the document, the repeal and replacement of the section is the most efficient way to indicate these changes.

Public comment is solicited on the updated Reimbursable Cost Guideline. Comments may be submitted as stated in the "SUBMITTAL OF COMMENTS" paragraph of this preamble.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five years these sections as proposed are in effect, there will be fiscal implications as a result of enforcement and administration of these sections. The fiscal implications of these rules are generally attributed to the updating of the Reimbursable Cost Guidelines to reflect market costs for corrective action activities. The Reimbursable Cost Guidelines as proposed represent both increases in costs and opportunities for cost savings for state government through expenditures from the Petroleum Storage Tank Remediation Fund. The most significant changes involve an increase of up to 15% above the current Reimbursable Cost Guidelines for drilling and monitor well installation costs and a decrease of up to 20% for the cost associated with laboratory analysis. Any increase in costs will be paid to owners and operators as reimbursements from the Petroleum Storage Tank Remediation Fund. There are no anticipated additional administrative costs to the commission.

State agencies that own or operate leaking petroleum storage tanks will realize a benefit to an updated Reimbursable Cost Guideline, since the proposed guideline is more reflective of current market costs for corrective action activities. The updated cost guideline will allow state agencies to more accurately project costs associated with the cleanup of leaking petroleum storage tanks. These cost guidelines as proposed represent both increases in costs and opportunities for cost savings for affected petroleum storage tank owners and operators. Additionally, any increase in corrective action costs can be

reimbursed from the Petroleum Storage Tank Remediation Fund. The effects on local governments, small businesses, and persons who own or operate leaking petroleum storage tanks will be similar to those for state agencies.

PUBLIC BENEFIT

Mr. Minick also has determined that for the first five years these sections as proposed are in effect the public benefit anticipated as a result of enforcement of and compliance with the sections will be more cost-effective remediation of leaking petroleum storage tanks and enhanced protection of human health and safety and the quality of groundwater resources. There are no anticipated costs to persons to comply with these sections as proposed other than those described previously.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed amendments, repeal, and new section is to update the Reimbursable Cost Guidelines to reflect current market costs for corrective action activities and to make minor additional changes to clarify and streamline the rule language. The rule amendments, repeal, and new section will substantially advance this specific purpose by allowing the commission to provide reasonable reimbursement of leaking petroleum storage tank corrective action costs. Promulgation and enforcement of these rules will not create a burden on private real property which is the subject of the rule amendments because corrective action would be required on these sites and should be reimbursed at actual cost with or without an update of the Reimbursable Cost Guidelines.

These amendments, repeal, and new section are excepted from the Private Real Property Preservation Act under Texas Government Code, §2007.3(b)(4), because the rulemaking is reasonably taken to fulfill an obligation mandated by federal law in 40 Code of Federal Regulations, Part 280, Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (UST).

COASTAL MANAGEMENT PROGRAM

31 TAC Chapter 505, Subchapter A (Purpose and Policy and State Agency Actions Subject to the Coastal Management Program), §505.11(b)(2) requires the commission to evaluate proposed rules to ensure consistency with the Coastal Management Program goals and policies regarding underground storage tanks. The commission has reviewed the proposed rule amendments, repeal, and new section for compliance with the Coastal Management Program and has determined that the proposed rule amendments, repeal, and new section relate to the costs of and procedures regarding the reimbursements of corrective action activities, which are procedural in nature and therefore are not subject to the Coastal Management Program.

SUBMITTAL OF COMMENTS

Written comments on the proposal may be mailed to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or by faxed to (512) 239-4808.

All 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, please contact Dan Neal, Reimbursement Section, Petroleum Storage Tank Division, (512) 239-2001.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §§26.341 - 26.363, which provides the commission with the authority to establish and administer a program to regulate underground and aboveground storage tanks, to reimburse eligible owners and operators from the Petroleum Storage Tank Remediation Fund, and to establish guidelines for determining the amounts that may be paid from the Petroleum Storage Tank Remediation Fund. The amendments are also proposed under Texas Water Code, §§5.103, 5.105, and 5.235, which authorize the commission to adopt any sections necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas.

The proposed amendments implement Texas Water Code, Chapter 26.

SUBCHAPTER H : INTERIM REIMBURSEMENT PROGRAM

§§334.309, 334.310, 334.322

§334.309. Reimbursable [Reasonable] Costs.

(a) The commission will utilize the reimbursable cost guidelines, as outlined in §334.560 of this title (relating to Reimbursable Cost Guidelines), to evaluate the reimbursability of claims related to the cleanup of leaking petroleum storage tank sites.

(b) (No change.)

(c) For those activities that require preapproval, pursuant to §334.310(f) of this title (relating to Requirements for Eligibility [Corrective Action]), the commission will consider the pre-approved cost or the actual cost, whichever is lower, as the reimbursable cost.

§334.310. Requirements for Eligibility.

(a) For [In order for] a person to be an eligible owner or operator under this subchapter, each of the following requirements must be met.

(1) The [Such] person must meet the other requirements of this chapter and must be:

(A) - (E) (No change.)

(F) an adjacent landowner who can clearly prove that the land has been contaminated by a release of petroleum products from a tank described in subparagraph (A) of this paragraph which is not located on said land, and who performed corrective action in response to a release of petroleum products from such tank, and either:

(i) performed emergency abatement actions by completing all the following:

(I) - (II) (No change.)

(III) taking actions necessary to protect against imminent danger to human health and safety by mitigating fire, explosion, and vapor hazards, by removing phase-separated product from structures, basements, sumps, etc., or performing other actions as deemed necessary by the executive director. Restoration of site to preexisting conditions, cost of relocating utility structures, site assessment, and remediation are not considered part of emergency abatement activities. Any expenses incurred after 72 [48] hours from commencement of the action must be approved by the executive director in writing; and

(IV) (No change.)

(ii) (No change.)

(2) - (5) (No change.)

(b) - (e) (No change.)

(f) Unless otherwise approved by the executive director, all corrective action activities, including activities proposed in corrective action plans, must be approved in writing by the executive director prior to implementation. For reimbursement of emergency, initial abatement measures and phase-separated product recovery as required by §334.77 of this title (relating to Initial Abatement Measures and Site Check), approval by the executive director is not required prior to implementation, unless the emergency action extends beyond 72 [48] hours, then written approval will be required for all activities [with the exception of continuous phase-separated product recovery].

§334.322. Subchapter H Definitions.

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

Emergency abatement - Taking actions necessary to protect against imminent danger to human health and safety by mitigating fire, explosion, and vapor hazards, by removing phase-separated product from structures, basements, sumps, etc., or performing other actions as deemed necessary by the executive director. Restoration of site to preexisting conditions, cost of relocating utility structures, site assessment, and remediation are not considered part of emergency abatement activities.

Initial abatement measures - The mitigation of all existing or potential fire, explosion, or vapor hazards, including the removal of phase-separated product, to provide adequate protection of human health, safety, and the environment in emergency situations or other situations where emergency actions must be implemented to prevent further impacts to the environment. Restoration of site to preexisting conditions, cost of relocating utility structures, site assessment, and remediation are not considered part of initial abatement measures.

Phase-separated product - See Free-product as defined in §334.2 of this title (relating to Definitions).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on May 14, 1997.

**SUBCHAPTER M : REIMBURSABLE COST GUIDELINES FOR THE
PETROLEUM STORAGE TANK REIMBURSEMENT PROGRAM**

§334.560

The repeal is proposed under Texas Water Code, §§26.341 - 26.363, which provides the commission with the authority to establish and administer a program to regulate underground and aboveground storage tanks, to reimburse eligible owners and operators from the Petroleum Storage Tank Remediation Fund, and to establish guidelines for determining the amounts that may be paid from the Petroleum Storage Tank Remediation Fund. The repeal is also proposed under Texas Water Code, §§5.103, 5.105, and 5.235, which authorize the commission to adopt any sections necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas.

The proposed repeal implements Texas Water Code, Chapter 26.

§334.560. Reimbursable Cost Guidelines.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on May 14, 1997.

**SUBCHAPTER M : REIMBURSABLE COST GUIDELINES FOR THE
PETROLEUM STORAGE TANK REIMBURSEMENT PROGRAM**

§334.560

The new section is proposed under Texas Water Code, §§26.341 - 26.363, which provides the commission with the authority to establish and administer a program to regulate underground and aboveground storage tanks, to reimburse eligible owners and operators from the Petroleum Storage Tank Remediation Fund, and to establish guidelines for determining the amounts that may be paid from the Petroleum Storage Tank Remediation Fund. The new section is also proposed under Texas Water Code, §§5.103, 5.105, and 5.235, which authorize the commission to adopt any sections necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas.

The proposed new section implements Texas Water Code, Chapter 26.

§334.560. Reimbursable Cost Guidelines.

The commission hereby adopts the following Reimbursable Cost Guidelines for the Petroleum Storage Tank Reimbursement Program which are in effect as of September 29, 1997. Figure: 30 TAC

§334.560

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on May 14, 1997.