

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §37.11 and new §37.52, concerning Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas without changes to the proposed text as published in the June 5, 1998, issue of the *Texas Register* (23 TexReg 5937) and will not be republished.

#### EXPLANATION OF ADOPTED RULE

The new rule in §37.52 will allow the adoption of a financial assurance option that will cross commission program lines by allowing a permittee, licensee or registrant to demonstrate financial assurance obligations through one mechanism. The rule will give the regulated community another option when complying with financial responsibility. A universal mechanism reduces the number of financial assurance mechanisms required to comply with financial responsibility. However, it is not intended to reduce the total dollar amount of financial assurance required to be demonstrated for any commission program area that requires a permitted, licensed or registered facility to demonstrate financial assurance. A definition of program area is added to §37.11. For the purpose of the new section, program area means the specific commission area under which the facility is permitted, licensed or registered to operate. Program areas include, but are not limited to, Industrial and Hazardous Waste, Underground Injection Control, Municipal Solid Waste, or Petroleum Storage Tanks.

The new §37.52 concerning Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas, adds the option of a universal financial assurance mechanism for owners or operators of facilities which are authorized by rules from more than one program area of the commission. The anniversary date of the universal mechanism as specified in new §37.52 is the date on which owners or operators shall adjust the financial assurance for inflation for all facilities demonstrating through the universal mechanism.

#### 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 inasmuch as the rule will merely offer an additional option for financial assurance, and it does not meet any of the four applicability requirements listed in §2001.0225(a). This adopted rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This adoption does not exceed an express requirement of state law that is not specifically required by federal law nor does it exceed the requirements of a delegation agreement or contract between the state and federal government as there is no agreement or contract between the commission and the federal government concerning this universal mechanism for financial assurance. This adoption falls within the commission’s authority under Texas Health and Safety Code, §361.085 and Texas Water Code, §26.352, which authorize the commission to adopt requirements by which permittees, licensees, or registrants demonstrate financial assurance.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule proposal pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of this rulemaking is to modify Chapter 37 to reflect the addition of a universal financial assurance option to cross multiple program areas and facilities allowing a permittee, licensee, or registrant to demonstrate financial assurance obligations through one mechanism. The promulgation and enforcement of these rules will not burden private real property nor adversely affect property values because the proposed rule will not reduce or increase the amount of financial assurance required to be demonstrated by any one facility or in any one program area.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

Title 31 Texas Administrative Code §505.11, relating to Actions and Rules Subject to the Coastal Management Program (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 which apply to the Texas Natural Resource Conservation Commission and which are identified in §505.11(a)(6) and §505.11(b)(2); 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 rule closed at 5:00 p.m., July 6, 1998. Safety Kleen Corp. (Safety Kleen), Texas Utility

Services, Inc. (TU), and BFI Waste Systems of North America, Inc. (BFI) submitted comments on the proposed rule, and the three commenters generally supported the proposed changes.

## ANALYSIS OF TESTIMONY

### GENERAL COMMENTS

Safety Kleen, TU, and BFI all supported the rules as proposed. TU specifically commented that the universal mechanism would require the regulated community to continue providing appropriate liability coverage while reducing paperwork and allowing the regulated community direct management of the costs of financial assurance requirements. Safety Kleen suggested a language change for clarification. BFI suggested adding language that was recently published in federal regulations.

Regarding proposed §37.52, Safety Kleen suggested a language modification to clearly indicate that the amount of funds demonstrated by the universal mechanism will not be the sum of funds that would be available if separate mechanisms were established and maintained for units utilized for the management of wastes under multiple program areas. Safety Kleen expressed concerns that in some cases duplicate financial assurance may be required for units utilized for the management of wastes under multiple program areas.

**The commission recognizes there may be cases due to the addition of programs or changes to rules where cost estimates may be duplicated between waste programs. However, without first obtaining commission confirmation that the cost estimate is duplicated, the financial assurance**

**amount demonstrated through the Universal Mechanism must be the sum of funds that would be available if separate mechanisms were established and maintained for units utilized for the management of waste under multiple program areas. Consequently, the commission has not added language to the rule as suggested by the commenter.**

Regarding proposed §37.52, BFI suggested that this rulemaking process be used for incorporating the federal financial mechanisms which were published in the April 10, 1998, issue of the *Federal Register* (63 FedReg 17706). These new federal regulations adopt the financial test / corporate guarantee for use by privately owned municipal solid waste (MSW) landfills.

**The new federal financial mechanism relating to MSW landfills is not pertinent to the subject of this rulemaking regarding a universal mechanism for financial assurance. The commission is in the process of making a determination whether to propose changes to the current State test. The commission appreciates BFI's comments, however, their suggestion does not appear relative to the universal mechanism proposal, and no additional language will be added to this rule. The commission will consider the federal financial mechanisms in a future rulemaking.**

#### STATUTORY AUTHORITY

The new and amended sections are adopted under Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §§361.011, 361.017, and 361.024, which authorize the commission to adopt

any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The new and amended sections implement Texas Health and Safety Code, §361.085 and Texas Water Code, §26.352.

**SUBCHAPTER A : GENERAL FINANCIAL ASSURANCE REQUIREMENTS**

**§37.11, §37.52**

**§37.11. Definitions.**

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

(1) - (11) (No change.)

(12) **Program area** - TNRCC areas under which the facility is permitted, licensed or registered to operate, including but not limited to Industrial and Hazardous Waste, Underground Injection Control, Municipal Solid Waste, or Petroleum Storage Tanks.

(13) **Standby trust** - An unfunded trust established to meet the requirements of this chapter.

(14) **Tangible net worth** - The tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.

**§37.52. Use of A Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas.**

An owner or operator may use a universal mechanism to meet the requirements of this chapter for multiple facilities permitted, licensed or registered in multiple program areas, provided the mechanism is allowed to be used in the program areas represented. The amount of funds demonstrated by the universal mechanism must be no less than the sum of funds that would be available if separate mechanisms were established and maintained. The wording of the mechanisms must be in a form satisfactory to the executive director. The available mechanisms are those specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure) and Subchapter F of this chapter (relating to Financial Assurance Mechanisms for Liability), except that the financial test or corporate guarantee may not be combined with other specified mechanisms and a standby trust fund shall be required in certain circumstances. A universal mechanism submitted to the executive director shall include a list showing for each facility covered by the mechanism: the name, physical and mailing address of the facility, each program area and commission registration, license or permit number, the rules regulating the program under which the facility is permitted, licensed or registered, and the amount of funds demonstrated for each permit, license or registration for closure, post closure, corrective action, liability, and decommissioning. The anniversary date of the universal mechanism is the date on which owners or operators shall make an annual inflation adjustment for all facilities demonstrating through the universal mechanism. In directing funds available through the universal

mechanism for any of the facilities covered by the mechanism, the executive director may direct only the amount of funds designated for each permit, license, or registration for that facility.