

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §37.11, concerning Definitions, §37.261, concerning Corporate Guarantee for Closure, and §37.551, concerning Corporate Guarantee for Liability. The amendments are adopted with changes to the proposed text as published in the June 4, 1999, issue of the *Texas Register* (24 TexReg 4174).

#### EXPLANATION OF ADOPTED RULES

The commission is adopting the definition of substantial business relationship, which will allow corporations to provide financial test guarantees for entities including Limited Liability Companies (LLCs), Limited Liability Partnerships (LLPs), and Limited Partnerships (LPs).

In September 1988, the United States Environmental Protection Agency (EPA) modified 40 Code of Federal Regulations (CFR) Parts 264 and 265, Subpart H, to expand the mechanisms available to owners and operators to demonstrate financial responsibility for third-party liability. The modifications included a new option which allowed corporate guarantors to demonstrate financial responsibility for liability using the financial test on behalf of entities with which the guarantor had a “substantial business relationship.” In September 1992, EPA modified 40 CFR Parts 264 and 265, Subpart H again and expanded the use of substantial business relationship to financial test guarantees for closure and post-closure care. In 40 CFR 254.141(h), EPA defines the “substantial business relationship” as “the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A ‘substantial business relationship’ must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such

that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the applicable EPA Regional Administrator.” This broad federal definition requires each state to determine under its own laws what constitutes “a business relationship necessary . . . to make a guarantee contract issued incident to that relationship valid and enforceable.”

Current federal regulations allow corporations to use the financial test to provide guarantees on behalf of: (1) their subsidiaries; and (2) entities with which the guarantor has a substantial business relationship. Federal regulations define a “subsidiary” in 40 CFR 261.141(d) as a corporation in which a “parent corporation” directly owns at least 50% of the voting stock of the corporation which is the facility owner or operator. For the purpose of providing corporate guarantees using the financial test, guarantors cannot treat LLCs, LLPs, LPs or other noncorporate entities as “subsidiaries.”

By adopting this rule for substantial business relationship, the commission will allow corporate guarantors to use the financial test to demonstrate financial responsibility for liability, closure, and post-closure on behalf of noncorporate (non-subsidiary) entities such as LLCs, LLPs, and LPs. The definition for substantial business relationship will recognize a substantial business relationship between a guarantor corporation and entities such as LPs, LLPs, and LLCs in which the guarantor corporation has at least a 50% ownership interest. Such a definition for substantial business relationship will provide an additional option to corporations which choose to provide guarantees on behalf of noncorporate entities in which the corporation has an ownership interest, similar to a corporate parent’s interest in a subsidiary. This definition will narrowly define the relationship and preserve the state’s

ability to enforce the guarantee for financial responsibility. In addition, the rules require the guarantor to provide documentation to the commission which demonstrates that the guarantee contract is valid and enforceable under state law and that a substantial business relationship exists between guarantor corporation and the entity guaranteed.

Definitions of substantial business relationship and entity are added to §37.11. Substantial business relationship means a relationship where the guarantor is a corporation and owns at least 50% of the entity guaranteed. The term “entity,” for the purposes of Chapter 37, means a legal organization engaged in lawful business or purpose, such as a corporation, partnership, sole proprietorship, LLC, LLP, LP, or similar business organization. A change to the language in the definition of entity has been made from the language as originally proposed, and this change is discussed in the Analysis of Testimony section in this preamble.

Amended §37.261, concerning Corporate Guarantee for Closure, adds a description of the supplemental information that the guarantor must include with the demonstration of financial responsibility for closure and post-closure in order to provide the commission with adequate assurances that a substantial relationship exists and that the guarantee issued incident to that relationship is valid and enforceable. The guarantor will be required to submit certain information such as a description of the “substantial business relationship” and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; an original or certified original copy

of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity. A change to the language in §37.261 has been made from the language as originally proposed, and this change is discussed in the Analysis of Testimony section in this preamble.

Amended §37.551, concerning Corporate Guarantee for Liability, adds a description of the supplemental information that the guarantor must include with the demonstration of financial responsibility for liability in order to provide the commission with adequate assurances that a substantial relationship exists and that the guarantee issued incident to that relationship is valid and enforceable.

Again, the guarantor will be required to submit certain information such as a description of the “substantial business relationship” and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity. A change to the language in §37.551 has been made from the language as originally proposed, and this change is discussed in the Analysis of Testimony section in this preamble.

FINAL REGULATORY IMPACT ASSESSMENT

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 Texas Government Code inasmuch as the rules will merely offer an additional option for financial assurance, and they do not meet any of the four applicability requirements listed in §2001.0225(a). The rules will merely offer greater flexibility in instances where corporations guarantee financial responsibility for entities with which the corporation has a substantial business relationship.

The economy, a sector of the economy, productivity, competition, or jobs, will not be adversely affected in a material way because no additional costs are caused by the rules.

The rules do not adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state, because the rules will not reduce the amount of financial assurance required to be demonstrated. The rules are administrative in nature and simply expand the instruments available to corporate guarantors who provide guarantees on behalf of noncorporate entities.

The purpose of these rules is to adopt a Texas definition for “substantial business relationship” which will allow corporations to provide financial test guarantees for entities including LLCs, LLPs, and LPs. The new definition will allow corporations to use the financial test for demonstrating financial responsibility on behalf of LLCs, LLPs, and LPs.

This proposal does not exceed a standard set by federal law and is specifically allowed by federal law.

The federal regulations allow the corporations to use the financial test as a corporate guarantee for closure, post-closure, and liability coverage, on behalf of third parties with which the corporation has a substantial business relationship. The federal regulations defer to each state to ensure that guarantee contracts issued incident to that relationship are valid and enforceable.

This proposal does not exceed the requirements of a delegation agreement or contract between the state and federal government, as the substantial business relationship requirements will be equivalent to the federal financial assurance mechanism requirements.

The rules are adopted under specific state law and the general powers of the commission. The specific state law is Texas Health and Safety Code, §361.085.

#### 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 adopt the definition of substantial business relationship which would allow corporations to provide financial test guarantees for entities including LLCs, LLPs, and LPs. The new definition will allow corporate guarantors to use the financial test to demonstrate financial responsibility on behalf of noncorporate entities such as LPs, LLPs, and LLCs. The federal regulations allow guarantor corporations to provide corporate guarantees using the financial test on behalf of: (1) their subsidiaries;

and (2) entities with which the guarantor has a substantial business relationship. Federal regulations define “subsidiaries” as corporations. For the purpose of providing corporate guarantees using the financial test, guarantors cannot treat LLCs, LLPs, LPs or other noncorporate entities as “subsidiaries.” The commission’s rules adopt a definition for “substantial business relationship” and allow corporate guarantors to use the financial test to demonstrate financial responsibility on behalf of noncorporate (non-subsidiary) entities such as LLCs, LLPs, and LPs for liability, closure, and post-closure. The definition will recognize a substantial business relationship between a guarantor corporation and entities such as LLCs, LLPs, and LPs in which the guarantor corporation has at least a 50% ownership interest. Such a definition for substantial business relationship will provide an additional option to corporations which choose to provide financial test guarantees to the state on behalf of noncorporate entities in which the corporation has an ownership interest, similar to a corporate parent’s interest in a corporate subsidiary. This definition narrowly defines the relationship and preserves the state’s ability to enforce the guarantee for financial responsibility. The promulgation and enforcement of these rules will not burden private real property nor adversely affect property values because these rules will not reduce the amount of financial assurance required to be demonstrated.

#### 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 rules are subject to the CMP and must be consistent with applicable CMP goals found in 31 TAC §501.12 and policies which are found in 31 TAC §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 Annotated, §§6901 et seq.

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 changes are consistent with the applicable CMP goals and policies because the modification to the rules is insignificant in relationship to the CMP, have no impact on the CNRAs, and include no new requirements applicable to agency action subject to the CMP. The commission has also determined that these rules will not have a direct or significant adverse effect on CNRAs identified in the applicable CMP policies and will not result in a substantive effect. Because these rules will 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 these rules will have no new effect on the CNRAs. The rules will continue having their original effect, which is to require demonstrations of financial assurance for hazardous waste facilities in order to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values

of CNRAs, and also the rules will 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 Annotated, §§6901 et seq. 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 will have no new impact upon the coastal area.

#### HEARING AND COMMENTERS

A public hearing was not held on these rules, and the public comment period closed on July 5, 1999. Written comments were received from Dow Chemical Company (Dow), Shell Oil Company (Shell), and Thompson and Knight. All supported the general rule concept, but suggested changes.

#### ANALYSIS OF TESTIMONY

Regarding proposed §37.11(6), concerning the definition of entity, Dow suggested that the phrase “or similar business organization” be added to the definition. Dow suggested that the definition of entity read: “Entity - For the purposes of this chapter, means a legal organization engaged in lawful business or purpose, such as a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, limited partnership or similar business organization.”

**The commission agrees with Dow’s comment and has amended the proposed definition to include “or similar business organization” to clarify that “entity” includes, but is not limited to, the business organizations specifically listed in the definition. The phrase “or similar business organization” is added to the definition of entity and will read as follows: “Entity - For the purposes of this chapter, means a legal organization engaged in lawful business or purpose, such as a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or limited partnership or similar business organization.”**

Regarding proposed §37.11(15), concerning the definition of “substantial business relationship,” Dow suggested that the phrase “is a corporation and” be deleted. Dow believes that the new rule should allow not only the entity guaranteed, but also the guarantor, to be a non-corporate entity. Dow suggested that guarantors should be able to enjoy the benefits of the new business organization forms and the tax advantages that they provide. Dow suggested that the definition of substantial business relationship read: “Substantial business relationship - a relationship where the guarantor owns at least 50% of the entity guaranteed.”

**The commission disagrees with the commenter. The financial test guarantees used by the executive director have been approved by the Texas attorney general and are copied from the federal guarantees provided in 40 CFR §264.151(h). These guarantees are corporate guarantees which by their language require the guarantor to be a corporation. To maintain consistency with federal requirements, the commission will continue to require that only corporations can be**

**guarantors which use the financial test. Consequently, the commission has not changed the language in the rule as suggested by the commenter.**

Regarding proposed §37.11(15), concerning the definition of “substantial business relationship,” Shell commented that less than 50% ownership should be sufficient. Fifty percent ownership investment by the guarantor company is unnecessarily restrictive and precludes use of this mechanism by a majority owner with great financial resources. Shell suggested that the “substantial business relationship” should be determined based on the financial strength of the guarantor who has a majority interest in the entity guaranteed. A majority interest is sufficiently similar to the relationship between a parent corporation and a subsidiary to clearly establish a “substantial business relationship” for the purposes of this rule.

**The commission disagrees with the commenter. To minimize risk to the state and to allow the commission to process substantial business relationship claims fairly and routinely, the commission believes that the 50% ownership requirement is reasonable. Either direct or higher-tier corporate parents can provide a guarantee on behalf of an entity with which it has the substantial business relationship. The proposed definition tracks the 50% ownership requirement which currently exists in order for a parent corporation to guarantee on behalf of another corporation (i.e., a subsidiary corporation). This requirement provides assurances that the guarantor has a controlling interest in the guaranteed entity, and that it is able to influence the operation and management of the entity. By reducing the ownership interest to less than 50%, as**

**Shell proposes, the relationship between the guarantor and the entity guaranteed becomes more attenuated. The proposed definition narrowly defines the substantial business relationship and preserves the state’s ability to enforce the guarantee for financial responsibility. In accordance with 40 CFR §264.141(h), the proposed definition ensures that the substantial business relationship “arise[s] from a pattern of recent or ongoing business transactions, in addition to the guarantee itself.” The commission has not changed the language in the rule as suggested by the commenter.**

Shell also commented regarding proposed §37.11(15), concerning the definition of “substantial business relationship,” that the definition should allow several entities whose interests add up to 50% to demonstrate through one financial test and designate the majority owner as the primary party.

**The commission disagrees with the commenter. Federal law allows only a single owner or operator to demonstrate through the financial test. The federal regulations for the financial test, found at 40 CFR §§264.143(f), 264.145(f), and 264.147(f), are clear that only single corporations can use their financial information to demonstrate that they meet the requirements for the financial test. The test requires that either financial ratios measuring financial ability to perform or a bond rating of the corporation demonstrating financial responsibility through the financial test be used. The financial test requires the corporation to demonstrate the full amount of the cost estimate of financial responsibility for liability, closure, or post-closure, not simply part of it. In addition, 40 CFR §264.143(g) and §264.145(g), concerning Use of Multiple Financial Mechanisms,**

**allows an owner or operator to satisfy the financial assurance requirements by establishing more than one financial mechanism per facility. Mechanisms which can be used in combination are limited to trust funds, payment bonds, letters of credit, and insurance. Thus, the federal regulations prohibit the combination of multiple financial tests from different corporations for a single demonstration of financial assurance. The commission has not changed the language in the rule as suggested by the commenter.**

Regarding proposed §37.11(15), concerning the definition of “substantial business relationship,” Thompson and Knight suggested that the phrase “either directly or indirectly” be added to clarify commission’s intent that higher-tier parent corporations can provide a guarantee on behalf of the owner or operator even though they own an indirect interest in the entity guaranteed. The definition would then read: “Substantial business relationship - A relationship where the guarantor is a corporation and owns, either directly or indirectly, at least a 50% interest in the entity guaranteed.”

**The staff agrees with Thompson and Knight that the definition of “substantial business relationship” is intended to allow parent or higher-tier parent corporations to provide financial test guarantees. However, the commission has not changed the language in the rule as suggested by the commenter because the commission believes that the definition is clear and that adding “either directly or indirectly” would broaden the substantial business relationship beyond what is intended by the commission. Neither EPA regulations nor the commission’s rules on financial assurance define “indirect” or use this term when referring to ownership. Arguably, a**

**corporation may “indirectly” own 50% of an entity without being a parent or without having a controlling interest in the entity that is being guaranteed. The purpose of the proposed definition is to narrowly define substantial relationship and preserve the state’s ability to enforce the guarantee for financial responsibility. Consistent with the federal definition, the proposed definition ensures that the substantial business relationship “arise[s] from a pattern of recent or ongoing business transactions, in addition to the guarantee itself.” (40 CFR §264.141(h))**

Regarding proposed §37.261(d), concerning Corporate Guarantee for Closure, Dow stated that too many constraints and too much documentation is required in the proposed rules. Dow suggested that the language be deleted which requires submittal of “an original or certified original copy of the Resolution by the Board of Directors authorizing the corporate guarantee on behalf of the entity.” Dow asserted that in large companies substantial authority is granted to executive officers, like chief financial officers, and many can grant a hazardous waste guarantee for an entity. Dow also suggested the deletion of rule language in §37.261(d), which requires submittal of “the Resolution by the Board of Directors authorizing the formation of the guaranteed entity.” Dow contends that this requirement will cause unnecessary and costly paperwork and there will be cases where the corporation does not create, but acquires, the entity.

**The commission agrees with Dow in principal. In cases where a corporation has granted general authority to its officers to provide guarantees for the obligations of subsidiaries or other entities, the commission believes it is feasible to accept certified copies of the relevant enabling resolutions**

**or a certified letter from the chief financial officer of the guarantor corporation. In addition, the commission agrees that the proposed rule language does not take into account situations where the corporation acquires rather than creates the entity. The commission requests this type of information because it provides information confirming that the corporation explicitly approves of the formation of the relationship. However, rather than deleting the language as suggested by Dow, the commission has revised the rule by adding the phrases: “or a certified letter from the chief financial officer,” and “or acquisition” to §37.261(d). Section 37.261(d) has been revised to read: “If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit a description of the substantial business relationship and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.”**

In addition, Dow suggested the deletion of rule language in §37.261(d), which requires submittal of “the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.”

**The commission disagrees with the commenter. The executive director expects to use the requested information to confirm the existence of the “substantial business relationship,” to determine the limitations on the life or period of existence of the entity guaranteed and on the possible duration of its “substantial business relationship” with the guarantor corporation, and most importantly, to use the submitted documents to develop a record which may be used, if needed, in an enforcement case or in a bankruptcy action in which the commission has an interest. The commission has not changed the language in the rule as suggested by the commenter.**

Regarding proposed §37.261(d), concerning Corporate Guarantee for Closure, Shell suggested that some of the information required was unnecessary, burdensome to provide, and that the substance of the information requested could be provided through alternative means. Shell questioned the requirements to submit an original or certified original copy of the Resolution by the Board of Directors authorizing the corporate guarantee on behalf of the entity; the organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity. Instead, Shell proposed that the commission accept an affidavit, prepared and certified by a corporate officer, addressing the information. Shell’s Board of Directors has authorized its officers to provide guaranties for the obligations of its subsidiaries. Evidence of an officer’s authority would be provided by a certified copy of the enabling resolutions. Partnership agreements and other like documents could comprise boxes of information and Shell suggested that a written description of the relationship be allowed in lieu of an organizational chart or partnership agreements. Alternately, Shell proposed that guarantor corporations

be allowed to submit information provided in Securities and Exchange Commission or like agency filings, or a certified public accountant's (CPA) report.

**The commission agrees with Shell in principal, but disagrees that the alternatives presented by Shell would supply information that would provide adequate substitutes for the information requested by §37.261(d). In cases where a corporation has granted general authority to its officers to provide guarantees for the obligations of subsidiaries of other entities, the commission believes that it is feasible to accept certified copies of the relevant enabling resolutions or a certified letter from the chief financial officer of the guarantor corporation. The commission requests this type of information because it provides information confirming that the corporation explicitly approves of the formation of the relationship. However, rather than deleting the language as suggested by Shell, the commission has revised the rule by adding the phrases: “or a certified letter from the chief financial officer,” and “or acquisition” to §37.261(d). The commission disagrees that a written description of the substantial business relationship should suffice in lieu of an organizational chart. Organizational charts have been submitted by entities making financial assurance demonstrations and the commission has found these charts to be very helpful. The commission has found that while written descriptions are instructive, they can provide complex descriptions which are ambiguous or insufficient. An organizational chart, in combination with a written description, can provide thorough information which will assist the agency in determining whether a substantial business relationship exists. Moreover, the commission believes that submittal of partnership agreements, or other like documents, and**

**organizational charts provide necessary information that is not available through Security and Exchange Commission, or like agency filings, or a CPA's report. The commission expects to use the requested information to confirm the existence of the "substantial business relationship," to determine the limitations on the life or period of existence of the entity guaranteed and on the possible duration of its "substantial business relationship" with the guarantor corporation, and most importantly, to use the submitted documents to develop a record which may be used, if needed, in an enforcement case or in a bankruptcy action in which the commission has an interest. Neither Security and Exchange Commission filings nor a CPA's report provide a sufficient level of detail to allow commission to determine the acceptability of the substantial business relationship. A listed corporation making internal organizational changes which include creating an LLC or LP would not be required to submit the types of information requested in the proposed rule. In addition, a CPA is not required to routinely review the requested documents as part of a CPA's routine financial duties and, therefore, the commission does not want to pass the responsibility of the review onto a CPA. In addition, as stated previously, the commission wants to retain the information in the event it is needed in a future enforcement or bankruptcy proceeding. Consequently, the commission has not changed the language in the rule as suggested by the commenter.**

Regarding proposed §37.551(b), concerning Corporate Guarantee for Closure, Dow suggested striking the word, "corporation" to allow not only the entity guaranteed but also the guarantor to be a non-corporate entity.

**The commission disagrees with the commenter. The financial test guarantees issued by the commission have been approved by the Texas attorney general and are copied from the federal guarantees provided in 40 CFR §264.151(h). These guarantees are corporate guarantees which by their language require the guarantor to be a corporation. To be consistent with federal requirements, the commission will continue to require that only corporations can be guarantors which use the financial test. Consequently, the commission has not changed the language in the rule as suggested by Dow.**

Regarding proposed §37.551(d), concerning Corporate Guarantee for Closure, Dow suggested that the language be deleted which requires submittal of “an original or certified original copy of the Resolution by the Board of Directors authorizing the corporate guarantee on behalf of the entity.” Dow asserted that in large companies substantial authority is granted to executive officers, like the chief financial officer, and many can grant a hazardous waste guarantee for an entity. Additionally, regarding proposed §37.551(d), concerning Corporate Guarantee for Closure, Dow suggested the deletion of rule language in §37.551(d), which requires submittal of “the Resolution by the Board of Directors authorizing the formation of the guaranteed entity.” Dow contends that this requirement will cause unnecessary and costly paperwork and there will be cases where the corporation does not create, but acquires the entity.

**The commission agrees with Dow in principal. In cases where a corporation has granted general authority to its officers to provide guarantees for the obligations of subsidiaries or other entities,**

the commission believes it is feasible to accept certified copies of the relevant enabling resolutions or a certified letter from the chief financial officer of the guarantor corporation, and the commission agrees that the proposed rule language does not take into account situations where the corporation acquires rather than creates the entity. Information, relating to the creation or acquisition of the entity guaranteed, is requested to obtain written documentation confirming that the corporation explicitly approves of the formation of the relationship. However, rather than delete the language as suggested by Dow, the commission has revised the rule by adding the phrases: “or a certified letter from the chief financial officer,” to §37.551(d). Section 37.551(d) has been revised to read: “If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit a description of the substantial business relationship and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.” Also, the language in the proposed rule asks for “an original or certified original copy” of the resolution authorizing the guarantee but not of the resolution authorizing the formation of the guaranteed entity. The rule has also been amended to ask for “an original or certified original copy” of each.

Shell commented that the commission has the right to promulgate regulations that are more stringent than federal regulations. However, Shell believes that the proposed rule regarding 50% ownership, a requirement not found in the comparable federal definition, will cause unnecessary confusion in the regulated community and would in fact exceed a standard set by federal law.

**The commission disagrees with the commenter and believes that the proposed definition does not exceed a standard set by federal law and is in fact, specifically allowed by federal law. The federal definition of “substantial business relationship” is “the extent of a business relationship under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A ‘substantial business relationship’ must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the applicable EPA Regional Administrator.” This broad definition requires each state to determine under its own laws what constitutes “a business relationship necessary . . . to make a guarantee contract issued incident to that relationship valid and enforceable.” The commission believes that the proposed definition meets the federal requirements and narrowly defines the relationship to preserve the state’s ability to enforce the guarantee and minimize risk to the state. Therefore, no changes have been made to the proposal, in this regard.**

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §361.011, and §361.017, 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.

## **SUBCHAPTER A : GENERAL FINANCIAL ASSURANCE REQUIREMENTS**

### **§37.11**

#### **§37.11. Definitions.**

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

(1) **Assets** - All existing and all probable future economic benefits obtained or controlled by a particular entity.

(2) **Current assets** - Cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

(3) **Current closure cost estimate** - The most recent of the estimates prepared for closure and approved by the executive director.

(4) **Current liabilities** - Obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

(5) **Current plugging and abandonment cost estimate** - The most recent of the estimates prepared in accordance with Chapter 331 of this title (relating to Underground Injection Control).

(6) **Entity** - For the purposes of this chapter, means a legal organization engaged in lawful business or purpose, such as a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or limited partnership or similar business organization.

(7) **Face amount** - The total amount the insurer is obligated to pay under an insurance policy.

(8) **Financial responsibility** - This term shall mean the same as financial assurance.

(9) **Independent audit** - An audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

(10) **Liabilities** - Probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

(11) **Net working capital** - Current assets minus current liabilities.

(12) **Net worth** - Total assets minus total liabilities and equivalent to owner's equity.

(13) **Program area** - Texas Natural Resource Conservation Commission 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.

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

(15) **Substantial business relationship** - A relationship where the guarantor is a corporation and owns at least 50% of the entity guaranteed.

(16) **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.

## **SUBCHAPTER C : FINANCIAL ASSURANCE MECHANISMS FOR CLOSURE**

### **§37.261**

#### **STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §361.011 and §361.017, 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.

#### **§37.261. Corporate Guarantee for Closure.**

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a written guarantee, hereafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure).

(b) The guarantor shall be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.251 of this title (relating to Financial Test for Closure). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.361 of this title (relating to Corporate Guarantee for Closure). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.251(c) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit a description of the substantial business relationship and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.

(e) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to perform closure of the facility covered by the corporate guarantee in accordance with the closure plan or the closure requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in §37.201 of this title (relating to Trust Fund for Closure) in the name of the owner or operator;

(2) the corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts;

(3) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor shall provide such alternative financial assurance in the name of the owner or operator.

## **SUBCHAPTER F : FINANCIAL ASSURANCE MECHANISMS FOR LIABILITY**

### **§37.551**

#### **STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §361.011 and §361.017, 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.

#### **§37.551. Corporate Guarantee for Liability.**

(a) An owner or operator may meet the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining a written guarantee for liability coverage, hereinafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) The guarantor must be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.541 of this title (relating to Financial Test for Liability). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.661 of this title (relating to Corporate Guarantee). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.541(c) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit a description of the substantial business relationship and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.

(e) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to satisfy a judgement based on a determination of liability for bodily injury or property damage to third parties caused by sudden accidental occurrences, arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor shall do so up to the limits of coverage;

(2) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor shall provide such alternative financial assurance in the name of the owner or operator.

(f) In the case of corporation incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(1) the state in which the guarantor is incorporated; and

(2) each state in which a facility covered by the guarantee is located have submitted a written statement to the United States Environmental Protection Agency that a guarantee executed as described in this section and §37.661 of this title (relating to Corporate Guarantee) is a legally valid and enforceable obligation in that state.

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §335.112 and §335.152, regarding Industrial Solid Waste and Municipal Hazardous Waste. The amendments are adopted without changes to the proposed text as published in the June 4, 1999, issue of the *Texas Register* (24 TexReg 4171) and will not be republished.

#### EXPLANATION OF ADOPTED RULES

The commission is adopting the definition of Substantial business relationship. The definition will be placed in 30 TAC Chapter 37, concerning Financial Assurance. The purpose of this rulemaking for Chapter 335 is to adopt the “substantial business relationship” for closure and post-closure and to provide the appropriate references to “substantial business relationship” in Chapter 335. The “substantial business relationship” rule will allow corporations to provide financial test guarantees for entities including Limited Liability Companies (LLCs), Limited Liability Partnerships (LLPs), and Limited Partnerships (LPs).

In September 1988, the United States Environmental Protection Agency (EPA) modified 40 Code of Federal Regulations (CFR) Parts 264 and 265, Subpart H, to expand the mechanisms available to owners and operators to demonstrate financial responsibility for third party liability. The modifications included a new option which allowed corporate guarantors to demonstrate financial responsibility for liability using the financial test on behalf of entities with which the guarantor had a “substantial business relationship.” In September 1992, EPA modified 40 CFR Parts 264 and 265, Subpart H, again and expanded the use of substantial business relationship to financial test guarantees for closure

and post-closure care. In 40 CFR 254.141(h), EPA defines the substantial business relationship as “the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A ‘substantial business relationship’ must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the applicable EPA Regional Administrator.” This broad federal definition requires each state to determine under its own laws what constitutes “a business relationship necessary . . . to make a guarantee contract issued incident to that relationship valid and enforceable.”

Current federal regulations allow corporations to use the financial test to provide guarantees on behalf of: (1) their subsidiaries; and (2) entities with which the guarantor has a substantial business relationship. Federal regulations define “subsidiaries” as corporations. The federal regulations, in 40 CFR 264.141(d), define a “parent” corporation as “a corporation which directly owns at least 50% of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a ‘subsidiary’ of the parent corporation. For the purpose of providing corporate guarantees using the financial test, guarantors cannot treat LLCs, LLPs, LPs, or other non-corporate entities as ‘subsidiaries.’”

The commission’s rules in Chapters 37 and 335 will adopt a definition for substantial business relationship and allow corporate guarantors to use the financial test to demonstrate financial responsibility for liability, closure, and post-closure on behalf of non-corporate (non-subsidiary) entities

such as LLCs, LLPs, and LPs. The definition will recognize a substantial business relationship between a guarantor corporation and entities such as LPs, LLPs, and LLCs in which the guarantor corporation has at least a 50% ownership interest. Such a definition for substantial business relationship will provide an additional option to corporations which choose to provide guarantees on behalf of non-corporate entities in which the corporation has an ownership interest, similar to a corporate parent's interest in a subsidiary. This definition will narrowly define the relationship and preserve the state's ability to enforce the guarantee for financial responsibility. In addition, these rules require the guarantor to provide documentation to the commission which demonstrates that the guarantee contract is valid and enforceable under state law and that a substantial business relationship exists between the guarantor corporation and the entity guaranteed.

Amended §335.112, concerning Standards, adds a reference to the definition of substantial business relationship. The definition of substantial business relationship is addressed in a concurrent rulemaking for Chapter 37.

Amended §335.152, concerning Standards, also adds references to the definition of substantial business relationship.

#### FINAL REGULATORY IMPACT ASSESSMENT

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 Texas Government Code inasmuch as the rules will merely offer an additional option for financial assurance, and they do not meet any of the four applicability requirements listed in §2001.0225(a). The rules will merely offer greater flexibility in instances where corporations guarantee financial responsibility for entities with which the corporation has a substantial business relationship.

The economy, a sector of the economy, productivity, competition, or jobs, will not be adversely affected in a material way because no additional costs are caused by the rules.

The rules do not adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state, because the rules will not reduce the amount of financial assurance required to be demonstrated. The rules are administrative in nature and simply expand the instruments available to corporate guarantors who provide guarantees on behalf of non-corporate entities.

The purpose of these rules is to adopt a Texas definition for substantial business relationship which will allow corporations to provide financial test guarantees for entities including LLCs, LLPs, and LPs.

The new definition will allow corporations to use the financial test for demonstrating financial responsibility on behalf of LLCs, LLPs, and LPs.

This proposal does not exceed a standard set by federal law and is specifically allowed by federal law.

The federal regulations allow the corporations to use the financial test as a corporate guarantee for

closure, post-closure, and liability coverage, on behalf of third parties with which the corporation has a substantial business relationship. The federal regulations defer to each state to ensure that guarantee contracts issued incident to that relationship are valid and enforceable.

This proposal does not exceed the requirements of a delegation agreement or contract between the state and federal government, as the substantial business relationship requirements will be equivalent to the federal financial assurance mechanism requirements.

The rules are adopted under specific state law and the general powers of the commission. The specific state law is Texas Health and Safety Code, §361.085.

#### 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 adopt the definition of substantial business relationship which would allow corporations to provide financial test guarantees for entities including LLCs, LLPs, and LPs. The new definition will allow corporate guarantors to use the financial test to demonstrate financial responsibility on behalf of non-corporate entities such as LLCs, LLPs, and LPs. The federal regulations allow guarantor corporations to provide corporate guarantees using the financial test on behalf of: (1) their subsidiaries; and (2) entities with which the guarantor has a substantial business relationship. Federal regulations define “subsidiaries” as corporations. For the purpose of providing corporate guarantees using the

financial test, guarantors cannot treat LLCs, LLPs, LPs, or other non-corporate entities as “subsidiaries.” The commission’s rules adopt a definition for substantial business relationship and allow corporate guarantors to use the financial test to demonstrate financial responsibility on behalf of non-corporate (non-subsiary) entities such as LLCs, LLPs, and LPs for liability, closure, and post-closure. The definition will recognize a substantial business relationship between a guarantor corporation and entities such as LLCs, LLPs, and LPs in which the guarantor corporation has at least a 50% ownership interest. Such a definition for substantial business relationship will provide an additional option to corporations which choose to provide financial test guarantees to the state on behalf of non-corporate entities in which the corporation has an ownership interest, similar to a corporate parent’s interest in a corporate subsidiary. This definition narrowly defines the relationship and preserves the state’s ability to enforce the guarantee for financial responsibility. The promulgation and enforcement of these rules will not burden private real property nor adversely affect property values because these rules will not reduce the amount of financial assurance required to be demonstrated.

#### 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 rules are subject to the CMP and must be consistent with applicable CMP goals found in 31 TAC §501.12 and policies which are found in 31 TAC §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 Annotated, §§6901 et seq.

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 changes are consistent with the applicable CMP goals and policies because the modification to the rules is insignificant in relationship to the CMP, have no impact on the CNRAs, and include no new requirements applicable to agency action subject to the CMP. The commission has also determined that these rules will not have a direct or significant adverse effect on CNRAs identified in the applicable CMP policies and will not result in a substantive effect. Because these rules will 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 these rules will have no new effect on the CNRAs. The rules will continue having their original effect, which is to require demonstrations of financial assurance for hazardous waste facilities in order to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also the rules will 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 Annotated, §§6901 et seq. 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 will have no new impact upon the coastal area.

#### HEARING AND COMMENTERS

A public hearing was not held on these rules, and the public comment period closed on July 5, 1999. Only Dow Chemical Company (Dow) provided written comments. Dow supported the general rule concept but suggested changes.

#### ANALYSIS OF TESTIMONY

Regarding proposed §335.112(a)(7) concerning Standards, Dow suggested that the concept of corporation be deleted from the rule. This proposed change would allow not only the entity guaranteed, also the guarantor, to be a non-corporate entity.

Similarly, Dow suggested that the concept of corporation be deleted from proposed §335.152(a)(6)(B) and (C), concerning Standards. This proposed change would allow not only the entity guaranteed, also the guarantor, to be a non-corporate entity.

**The commission disagrees with the commenter. The financial test guarantees used by the commission have been approved by the Texas attorney general and are copied from the federal guarantees provided in 40 CFR §264.151(h). These guarantees are corporate guarantees which by their language require the guarantor to be a corporation. To be consistent with federal requirements, the commission will continue to require that only corporations can be guarantors which use the financial test. Consequently, the commission has not changed the language in the rule as suggested by the commenter.**

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §361.011, and §361.017, 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.

**SUBCHAPTER E : INTERIM STANDARDS FOR OWNERS AND OPERATORS  
OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES**

**§335.112**

**§335.112. Standards.**

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 265 (including all appendices to Part 265) (except as otherwise specified herein) are adopted by reference as amended and adopted in the CFR through June 1, 1990, at 55 FedReg 22685 and as further amended as indicated in each paragraph of this section:

(1) Subpart B--General Facility Standards (as amended through April 12, 1996, at 61 FedReg 16290);

(2) Subpart C--Preparedness and Prevention;

(3) Subpart D--Contingency Plan and Emergency Procedures, except 40 CFR §265.56(d);

(4) Subpart E--Manifest System, Recordkeeping and Reporting (as amended through January 29, 1992, at 57 FedReg 3492), except 40 CFR §§265.71, 265.72, 265.75, 265.76, and 265.77;

(5) Subpart F--Groundwater Monitoring (as amended through December 23, 1991, at 56 FedReg 66369), except 40 CFR §265.90 and §265.94;

(6) Subpart G--Closure and Post-Closure (as amended through August 18, 1992, at 57 FedReg 37194); except 40 CFR §265.112(d)(3) and (4) and §265.118(e) and (f);

(7) Subpart H--Financial Requirements (as amended through September 16, 1992, at 57 FedReg 42832); except 40 CFR §265.142(a)(2); provided that the corporate guarantee for closure or for post-closure care, described in 40 CFR §265.143(e)(10) or §265.145(e)(11), respectively, may be provided by a direct or higher-tier parent corporation of the owner or operator, or a corporation which has a substantial business relationship, as defined in §37.11 of this title (relating to Definitions), with the entity guaranteed;

(8) Subpart I--Use and Management of Containers;

(9) Subpart J--Tank Systems (as amended through August 31, 1993, at 58 FedReg 46040);

(10) Subpart K--Surface Impoundments (as amended through August 18, 1992, at 57 FedReg 37194-37282);

(11) Subpart L--Waste Piles (as amended through January 29, 1992, at 57 FedReg 3493), except 40 CFR §265.253;

(12) Subpart M--Land Treatment, except 40 CFR §§265.272, 265.279, and 265.280;

(13) Subpart N--Landfills (as amended through July 10, 1992, at 57 FedReg 30658), except 40 CFR §§265.301(f)-265.301(i), 265.314, and 265.315;

(14) Subpart O--Incinerators (as amended through February 21, 1991, at 56 FedReg 7208);

(15) Subpart P--Thermal Treatment (as amended through July 17, 1991, at 56 FedReg 32692);

(16) Subpart Q--Chemical, Physical, and Biological Treatment;

(17) Subpart R--Underground Injection;

(18) Subpart W--Drip Pads (as amended through December 24, 1992, at 57 FedReg 61492);

(19) Subpart AA--Air Emission Standards for Process Vents (as amended through June 13, 1997, at 62 FedReg 32451);

(20) Subpart BB--Air Emission Standards for Equipment Leaks (as amended through June 13, 1997, at 62 FedReg 32451);

(21) Subpart DD--Containment Buildings (as amended through August 18, 1992, at 57 FedReg 37194); and

(22) The following appendices contained in 40 CFR Part 265:

(A) Appendix I--Recordkeeping Instructions (as amended through March 24, 1994, at 59 FedReg 13891);

(B) Appendix III--EPA Interim Primary Drinking Water Standards;

(C) Appendix IV--Tests for Significance; and

(D) Appendix V--Examples of Potentially Incompatible Waste.

(b) The regulations of the United States Environmental Protection Agency (EPA) that are adopted by reference in this section are adopted subject to the following changes:

(1) The term "regional administrator" is changed to the "executive director" of the Texas Natural Resource Conservation Commission or to the commission, consistent with the organization of the commission as set out in the Texas Water Code, Chapter 5, Subchapter B;

(2) The term "treatment" is changed to "processing";

(3) References the Resource Conservation and Recovery Act, to §3008(h) are changed to the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated (Vernon Pamphlet 1993), §361.303 (concerning Corrective Action);

(4) References to 40 CFR §§260.10, 264.90, 264.101, 270.41, or 270.42, are changed to §335.1 of this title (relating to Definitions), §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response), §335.167 of this title (relating to Corrective Action for Solid Waste Management Units), §305.62 of this title (relating to Amendment), or §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee), respectively;

(5) References to 40 CFR, Part 264, Subpart F, are changed to §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response), §335.157 of this title (relating to

Required Programs), §335.158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title (relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335.167 of this title (relating to Corrective Action for Solid Waste Management Units);

(6) References to 40 CFR, Part 265, Subpart F, are changed to include §335.116 of this title (relating to Applicability of Groundwater Monitoring Requirements) and §335.117 of this title (relating to Recordkeeping and Reporting), in addition to the reference to 40 CFR, Part 265, Subpart F, except §265.90 and §265.94; and

(7) References to the EPA are changed to the Texas Natural Resource Conservation Commission.

(c) A copy of 40 CFR, Part 265 is available for inspection at the library of the Texas Natural Resource Conservation Commission, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

**SUBCHAPTER F : PERMITTING STANDARDS FOR OWNERS  
AND OPERATORS OF HAZARDOUS WASTE STORAGE,  
PROCESSING, OR DISPOSAL FACILITIES**

**§335.152**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §361.011, and §361.017, 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.

**§335.152. Standards.**

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 264 (including all appendices to Part 264) are adopted by reference as amended and adopted in the Code of Federal Regulations through June 1, 1990, at 55 FedReg 22685 and as further amended and adopted as indicated in each paragraph of this section:

(1) Subpart B--General Facility Standards (as amended through April 12, 1996, at 61 FedReg 16290); in addition, the facilities which are subject to 40 CFR Part 264, Subpart X, are subject to regulation under 40 CFR §264.15(b)(4) and §264.18(b)(1)(ii);

(2) Subpart C--Preparedness and Prevention;

(3) Subpart D--Contingency Plan and Emergency Procedures, except 40 CFR

§264.56(d);

(4) Subpart E--Manifest System, Recordkeeping, and Reporting (as amended through January 29, 1992, at 57 FedReg 3462), except 40 CFR §§264.71, 264.72, 264.76 and 264.77; facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §264.73(b)(6);

(5) Subpart G--Closure and Post-Closure (as amended through August 18, 1992, at 57 FedReg 37194); facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §§264.90(d), 264.111(c), 264.112(a)(2), 264.114, 264.117(a)(1)(i) and (ii), and 264.118(b)(1) and (2)(i) and (ii);

(6) Subpart H--Financial Requirements (as amended through June 10, 1994, in 59 FedReg 29958); except 40 CFR §264.142(a)(2); and subject to the limitations set forth in this section:

(A) Facilities which are subject to 40 CFR Part 264, Subpart X, are subject to 40 CFR §§264.142(a), 264.144(a) and 264.147(b);

(B) Facilities which qualify for the corporate guarantee for liability are additionally subject to 40 CFR §264.147(g)(2) and §264.151(h)(2). The corporate guarantee for liability may be provided by a direct or higher-tier parent corporation of the owner or operator, or a corporation which has a substantial business relationship, as defined in §37.11 of this title (relating to Definitions), with the entity guaranteed; and

(C) The corporate guarantee for closure or for post-closure care, described in 40 CFR §264.143(f)(10) or §264.145(f)(11), respectively, may be provided by a direct or higher-tier parent corporation of the owner or operator, or a corporation which has a substantial business relationship, as defined in §37.11 of this title, with the entity guaranteed;

(7) Subpart I--Use and Management of Containers;

(8) Subpart J--Tank Systems (as amended through August 31, 1993, at 58 FedReg 46040);

(9) Subpart K--Surface Impoundments (as amended and adopted through January 29, 1992, at 57 FedReg 3462), except 40 CFR §264.221 and §264.228:

(A) References to 40 CFR §264.221 are changed to §335.168 of this title (relating to Design and Operating Requirements)

(B) References to 40 CFR §264.228 are changed to §335.169 of this title

(relating to Closure and Post Closure Care)

(10) Subpart L--Waste Piles (as amended and adopted through January 29, 1992, at 57 FedReg 3462), except 40 CFR §264.251;

(11) Subpart M--Land Treatment, except 40 CFR §264.273 and §264.280;

(12) Subpart N--Landfills (as amended through November 18, 1992, at 57 FedReg 54452), except 40 CFR §§264.301, 264.310, 264.314 and 264.315;

(13) Subpart O--Incinerators (as amended through February 21, 1991 at 54 FedReg 7207); and

(14) Subpart S--Corrective Action for Solid Waste Management Units (as amended through February 16, 1993 at 58 FedReg 8683);

(15) Subpart W--Drip Pads (as amended through December 24, 1992 at 57 Federal Regulations 61492);

(16) Subpart X--Miscellaneous Units.

(17) Subpart AA--Air Emission Standards for Process Vents (as amended through June 13, 1997, at 62 FedReg 32451);

(18) Subpart BB--Air Emission Standards for Equipment Leaks (as amended through June 13, 1997, at 62 FedReg 32451);

(19) Subpart DD--Containment Buildings (as amended through August 18, 1992, at 57 FedReg 37194); and

(20) The following appendices contained in 40 CFR Part 264:

(A) Appendix I--Recordkeeping Instructions (as amended through March 24, 1994, at 59 FedReg 13891);

(B) Appendix IV--Cochron's Approximation to the Behrens-Fisher Students' T-Test;

(C) Appendix V--Examples of Potentially Incompatible Waste;

(D) Appendix VI--Political Jurisdictions in Which Compliance With §264.18(a) Must Be Demonstrated; and

(E) Appendix IX--Ground-Water Monitoring List (as amended through June 13, 1997, at 62 FedReg 32451).

(b) The provisions of 40 CFR §264.18(b) are applicable to owners and operators of hazardous waste management facilities, for which a permit is being sought, which are not subject to the requirements of §§335.201-335.206 of this title (relating to Location Standards for Hazardous Waste Storage, Processing, or Disposal). A copy of 40 CFR §264.18(b) is available for inspection at the library of the TNRCC, located on the first floor of Building A at 12100 Park 35 Circle, Austin, Texas.

(c) The regulations of the Environmental Protection Agency that are adopted by reference in this section are adopted subject to the following changes.

(1) The term "regional administrator" is changed to the "executive director" of the Texas Natural Resource Conservation Commission or to the commission, consistent with the organization of the commission as set out in the Texas Water Code, Chapter 5, Subchapter B.

(2) The term "treatment" is changed to "processing."

(3) References to §3008(h) of the Resource Conservation and Recovery Act are changed to the Texas Solid Waste Disposal Act, Texas Health and Safety Code (Vernon Pamphlet 1993), §361.303 (relating to Corrective Action).

(4) References to 40 Code of Federal Regulations §§260.10, 264.90, 264.101, 270.41, or 270.42, are changed to §335.1 of this title (relating to Definitions), §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response), §335.167 of this title (relating to Corrective Action for Solid Waste Management Units), §305.62 of this title (relating to Amendment), or §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee), respectively.

(5) References to 40 Code of Federal Regulations Part 264 Subpart F are changed to §335.156 of this title (relating to Applicability of Groundwater Monitoring and Response), §335.157 of this title (relating to Required Programs), §335.158 of this title (relating to Groundwater Protection Standard), §335.159 of this title (relating to Hazardous Constituents), §335.160 of this title (relating to Concentration Limits), §335.161 of this title (relating to Point of Compliance), §335.162 of this title (relating to Compliance Period), §335.163 of this title (relating to General Groundwater Monitoring Requirements), §335.164 of this title relating to Detection Monitoring Program), §335.165 of this title (relating to Compliance Monitoring Program), §335.166 of this title (relating to Corrective Action Program), and §335.167 of this title (relating to Corrective Action for Solid Waste Management Units).

(6) References to 40 Code of Federal Regulations Part 265 Subpart F are changed to include §335.116 of this title (relating Applicability of Groundwater Monitoring Requirements) and §335.117 of this title (relating to Recordkeeping and Reporting), in addition to the reference to 40 Code of Federal Regulations Part 265 Subpart F, except §265.90 and §265.94.

(7) References to the EPA are changed to the Texas Natural Resource Conservation Commission.

(d) A copy of 40 Code of Federal Regulations Part 264 is available for inspection at the library of the Texas Natural Resource Conservation Commission, located on the first floor of Building A at 12100 Park 35 Circle, Austin.