

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §324.22, concerning Used Oil Standards. Section 324.22 is adopted with changes to the proposed text as published in the October 22, 1999 issue of the *Texas Register* (24 TexReg 9207).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Changes have been adopted in Chapter 324 as the result of ongoing efforts by the commission for regulatory reform. This rulemaking focuses on financial assurance and is based upon a two-step process. The first step involved identification of all commission programs which contain a financial assurance component and transfer of those requirements into 30 TAC Chapter 37. The second step involved processing of the rules to eliminate redundant requirements, to remove duplicative mechanisms, and to consolidate provisions whenever possible. Modifications are simultaneously adopted in 30 TAC Chapters 37, 305, 330, 331, 334, 335, and 336. Entities who are required to provide financial assurance are specifically instructed to do so in each relevant, technical chapter. Those requirements that are overseen by the commission's technical program staff, such as the calculation of closure, post closure, and corrective action costs, will remain in the technical rule chapters. Each technical chapter refers the reader to Chapter 37 for the rules pertaining to financial assurance and to the financial assurance mechanisms.

The financial assurance rules being adopted are consolidated in accordance with the commission's ongoing regulatory reform initiative. For example, previously, several programs had rules with a separate subchapter concerning financial assurance and the allowed mechanisms. Frequently, the requirements were repetitive and identical. These rules consolidate financial requirements to reduce

duplicative language while retaining the integrity of the previous requirements. The owner or operator must comply with the requirements of closure, the requirements of post closure, and the requirements of corrective action, or any combination of the three, as is appropriate for the particular activity conducted at the type of facility or site being considered. The mere consolidation, or inclusion, of all three types of activities in a single rule section does not alter the scope of the applicability of the rule, nor does it impose a more or less stringent regulation.

The adopted amendments to the financial assurance rules are also for the purpose of clarification, in accordance with the commission's ongoing regulatory reform initiative. For example, the adoptions clarify and use cross-references to indicate that the owner or operator is subject to the provisions of the relative technical chapters, the general subchapters of Chapter 37, the mechanism requirements, the mechanism wordings, and the specific program subchapters of Chapter 37.

The rule adoption is for simplification and clarification and involves few substantive changes in the procedures and criteria to be used by the commission and the regulated community for providing financial assurance and other associated activities that are regulated under this chapter. Substantive changes are minimal and occur, when necessary, for the purposes of consolidation, clarification, compatibility and consistency with commission rules and federal requirements, and protection of human health and the environment. Substantive changes in the regulations were specifically articulated proposal preamble published in the October 22, 1999 issue of the *Texas Register* to make those instances easily identifiable. In general, these rule amendments involve organization, editorial

modifications, reordering requirements into a more logical sequence, and correcting cross-reference citations.

Texas law requires the commission to adopt rules requiring financial assurance for various program areas including Texas Health and Safety Code (HSC), §361.085, for solid waste, hazardous waste, and permitted facilities and HSC, §371.026, for used oil handlers.

The purpose of the financial assurance requirements is to assure that adequate funds will be readily available to cover the costs of closure, post closure, and corrective action associated with certain types of facilities. Financial assurance is important for two primary reasons. First, to prevent delays in addressing environmental needs at facilities, owners and operators need to have funds that are readily available. Moreover, if the owner or operator lacks sufficient funds, environmental needs may have to be addressed through state or federal cleanup funds rather than by the entity responsible for the facility. Additionally, some programs require liability coverage to protect third parties from bodily injury and property damage that may result from a permittee's waste management activities.

This rule adoption is necessary to maintain consistency of commission rules and to fulfill the statutory mandates requiring financial assurance.

SECTION BY SECTION DISCUSSION

Corrections to the proposed rule for Chapter 324 was published in the *Texas Register* on November 26, 1999 (24 TexReg 10606). The changes were primarily to include a statutory authority reference. The

corrections are included in the adopted rule text. Additionally, the commission adopts §324.22(b) with changes to incorporate an existing concept that was inadvertently deleted during the proposal of the rule. Retention of the concept is necessary to clarify that used oil handlers are subject to the soil remediation requirements. Section 324.22(b) is adopted to read as follows: “Used oil handlers, subject to the soil remediation requirements of subsection (c) or (d) of this section, and transporters of used oil, must meet the requirements of Chapter 37, Subchapter L of this title (relating to Financial Assurance for Used Oil Recycling).”

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, 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 Administrative Procedure Act. Although the rule is adopted to protect the environment and reduce risk to human health, this rulemaking is not a major environmental rule because it does 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. The rule does not adversely affect in a material way the aforementioned aspects of the state because, generally, the changes are made to the financial assurance rules for the purposes of consolidation and organization. In the few instances where substantive changes are being adopted, there are no such changes which modify the procedures and criteria used by the commission and the regulated entities in such a manner that the rule, as adopted, is a “major environmental rule.” The rule, as adopted, provides better-written, better-organized, and easier to use financial assurance rules, which in turn provide an overall benefit to the affected economy,

sectors of the economy, productivity, competition, jobs, the environment, and the public health and safety of the state and affected sectors of the state. The economy, a sector of the economy, productivity, competition, or jobs, are not adversely affected in a material way by the few substantive changes. In fact, the changes should benefit the economy, a sector of the economy, and productivity by clarifying existing requirements and by making the rules easier to understand. As the previously existing rules were protective of human health and the environment, this rule adoption does not decrease the protection of the environment or human health. More simply stated, the adoption revises the commission's rules in a manner which could provide a benefit to the economy while enhancing the protection of the environment and public health and safety.

Furthermore, this rule does not meet any of the four applicability requirements listed in Texas Government Code §2001.0225(a). The rule does not exceed a standard set by federal law because one of the purposes of this rulemaking is to adopt state rules which are accordant with the corresponding federal regulations. Any requirements in the rule are in accord with the corresponding federal regulations, and they do not exceed an express requirement of state law because they implement state law provisions to require financial assurance. This adoption does not exceed the requirements of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state or federal program because there is no federal financial assurance program. There are, however, federal financial assurance requirements for many of the delegated programs, and this rule is consistent with the corresponding federal financial assurance requirements. The adoption is not made solely under the general powers of the commission, but is also made under the requirements of specific state law that allows the commission to provide these programs. Finally,

this rule is not adopted on an emergency basis to protect the environment or to reduce risks to human health.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of this rulemaking is to delete obsolete language, to make the rules consistent with commission and federal rules, and to implement the commission's guidelines on regulatory reform as well as to provide clarifications to existing rule language. Promulgation and enforcement of the rule does not create a burden on private real property. There are no significant, new requirements being added. In the few instances where substantive changes are being adopted, there are no such changes which modify the financial assurance rules, procedures, or criteria in such a manner that a burden on private real property is modified or created. A landowner's rights in private real property will not be affected by the adoption of this rule.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the rule is subject to the CMP and must be consistent with applicable CMP goals and policies which are found in 31 TAC §501.12 and §501.14. The CMP goal applicable to the rule is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of Coastal Natural Resource Areas (CNRAs). CMP policies applicable to the rule include the administrative policies and the policies for specific activities related to construction and operation of

solid waste treatment, storage, and disposal facilities. In particular, the CMP policy most applicable to this rule is to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and comply with standards established under the Solid Waste Disposal Act, 42 United States Code, §§6901 et seq.

This rulemaking is related to financial assurance, which in turn impacts the issuance of permits, including those permits relating to solid waste facilities. Thus, this rulemaking is subject to the CMP. The commission has prepared a consistency determination for the rules pursuant to 31 TAC §505.22 and has found that this rulemaking is consistent with the applicable CMP goals and policies. The commission determined that the rule adoption is consistent with the applicable CMP goals and policies because the modification implemented by this rule is insignificant in relationship to the CMP and has no impact upon CNRAs.

The rulemaking does contain minor, substantive changes. In the few instances where a substantive change is made, it is for the purpose of achieving consistency with state and federal law and to achieve consistency with commission rules. However, the commission has determined that this rule does not have a direct or significant, adverse effect on CNRAs. This adoption does not change the technical permitting requirements of waste facilities nor change the amount of financial assurance that must be demonstrated. Instead, this financial assurance rule addresses the means by which demonstrations of financial assurance can be made.

Because this rule adoption does not modify the amount of financial assurance to be demonstrated for permits for owners and operators of hazardous waste storage, processing, or disposal facilities, promulgation and enforcement of this rule has no new effect on the CNRAs. The rule continues having its original effect, which is to require demonstrations of financial assurance in order to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also the rule continues to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and comply with standards established under the Solid Waste Disposal Act, 42 United States Code, §§6901 et seq.

The CMP goal applicable to the rule is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs. Because the rule does not change the amount of financial assurance required by the previously existing rules, the rule is consistent with the applicable CMP goal. CMP policies applicable to the rules include the administrative policies and the policies for specific activities related to construction and operation of solid waste treatment, storage, and disposal facilities.

Promulgation and enforcement of this rule is consistent with the applicable CMP goals and policies because the adoption does not change the amount of financial assurance required in the previously existing rules. The rule modifications do not relax the existing requirements which encourage safe and appropriate storage, management, and treatment of hazardous waste, and thereby the rule modifications result in no substantive effect on the management of coastal areas of the state. In addition, this rule

does not violate any applicable provisions of the CMP's stated goals and policies. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that these rules are consistent with CMP goals and policies, and the rule has no new impact upon the coastal area.

HEARING AND COMMENTERS

A public hearing was not requested or held concerning this rule. The public comment period closed November 22, 1999 at 5:00 p.m. central standard time. Written comments were not received regarding this chapter. However, comments were received regarding other rule chapters associated with this rulemaking. Those comments as well as the changes that are being made throughout the associated promulgation are described and discussed in the adoption preambles for Chapters 37, 305, 324, and 331 being simultaneously published in this issue of the *Texas Register*.

The adopted amendments are necessary to maintain consistency of commission rules and to fulfill the statutory mandates requiring financial assurance.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. This rule is also adopted under HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities; Used Oil Collection, Management, and Recycling Act in HSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used

oil recycling program relating to used oil; and HSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers.

Together, these statutes authorize the commission to adopt any rules necessary to carry out its powers and duties under TWC and other laws of Texas and to establish and approve all general policy of the commission.

SUBCHAPTER A : USED OIL RECYCLING

§324.22

§324.22. Soil Remediation Requirements for Used Oil Handlers.

(a) This section applies to transporters of used oil who are seeking registration under this chapter. It also applies to owners and operators of used oil transfer, processing, rerefining, and off-specification used oil burning facilities referred to as “used oil handlers.” It does not apply to a used oil handler which is owned or otherwise effectively controlled by the owners or operators where the used oil is generated.

(b) Used oil handlers, subject to the soil remediation requirements of subsection (c) or (d) of this section, and transporters of used oil, must meet the requirements of Chapter 37, Subchapter L of this title (relating to Financial Assurance for Used Oil Recycling).

(c) Used oil handlers meeting the requirements of this subsection must provide financial assurance for soil remediation in the amounts specified. A used oil handler must, within 30 days after an increase in the active area of the facility which results in a higher financial assurance requirement, provide for increased financial assurance. Additionally, a used oil handler must, at a minimum, update its financial assurance annually to cover any increased cost due to inflation and to account for any other appropriate adjustments, including a lower financial assurance amount. The active area of the facility is the earthen area at the facility over which any transportation, storage, or processing of used oil occurs.

Records demonstrating the size of the active area of the facility and related financial assurance are to be maintained in the facility's operating record; however, the original financial assurance mechanism must be submitted to the commission per §37.2015 of this title (relating to Submission of Documents). The amount required for financial assurance is:

(1) for a facility with an active area of over 1,000 square feet up to 10,000 square feet, \$410 for each 1,000-square-foot increment;

(2) for a facility with an active area of over 10,000 square feet up to 100,000 square feet, \$4,100 for each 10,000-square-foot increment;

(3) for a facility with an active area of over 100,000 square feet up to 1 million square feet, \$41,000 for each 100,000 square-foot increment and \$4,100 for each 10,000 square-foot increment;

(4) for a facility with an active area of over 1 million square feet, \$410,000 for each 1-million-square foot increment, \$41,000 for each 100,000 square-foot increment, and \$4,100 for each 10,000 square-foot increment; or

(d) Used oil handlers may meet the following alternate requirements.

(1) Used oil handlers must:

(A) annually provide a certification statement to the executive director that the used oil handler is in compliance with the applicable requirements of this chapter; and

(B) obtain certification from a Registered Professional Engineer or other qualified independent professional that the used oil facility units have been designed and constructed in accordance with appropriate design standards, and that the units exhibit mechanical integrity. Such a certification must be obtained for each unit added to the facility, and for each unit that has undergone repair to restore mechanical integrity, within 90 days of the addition or completion of repair;

(2) Used oil handlers must ensure that spills in quantities of 25 gallons or greater are reported to the agency in accordance with the spill reporting requirements of Chapter 327 of this title (relating to Spill Prevention and Control);

(3) Used oil handler facilities must be provided with secondary containment for all areas where used oil is stored, transferred, or otherwise handled, including, but not limited to, loading docks, parking areas, storage areas, and any other areas where shipments of used oil are held for more than 24 hours; and the facility's used oil tanks, containers, and secondary containment must be constructed, operated, and maintained to conform to the requirements of Title 40 Code of Federal Regulations §§264.174, 264.193(c)-(f), and 264.195(b), as if the used oil were hazardous waste, or to conform to the following:

(A) the secondary containment must be:

(i) stationary;

(ii) constructed of non-earth materials (e.g., concrete);

(iii) maintained free of cracks, gaps, or holes; and

(iv) overlain or underlain with a synthetic liner at least 40 mils thick;

(B) the secondary containment must:

(i) be large enough to contain a catastrophic spill of 100% of the capacity of the largest used oil storage, transfer, or other handling equipment or device; and

(ii) have at least 12 inches of freeboard or sufficient freeboard to hold the precipitation which would be collected, including any run-on or infiltration of precipitation, as a result of a 25-year, 24-hour rainfall event;

(C) the secondary containment system must prevent the release of used oil or other accumulated liquid from the secondary containment system to the soil, ground water, or surface water until removed;

(D) used oil or other accumulated liquid must be removed from the secondary containment system within 24 hours from discovery, or in as timely manner as possible;

(4) Used oil handlers must provide spill response capability to adequately respond to a catastrophic spill of 100% of the capacity of the largest used oil storage, transfer, or other handling equipment or device, plus 10% of the remaining storage capacity; and

(5) Used oil handlers must meet the requirements of subsection (c) of this section, but the amount of financial assurance provided is 10% of the amount that would otherwise be required under subsection (c).

(e) As required, processors or re-refiners who store or process used oil in aboveground tanks must, at closure of a tank system, demonstrate financial assurance in the amount of the cost to comply with the closure requirements of 40 CFR §279.54(h). If the used oil handler cannot demonstrate that all contaminated soils are removed or decontaminated as required in 40 CFR §279.54(h), the used oil handler must further demonstrate financial assurance in the amount required to cover the soil and perform post closure in accordance with the closure and post closure care requirements that apply to hazardous waste landfills under 40 CFR §§265.310, 265.117-265.120, and 265.145.