

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§335.341-335.351 and the repeal of §335.352, concerning the assessment and remediation of State Superfund sites 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. Sections 335.342, 335.343, 335.345, 335.346, 335.348, 335.349, and 335.351 are adopted with changes to the proposed text as published in the January 23, 1998, issue of the *Texas Register* (23 TexReg 515). Sections 335.341, 335.344, 335.347, 335.350, and the repeal of §335.352 are adopted without changes and will not be republished.

EXPLANATION OF ADOPTED RULE

Chapter 335, Subchapter K sets forth requirements for the State Superfund program. The rule changes to these sections will enhance the implementation of certain provisions of House Bill (HB) 2776 passed by the 75th Texas Legislature, streamline current assessment and remediation procedures of State Superfund sites, and ensure consistency with the existing cleanup standards of the Risk Reduction Rules in Chapter 335, Subchapter S.

Section 335.341, concerning Purpose and Scope, establishes that Chapter 335, Subchapter K addresses the State Superfund program, and sets forth the general process for listing on the State Superfund Registry. The commission proposed to amend §335.341 to recognize the commission's Voluntary Cleanup Program (VCP) as a viable alternative to listing a site on the State Superfund Registry. Changes to §335.343 and §335.344 were proposed to be consistent with the amendment to §335.341.

The commission did not receive any comments on the proposed changes to §335.341, and the section is adopted as proposed.

Section 335.342 contains definitions specific to the State Superfund program. The commission proposed adding, amending, and deleting a number of terms and definitions in Subchapter K. In response to comments, several proposed definitions were amended in the final rule, and one proposed definition, "Unilateral order," was deleted based on comments. In addition, the commission identified several grammatical changes that were necessary. Finally, the definitions in Subchapter K are numbered to comply with Secretary of State rules for rulemakings adopted after the Subchapter K amendments were proposed.

Section 335.343 establishes requirements for the ranking of facilities. The commission proposed to clarify the agency's use of the same Hazardous Ranking System (HRS) as the U.S. Environmental Protection Agency (EPA) for scoring State Superfund sites, and provide that criteria other than the HRS be considered in prioritizing sites. In addition, the commission proposed that an updated state registry identifying each facility and relative priority be published annually. The commission adopts the section as proposed, and, based on comments, has listed some of the relative priority factors other than the HRS score that might be considered such as community interests, simplicity, costs, and time.

Section 335.344, concerning Delisting and Modifications, discusses the procedures for delisting a facility from the State Superfund Registry, modifying a facility's ranking, or modifying information on a facility. The commission proposed to amend §335.344 to delete the language that allowed "any

interested person" to request a delisting or modification. This is consistent with the statutory language which does not include "interested persons." The commission did not receive any comments on this section, and the changes to the section are adopted as proposed.

Section 335.345, concerning Requests for Information or Production of Documents, provides that the executive director may submit requests for information from persons with information on a site listed on the State Registry. Documents submitted under the request are public record. The commission proposed amending §335.345 to replace much of the existing language in the section with language that establishes clear, succinct requirements that prescribe requested documents to be delivered within 45 days. In addition, the commission proposed identifying the Public Information Act as the effective law for making records public. The commission adopts the subsection (b) as proposed. Based on comments, the commission adopts proposed new language in subsection (a), but retains the previous language that set forth a specific process.

Section 335.346, concerning Removals and Preliminary Site Investigations, establishes the procedures for conducting removals at State Superfund sites, including the requirement that no person may conduct a removal without the authorization of the executive director and already existed in statute and rule. In addition, the section authorizes the use of the Hazardous and Solid Waste Remediation Fee Account to fund removals. The commission proposed amending §335.346 to provide that the executive director may conduct early planned removals at sites to substantially reduce the overall cost of cleaning up the site. There were no public comments on this section; however, the commission did make two editorial changes for purposes of consistency.

Section 335.347, concerning Financial Capability Determinations, sets forth the criteria used for the agency's determination of financial capability of a potentially responsible party (PRP) to participate in an investigation and/or remediation. The commission proposed amending §335.347 to clarify portions of the section and to no longer require that notice of capability be provided to all PRPs. The commission did not receive any comment on this section, and the section is adopted as proposed.

Section 335.348, concerning General Requirements for Remedial Investigations, establishes the requirements for investigation at State Superfund sites. The commission proposed several amendments to §335.348. The most notable change was the removal of the baseline risk assessment as a comparison standard for remedial action alternatives. Instead, the commission proposed that a PRP evaluate health-based and ecological risks, and then calculate cleanup levels to the satisfaction of the executive director before the remedial action is selected. This was proposed to be consistent with the proposed Texas Risk Reduction Program (TRRP) rule. The commission also proposed clarifying that the scope of the health and safety plan to include the general public in addition to on-site personnel; allowing a PRP to choose a presumptive remedy in lieu of the feasibility study to expedite the remedial process; and requiring all engineering evaluations, plans, and specifications of the feasibility study to be prepared in accordance with the Texas Engineering Practice Act. The commission adopts the three proposed changes noted above, but still retains the Baseline Risk Assessment. Although removal of the baseline risk assessment was supported by the commenters, the commission retains the baseline risk assessment because no alternative exists until the TRRP rule is adopted. In addition, the final rule incorporates grammatical changes and other changes based on comments received.

Section 335.349, concerning General Requirements for Remedial Activities, discusses the agency's acceptance of the remedial action plan, public notice of the plan, modifications to the plan, and general standards for the substance of the plan. The commission proposed to change the current time frames for selecting the proposed remedial action to add procedures for modifying the proposed remedial action after the date of the initial public meeting, and to require that all documents submitted in connection with the remedial design and remedial action be prepared in accordance with the Texas Engineering Practice Act. Except for one editorial change, the section is adopted as proposed.

Section §335.350, concerning Defense to Liability and Claims of Divisibility, establishes eligibility and procedures for defense of liability and claims of divisibility. The commission proposed several simple cleanup changes to the section to be consistent with other changes in the proposed rule. No comments were received on this section, and the commission adopts this section as proposed.

Section 335.351, concerning Settlement Agreements, provides detail on the development and approval of settlement agreements between the commission and PRPs. Specifically, the section discusses mixed funding, de minimus settlements, covenants not to sue, and discharge of liability for other PRPs. The commission proposed deleting language specifically addressing partial settlements, but proposed adding subsections on remedial investigation settlements and remedial action settlements. For remedial investigation settlements, the commission proposed that in the case of a settlement offer that is less than a good faith offer to fund or perform a remedial investigation, the executive director shall consider the party's ability to pay. Based on comment, the adopted rule combines the discussion of remedial investigation and remedial action settlements into one subsection, and does not contain the proposed

language on a party's ability to pay as the exclusive basis for the executive director's consideration of the offer for remedial investigation settlements.

Section 335.352, concerning Adoption by Reference, referred to the federal HRS and agency and EPA guidance documents. The commission proposed repealing this section because the reference to the HRS is no longer necessary given the amendments to §335.343, and to allow guidance documents to be added or taken off the list administratively. The commission received no comments on the repeal of §335.352, and the adopted rule no longer contains the section.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rule does not meet the definition of major environmental rule, because the rule is not expected to adversely affect the economy, a sector of the economy, the environment, productivity, competition, jobs, or the public health and safety of the state or a sector of the state. Investigation and remediation of State Superfund sites will be streamlined and expedited by the final rule while retaining measures protective of human health and safety. This, in turn, will improve environmental protection and may have positive economic benefits, as well, as sites are more quickly restored to an active and productive use.

The final rule does not meet any of the four specific applicability requirements. It does not exceed a federal standard or a requirement of delegation because the program is a state program not governed by federal law or regulation. As such, there is not a federal delegation program for State Superfund. The final rule does not exceed an express state statutory requirement because the rule changes are consistent with HB 2776, Acts of the 75th Legislature, affecting the State Superfund statute in Health and Safety Code, Chapter 361, Subchapter F. Finally, the final rule is adopted under authority provided by statutes in addition to state law providing general rulemaking authority to the commission. The other statutes are Health and Safety Code, §361.017 and §361.024, which provide authority to adopt rules governing industrial solid waste under the Solid Waste Disposal Act and the specific rulemaking authority of Health and Safety Code, Subchapter F.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, Annotated, §2007.043. The specific purpose of the rule is to enhance the existing State Superfund program and to implement provisions of HB 2776, Acts of the 75th Legislature. The rules will substantially advance this specific purpose by clarifying portions of the rule, by streamlining the assessment and remediation procedures, and by implementing certain provisions in HB 2776 where rulemaking is necessary. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the rules are intended to streamline existing procedures to facilitate removals and remedial actions at affected sites. These streamlining measures should reduce the administrative burden of remediating a site within the State Superfund program while continuing to be protective of human and ecological receptors.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

Title 31 Texas Administrative Code §505.11, relating to Actions and Rules Subject to the CMP, requires the commission to evaluate proposed rules to ensure consistency with the CMP. The commission has reviewed this rulemaking for consistency with the CMP goals and policies. The rulemaking does not consist of actions or rules subject to the CMP identified in §505.11(a)(6) and §505.11(b)(2) for the Texas Natural Resource Conservation Commission; therefore, the proposed rule is not subject to the CMP.

HEARINGS AND COMMENTERS

The commission did not hold a public hearing on the proposed rule changes. The comment period for the proposed rules closed at 5:00 p.m., February 23, 1998. Amoco Corporation (Amoco), Association of Chemical Industry of Texas (ACIT), and the Texas Chemical Council (TCC) submitted comments on the proposed rule, and the three commenters generally supported the proposed changes.

ANALYSIS OF TESTIMONY

GENERAL COMMENTS

ACIT, Amoco, and TCC commented that many of the changes proposed by the commission will facilitate cleanups and greater environmental benefit will result from the limited funds available for State Superfund. In addition, both ACIT and Amoco support the comments of TCC.

§335.342. DEFINITIONS

Regarding proposed §335.342, the commission received several comments. In addition, the final rule numbers all definitions in Subchapter K to comply with the rules of the Secretary of State.

Concerning the definition of “Agreed order or agreed administrative order,” the commission did not receive any comments, but has replaced the term “remediation” with “remedial action” for purposes of consistency.

Concerning the definition of "Divisible," ACIT and TCC recommended that the definition be revised to include releases "from" a facility in addition to releases "at" a facility. In addition, ACIT and TCC also recommended removing the reference to "remedial action plan," since that term is no longer used in the rules, and adding "that" before "are capable" as a grammatical correction.

The commission concurs that "at or from" a facility clarifies the definition and has made the change. The commission has also made the grammatical correction suggested. However, the commission disagrees with the comment to remove the reference to remedial action plan. The term is used in the definition to be consistent with statutory language in Health and Safety Code, §361.276(b).

Concerning the definition of "Good Faith Offer," TCC commented that the addition of "fully and" to the existing term "effectively" adds no value and could make individual staff members feel compelled to require unreasonable activities and expenditure of funds. TCC further commented that the existing

language of "effectively" is more than adequate. As such, TCC recommended removing the proposed addition in subparagraphs (A) and (B). Also concerning "Good Faith Offer," TCC recommended removing the proposed addition of "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/remediation" in subparagraphs (A) and (B) because it questions whether such a statement is appropriate in a definition and questions whether or not this is appropriate under existing law and the commission's rules. Specifically, TCC referred to "divisible" sites under Texas Health and Safety Code, §361.187(f), "mixed funding" under §361.199, and "settlements" under §361.200 in questioning the appropriateness of the additional language. TCC recommended that the executive director retain discretion to determine what is a "good faith offer."

With the exception of divisibility, the commission disagrees with TCC's comments on the definition of good faith offer and has not removed the proposed additions to subparagraphs (A) and (B). Statutory time periods when there is a good faith offer should not be invoked by settlement offers less than the full amount except in the case of divisibility. The commission is concerned that removing the requirement will lead to offers that are intended to initiate statutory timeframes effectively delaying cleanup of Superfund sites and resulting in the inefficient use of state resources. The commission emphasizes that this does not in any way change the current practice of individual PRPs voluntarily joining together early in the process to develop their own good faith offers which, when taken together, would result in full funding; although individuals within the group would remain jointly and severally liable. In fact, the commission encourages PRPs to form groups in this manner and make good faith offers utilizing combined resources. In

addition, settlements can occur prior to or after an order is issued, and the commission emphasizes that the inclusion of this requirement does not have the consequence of removing partial settlements. As noted earlier, the commission agrees that divisibility can be an exception to fully fund or perform the remedial investigation or remedial action, and the adopted rule includes a claim of divisibility as an exception.

Concerning the definition of "Health and safety plan," ACIT and TCC commented that "the public" should be removed from the Health and Safety Plan. ACIT commented that public protection is an issue for the spill contingency plan. TCC noted that the plan should only address the protection of on-site personnel, as implied by the reference to Occupation and Safety Administration (OSHA) regulations to protect workers. TCC emphasized that while it fully supports protection of the public from activities at contaminated sites, the Health and Safety Plan comes into effect long after the public has been excluded from the contaminated property. For purposes of clarification, ACIT also recommended changing "...from potential hazards particular to a facility while implementing the remedial investigation or remedial action" to "...from potential hazards associated with implementing the remedial investigation or the remedial action at a particular facility." In addition, ACIT commented that the Health and Safety Plans should conform to the relevant portions of OSHA regulations.

The commission disagrees with the recommendation to remove the public from the Health and Safety Plan because the commission is tasked with protecting the public. Although activities in the remedial investigation and remedial action stage should protect the public, the Health and Safety Plan should address contingencies in the event that activities and/or controls fail. For example,

emissions can migrate off-site or the public can enter the facility if it is not properly secured. The commission agrees with the clarification changes and ACIT's comment on referencing the relevant portions of the OSHA regulations, and has made those changes.

Concerning the definition of "Implementation schedule," ACIT and TCC recommended clarifying the definition by revising it to read, "A document describing the sequence, duration and interdependency of each activity to be conducted during a remedial investigation or remedial action."

The commission agrees that the recommended change adds clarity, and the change is incorporated in the adopted rule.

Concerning the definition of "Potentially responsible party," the commission did not receive any comments, but has added Health and Safety Code, §361.275(g), as another section in the statute that defines PRPs.

Concerning the definition of "Quality assurance project plan (QAPP)," TCC recommended removing "comprehensive" from "comprehensive detail" because the term might make individual staff members feel compelled to make unreasonable demands of PRPs. ACIT and TCC recommended replacing "data quality goals" with "data quality objectives," since most existing guidance refers to objectives rather than goals.

The commission agrees that changing data quality goals to data quality objectives is more accurate, and the change has been made to the adopted rule. In addition, "remedial" has been added before investigation for consistency. The commission disagrees with removing "comprehensive," because the QAPP should be comprehensive. If a person believes unreasonable demands are being made by staff, the person should notify the appropriate manager at the agency to discuss his concerns. However, the commission expects that staff's review of a QAPP will be reasonable in most, if not all, cases.

Concerning the definition of "Remedial action," the commission did not receive any comments but has deleted "migrate to" before "cause an imminent and substantial danger" for clarity.

Concerning the definition of "Remedial action drawings and specifications," ACIT and TCC recommended minor wording changes to clarify the definition. Specifically, TCC and ACIT recommended deleting "the" before "work," and changing "as applied to the remedial action" to "to be applied during the remedial action."

The commission agrees that the suggested changes clarify the definitions, and the adopted rule incorporates the changes.

Concerning the definition of "Remedial design," ACIT and TCC recommended changes to clarify the definition. First, the commenters recommended changing "engineering drawings and technical

specifications" to "the remedial action drawings and specifications." Second, the commenters recommended listing the specific items for a remedial design.

The commission concurs with the first suggestion and has changed "engineering drawings and technical specifications" to "the remedial action drawings and specifications." However, the commission does not concur with the recommendation to add the list of items contained in the remedial action plan because this simply repeats what is in §335.349. The commission has added subsection (d) to the cite for §335.349 to provide more specificity.

Concerning the definition of "Remedial investigation," TCC commented that the proposed definition implies that all remedial investigations will include the elements in the definition, which is not consistent with §335.348. TCC recommended modifying the definition to read, "An investigative study, which may include, removals...."

The commission agrees with TCC and has incorporated the change to the adopted rule.

Concerning the definition of "Settlement offer," no comments were received, but the commission has made a grammatical change by removing a comma before "and/or."

Concerning the definition of "Unilateral order," TCC recommended removing the definition because it seems inappropriate to include a definition of a new type of commission order in a subchapter on waste. TCC also commented that it was unable to determine where "unilateral order" was used in the rule.

The commission agrees with the comment, and has deleted the definition of Unilateral order.

§335.343. RANKING OF FACILITIES

Concerning proposed §335.343(a), TCC commented that it supports the concept of not determining the relative priorities of the sites solely on the basis of the HRS; however, TCC noted that the proposed rule is not clear on what other factors would be considered. Therefore, TCC recommended deleting subsection (a) and suggested changes to proposed subsection (c): TCC recommended adding the following language to the end of subsection (c), "The relative priority will be based on, but not limited to, such factors as the Superfund HRS scores, relative costs of investigation and remediation, and estimated time to complete the remedial actions." ACIT commented that nothing in HB 2776 changed the need to move from a mandatory priority scheme using the HRS to a discretionary system.

Regarding ACIT's comment, the commission acknowledges that HB 2776 did not address the prioritization of facilities; however, as the preamble to the proposed rule noted, HB 2776 was one of several reasons for proposing amendments to the Superfund rules. The rules were also proposed to streamline current assessment and remediation procedures for State Superfund sites. The Health and Safety Code does address prioritization in §361.181(b), but does not specify relative factors to be considered. Therefore, the commission may establish by rule the relative

factors. The commission contends that criteria such as community interests and simplicity are legitimate criteria to consider when prioritizing sites, and that the commission should have the flexibility to consider these factors.

The commission generally agrees with TCC comments, except that it does not concur with the removal of subsection (a). Subsection (a) establishes the HRS as an integral part of the ranking of facilities. The rule does state that priority listing on the State Registry "may be" be based on the HRS rather than "is" based on the HRS to clarify that it is not the only criteria for ranking. The recommended change to proposed subsection (c) to identify some of the relative factors is incorporated into subsection (a). The commission has also added community interests and simplicity as other relative factors.

§335.345. REQUESTS FOR INFORMATION OR PRODUCTION OF DOCUMENTS

Concerning proposed §335.345(a), ACIT and TCC commented that while proposed additions to subsection (a) are appropriate, the portions of subsection (a) proposed for deletion, language specifying the procedures that the agency must follow if a party does not comply with the initial request for information, should be retained. The commenters stated that nothing in these procedures has been changed by new law, and there is not basis for deleting this language.

The commission agrees with the commenters. Health and Safety Code, §361.182 is clear concerning the requirement that the commission adopt rules regarding notice and opportunity so a hearing before the commission on whether the requested information or documents should be

produced. The commission adopts the language proposed to be added and retains the existing language regarding notice and hearing.

§335.346. REMOVALS AND PRELIMINARY SITE INVESTIGATIONS

Concerning proposed §335.346, no comments were received, but two changes have been made. In proposed subsection (b), reference was made to "a safety and health" plan. To be consistent, the adopted rule refers to "a health and safety plan." In subsection (c), a reference to "sampling, testing" has been removed to be consistent with other changes in the subsection.

§335.348. GENERAL REQUIREMENTS FOR REMEDIAL INVESTIGATIONS

TCC submitted a general comment on proposed §335.348 that the proposed section does not fit or flow together very well because the section is a combination of revisions to current provisions and additions of new provisions.

The commission acknowledges that all the proposed changes to the §335.348 may have appeared confusing; however, the *Texas Register* has a prescribed format for proposing amendments to rules. The adopted rule presents the section without all of the underlines and brackets, and the commission considers the structure of the section to be well organized.

In another general comment, TCC noted that the removal of the title "Feasibility Study" from "Remedial Investigation/Feasibility Study," is inconsistent with the exact language of the statute; however, it is a concept that is understandable and consistent with the intent of the statute.

The commission agrees there may be an inconsistency with the specific statutory term, but not the underlying concepts; therefore, the removal of "Feasibility Study" from the title of "Remedial Investigation/Feasibility Study" does not result in a substantive change.

TCC commented that the feasibility study, the health-based risk assessment, and the ecological risk assessment are included in the definition of "Remedial investigation" in proposed §335.342 but are not included as one of the elements of a remedial investigation in proposed §335.348(d). TCC recommended including these items as potential components of the remedial investigation in subsection (d).

The commission agrees with TCC's comment, and has made the changes. The feasibility study and the baseline risk assessment are included as §335.348(d)(7) and (8), respectively. A baseline risk assessment is included rather than a health-based assessment for reasons noted in the response to comments on proposed §335.348(f). The ecological risk assessment has been added to paragraph (5) where the existing rule already addressed ecological concerns.

Concerning proposed §335.348(e), the commission did not receive any comments, but has made a grammatical change in paragraph (2). The adopted rule now states, "a quality assurance project plan to ensure the integrity of all samples;" rather than stating, "...to assure the integrity of all samples...."

Regarding proposed §335.348(f), TCC supported the removal of the baseline risk assessment and implementation of a health-based assessment because the baseline risk assessment serves no useful

purpose and only adds to the cost and time required to complete the cleanup. The commission did not receive comment on the requirement for an ecological risk assessment.

The commission proposed removing the baseline risk assessment from §335.348(e) and deleting the subsection. The proposed rule replaced the baseline risk assessment requirement with a general requirement to conduct a health-based risk assessment or similar study. The reason for doing so was to be consistent with the planned TRRP rule, proposed 30 TAC Chapter 350. As proposed, the TRRP rule will specify mandatory and contingent exposure pathways eliminating the need for a baseline risk assessment. The commission proposed the TRRP rule on May 15, 1998, and the rule is not expected to be final and effective until November, 1998, if adopted. Therefore, removing the baseline risk assessment would result in a 4-5 month time period in which agency staff and PRPs would not have clear regulatory direction in establishing exposure pathways and points of exposure at State Superfund sites. In addition, removing the baseline assessment would have created an inconsistency between the State Superfund program and other programs such as Voluntary Cleanup Program sites, Corrective Actions, and Closures when Risk Reduction Standard 3 remediations are performed. Standard 3 requires a baseline risk assessment for these other programs, and some may consider removing the baseline for State Superfund to be an inequity. To maintain continuity and consistency at this time, the commission is not removing the baseline risk assessment as proposed; therefore, the commission is retaining existing subsection (e), which establishes the requirement for the baseline risk assessment, and deleting proposed subsection (f).

The ultimate goal, though, is to remove the baseline assessment from State Superfund and be consistent with the TRRP rule; therefore, the commission will propose amending the Subchapter K rule after it is final to remove the baseline risk assessment and reference the proposed TRRP rule. Adoption of the rule amendment would be concurrent with the adoption of the TRRP rule. This should put the two rules on the same schedule and resolve the inconsistency issue.

The portion of proposed subsection (f) addressing ecological risks has been added to subsection (e). As a result, proposed subsection (e) is subsection (f).

In another comment concerning proposed §335.348(f), Amoco and TCC supported the concept of not requiring the evaluation when standards are apparent, except that TCC recommended "and undisputed" be removed. TCC argued that someone may take issue with a determination by the agency whether that person has a valid basis or not for disputing the standards.

In retaining subsection (e), the commission is also retaining the concept of not requiring the evaluation when standards are apparent. The commission agrees with the commenters concerning removal of "undisputed" for the reasons noted in the comment, and the term does not appear in the final rule.

Concerning proposed §335.348(g), ACIT and TCC commented that the subsection was too vague to be enforceable because there is no way to define what guidance material has "credible authority." ACIT

and TCC recommended removing subsection (g) until the Texas Risk Reduction Program, 30 TAC Chapter 350, rules are adopted.

The commission agrees with the commenters for the reasons noted and has deleted proposed subparagraph (g).

Concerning proposed new §335.348(i), ACIT and TCC commented that the requirement should be modified so that EPA technical guidance documents must be identified at the workplan stage so that their requirements can be incorporated into the development of the remedial investigation and not used as a method to disapprove a report after the work has been completed.

The commission acknowledges that technical guidance should be identified early so that everyone has a clear understanding of the appropriate guidance to be used. In practice, the agency will recognize the requirements of the guidance in the workplan stage for the remedial investigation. However, the commission also recognizes that a significant change in a guidance document could occur that would render the previous guidance questionable in regard to protection of public health, safety, and the environment. In these extenuating circumstances, the commission wishes to retain the ability to consider other guidance documents that are protective. Therefore, the commission does not agree that the rule specifically state that guidance documents be identified at the workplan stage.

Concerning proposed §335.348(j), ACIT and TCC recommended removing the public from the scope of the Health and Safety Plan and suggested that the requirement track changes based on comments concerning the definition of "Health and safety plan" in §335.342.

For reasons noted earlier in response to comments on the Health and Safety Plan in §335.342, the commission disagrees with the commenters, and has not removed public from the Health and Safety Plan. Consistent with other changes to the definition of Health and Safety Plan, the commission has made changes to this subsection.

Concerning proposed new §335.348(l), TCC supports presumptive remedies as a first choice in the remedy selection.

Concerning proposed §335.348(n), ACIT and TCC commented that there is no legal basis for requiring that a feasibility study be prepared under the supervision of a licensed engineer, because any engineering evaluation included in a feasibility study is conceptual only.

The commission disagrees with the commenters, noting that the requirement is consistent with the requirements of the Texas Board of Professional Engineers and the Texas Engineering Practice Act. Furthermore, the executive director received a letter from the Texas Board of Professional Engineers stating that feasibility studies must be prepared and submitted in accordance with the Texas Engineering Practice Act. The commission has edited the proposed subsection to be more clear that the entire Act applies to the preparation of these documents.

§335.349. GENERAL REQUIREMENTS FOR REMEDIAL ACTIVITIES

Regarding proposed §335.349(f), ACIT and TCC recommended that language be added so that the requirement for engineering plans and specifications to be prepared under the supervision of a licensed engineer and sealed by a licensed engineer is only necessary for final approved remedial design or other reports submitted and approved by the executive director. The commenters argued that draft documents should not have to be sealed.

The commission disagrees with the commenters for the same reasons noted in response to comments on proposed §335.348(n). The commission, though, has edited subsection (f) to be consistent with changes to proposed §335.348(n).

§335.351. SETTLEMENT AGREEMENTS

Regarding proposed §335.351(a), the commission did not receive any comments, but has clarified that settlements may be made after an order is issued. Regarding proposed §335.351(b), ACIT and TCC commented that new language stating that, "In the case of an offer which is less than a good faith offer to fund or perform a remedial investigation, the executive director's consideration of the offer shall be based on a party's ability to pay" is not supported by any legislative authority. ACIT and TCC recommended combining subsections (b) and (c), which discusses remedial action settlements, because the same factors that apply to the executive director's consideration of a less than 100% offer for remedial actions should also apply to remedial investigations.

The commission agrees with the commenters for the reasons stated in the comment, and the adopted rule does not contain the proposed language. The settlement factors identified for remedial actions will be applicable to remedial investigations as well. The commission also concurs with the comment to combine the discussion of remedial investigation and remedial action settlements into one subsection. In the adopted rule, proposed subsection (b) has been deleted and proposed subsection (c) is now subsection (b). Subsequent subsections are renumbered. Also, the title of new subsection (b) has been changed to "Settlements" from "Remedial action settlements" to be consistent with inclusion of remedial investigation in this subsection. The commission also made a grammatical change in §335.351(b)(1)(D) to correct the spelling of "non-cooperation."

Concerning proposed §335.351(d)(1), the commission did not receive any comments, but has removed “plan” from “remedial action plan” for consistency.

The commission has edited §335.351(c)(5)(B) for clarity.

STATUTORY AUTHORITY

The amendments are adopted under the 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. The amendments are also adopted under the 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. The Texas Solid Waste Disposal Act, Texas

Health and Safety Code, Subchapter F provides additional authority to adopt rules specific to the registry and cleanup of certain hazardous waste facilities.

**SUBCHAPTER K : HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND
REMEDATION**

§§335.341-335.351

The amendments are adopted under the 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. The amendments are also adopted under the 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. The Texas Solid Waste Disposal Act, Texas Health and Safety Code, Subchapter F provides additional authority to adopt rules specific to the registry and cleanup of certain hazardous waste facilities.

§335.341. Purpose and Scope.

(a) (No change.)

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

(1) (No change.)

(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 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) - (5) (No change.)

§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) (No change.)

(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.

(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 which may include removals, feasibility study, baseline risk assessment, ecological risk assessment, or similar study, 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.

§335.343. Ranking of Facilities.

(a) The relative priority for action needed at a facility investigated by the executive director for possible listing on the State Registry may be based on the following relevant factors:

(1) A superfund hazard ranking system (HRS). The Superfund HRS is a methodology designed to determine a numerical score for a facility based on the judgment of the executive director concerning various factors which may impact the public health and safety or the environment.

(2) Other relevant factors including:

(A) community interests;

(B) simplicity;

(C) costs of investigation and remedial action;

(D) estimated time to complete the remedial action; or

(E) any other factor that the executive director determines is relevant and significant to the priority ranking of the facility.

(b) Upon appropriate investigation by the executive director, a facility will be assigned a Superfund HRS score. A facility may be proposed for listing on the State Superfund Registry if it is assigned a Superfund HRS score 5.0 or greater.

(c) The relative priority for action at facilities listed on the State Registry will be periodically reviewed and revised by the executive director as necessary to accurately reflect the need for action at the facilities.

(d) The commission shall annually publish an updated state registry identifying each facility and the relative priority for action at each listed facility.

(e) If a facility has been deleted in accordance with §335.344 of this title (relating to Delisting and Modifications) based, in whole or in part, on the facility being addressed pursuant to Chapter 333 of this title (relating to Voluntary Cleanup Programs), and the executive director determines that the facility is no longer being adequately addressed, the facility shall automatically revert to the status the facility had immediately before the facility was deleted from the Registry in accordance with the Act, §361.189. No public meeting is required under this subsection.

§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) - (3) (No change.)

(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; or

(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).

(d) With the exception of paragraph (c) (5) 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.

§335.345. Requests for Information or Production of Documents.

(a) The executive director may submit requests for information and requests for production of documents as authorized by the Act, §361.182 to any person who has information or documents which in the executive director's opinion are necessary for the adequate investigation or remediation of a

facility listed on the Registry or that the executive director has reason to believe should be listed on the State Registry. The requested information or documents shall be produced within forty-five days from the date of request. If the requested information or documents are not produced within forty-five days, the executive director may petition the commission to issue an order directing compliance with the requests for information or production of documents. The executive director shall serve a copy of the petition on the person to whom the request for information or production of documents was directed at least 20 days prior to the scheduled date of commission action on the petition. The person to whom the request for information or production of documents was directed may appear before the commission and present evidence and argument on the petition or in support of a claim asserted under subsection (b), or the commission may refer the matter to the office of hearings examiners for the taking of evidence.

(b) Information or documents provided to the executive director in accordance with this section are subject to the Public Information Act and its exceptions.

§335.346. Removals and Preliminary Site Investigations.

(a) For facilities listed on the Registry or proposed for listing on the Registry, no person may perform any partial or total removals at such facility or conduct preliminary investigations of any type at such facility without the advance written authorization of the executive director after notice and opportunity for comment to all other potentially responsible parties.

(b) To expedite the executive director's consideration of a proposal to conduct removals or preliminary investigations at a facility, the person proposing such actions shall submit to the executive director a workplan describing the removal and/or investigation activities proposed, a health and safety plan, a quality assurance project plan, and an implementation schedule for completing various subtasks identified in the workplan.

(c) Any authorization by the executive director to perform preliminary investigations, investigation activities, or partial or total removals at a facility does not constitute a finding or determination by the executive director that such preliminary investigation constitutes an approved remedial investigation or that the removal constitutes the final remedial action. An authorization by the executive director to perform any partial or total removals or investigation activities also does not constitute a determination or finding by the executive director that any release or threatened release attributed to the removed materials is divisible as defined in the Act, §361.276.

(d) Pursuant to the Act, §361.133(c)(1)-(4) and (g), the executive director may use money in the Hazardous and Solid Waste Remediation Fee Account for necessary and appropriate removal and remedial action at sites at which solid waste or hazardous substances have been disposed if funds from a liable party, independent third party, or the federal government are not sufficient for the removal or remedial action. The executive director may also perform removals under the Act, §361.133(c)(5) to protect human health and the environment.

§335.347. Financial Capability Determinations.

The executive director may make a determination of whether a potentially responsible party (PRP) is financially capable of participating in a facility investigation or remediation. Such a determination may be based on some or all of the following financial information:

- (1) a PRP's audited financial statements;
- (2) a PRP's federal or state income tax returns;
- (3) - (8) (No change.)

§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) (No change.)

(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) (No change.)

(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.

(8) a baseline-risk assessment.

(e) A baseline risk assessment will be conducted in accordance with the Environmental Protection Agency's Risk Assessment Guidance for Superfund - Volume 1: Human Health Evaluation Manual or other equivalent EPA guidance document. An ecological risk assessment shall also be completed before the executive director's selection of the proposed remedial action. The evaluation may not be required when the executive director determines that remediation standards are apparent and adequately protective of human health and the environment.

(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.

§335.349. General Requirements For Remedial Activities.

(a) Based on the proposals set forth in the feasibility study, the presumptive remedy, or other similar study, elements from different remedial action alternatives as proposed in a remedial investigation as well as any other information available to the executive director, the executive director shall select a proposed remedial action. After the selection of the proposed remedial action, the

executive director shall hold a public meeting to discuss the proposed action, as required by the Act, §361.187. This meeting is not a contested case hearing within the meaning of Texas Government Code, Chapter 2001. Persons desiring to submit comments are encouraged to do so prior to the public meeting. Written comments should be submitted to the executive director at least 5 days prior to the date set for public meeting. All other comments shall be presented in the public meeting.

(b) This subsection describes the administrative procedures for modifying the proposed remedial action after the date of the initial public meeting to discuss the remedial action for the site.

(1) A minor change in the proposed remedial action is one that does not significantly affect the scope, performance, or cost of the proposed remedial action. The executive director will document minor changes in the project records without the necessity of another public meeting.

(2) A significant change in the proposed remedial action is one that materially affects the scope, performance, or cost of the proposed remedial action, but uses the same approach and results in a remedial action as least as protective as originally proposed. For significant changes, the executive director shall notify the PRPs by certified mail of the changes and issue a public notice in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located. The notice shall provide information regarding the significant changes in the proposed remedial action; however, a public meeting or opportunity for public comment is not required. If the commission has not entered into an administrative order to perform the remedial action, a significant change will extend the schedules provided in the Act, §361.187(d).

(3) A fundamental change in the proposed remedial action is one that uses a different approach to achieve the remedial action goals, or one that uses the same approach, but results in a remedial action that is less protective than that originally proposed. A major change in technology to address the contamination is a fundamental change. For fundamental changes, the executive director shall hold another public meeting to discuss the proposed changes in accordance with the Act, §361.187, and as described in subsection (a) of this section. This newly proposed remedial action shall supersede the remedial action originally proposed in the initial public meeting.

(c) Engineering documents submitted in connection with the remedial action must be approved by the executive director and must demonstrate compliance with relevant cleanup standards, except as provided in the Act, §361.193. The scope of these documents will depend on the nature and complexity of the proposed remedial action and may vary from facility to facility.

(d) The executive director shall establish the minimum requirements for the remedial design, based on the specific characteristics of the facility and the remedial action. If appropriate, the executive director may waive any of the requirements in this subsection for a particular facility. Typical remedial design requirements include, but are not limited to:

(1) remedial action drawings and specifications;

(2) quality assurance project plan;

(3) sampling and analysis plan;

(4) spill/release contingency plan;

(5) implementation schedule; and

(6) an operations and maintenance plan.

(e) A health and safety plan shall be prepared that addresses the protection of on-site personnel and the public from potential hazards particular to a facility while implementing the remedial action.

(f) All engineering plans and specifications prepared for remedial activities must be prepared and submitted in accordance with the Texas Engineering Practice Act.

§335.350. Defense to Liability and Claims of Divisibility.

(a) The burden of establishing that a PRP qualifies for any defenses to liability set forth in the Act, §361.275 or that a release is divisible as set forth in the Act, §361.276 lies with the PRP asserting such claim.

(b) A PRP must demonstrate to the executive director its entitlement to a defense or claim under the Act, §361.275 or §361.276. The determination by the executive director of a PRP's request

for limitation of liability under these sections of the Act is a discretionary act which does not entitle the PRP to an appeal to the commission or an adjudicatory hearing on such determination.

(c) The executive director will not consider claims of divisibility until a site has been adequately characterized by a remedial investigation.

(d) A determination by the executive director on a defense or claim asserted under the Act, §361.275 or §361.276 shall have no res judicata or collateral estoppel effect on a PRP's ultimate liability for remediation of a facility as determined in subsequent commission proceedings or in district court.

§335.351. Settlement Agreements.

(a) General purpose. The commission encourages PRPs to enter into negotiated settlement agreements which shall include an agreed administrative order with the commission so that an effective remedial investigation and remedial action of a facility can be quickly implemented while at the same time resolving PRP's apparent liability for the facility. The goal of the executive director in negotiating PRP settlements is to obtain a complete remedial investigation and remedial action of the facility by PRPs, or to collect from PRPs 100% of the agency's cost of performing a complete remedial investigation and remedial action of the facility. PRPs shall have 60 days after the end of the good faith offer period to negotiate a settlement/final administrative order. Settlement negotiations shall run concurrently with agreed order negotiations. Settlements may also be made after an order is issued.

(b) Settlement.

(1) In the case of an offer which is less than a good faith offer to fund or perform a remedial investigation or remedial action, the executive director's consideration of the offer may be based on:

(A) the relationship between the parties' actions in storing, processing, and disposing of hazardous substances and the remedial action required to eliminate the release or threatened release;

(B) the volume of hazardous substances each party is responsible for at the site to the extent that the costs of the remedial action are based on the volume of waste present;

(C) consideration of toxicity or other waste characteristics if those characteristics affect the cost to eliminate the release or threatened release;

(D) a party's cooperation with state agencies, its cooperation or non-cooperation with the pending efforts to eliminate the release or threatened release, or a party's actions concerning storing, processing, or disposing of hazardous substances, as well as the degree of care that the party exercised; and

(E) a party's ability to pay.

(2) The commission may consider a settlement proposal for remedial investigation and/or remedial action of less than 100% of a facility's remedial investigation and/or remedial action costs. Upon settling with cooperative parties, the commission will vigorously seek all remaining relief, including full cost recovery of monies expended from the Hazardous and Solid Waste Remediation Fee Account, including penalties, damages, and interest where appropriate, as well as the agency's oversight costs, from parties whose non-cooperation prevented the achievement of a complete settlement.

(c) Mixed funding. Mixed Funding means use of funds from federal, state, and private party sources, or any combination of those sources, to fund a timely remedial action. Mixed funding may be used in the following circumstances.

(1) In order to achieve an expeditious remedial action of a facility listed on the Registry, the commission may agree to reimburse parties to a settlement agreement from the Hazardous and Solid Waste Remediation Fee Account with interest, for certain costs incurred as a result of the timely implementation of the remedial action that the parties agree to perform but which the commission agrees to finance in whole or in part. The commission may agree to utilize funds from whatever other federal or state sources are available to the commission for the funding of a facility remediation.

(2) Mixed funding shall be provided only to PRPs whom the commission has found to be eligible and who have entered into an agreed administrative order with the commission. The agreed

administrative order shall identify remedial action tasks to be addressed by the mixed funding, costs to be borne by the Hazardous and Solid Waste Remediation Fee Account and the terms of agreement.

(3) A PRP must submit sufficient documentation, as requested by the executive director, to support its request for mixed funding.

(4) The commission's granting of a request for mixed funding does not diminish or alter the standard and scope of liability as set out in the Act. The commission will not approve mixed funding based solely on the grounds that a share of wastes at a site may be attributable to an unknown or financially nonviable party. In addition, the availability or the amount of any fund-financing for a particular site will not be dependent on consistency with any volumetric allocation.

(5) Good faith negotiations and early cooperation of settlers will be considered in mixed funding requests. The executive director shall only consider mixed funding for remedial action if the PRP meets the following conditions:

(A) the PRP participated in the remedial investigation; or

(B) the PRP did not participate in the remedial investigation and the PRP agreed to reimburse all agency expenses associated with the remedial investigation.

(6) If a PRP is found to be eligible for mixed funding, the executive director shall make an initial determination regarding the amount of funding to be provided. This determination is solely within the discretion of the executive director and is not subject to adjudication in an administrative hearing or appeal to the commission. A determination of eligibility is not a funding commitment as actual funding will depend on availability of funds and approval of the commission

(7) Where a remedial action has been completed at a facility pursuant to a mixed funding agreement, the Hazardous and Solid Waste Remediation Fee Account shall be subject to an obligation for subsequent remedial actions at the same facility only to the extent that such subsequent actions are necessary by reason of failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the fund for the original remedial action. The fund's obligation for such future remedial action may be met through fund expenditures, or through payment by parties who were not signatories to the original agreement.

(d) De minimis settlements. The commission may reach a final settlement with a PRP for only a minor portion of the response costs at a facility if the conditions in either of the following subparagraphs (1) or (2) of this subsection are met.

(1) A PRP can demonstrate the following:

(A) the amount of the hazardous substances contributed by a particular PRP is minimal in comparison to the amounts of other hazardous substances at the facility; or

(B) the toxicity or other hazardous effects of the hazardous substances contributed by a particular PRP are minimal in comparison to the toxicity or other hazardous effects of other hazardous substances at the facility.

(2) The PRP can demonstrate that it:

(A) is the owner of the real property on or in which the facility is located;

(B) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(C) did not contribute to the release or threatened release of a hazardous substance at the facility through any action or omission.

(3) Paragraph (2) of this subsection does not apply if the PRP purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(e) Covenants not to sue.

(1) The commission may, in its discretion, provide any PRP with a covenant not to sue concerning any existing or future liability resulting from a release or threatened release of a hazardous substance addressed by a remedial action if each of the following conditions is met:

(A) the covenant not to sue is in the public interest as determined by criteria set forth in paragraph (2) of this subsection;

(B) the granting of the covenant not to sue would expedite a remedial action approved by the commission; and

(C) the PRP is in full compliance with the terms of any order issued by the commission for response to the release or threatened release for the facility concerned.

(2) In assessing the appropriateness of granting a covenant not to sue and in determining the appropriate legal scope of such a covenant, the commission shall consider whether the covenant is in the public interest on the basis of such factors as the following:

(A) the effectiveness and reliability of the remedial action, in light of other alternative remedies considered for the facility concerned;

(B) the nature of the environmental risks remaining at the facility;

(C) the extent to which performance standards are included in the order or decree;

(D) the extent to which the response provides a complete remedial action for the facility, including a reduction in the hazardous nature of the substances at the facility;

(E) the extent to which the technology used in the remedial action is demonstrated to be effective;

(F) whether the Hazardous and Solid Waste Remediation Fee Account or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility; and

(G) whether the remedial action will be carried out, in whole or in significant part, by the PRPs themselves.

(3) A covenant not to sue shall be subject to the satisfactory performance by the PRP of its obligations under any order issued by the commission for remedial actions to address the release or threatened release of a hazardous substance at the facility. A covenant not to sue concerning future liability for remediation of the facility shall not take effect until the executive director certifies that the remedial action has been completed or the ordered action has been performed in accordance with any such order issued by the commission.

(4) A covenant not to sue a PRP concerning future liability for remediation of a facility may include an exception to the covenant that allows the commission to sue such person where such liability arises out of conditions which are unknown to the executive director at the time he certifies under paragraph (3) of this subsection that the remedial action has been completed at the facility. A covenant not to sue may provide that such future liability may be limited to the same proportion as that established in the original settlement agreement or order issued by the commission.

(f) Discharge of liability for other PRPs. Any settlement agreement with the commission which resolves a PRP's liability for remediation of a facility does not discharge the liability of any other PRP unless its terms so provide, but it reduces the potential liability of the other PRPs by the amount of the settlement. A PRP will be afforded the opportunity to comment on any settlement agreement with the commission to which it is not a party.

**SUBCHAPTER K : HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT AND
REMEDATION**

§335.352

The repeal is adopted under the 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. The repeal is also adopted under the 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. The Texas Solid Waste Disposal Act, Texas Health and Safety Code, Subchapter F provides additional authority to adopt rules specific to the registry and cleanup of certain hazardous waste facilities.

§335.352. Adoption of Appendices by Reference.