

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§334.484, 334.485, and 334.508, concerning Underground and Aboveground Storage Tanks. Sections 334.484 and 334.508 are adopted with changes to the proposed text as published in the October 22, 1999 issue of the *Texas Register* (24 TexReg 9237). The remaining section is adopted without changes and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Changes have been adopted in Chapter 334 as the result of ongoing efforts by the commission for regulatory reform. The adopted changes focus on financial assurance and are 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 coordination with 30 TAC Chapters 37, 305, 324, 330, 331, 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 adopted 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 financial assurance rules are also being adopted for clarification in accordance with the commission's ongoing regulatory reform initiative. For example, the adopted rules 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 and federal requirements, and protection of human health and the environment. Substantive changes in the regulations were specifically articulated in the proposal preamble published in the October 22, 1999 issue of the *Texas Register* to make those

instances easily identifiable. In general, the adoption of these rules 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 Water Code (TWC), §26.352, for underground storage tanks and Texas Health and Safety Code (HSC), §361.085, for solid waste, hazardous waste, and permitted facilities.

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.

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

## SECTION BY SECTION DISCUSSION

Corrections to the proposed rules for Chapter 334 were 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 30 TAC §334.484(c)(16) with changes to correct the inadvertent omission of a cross-reference to Chapter 37, Subchapter K. Section 334.484(c)(16) is adopted as follows: “(16) documentation on the financial assurance required (see Chapter 37, Subchapter K of this title (relating to Financial Assurance Requirements for Class A or B Petroleum-Substance Contaminated Soil Storage, Treatment, and Reuse Facilities);)” Section 334.508(g) is adopted with changes to correct the cross-reference to Chapter 37, Subchapter B. There were no other modifications made to Chapter 334.

## 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 rules are 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 rules do not adversely affect in a material way the aforementioned aspects of the state because, generally, the adopted changes are made to the financial assurance rules for the purposes of consolidation and organization. In the few instances where a substantive change is 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 adopted rules are a “major environmental rule.” The adopted rules provide better-written, better-organized, and easier to use financial assurance rules, which in turn provides 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 adopted substantive changes. In fact, the adoption 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 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, these rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The rules do 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 rules 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 these rules are 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, these rules are not being 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 rules does not create a burden on private real property. There are few 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 these rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking for consistency with the Texas Coastal Management Program's (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the rules are 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 rules 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 rules 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 these rules 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 adoption is consistent with the applicable CMP goals and policies because the modification implemented by these adopted rules is insignificant in relationship to the CMP and has no impact upon CNRAs.

The adoption 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 these adopted rules do not have a direct or significant, adverse effect on CNRAs. This adoption does not change the

technical permitting requirements of waste facilities nor change to the amount of financial assurance that must be demonstrated. Instead, this financial assurance rule adoption 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 these rules has no new effect on the CNRAs. The rules continue having their 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 rules continue 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 rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs. Because this rule adoption does not change the amount of financial assurance required by the previously existing rules, the rules are 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 these rules 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, these rules do 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 rules have no new impact upon the coastal area.

#### HEARING AND COMMENTERS

A public hearing was not requested or held concerning these rules. 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*.

#### STATUTORY AUTHORITY

The amendments are adopted under 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.

The amendments are also adopted under TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for underground storage tanks; under TWC,

§26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; and under HSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for solid waste, hazardous waste, and permitted facilities.

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 K : STORAGE, TREATMENT, AND REUSE PROCEDURES FOR  
PETROLEUM-SUBSTANCE CONTAMINATED SOIL**

**§334.484, 334.485, 334.508**

**§334.484. Registration Required for Petroleum-Substance Waste Storage or Treatment Facilities.**

(a) A person shall submit the required application and receive the appropriate registration issued after the effective date of these rules prior to storing or treating petroleum-substance wastes at a new Class A facility or treating soil utilizing a new Class B waste management facility.

(b) A person may not commence physical construction of a new Class A or utilize a Class B petroleum-substance waste management facility without first having submitted the required application and received the appropriate registration unless otherwise authorized by the executive director.

(c) Any person who intends to store or treat petroleum-substance waste at a Class A or Class B facility after the effective date of this subchapter shall submit an application for registration on a form approved by the executive director. Such person shall submit information to the executive director which is sufficiently detailed and complete to enable the commission to determine whether such storage or treatment is compliant with the terms of this subchapter. Such information shall include, at a minimum:

- (1) information concerning the location of the facility;
- (2) identification of the facility owner, facility operator, and landowner;
- (3) the job descriptions of all key operating personnel;
- (4) documentation on the proposed access routes to the facility, proposed daily volumes of traffic associated with the facility, and confirmation on the suitability of roads leading to the facility;
- (5) waste storage, management, handling, and shipping methods;
- (6) waste treatment methods;
- (7) waste sampling and analytical methods;
- (8) disposition or reuse documentation;
- (9) recordkeeping requirements;
- (10) security and emergency procedures;

(11) facility closure plan and closure cost estimate (see §334.508 of this title (relating to Closure Requirements Applicable to Class A and Class B Facilities));

(12) facility plans and specifications;

(13) site maps and vicinity maps;

(14) documentation on the land use in the vicinity of the facility;

(15) identification of all potential contaminant receptors in the vicinity, including any water wells within 1,000 feet;

(16) documentation on the financial assurance required (see Chapter 37, Subchapter K of this title (relating to Financial Assurance Requirements for Class A or B Petroleum-Substance Contaminated Soil Storage, Treatment, and Reuse Facilities));

(17) documentation on all required restrictive easements;

(18) the geology and hydrogeology where the facility is located;

(19) documentation on the effectiveness of the treatment method;

(20) documentation of the receipt of any additional authorization required by any other federal, state, or local regulatory agency; and

(21) any other information as the executive director may deem necessary to determine whether the facility and operation thereof will comply with the requirements of this subchapter. The application shall be submitted to the executive director of the commission, and a copy shall be submitted to the commission's field office in the district where the proposed facility will be located.

(d) If the applicant is other than an individual, the application shall be signed by the owner or operator of the facility, the president or chief executive officer of the company, or all the partners of the company.

(e) Any person who stores or treats petroleum-substance waste shall have the continuing obligation to immediately provide written notice to the executive director of any changes or additional information concerning the information submitted to the commission or activities authorized in any registration within 15 days of the change or from the date the additional information was acquired.

(f) Any information required by this subsection shall be submitted to the executive director's office in Austin and to the appropriate region office.

(g) The registration is not transferable to any other facility or facility owner. Any transfer of ownership shall require a change in registration of the facility. However, a change in registration of a

facility shall not relieve the transferor of any liability which may have been incurred prior to the change in registration.

(h) The applicant or a person affected may file with the chief clerk of the commission a motion for reconsideration under §50.39(b)-(f) of this title (relation to Motion for Reconsideration) of the executive director's final approval or denial of an application for registration.

**§334.485. Suspension or Revocation of Registration.**

(a) A registration may be suspended or revoked for the following reasons:

(1) if the registrant fails to maintain complete and accurate records required under this subchapter;

(2) if the registrant falsifies information in, or omits material information from, any records or documents maintained, received, or required by this chapter;

(3) if the registrant fails to comply with any rule or order entered by the commission pursuant to the requirements of Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks);

(4) if the registrant fails to maintain financial assurance as required by this subchapter and Chapter 37, Subchapter K of this title (relating to Financial Assurance Requirements for Class A or B Petroleum-Substance Contaminated Soil Storage, Treatment, and Reuse Facilities);

(5) if the registrant exceeds maximum allowable inventory without prior written authorization from the executive director; or

(6) for any good cause which, in the opinion of the executive director, constitutes grounds for suspension or revocation of the registration.

(b) If the executive director determines that good cause exists for suspension or for revocation of a registration, he shall petition the commission for an order, suspending or revoking the registration.

(1) The executive director shall notify the registrant in writing, by registered or certified mail, of the grounds for the suspension or revocation, and provide the registrant with an opportunity for hearing on the executive director's petition.

(2) The executive director shall provide notice at least ten days prior to the date of the hearing.

(3) The registrant shall be afforded an opportunity to answer the executive director's petition for suspension or revocation in the manner generally described by this title.

(4) A registration may be suspended for any length of time which is warranted in the opinion of the commission. The commission may impose terms and conditions on the suspension, as well as conditions for reinstatement of the registration.

(5) If the term of the suspension does not exceed the original term of the registration, the registrant does not need to reapply at the termination of the suspension.

(6) A revocation pursuant to this section is permanent.

**§334.508. Closure Requirements Applicable to Class A and Class B Facilities.**

(a) The facility owner or operator shall submit his closure plan to the executive director for approval with the application for registration.

(b) In the closure plan, the facility owner or operator shall address the following objectives and indicate how they will be achieved:

(1) removal and decontamination of all structures, equipment, or improvements which will no longer be utilized at the facility;

(2) removal and proper disposal or treatment and reuse of all petroleum-substance wastes from the facility; and

(3) removal or treatment of any petroleum-substance waste and petroleum-substance waste constituents which exist above the established cleanup levels that have been released from the facility into the soil, groundwater, or surface water.

(c) During the closure period, the facility owner or operator of a petroleum-substance treatment facility shall:

(1) continue the contaminant assessment or corrective action at the facility as directed by the executive director;

(2) maintain the run-on and run-off control systems required under §334.502 of this title (relating to Design and Operating Requirements of Stockpiles and Land Surface Treatment Units);

(3) control wind dispersal of particulate matter which may be subject to wind dispersal.

(d) When closure is completed, the facility owner or operator shall submit to the executive director for approval certification both by the facility owner or operator and by an independent qualified hydro geologist, geologist, or an independent registered professional engineer, that the facility has been closed in accordance with the specifications in the approved closure plan.

(e) The facility owner or operator shall prepare a written estimate, in current dollars, of the cost of closing the facility in accordance with the closure plan as specified in subsections (a) and (b) of

this section. The closure cost estimate shall equal the cost of closing at the point in the facility's operating life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan. The closure cost estimate shall be based on the costs to the facility owner or operator of hiring a third party to close the facility. A third party is a party who is neither a parent nor a subsidiary for the facility owner or operator. Notwithstanding other closure costs, such estimate shall also include the costs associated with third party removal, shipment off-site, and treatment or disposal off-site of the following wastes to an authorized storage, treatment, or disposal facility:

(1) maximum inventory of wastes possible in storage and/or treatment units;

(2) any contaminated soils, groundwater, or surface water generated as a result of releases at the site;

(3) wastes generated as a result of closure activities;

(4) contaminated storm water or leachate.

(f) The closure cost estimate may not incorporate a positive cost that may be realized by the sale of petroleum-substance wastes, facility structures or equipment, land, or other facility assets at the time of partial or final closures rather than or in addition to waste disposal and clean-up costs. The facility owner or operator may also not incorporate a zero cost for petroleum-substance waste that might have economic value rather than the waste disposal cost.

(g) The facility owner or operator shall revise the closure cost estimate whenever a change in the closure plan increases the cost of closure. The revised closure cost estimate shall be adjusted for inflation as specified in Chapter 37, Subchapter B of this title (relating to Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(h) The facility owner or operator shall keep the following at the facility during the operating life of the facility: the latest closure cost estimate prepared in accordance with subsections (e) and (f) of this section and, when this estimate has been adjusted for inflation, the latest adjusted closure cost estimate.

(i) For the remaining financial assurance requirements, see Chapter 37, Subchapter K of this title (relating to Financial Assurance Requirements for Class A or B Petroleum-Substance Contaminated Soil Storage, Treatment, or Reuse Facilities).