

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** February 22, 2023

**DATE OF REQUEST:** February 3, 2023

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Gwen Ricco, Rule/Agenda Coordinator, (512) 239-2678

**CAPTION:** Docket No. 2022-0989-RUL Consideration for publication of, and hearing on, new Sections 338.1, 338.2, 338.3, 338.5, 338.7, 338.9, 338.20, 338.21, and 338.22 of 30 TAC Chapter 338, Aboveground Storage Vessel Safety Program.

The proposed rulemaking would add a new Chapter 338 to implement Senate Bill 900, 87th Texas Legislature, which requires the establishment of the Aboveground Storage Vessel Safety Program in the state. (Keith Sheedy, Michael Parr, Barrett Hollingsworth, and Cullen McMorrow; Rule Project No. 2022-015-338-CE.)

Craig Pritzlaff

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**Director**

Kelly Cook

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**Division Deputy Director**

Gwen Ricco

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**Agenda Coordinator**

Copy to CCC Secretary? NO  YES

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** February 3, 2023

**Thru:** Laurie Gharis, Chief Clerk  
Erin E. Chancellor, Interim Executive Director

**From:** Craig Pritzlaff, Director  
Office of Compliance and Enforcement

**Docket No.:** 2022-0989-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 338, Aboveground Storage Vessel Safety Program  
Rule Project No. 2022-015-338-CE

**Background and reason(s) for the rulemaking:**

This proposed rulemaking is to implement Senate Bill (SB) 900 (effective September 1, 2021) filed by Senator Alvarado (companion bill filed by Representative Paddie) which amends the Texas Water Code (TWC) by establishing a new Aboveground Storage Vessel Safety (ASVS) Program, to provide for the protection of groundwater and surface water resources in the event of an accident or natural disaster, identifying new safety elements that the TCEQ must include in the ASVS Program; and defining the universe of regulated entities.

SB 900 requires that the TCEQ must promulgate rules and establish the ASVS Program by September 1, 2023. The bill requires this program to include all critical safety elements applicable to a storage vessel and that TCEQ determines to be critical for the protection of ground water and surface water resources following federal statutes/regulations and national consensus standards identified in the bill.

**Scope of the rulemaking:**

The proposed new Chapter 338 rules would require that an owner or operator of a storage vessel must register, assess, and report to TCEQ on its compliance status with the ASVS Program no later than September 1, 2027, with any storage vessels constructed or brought into service after that date required to register and certify compliance no later than 30 days following start of their operations. The proposed rulemaking would require owners and operators of storage vessels to comply with the standards referenced in the rules, upon completion of the next regularly scheduled out-of-service maintenance that occurs after September 1, 2027, with all facilities required to certify compliance status no later than September 1, 2037.

The TCEQ estimates there are approximately 36,000 storage vessels subject to the ASVS Program. The TCEQ, per the SB900 bill language, is required to conduct on-site inspections of the registered and certified facilities at least once every five years to determine compliance. The rulemaking does allow the agency to approve exemptions from specific storage vessel regulations, if the owner or operator of the storage vessel demonstrates that the vessel presents a sufficiently low risk of hazards such that it does not warrant regulation under the program.

The ASVS Program is applicable to aboveground storage vessels located at petrochemical plants, petroleum refineries, or bulk storage terminals that are constructed with nonearthen materials, have a storage capacity of 21,000 gallons (500 barrels) or more, and store a regulated substance as defined by TWC, §26.343.

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The bill also created a new General Revenue–Dedicated Performance Standards for Safety at Storage Vessels Program Account and requires the TCEQ to establish certification fees in amounts sufficient to cover program costs for deposit to the account.

**A.) Summary of what the rulemaking would do:**

The proposed rules would establish the ASVS Program. The rulemaking provides the standards (incorporation by reference of federal statutes/regulations and national consensus standards) that must be complied with by owners/operators of applicable storage vessels. The rulemaking also establishes a registration/certification program, along with providing the fee structure that would be needed to fund the program.

**B.) Scope required by federal regulations or state statutes:**

This rulemaking is not required to satisfy any federal regulations. However, the rulemaking is needed to implement SB 900 bill language.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

There are no additional staff recommendations provided in this rulemaking that are beyond what is required by state statute.

**Statutory authority:**

The rulemaking would be proposed under TWC, §5.013, General Jurisdiction of Commission; TWC §5.102, General Powers; TWC §5.103, Rules; TWC §5.105, General Policy; TWC §5.120, Conservation and Quality of Environment; TWC §26.041, Health Hazards; Texas Health and Safety Code (THSC) §382.017, Rules; THSC §382.002 Policy and Purpose; THSC §382.011 General Powers and Duties; THSC §382.012 State Air control Plan; and THSC §382.016 Monitoring Requirements; Examination of Records. The rulemaking is also proposed under TWC §7.002, Enforcement Authority; TWC §7.032, Injunctive Relief; and TWC §7.303 Grounds for Revocation or Suspension of License, Certificate, or Registration.

**Effect on the:**

**A.) Regulated community:**

The proposed rulemaking is anticipated to result in fiscal implications for businesses or individuals that are owners or operators of affected storage vessels located at a petrochemical plant, a petroleum refinery, or a bulk storage terminal. Proposed §338.22 provides for an annual fee set by the executive director not to exceed \$2,000.00 per storage vessel. The executive director estimates there are approximately 36,000 storage vessels that would be impacted by this rulemaking.

**B.) Public:**

The public would not be adversely affected by the proposed changes. The public benefit anticipated would be compliance with state law and the additional protection of groundwater and surface water resources in the event of an accident or natural disaster.

**C.) Agency programs:**

This is a new program that the Agency must implement. Before the program is fully in place it is estimated that the agency would need an additional 73 FTEs and would need funding to develop

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the electronic registration/certification system well before the September 1, 2027, program start date.

**Stakeholder meetings:**

The commission held three informal stakeholder meetings in July 2022 related to this rulemaking. There are six public hearings planned, which will be held in Fort Worth, Beaumont, Houston, Corpus Christi, Midland, and Austin, during the comment period.

**Potential controversial concerns and legislative interest:**

The rulemaking is to implement SB 900. Updates on the implementation of this bill have been requested by the legislators during interim hearings and it can be expected that legislative interest in this new program would continue.

**Would this rulemaking affect any current policies or require development of new policies?** Yes, this is a new program for the Agency.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

If the proposed rules are not adopted, the agency would not be implementing a statutory requirement, which has been assigned specifically to the agency.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** February 22, 2023

**Anticipated *Texas Register* publication date:** March 10, 2023

**Anticipated public hearing dates:** Fort Worth March 23, 2023, Beaumont March 28, 2023, Houston March 29, 2023, Corpus Christi April 3, 2023, Midland April 6, 2023, and Austin April 10, 2023

**Anticipated public comment period:** March 10, 2023 - April 10, 2023

**Anticipated adoption date:** August 9, 2023

**Agency contacts:**

Keith Sheedy, Critical Infrastructure Division, (512) 239-1556

Michael Parr, Staff Attorney, (512) 239-0611

Cullen McMorrow, Staff Attorney, (512) 239-0607

Barrett Hollingsworth, Staff Attorney, (512) 239-0657

Gwen Ricco, Texas Register Rule/Agenda Coordinator, (512) 239-2678

**Attachments:** None

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Jim Rizk  
Morgan Johnson  
Krista Kyle  
Office of General Counsel  
Keith Sheedy  
Michael Parr  
Cullen McMorrow  
Barrett Hollingsworth  
Gwen Ricco

AN ACT

relating to the safety of storage vessels.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 26.341(b), Water Code, is amended to read as follows:

(b) The legislature declares that it is the policy of this state and the purpose of this subchapter to:

(1) maintain and protect the quality of groundwater and surface water resources in the state from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resources; ~~and~~

(2) require the use of all reasonable methods, including risk-based corrective action, to implement this policy; and

(3) promote the safety of storage vessels as defined in Section 26.3442, by adopting requirements for the design, construction, operation, and maintenance of storage vessels, with the objective of protecting groundwater and surface water resources in the event of accidents and natural disasters.

SECTION 2. Subchapter I, Chapter 26, Water Code, is amended by adding Sections 26.3442, 26.3443, and 26.3444 to read as follows:

Sec. 26.3442. PERFORMANCE STANDARDS FOR SAFETY AT STORAGE VESSELS. (a) Definitions:

1           (1) Storage vessel:

2                   (A) is made of nonearthen materials;

3                   (B) is located on or above the surface of the  
4 ground;

5                   (C) has a capacity of 21,000 gallons or more of a  
6 regulated substance as defined by Section 26.343, Water Code; and

7                   (D) is located at or is part of a petrochemical  
8 plant, a petroleum refinery, or a bulk storage terminal as that term  
9 is defined by Subsection (a)(2).

10           (2) "Bulk storage terminal" means a site in this  
11 state, including end-of-line pipeline storage terminals (excluding  
12 breakout tanks), refinery storage terminals, for-hire storage  
13 terminals, and rail and barge storage terminals.

14           (3) "National consensus standards" means any  
15 performance standard for storage tanks, or a modification thereof,  
16 that:

17                   (A) has been adopted and promulgated by a  
18 nationally recognized standards-producing organization under  
19 procedures whereby it can be determined by the commission that  
20 persons interested and affected by the scope or provisions of the  
21 standard have reached substantial agreement on its adoption; and

22                   (B) was formulated in a manner that afforded an  
23 opportunity for diverse views to be considered.

24           (b) The following tanks, including any pipe that is  
25 connected to the tank, are not considered to be storage vessels and  
26 are exempt from regulation under the Performance Standards for  
27 Safety at Storage Vessels requirements in Sections 26.3442,

1 26.3443, and 26.3444:

2 (1) a tank used in or associated with the production or  
3 gathering of crude oil or natural gas;

4 (2) a tank that is part of a stormwater or wastewater  
5 collection system;

6 (3) a flow-through process tank, including a pressure  
7 vessel or process vessel and oil and water separators;

8 (4) a storage vessel operating above 0.5 Pounds per  
9 Square Inch Gauge;

10 (5) heated tanks;

11 (6) an intermediate bulk container or similar tank  
12 that may be moved within a facility;

13 (7) a tank regulated under the federal Surface Mining  
14 Control and Reclamation Act (30 U.S.C. Sec. 1201 et seq.);

15 (8) a tank used for the storage of products regulated  
16 under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 301  
17 et seq.);

18 (9) a tank, including piping and collection and  
19 treatment systems, that is used in the management of leachate,  
20 methane gas, or methane gas condensate, unless the tank is used for  
21 storage of a regulated substance;

22 (10) a tank or pressure vessel that is used to store  
23 liquefied petroleum gas; and

24 (11) a tank regulated under the U.S. Department of  
25 Transportation's (DOT's) Pipeline and Hazardous Materials Safety  
26 Administration (PHMSA) (49 U.S.C. 60101 et seq.).

27 (c) Not later than September 1, 2023, the commission shall

1 establish a Performance Standards for Safety at Storage Vessels  
2 Program as described in this section to provide for the protection  
3 of groundwater and surface water resources from a release of  
4 substances from a storage vessel in the event of an accident or  
5 natural disaster.

6 (d) In establishing the portion of the Performance  
7 Standards for Safety at Storage Vessels Program governed by this  
8 subsection, the commission shall, except as provided by Section  
9 26.3443, include all and only those critical safety elements that  
10 are applicable to a storage vessel, and that the commission  
11 determines to be critical in this state for the protection  
12 described by Subsection (c), from the following federal statutes  
13 and regulations, ensuring that the correct critical safety elements  
14 are applied to the correct types of storage vessels as delineated in  
15 the applicability section of each cited federal statute and  
16 regulation:

17 (1) Clean Air Act Risk Management Plan Rule and  
18 Maximum Achievable Control Technology/National Emission Standards  
19 for Hazardous Air Pollutants program requirements;

20 (2) Resource Conservation and Recovery Act  
21 requirements for Treatment, Storage, and Disposal Facilities (40  
22 C.F.R. Parts 264/265, Subparts A-E);

23 (3) Spill Prevention, Control, and Countermeasure  
24 Regulations (40 C.F.R. Part 112); and

25 (4) EPA Risk Management Plan Rules regarding accident  
26 prevention at facilities that use certain hazardous substances.

27 (e) In establishing the portion of the Performance



1 Standards for Safety at Storage Vessels Program governed by this  
2 subsection, the commission shall, except as provided by Section  
3 26.3443, include all and only those critical safety elements that  
4 are applicable to a storage vessel, and that the commission  
5 determines to be critical in this state for the protection  
6 described by Subsection (c), from the following national consensus  
7 standards, ensuring that the correct critical safety elements are  
8 applied to the correct types of storage vessels as delineated in the  
9 applicability section of each cited national consensus standard:

10 (1) for in-service storage vessels constructed on or  
11 before September 1, 2027:

12 (A) from American Petroleum Institute (API)  
13 Standard 653: Tank Inspection, Repairs, Alteration, and  
14 Reconstruction, the commission shall require adherence to the  
15 protocol to applicable tanks included in this standard for the  
16 following:

17 (i) Section 4.3: Tank Shell Evaluation;  
18 (ii) Section 4.4: Tank Bottom Evaluation;  
19 (iii) Section 4.5: Tank Foundation  
20 Evaluation;

21 (iv) Section 6.2: Inspection Frequency  
22 Considerations;

23 (v) Section 6.3: Inspections from the  
24 Outside of the Tank;

25 (vi) Section 6.4: Internal Inspection, if  
26 applicable in accordance with Section 6.3;

27 (vii) Section 8: Design Considerations for

1 Reconstructed Tanks; and  
2 (viii) Section 9: Tank Repair and  
3 Alteration;  
4 (B) from API Standard 2350 or API Recommended  
5 Practices 2350: Overfill Protection for Storage Tanks in Petroleum  
6 Facilities, the commission shall include the following critical  
7 safety elements for storage vessels included in this standard:  
8 (i) Section 4: Overfill Prevention  
9 Systems, including management systems and operational procedures  
10 before and after product receipt as applicable;  
11 (ii) Section 5: Overfill Prevention  
12 Systems, including requirements for manual or automated overfill  
13 prevention systems as applicable, including use of remote operated  
14 shutoff valves;  
15 (iii) the requirements referenced in  
16 Subparagraphs (i) and (ii) only apply to atmospheric tanks as  
17 specified in API Standard 2350; and  
18 (iv) API 2350 assessment protocol to  
19 determine how to manage overfill through engineered controls,  
20 administrative controls, and hazard class in applicable  
21 quantities; and  
22 (C) from either National Fire Protection  
23 Association (NFPA) 30 Ch. 22 or API Recommended Practice 2001, the  
24 commission shall require fire suppression systems on storage  
25 vessels subject to the protocol in the applicable standard; and  
26 (2) for in-service storage vessels constructed after  
27 September 1, 2027:

1           (A) all of the standards listed in Subdivision  
2 (1); and

3           (B) API 650: Welded Tanks for Oil Storage and  
4 NFPA 30, Chapter 22 location standards; and

5           (C) NFPA 30, Chapter 22 location standards,  
6 except for reconstruction standards at an original storage vessel  
7 location.

8           (f) The applicable standard chosen by the commission under  
9 Subsection (e)(1)(C) only applies to material stored at atmospheric  
10 pressure with a flashpoint less than or equal to 100 Fahrenheit as  
11 defined by OSHA Process Safety Management.

12           (g) The applicable standard in Subsection (e)(2)(B) only  
13 applies to atmospheric storage vessels as defined in API 650.

14           (h) The commission may require a plan to control spills from  
15 atmospheric storage vessels that includes recommended practices in  
16 NFPA 30.

17           (i) An owner or operator of a storage vessel shall register  
18 with the commission, assess and report to the commission its  
19 current compliance status with the Performance Standards for Safety  
20 at Storage Vessels Program no later than September 1, 2027. For  
21 storage vessels constructed and brought into service after  
22 September 1, 2027, an owner or operator of a storage vessel shall  
23 register and certify its compliance status to the commission with  
24 the Performance Standards for Safety at Storage Vessels Program no  
25 later than 30 days after start of operation.

26           (j) An owner or operator of a storage vessel shall comply  
27 with the Performance Standards for Safety at Storage Vessels

1 Program requirements on completion of the next regularly scheduled  
2 out-of-service maintenance of the storage vessel by the owner or  
3 operator that occurs after September 1, 2027. However, all  
4 facilities must certify compliance status by no later than  
5 September 1, 2037. Any modifications or retrofits necessary for  
6 compliance with the Performance Standards for Safety at Storage  
7 Vessels Program should be made during these out-of-service  
8 maintenance periods as identified by the owner or operator unless  
9 the owner or operator makes and records with the commission a  
10 demonstration of technical impracticability that the commission  
11 approves.

12 (k) The commission in implementing the Performance  
13 Standards for Safety at Storage Vessels Program shall require an  
14 owner or operator of a storage vessel or a designated third party as  
15 assigned by the owner or operator to certify compliance status  
16 every 10 years with the standards referenced in Subsections (d) and  
17 (e) as applicable.

18 (l) The commission shall keep confidential information  
19 reported to, obtained by, or otherwise submitted to the commission  
20 that:

21 (1) is subject to restrictions on dissemination under  
22 federal law, including off-site consequence analysis information  
23 subject to Title 40, Part 1400, C.F.R.; or

24 (2) may otherwise present a security risk, if  
25 disclosed publicly.

26 (m) The commission shall conduct on-site inspections of the  
27 registered/certified facilities at least once every five years to

1 determine compliance with the Performance Standards for Safety at  
2 Storage Vessels Program. This subsection does not limit the  
3 commission's ability to inspect a facility under other state or  
4 federal regulations.

5 Sec. 26.3443. CERTAIN COMMISSION EXEMPTIONS AND RULES;  
6 AMENDMENTS AND ALTERNATIVE STANDARDS. (a) The commission, in  
7 implementing the Performance Standards for Safety at Storage  
8 Vessels Program under Section 26.3442, may approve exemption of  
9 specific storage vessels otherwise subject to Section 26.3442 from  
10 regulation under the program if the legal owner or operator submits  
11 a request to the commission demonstrating that the vessel presents  
12 a sufficiently low risk of floods, storm surges, hurricanes,  
13 accidents, fires, explosions, or other hazards such that it does  
14 not warrant regulation under the program.

15 (b) The commission shall establish through rulemaking the  
16 effective date of a federal law or regulation that the commission is  
17 implementing under Section 26.3442(d), or a national consensus  
18 standard that the commission is implementing under Section  
19 26.3442(e). The commission shall amend through rulemaking changes  
20 if a federal law or regulation or national consensus standard is  
21 amended in a way that materially conflicts with the commission's  
22 current implementation of the Performance Standards for Safety at  
23 Storage Vessels Program except to the extent that the commission  
24 determines, after a cost-benefit analysis and if not prohibited  
25 under federal law, that the program as currently implemented by the  
26 commission is sufficiently effective for protection of the health,  
27 safety, and welfare of the citizens of this state.

1        (c) Notwithstanding the requirement of Section 26.3442(e)  
2 that the commission include only critical safety elements from  
3 specified national consensus standards, the commission may  
4 initiate a rulemaking proceeding to determine whether, for certain  
5 vessels in certain situations, an alternative national consensus  
6 standard would be at least as effective for public health and safety  
7 but more cost effective for the persons affected to implement. The  
8 commission may by rule apply the alternative national consensus  
9 standard in circumstances under which it has determined the  
10 alternative standard is as effective for public health and safety  
11 but more cost effective.

12        Sec. 26.3444. CERTIFICATION FEE. (a) The commission by  
13 rule shall establish fees in amounts sufficient to recover the  
14 reasonable costs to:

- 15            (1) implement a registration program for affected  
16 facilities;  
17            (2) review initial and ten-year certifications;  
18            (3) amend certifications;  
19            (4) inspect certified facilities; and  
20            (5) enforce compliance with applicable standards of  
21 Section 26.3442 and rules and orders adopted under those  
22 subsections.

23        (b) The certification fee under Subsection (a) shall be  
24 deposited to the credit of an account to be named the Performance  
25 Standards for Safety at Storage Vessels Program Account.

26        (c) The commission may use the money in the Performance  
27 Standards for Safety at Storage Vessels Program Account to pay:

1           (1) necessary expenses associated with the  
2 administration of the Performance Standards for Safety at Storage  
3 Vessels Program; and

4           (2) expenses associated with the review and amendment  
5 of certifications, inspection of certified facilities, and  
6 enforcement of the applicable standards of Section 26.3442 and the  
7 rules and orders adopted by the Performance Standards for Safety at  
8 Storage Vessels Program.

9           SECTION 3. This Act takes effect September 1, 2021.

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Speaker of the House

I hereby certify that S.B. No. 900 passed the Senate on April 29, 2021, by the following vote: Yeas 31, Nays 0; and that the Senate concurred in House amendments on May 27, 2021, by the following vote: Yeas 31, Nays 0.

\_\_\_\_\_  
Secretary of the Senate

I hereby certify that S.B. No. 900 passed the House, with amendments, on May 24, 2021, by the following vote: Yeas 145, Nays 0, one present not voting.

\_\_\_\_\_  
Chief Clerk of the House

Approved:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Governor



The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§338.1, 338.2, 338.3, 338.5, 338.7, 338.9, 338.20, 338.21 and 338.22.

### **Background and Summary of the Factual Basis for the Proposed Rules**

The proposed new Chapter 338, Aboveground Storage Vessel Safety (ASVS) Program, is necessary to implement Senate Bill (SB) 900, 87th Texas Legislature, which requires the establishment of the new ASVS Program in the state.

SB 900 amended the Texas Water Code (TWC) to establish the Performance Standards for Safety at Storage Vessels Program within the commission. This program has been designated as the Aboveground Storage Vessel Safety Program by the executive director. The bill identifies the safety elements that the commission must include in these standards and the entities regulated under this new program. The bill requires the commission to establish an ASVS Program by September 1, 2023, to provide for the protection of groundwater and surface water resources in the event of an accident or natural disaster. SB 900 requires this program to include all critical safety elements applicable to a storage vessel and that the commission determines to be critical for the protection of groundwater and surface water resources following federal statutes and regulations identified in the bill, along with national consensus standards also listed in the bill.

The bill authorizes the commission to conduct rulemaking to establish the effective date of standards used in implementing the program under conditions identified in the bill.

The commission must establish fees to cover the costs of implementing the registration program, reviewing initial and ten-year certifications, amending certifications, inspecting certified facilities, and enforcing compliance with the statutes, rules, and orders.

### **Section by Section Discussion**

#### *§338.1 Purpose and Applicability*

The commission proposes new §338.1 to state the purpose and scope of the proposed new Chapter 338 (Aboveground Storage Vessel Safety Program).

Proposed subsection (a) establishes that the goal of the ASVS Program is to protect groundwater and surface water resources in the event of accidents and natural disasters by requiring compliance with the safety standards for the design, construction, operation, and maintenance of storage vessels as provided in §338.5.

Proposed subsection (b) specifies that the requirements of new Chapter 338 apply to storage vessels located at or part of a petrochemical plant, a petroleum refinery, or a bulk storage terminal, except as exempted in §338.3. Subsection (b) further states that

the requirements of this chapter apply to all existing and future installed storage vessels that meet the definition of a storage vessel as defined in §338.2 related to Definitions.

Proposed subsection (c) establishes that the owner or operator of a storage vessel is required to comply with any other laws and regulations, including any other federal, state, or local governmental agencies or entities and that this chapter does not relieve an owner or operator from those responsibilities of compliance.

Proposed subsection (d) establishes that the owners and operators of storage vessels that are subject to the provisions in new Chapter 338 are responsible for complying with this chapter. Owners and operators are responsible for any violations or noncompliance of any person employed or contracted by the owner or operator.

#### *§338.2 Definitions*

The commission proposes new §338.2, which identifies the definitions that apply for the purposes of Chapter 338. For the standards provided in §338.5, the words and terms used in those specific standards will have the meanings of that standard, if defined. However, the words and terms as defined in this subsection shall supersede a definition if provided in a specific standard.

Proposed paragraph (1) defines the term “bulk storage terminal” as was provided in SB

900, in that it refers to a site in the state, including end-of-line pipeline storage terminals (excluding breakout vessels), refinery storage terminals, for-hire storage terminals, rail storage terminals, and barge storage terminals.

Proposed paragraph (2) defines the term “facility” as a site, tract, or other defined area where one or more aboveground storage vessels are located.

Proposed paragraph (3) defines the term “flow-through process vessel” as a vessel through which regulated substances flow as an integral part of a production process such as petroleum refining or petrochemical production. These vessels collect material discharged from a feedstock storage vessel, or equipment within the process before the material is transferred to other equipment or storage vessel(s) within the process or to product or by-product storage vessels. The definition of a flow-through process vessel excludes any vessel that is used for the static storage of regulated substances prior to the introduction into the production process or used for static storage of regulated substances that are products or by-products of the production system.

Proposed paragraph (4) defines the term “National consensus standard” as was provided in SB 900, in that it refers to any performance standard for storage vessel, or a modification thereof, that has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby persons interested and affected by the scope or provisions of the standard have reached

substantial agreement on its adoption and afforded an opportunity for diverse views to be considered. The American Petroleum Institute (API) and National Fire Protection Association (NFPA) standards listed in §338.5 of this chapter have met this requirement.

Proposed paragraph (5) defines the term “petrochemical plant.” The definition was taken from Title 34 Chapter 3 of the Comptroller of Public Accounts, Tax Administration, §3.362, Labor Relating to Increasing Capacity in a Production Unit in a Petrochemical Refinery or Chemical Plant. The definition refers to a facility that in a single continuous operation or using a batch processing method manufactures a basic or an intermediate chemical. A petrochemical plant may be either a single facility existing by itself or a facility within a chemical plant complex, consisting of several separate chemical plants each of which produces a single basic or intermediate chemical product. A chemical plant complex may include any combination of distinct facilities that manufacture basic chemicals, intermediate chemicals, or allied chemical products. In a chemical plant complex, each facility is considered individually to determine whether it qualifies as a petrochemical plant.

It should be noted that the petrochemical plant definition does not include a facility that manufactures "allied chemical products" or a facility, other than one that produces a basic or an intermediate chemical, that generates any chemical as a waste product or a by-product.

Proposed paragraph (6) defines the term “petroleum refinery.” The definition was taken from Title 34 Chapter 3 of the Comptroller of Public Accounts, Tax Administration, §3.362, Labor Relating to Increasing Capacity in a Production Unit in a Petrochemical Refinery or Chemical Plant. The term refers to a facility that manufactures finished petroleum products from crude oil, unfinished oils, natural gas liquids, other hydrocarbons, and oxygenates. Products of these refineries include gasoline, diesel, kerosene, distillate fuel oils, liquefied petroleum gas (LPG), residual fuel oils, lubricants, and other products refined through alkylation, coking, cracking, dewaxing, desulphurization, distillation, hydrotreating, isomerization, polymerization, or other chemical processes. These facilities also produce petrochemical feedstock for use by chemical plants. The term does not include facilities at an oil or gas lease site that remove water or other impurities and merely make the product more marketable.

Proposed paragraph (7) defines the term “regulated substance” as defined by TWC §26.343 to include: a substance defined in §101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 U.S.C. Section 9601 et seq.), but does not include a substance regulated as a hazardous waste under the federal Solid Waste Disposal Act (42 U.S.C. Section 6921 et seq.); petroleum, including crude oil or a fraction of it, that is liquid at standard conditions of temperature and pressure; and any other substance designated by the commission.

The following link lists the regulated substances under CERCLA §101(14):

<https://www.ecfr.gov/current/title-40/chapter-I/subchapter-J/part-302#302.4>.

Proposed paragraph (8) defines the term “storage vessel” as was provided in SB 900, in that it refers to a vessel made of non-earthen materials (e.g., concrete, steel, or plastic) located on or above the surface of the ground and that: has a capacity of 21,000 gallons (500 barrels) or more; stores a regulated substance as defined in the Texas Water Code (TWC), §26.343; is located at or is part of a petrochemical plant, a petroleum refinery, or a bulk storage terminal; and is not a vessel exempted under §338.3.

### *§338.3 Exemptions*

The commission proposes new §338.3 related to Exemptions. The exemptions listed in this subsection were provided in SB 900. The types of vessels listed in this subsection are exempt from the regulation of this chapter.

Proposed paragraph §338.3(a)(1) states that vessels used in or associated with the production or gathering of crude oil or natural gas are exempt. This exemption is specific to upstream sites and should not affect the three types of sites that are affected by the program: petrochemical plants, petroleum refineries, or bulk storage terminals.

Proposed paragraph (2) states that a vessel that is part of a stormwater or wastewater collection system is exempt. Paragraph (3) is the exemption for flow-through process vessels. This exemption also includes pressure vessels, process vessels and water separators. The definition of a flow-through process vessel is provided in §338.2(3).

Proposed paragraph (4) provides an exemption for storage vessels that are operating above 0.5 pounds per square inch gauge (psig). To determine status of this exemption the owner or operators should either: measure the operating pressure of the storage vessel with a pressure gauge located in the vapor space of the vessel or calculate the operating pressure as the total mixture vapor pressure at the storage temperature converted to gauge pressure. It should be noted that the executive director may ask for information that proves that the vessel is exempt from the standards found in this chapter.

Proposed paragraph (5) provides an exemption for heated vessels. For this exemption to apply, the storage vessel must be heated using an external heat source. This heat source could include, but is not limited to, steam, electric heating elements, or a heat medium such as hot oil. A storage vessel in which the process fluid being received is above ambient temperature and/or storage in an insulated vessel that is not heated using an external heat source would not be considered a heated vessel.



Proposed paragraph (6) provides an exemption for intermediate bulk containers or similar vessels that can be moved within a facility. It is the executive director's understanding that this exemption would apply to vessels that are equal to or exceed the 21,000 gallon applicability requirement and are designed to be mobile. For example, 'frac tanks' could meet this exemption if they are not being used as permanent storage.

Proposed paragraph (7) provides an exemption for vessels that are regulated under the federal Surface Mining Control and Reclamation Act. The proposed paragraph (8) provides an exemption for vessels used for the storage of products regulated under the Federal Food, Drug, and Cosmetic Act.

Vessels, including associated piping and collection and treatment systems, that are used in the management of leachate, methane gas, or methane gas condensate are exempted under paragraph (9), unless the vessel is used for storage of a regulated substance, which is defined in TWC §26.343.

Proposed paragraph (10) provides an exemption for pressure vessels that are used to store liquified petroleum gas. Finally, vessels that are regulated under the U.S. Department of Transportations' Pipeline and Hazardous Materials Safety Administration are exempted under proposed paragraph (11).

Proposed subsection (b) provides that the owner or operator of an affected storage vessel may submit a request for a specific storage vessel to be exempted from the requirements of this chapter. The request must be submitted in written form to the executive director or to whomever they designate. The request must demonstrate that the storage vessel presents a sufficiently low risk of floods, storm surges, hurricanes, accidents, fires explosions, or other hazards such that it does not warrant regulation under this chapter. If an exemption request is submitted, the storage vessel is considered subject to any applicable requirements until the executive director has provided written approval for the requested exemption. The executive director will determine what is a “sufficiently low risk” and does not foresee this type of exemption being widely requested or approved.

Proposed subsection (c) states that upon the request of the executive director, an owner or operator claiming to be exempted under subsection (a) or (b) of this section must provide appropriate documentation or other information in a timely manner to support the exemption claim.

### *§338.5 Standards*

The commission proposes new §338.5, which provides the applicable performance standards for safety at affected storage vessels to provide for the protection of groundwater and surface water resources from a release of regulated substances in the event of an accident or natural disaster. The selected standards were limited to those

listed in SB 900. The bill directed the commission to include only the critical safety elements that are applicable to a storage vessel that the commission determines to be critical for the protection of groundwater and surface water resources. The proposed standards are taken from national consensus standards and federal statutes/regulations.

In following the requirements found in SB 900, the commission is also proposing the listed standards to ensure that the correct critical safety elements are applied to the correct types of storage vessels as delineated in the applicability section of each national consensus standard or federal statute/regulation. This requirement is being proposed in subsection (a) and clarifies that for the listed standards, applicability of the requirements is based on the applicability section for each of the referenced standards. It is not the intent of the Executive Director to expand the applicability of the national consensus standards or federal statutes/regulations beyond the applicability provided in those specific standards. For any national consensus standard or federal statute/regulation incorporated by reference in this rule, owners or operators must comply with any separate applicable standards and regulations included in the incorporations by reference.

Proposed subsection (b) establishes the standards that will apply to existing storage vessels that were in service before or on September 1, 2027. This subsection makes it clear that all of the listed performance standards for safety will apply. The proposed

paragraph (1) incorporates by reference, 40 Code of Federal Regulations (CFR) Part 68, Chemical Accident Prevention Provisions, with the specific sections in that Part that will apply. Proposed subparagraph (B) incorporates by reference as amended through December 19, 2019, 40 CFR §68.3 concerning Definitions (84 Federal Register (FR) 69913). Proposed subparagraph (B) incorporates by reference as amended through December 19, 2019 (84 FR 69913) 40 CFR §68.10, Applicability. As already stated, the applicability is limited to storage vessels, which are defined in §338.2. Proposed clause (i) states that the regulated substances that are listed in §338.2 in the definition of a storage vessel, should be used instead of the regulated substance referenced in 40 CFR §68.10. The proposed clause (ii) specifies that the threshold quantity that is referenced in 40 CFR §68.10 does not apply and applicability is based on the volume of the storage vessel as defined in §338.2, which is 21,000 gallon or more of a regulated substance. The proposed clause (iii) specifies that the compliance dates provided in this chapter concerning registration and certification apply instead of the multiple compliance dates listed in §338.10(a) – (f).

Proposed subparagraph (C) incorporates by reference as amended through December 19, 2019 (84 FR 69913) 40 CFR §68.12 General Requirements. 40 CFR §68.12 establishes the general requirements for Programs 1, 2, and 3. If the referenced section requires that a plan or document be submitted, this will either be required under the certification requirements found in §338.21 or will be captured as a recordkeeping requirement in §338.9.

Proposed subparagraph (D) incorporates by reference as amended through June 20, 1996 (61 FR 31718) 40 CFR §68.15, Management. 40 CFR §68.15 establishes that a management system must be developed to oversee the implementation of the risk management program.

Proposed subparagraph (E) incorporates by reference as amended through June 20, 1996 (61 FR 31718) 40 CFR §68.48, Safety Information. This incorporation by reference concerns the Program 2 Prevention Program specific to safety information that the owner or operator must maintain.

Proposed subparagraph (F) incorporates by reference as amended through December 19, 2019 (84 FR 69914) 40 CFR §68.50, Hazard Review. Subparagraph (F) proposes the incorporated requirements that an owner or operator must conduct to ensure a review of hazards associated with the regulated substances has been conducted.

Proposed subparagraph (G) incorporates by reference as amended through January 31, 1994 (59 FR 4493) 40 CFR §68.56, Maintenance. This incorporation provides the requirements that an owner or operator must follow to ensure mechanical integrity of the storage vessels, along with required training.

Proposed subparagraph (H) incorporates by reference as amended through December 19, 2019 (84 FR 69914), 40 CFR §68.65, Process Safety Information. This incorporation by reference concerns the Program 3 Prevention Program specific to process safety information that the owner or operator must develop and maintain. This process safety information must include information pertaining to the hazards of the regulated substances used or stored, information pertaining to the technology of the process (storing of the substances), and information pertaining to the equipment being used.

Proposed subparagraph (I) incorporates by reference as amended through December 19, 2019 (84 FR 69914) 40 CFR §68.67, Process Hazard Analysis. This subparagraph incorporates the requirement that the owner or operator must perform an initial process hazard analysis. It should be noted that where the term process is used, this is specific to only aboveground storage vessels that are subject to this chapter. The process hazard analysis must be appropriate to the complexity of the process and must identify, evaluate, and control the hazards involved in the process. The owner or operator must determine and document the priority order for conducting process hazard analyses based on a rationale, which includes such considerations as extent of the process hazards, number of potentially affected employees, age of the process, and operating history of the process.

Proposed subparagraph (J) incorporates by reference as amended through January 31, 1994 (59 FR 4493) 40 CFR §68.73, Mechanical Integrity. 40 CFR §68.73 establishes that

the requirements apply to storage vessels and provides requirements including: written procedures, training for process maintenance activities, inspection and testing, equipment deficiencies, and quality assurance.

Proposed subparagraph (K) incorporates by reference as amended through January 31, 1994 (59 FR 4493) 40 CFR §68.75, Management of Change. This incorporation establishes the need for a written procedure to manage changes to chemicals, technology, equipment, and procedures.

Proposed subparagraph (L) incorporates by reference as amended through January 31, 1994 (59 FR 4493) 40 CFR §68.77, Pre-Startup Review. 40 CFR §68.77 establishes the requirements to perform a pre-startup safety review for any new or modified storage vessel.

Proposed subparagraph (M) incorporates by reference as amended through December 19, 2019 (84 FR 69915) all sections of 40 CFR Part 68, Subpart E, Emergency Response, (40 CFR §§68.90, 68.93, 68.95, 68.96). Subparagraph (M) incorporates the requirements for responding to an emergency response including applicability, emergency response coordination activities, an emergency response program, and emergency response exercises.

Proposed subparagraph (N) incorporates by reference as amended through April 9, 2004 (69 FR 18832) all sections of 40 CFR Part 68, Subpart G, Risk Management Plan; (40 CFR §§68.150, 68.151, 68.152, 68.155, 68.160, 68.165, 68.168, 68.170, 68.175, 68.180, 68.185, 68.190, 68.195). Subparagraph (N) incorporates the requirements for a risk management plan including submissions, assertion of claims of confidential business information, substantiating claims of confidential business information, executive summary, registration, offsite consequence analysis, five-year accident history, prevention program, emergency response program and exercises, certification, updates, and required corrections. Submission of plans, registration, and certification will follow the requirements found in this chapter.

Proposed subparagraph (O) incorporates by reference as amended through December 19, 2019 (84 FR 69916) all sections of 40 CFR Part 68, Subpart H, Other Requirements, (40 CFR §§68.200, 68.210, 68.215, 68.220). 40 CFR Part 68, Subpart H establishes requirements recordkeeping, availability of information to the public, permit content and air permitting authority or designated agency requirements, and audits. The recordkeeping timeframes found in this chapter should be used instead of the five-year recordkeeping requirement in 40 CFR §68.200.

The proposed paragraph (2) incorporates by reference, 40 CFR Part 112, Oil Pollution Prevention, with the specific sections in that Part that will apply. Proposed subparagraph (A) incorporates by reference as amended through April 18, 2011 (76 FR



21550) 40 CFR §112.1 General Applicability. The applicability of 40 CFR Part 112 applies to any owner operator of a non-transportation-related onshore or offshore facility engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products, which due to its location, could be expected to discharge oil in quantities that may be harmful into waters of United States. For this chapter, the 40 CFR Part 112 rules apply only to aboveground storage vessels, which meet the definition of a storage vessel in §338.2. The storage vessel exemptions found in §338.3 will also apply when determining applicability for this part. The exemptions found in 40 CFR §112.1(d) would also apply when determining applicability for this chapter. In 40 CFR §112.1(f) where the term ‘Regional Administrator’ should be considered to be the executive director.

Proposed subparagraph (B) incorporates by reference as amended through April 21, 2020 (85 FR 223399) 40 CFR §112.2 Definitions. 40 CFR §112.2 provides definitions of terms that would be specific to this Part.

Proposed subparagraph (C) incorporates by reference as amended through November 22, 2011 (76 FR 72124) 40 CFR §112.3 Requirement to Prepare and Implement a Spill Prevention, Control, and Countermeasure Plan. 40 CFR §112.3 establishes the requirements associated with the development and implementing a Spill Prevention Control and Countermeasure Plan.

Proposed subparagraph (D) incorporates by reference as amended through November 13, 2009 (74 FR 58810) 40 CFR §112.6 Qualified Facilities Plan Requirements. 40 CFR §112.6 provides the requirements for Tier I and Tier II qualified facilities concerning spill prevention control and countermeasure plans. The requirements for Tier I facilities include preparation and self-certification of the plans, technical amendments, and plan templates along with applicable requirements. The requirements for Tier II facilities include preparation and self-certification of plans, technical amendments, applicable requirements, and professional engineer certification of portions of a qualified facility's self-certified plan.

Proposed subparagraph (E) incorporates by reference as amended through November 13, 2009 (74 FR 58810) 40 CFR §112.7 General Requirements for Spill Prevention, Control, and Countermeasure Plans. 40 CFR §112.7 establishes the general requirements for a spill prevention, control, and countermeasure plan, including but not limited to: the plan uses good engineering practices, has full management approval, the plan must be available in writing, if the plan does not follow the specifically listed sequence specified in the plan, an equivalent plan must be approved and followed. The plan must also address when additional facilities or procedures, methods, or equipment are not yet fully operation by providing details of installation and operational start-up information.

Proposed subparagraph (F) incorporates by reference as amended through December 5, 2008 (73 FR 74304) 40 CFR §112.8 Spill Prevention, Control, and Countermeasure Plan requirements for onshore facilities (excluding production facilities). For facilities that are subject to this section, the owner or operator must meet the requirements of 40 CFR §112.7 and the specific discharge prevention and containment procedures listed in 40 CFR §112.8.

Proposed subparagraph (G) incorporates by reference as amended through December 5, 2008 (73 FR 74305) 40 CFR §112.12 Spill Prevention, Control, and Countermeasure Plan Requirements. For facilities that are subject to this section, the owner or operator must meet the requirements of 40 CFR §112.7 and the specific discharge prevention and containment procedures listed in 40 CFR §112.12

Proposed subparagraph (H) incorporates by reference as amended through July 17, 2002 (67 FR 47151) 40 CFR §112.20 Facility Response Plans. 40 CFR §112.20 establishes the requirements of when an owner operator of a non-transportation-related onshore or offshore facility, which due to its location, could be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, must prepare a facility response plan. This plan may be required to be submitted to the executive director during the facilities certification and will be required to be kept on-site per the recordkeeping requirements.

Proposed subparagraph (I) incorporates by reference as amended through June 30, 2000 (65 FR 40798) 40 CFR §112.21 Facility Response Training and Drills/Exercises. The proposed rule language notes that the term “Regional Administrator” used in 40 CFR §112.21 should be replaced with “executive director”. If a facility is required to prepare a facility response plan in 40 CFR §112.20, then the owner or operator must develop and implement a facility response training program and develop a drill/exercise program based on the requirements found in 40 CFR §112.21.

The proposed paragraph (3) incorporates by reference, 40 CFR Part 264 Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, with the specific sections in the Part that will apply. Proposed subparagraph (A) incorporates by reference as amended through December 10, 1987 (52 FR 46963) 40 CFR §264.10, Applicability. The applicability of 40 CFR Part 264 applies to any owner operator of facilities that treat, store, or dispose of hazardous waste. For this chapter, the 40 CFR Part 264 rules apply only to aboveground storage vessels, which meet the definition of a storage vessel in §338.2. The storage vessel exemptions found in §338.3 will also apply when determining applicability for this part. The exemptions found in 40 CFR §264.1 would also apply when determining applicability for this chapter.

Proposed subparagraph (B) incorporates by reference as amended through January 31, 1985 (50 FR 4514) 40 CFR §264.14, Security. The proposed rule language notes that the

term “Regional Administrator” in 40 CFR §264.14 should be replaced with “executive director”. Per the requirements of 40 CFR §234.14 the owner or operator must prevent unknowing entry, minimize the possibility for unauthorized entry of persons or livestock into the active portion of the facility, must have a 24-hour surveillance system that monitors and controls entry or have fencing. The owner or operator must have signage posted per the requirements that notices “Danger - Unauthorized Personnel Keep Out”.

Proposed subparagraph (C) incorporates by reference as amended through November 28, 2016 (81 FR 85826) 40 CFR §264.15, General Inspection Requirements. 40 CFR §264.15 establishes the general inspection requirements that are applicable to a regulated storage vessel. This includes but is not limited to requirements to; inspect the facility, have a written schedule for inspecting equipment, remedy any deterioration or malfunction of equipment, and record inspections.

Proposed subparagraph (D) incorporates by reference as amended through April 4, 2006 (71 FR 16903) 40 CFR §264.16, Personnel Training. 40 CFR §264.16 establishes personnel training requirements to ensure that facility personnel are able to respond effectively to emergencies.

Proposed subparagraph (E) incorporates by reference as amended through July 14, 2006 (71 FR 40272) 40 CFR §264.17, General Requirements for Ignitable, Reactive or

Incompatible Wastes. 40 CFR §264.17 establishes the requirements that an owner or operator must take to prevent accidental ignition or reaction of ignitable or reactive waste.

Proposed subparagraph (F) incorporates by reference as amended through July 14, 2006 (71 FR 40272) 40 CFR §264.18(b), Floodplains. 40 CFR §264.18(b) establishes the requirements for storage vessels that are located in a 100-year floodplain.

Proposed subparagraph (G) incorporates by reference as amended through May 19, 1980 (45 FR 33221) 40 CFR §264.31, Design and Operation of Facility. 40 CFR §264.31 states that facilities must be designed, constructed, maintained, and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water, which could threaten human health or the environment.

Proposed subparagraph (H) incorporates by reference as amended through April 1, 1983 (48 FR 14294) 40 CFR §264.32, Required Equipment. 40 CFR §264.32 states what equipment or processes must be located at a subject facility. This includes an internal communications or alarm system, ability to contact local police/fire departments or State or local emergency response teams, have on-site fire control equipment, and water at adequate volume and pressure.

Proposed subparagraph (I) incorporates by reference as amended through April 1, 1983 (48 FR 14294) 40 CFR §264.33, Testing and Maintenance of Equipment, which requires all affected facilities to test and maintain as necessary, the communications/alarm systems, fire protection equipment, spill control equipment, and decontamination equipment to assure its proper operation in time of an emergency.

Proposed subparagraph (J) incorporates by reference as amended through May 19, 1980 (45 FR 33221) 40 CFR §264.34, Access to Communications or Alarm System, which establishes requirements on when personnel involved in the affected operations must have access to emergency communication/alarm devices.

Proposed subparagraph (K) incorporates by reference as amended through May 19, 1980 (45 FR 33221) 40 CFR §264.37, Arrangements with Local Authorities. 40 CFR §264.37 establishes the requirements the owner or operator must attempt to make concerning the potential need for services from State and local authorities.

The proposed paragraph (4) incorporates by reference, specific sections from the American Petroleum Institute (API) Standard 653, Tank Inspection, Repairs, Alteration, and Reconstruction. The version of the API 653 standard being incorporated is the fifth edition, issued in November 2014, with Addendum 1 issued in April 2018 and Addendum 2 issued in May 2020.

Proposed subparagraph (A) incorporates by reference Section 4.3: Tank Shell Evaluation and any applicable Annex found in API 653. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with the requirements listed in Section 4.3 found in API 653. These requirements include general requirements, actual thickness determinations, minimum thickness calculations for welded tank shells, minimum thickness calculations for riveted tank shells, distortions, flaws, wind girders and shell stiffeners, shell welds, shell penetrations, and operation at elevated temperatures.

Proposed subparagraph (B) incorporates by reference as amended through September 1, 2023, Section 4.4: Tank Bottom Evaluation and any applicable Annex found in API 653. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with the requirements listed in Section 4.4 found in API 653. These requirements include general requirements, causes of bottom failures, tank bottom release prevention systems, bottom plate thickness measurements, minimum thickness for tank bottom plates, and minimum thickness for annual plate rings.

Proposed subparagraph (C) incorporates by reference Section 4.5: Tank Foundation Evaluation and any applicable Annex found in API 653. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3



are required to comply with the requirements listed in Section 4.5 found in API 653. These requirements include general requirements, foundation repair or replacement, and anchor bolts.

Proposed subparagraph (D) incorporates by reference Section 6.2: Inspection Frequency Considerations and any applicable Annex found in API 653. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with the requirements listed in Section 6.2 found in API 653. These requirements include several inspection frequency considerations for the storage vessels, along with how the interval between inspections should be determined.

Proposed subparagraph (E) incorporates by reference Section 6.3: Inspections from the Outside of the Tank and any applicable Annex found in API 653. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with the requirements listed in Section 6.3 found in API 653. These requirements include routine in-service inspections, external inspections, ultrasonic thickness inspections, and cathodic protection surveys.

Proposed subparagraph (F) incorporates by reference Section 6.4: Internal Inspection and any applicable Annex found in API 653. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are

required to comply with the requirements listed in Section 6.4 found in API 653. These requirements include general requirements and inspection interval requirements.

Proposed subparagraph (G) incorporates by reference Section 8: Design Considerations for Reconstructed Tanks and any applicable Annex found in API 653. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with all of the applicable requirements found in Section 8 of API 653. These requirements include general requirements, new weld joints, existing weld joint, shell design, shell penetrations, wind girders and shell stability, roofs, and seismic design.

Proposed subparagraph (H) incorporates by reference Section 9: Tank Repair and Alteration and any applicable Annex found in API 653. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with all of the applicable requirements found in Section 9 of API 653. These requirements include general requirements, removal and replacement of shell plate material, weld joint design, door sheet installation, shell repairs using lap-welded patch plates, repairs using nonmetallic materials, repairs of defects in shell plate material, alteration of tank shells to change shell height, repair of defective welds, repair of shell penetrations, addition or replacement of shell penetrations, alteration of existing shell penetrations, repair/replacement of tank bottoms, repair of

fixed roofs, repair of floating roofs, repair/replacement of floating roof perimeter seals, and hot taps.

The proposed paragraph (5) incorporates by reference, specific sections from the API Standard 2350; Overfill Prevention for Storage Tanks in Petroleum Facilities, Fifth Edition, September 2020 (Errata 1, April 2021). The standard applies to all storage vessels as defined in §338.2 with an internal design pressure not more than 2.5 psig, that contain either a National Fire Protection Association (NFPA) Class I liquid (a liquid that has a flash point below 100 degrees Fahrenheit) or a Class II liquid (any liquid that has a flash point at or above 100 degrees Fahrenheit and below 140 degrees Fahrenheit).

Proposed subparagraph (A) incorporates by reference Section 4: Overfill Prevention System (OPS) and any applicable Annex found in API 2350. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with all of the applicable requirements found in Section 4 of API 2350. The standard states that the prevention of vessel overfills requires the consideration of the following: awareness and calculation of available vessel capacity and inventory, monitoring and control of product movement and vessel level during filling, reliable instrumentation, sensors, human response to manually initiate the termination of flow, use of automatic vessel gauging systems or independent high-level alarms, and use of automated response systems to automatically terminate the flow.

Section 4 also establishes the requirements for a management system to fulfill the task required to prevent an overflow of storage vessels. Requirements for risk assessment are also provided in Section 4. Requirements for defining operating parameters in establishing levels of concerns, critical high levels, automated overflow prevention system activation levels, high-high or HH vessel levels, high levels, maximum working levels, response times, and level of concern changes and periodic reviews are also provided. In Section 4, there are also requirements for overflow prevention system (OPS) procedures, which include procedures for operations, procedures for training on overflow prevention systems, procedures for testing, inspection, and maintenance of the equipment of an OPSs, training for testing, inspection, and maintenance of OPSs, proof test documentation, and vessel alarm reports.

Proposed subparagraph (B) incorporates by reference Section 5: Requirements for OPS Procedures and any applicable Annex found in API 2350. All affected storage vessels that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with all of the applicable requirements found in Section 5 of API 2350. It is stated in the API 2350 standard that there are two types of OPS that are generally used to terminate a receipt of product into a storage vessel; with those types being a manual overflow prevention system (MOPS) and an automated overflow prevention system (AOPS). Section 5 provides requirements for vessel category criteria and instruments/equipment used for overflow prevention.

SB 900 requires that the commission review and propose rules that require fire suppression systems on storage vessels that are subject to the ASVS program. There were two standards listed in the bill; National Fire Protection Association (NFPA) 30 Chapter 22 and API Recommended Practice 2001. The proposed rule language in paragraphs (6) and (7) incorporate by reference specific sections from these two standards. The proposed paragraph (6) incorporates by reference Section 22.8, Fire Protection for Aboveground Storage Tanks from NFPA 30 Chapter 22 and any applicable Annex. Section 22.8 requires a fire-extinguishing system to be installed and used in accordance with NFPA standards. Applicability of the standard is based on NFPA 30 §22.8(1)-(4). This standard applies to atmospheric storage vessels with a storage capacity of 50,000 gallons or more, contain a Class I liquid (flash point that is less than 100 degrees Fahrenheit), the vessels are located in a congested area where there is an unusual exposure hazard to vessels from adjacent property or to adjacent property from the vessels, and the vessels are a fixed-roof or a combination fixed- and floating-roof that does not meet the requirements of NFPA 30 §§22.2.2(2) or (3) to be classified as a floating roof vessel.

Proposed paragraph (7) requires that for all storage vessels that are not required to install a fire suppression system under paragraph (6) of this section, API Recommended Practice 2001, 10<sup>th</sup> Edition, July 2019, Sections 5, 6, 7, 8, 9, 10, 11 and any applicable Annex are incorporated by reference and shall apply. Section 5 concerns the fire considerations design to help prevent potential hazards from

resulting, during a fire. Section 6 concerns the general approach for fire control and extinguishment use by both large and small facilities throughout the petroleum industry. This section provides general requirements for the three types of fire suppressing systems: fixed system, semifixed system, and portable equipment. The section furthermore discusses the requirements for the use of water, foam, dry chemicals, combined (dual) agents, or clean agents to control and extinguish fires. Section 7 provides the operating practices, including general requirements to establish standard operation procedures and emergency operating procedures and what needs to occur if a loss of containment should happen. Section 8 provides the maintenance procedures for fire prevention during construction, turnaround, repair, demolition, and routine/emergency maintenance activities. Section 9 addresses the basic principles of an emergency response and fire protection organization. While Section 10 provides the requirements for the training needed for firefighting. Finally, Section 11 addresses the need for pre-fire incident planning.

Proposed subsection (c) establishes the standards that will apply for new storage vessels that are placed into service after September 1, 2027. Proposed paragraph (1) states that all the standards that are listed in subsection (b) will apply to new storage vessels.

Proposed paragraph (2) incorporates by reference all sections of API 650: Welded Tanks for Oil Storage, Thirteenth Edition, March 2020 (Errata 1, January 2021). The API

650 standard establishes minimum requirements for material, design, fabrication, erection, and inspection for vertical, cylindrical, aboveground, closed- and open-top, welded storage vessels in various sizes and capacities for internal pressures approximating atmospheric pressure. All affected storage vessels that are placed into service after September 1, 2027, that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with all of the applicable requirements found in API 650. These standards apply to new storage vessels.

Proposed paragraph (3) incorporates by reference NFPA 30 §22.4; Location of Aboveground Storage Tanks from NFPA 30, Chapter 22 (Edition: 2021). All affected storage vessels that are placed into service after September 1, 2027, that meet the definition of a storage vessel in §338.2 and are not exempted under §338.3 are required to comply with all of the applicable requirements found in NFPA 30, §22.4, which concerns the location of aboveground storage vessels. These standards apply to new storage vessels.

Proposed subsection (d) provides the requirement that an owner or operator subject to the standard in subsection (b) must make any needed modifications or retrofits that are necessary to obtain compliance with the standards in §338.5 during the first out-of-service maintenance period for the storage vessel after September 1, 2027. An owner or operator may request approval from the executive director that the necessary modifications or retrofits are not technically feasible. The request is not approved

unless a written response is received from the executive director. This requirement applies to modifications or retrofits and does not apply to newly constructed storage vessels. It should also be noted as stated in the §338.21, Certification Section of the proposed rules, owners or operators of storage vessels brought into service prior to September 1, 2027, must certify compliance with the standards of §338.5 upon completion of the next regularly scheduled out-of-service maintenance, but no later than September 1, 2037. Owners or operators of storage vessels constructed and brought into service after September 1, 2027, must certify compliance with the §338.5 standards no later than 30 days after the start of operation of the storage vessel.

#### *§338.7 Inspections*

The commission proposes new §338.7 which establishes requirements the inspection requirements. The executive director will conduct inspections of storage vessels that are subject to these regulations to determine current compliance status.

Proposed subsection (a) states that in order to better develop these regulations, to conduct a study associated with these regulations, or to enforce the requirements of the ASVS program, at the request of the executive director, the owner or operator must per paragraph (1) furnish information related to the storage vessel, including storage vessel equipment and contents, and (2) allow the executive director to have access to and obtain all records relating to the storage vessel.



Proposed subsection (b) establishes when and what actions the executive director may do to develop these regulations further, conduct a study associated with these regulations, or to enforce the requirements of the ASVS program. Proposed paragraph (1) states that the executive director may enter at reasonable times to a facility in which a storage vessel is located. Proposed paragraph (2) states that the executive director may inspect and obtain samples of a regulated substance contained in the storage vessel. Proposed paragraph (3) states that the executive director may conduct monitoring or testing of the storage vessel, associated equipment, contents, or surrounding soils, air, surface water, or groundwater.

Proposed subsection (c) establishes that the executive director may require an owner or operator to conduct monitoring and testing, if the executive director determines that there is reasonable cause to believe that a release has occurred in an area in which the storage vessel is located.

#### *§338.9 Recordkeeping*

The commission proposes new §338.9(a) to establish the general recordkeeping requirements. Proposed paragraph (1) specifies that the owner or operator of an aboveground storage vessel must develop and maintain all records required by the provisions of this chapter. This includes recordkeeping requirements that are provided in the incorporated by reference standards.

Proposed paragraph (2) specifies that except as provided in paragraph (3), an owner or operator must maintain copies of all required records pertaining to an aboveground storage vessel in a secure location at the facility premises. The records must be immediately accessible for reference and use by the owner or operator and must be made available for inspection upon request by the executive director.

Proposed paragraph (3) establishes that if an owner or operator cannot reasonably maintain copies of the required records on the facility premises, then the records may be maintained at a readily accessible alternate site, provided that the records are accessible for reference and use by the owner or operator and the records are readily accessible and available for inspection upon request by the executive director. If the records will be maintained at an alternative site, information concerning this alternative site will be required to be reported during the registration/certification process. During an inspection, the owner or operator should have facilities available so that the executive director can view the records electronically at the facility where the storage vessel is located.

Proposed subsection (b) specifies the required records and documents. Proposed paragraph (1) requires that the owner or operator must meet all recordkeeping requirements and that they must maintain copies of the records described in subparagraphs (A) and (B) for the operational life of the aboveground storage vessel.

The requirement to maintain copies of the records for the operational life of the storage vessel is different from most agency recordkeeping requirements. However, the ASVS program is different in that the main goal is concerning design performance standards for safety. Therefore, how the storage vessel was originally designed, located, and what disaster plans were developed is necessary for the purpose of this program. Proposed subparagraphs (A) and (B) require that copies must be kept of the original and any amended registration and certification documents submitted, in accordance with §338.20 and §338.21 respectively. The executive director will develop the registration and certification program, which is envisioned to be completely electronic. The owner or operator should be able to print a copy of their submission or convert the information into a readable electronic format. Having this information available in either a paper format or an electronic format at the facility or alternative facility would meet this requirement.

Proposed paragraph (2) specifies that the owner or operator must maintain copies of records and documents demonstrating compliance with all applicable standards found in §338.5. Proposed subparagraphs (A) through (I) identify the standards that require documentation to demonstrate compliance with the safety standard.

The executive director will develop a guidance document to help owners and operators with determining compliance with the ASVS program. This will include, but not be limited to: determining if their storage vessels are subject to the ASVS regulations, how

to register their storage vessels, what information will be needed to provide certification status, fee requirements, and recordkeeping requirements. The executive director plans to provide a final draft of the guidance document before the start of the program on September 1, 2027.

*§338.20 Registration*

The commission proposes new §338.20(a) to establish the deadline for existing aboveground storage vessels to register as September 1, 2027.

Proposed subsection (b) specifies the registration requirements for new aboveground storage vessels (vessels placed into service on or after September 1, 2027). The owner or operator of new vessels have 30 days after the start of operation to register the aboveground storage vessel with the commission.

Proposed subsection (c) specifies that the owner or operator of an aboveground storage vessel is responsible with complying with the registration requirements. An owner or operator may designate an authorized representative to complete and submit the required registration, but the owner or operator is the responsible party for ensuring the vessel(s) they own comply with the ASVS program.

Proposed subsection (d) specifies that the owner or operator of vessels that are required to be registered are also required to pay the fee as described in §338.22.

Aboveground storage vessels that are not registered as required, are still subject to the fee. Therefore, if an aboveground storage vessel is registered after the deadline, an owner or operator would be required to pay registration fees from the registration deadline to the date of registration.

Proposed subsection (e) requires the current owner or operator of a storage vessel to notify the executive director of any changes to the to the registration within 30 days of the change. Changes that require notification include, but aren't limited to, the operational status of any storage vessel, the substance stored in any storage vessel, the ownership of any storage vessel, the compliance of any storage vessel, and the location of records for storage vessels.

Proposed subsection (f) requires the owner or operator of a storage vessel to provide all the registration information requested by the executive director for each storage vessel. All registration information must be filled out completely and accurately. Owners or operators must complete a registration form for each facility, with all storage vessels located within a facility on the same registration form.

Proposed subsection (g) specifies that the executive director may require the owner or operator to submit additional information if the information submitted was inaccurate, unclear, illegible, incomplete, or otherwise inadequate. If the executive director

requests additional information, the owner or operator has 30 days to provide the information requested.

Proposed subsection (h) specifies the requirements to remove a storage vessel from the program. To remove a storage vessel from the program, the vessel must be decommissioned and no longer be subject to the definition of a storage vessel as defined in §338.2 of this title. The owner or operator must notify the executive director, using the method authorized by the executive director, and certify that it no longer is subject to the program. A storage vessel registered with the executive director is considered a storage vessel as long as the vessel has the potential to contain a regulated substance. A storage vessel that is decommissioned and permanently removed from service would no longer require registration with the executive director under this program. The owner or operator must pay all outstanding fees owed to the agency before removing the vessel from the program.

#### *§338.21 Certification*

The commission proposes new §338.21 to establish the requirements for certification.

Proposed subsection (a) specifies that for storage vessels brought into service on or before September 1, 2027, the owner or operator of a storage vessel must report its compliance status to the executive director by September 1, 2027. The storage vessel does not need to comply with the safety standards at this time, but the owner or

operator shall indicate by this date whether the storage vessel meets the safety standards.

Proposed subsection (b) establishes the deadline for storage vessels brought into service before September 1, 2027. The owner or operator of these vessels must certify compliance during the next regularly scheduled out-of-service maintenance of the vessel, but no later than September 1, 2037.

Proposed subsection (c) establishes that the owner or operator of new vessels - those constructed and brought into service after September 1, 2027 - must certify compliance with the safety standards no later than 30 days from the start of operation.

Proposed subsection (d) specifies that the owner or operator must re-certify compliance with the safety standards every 10 years.

*§338.22 Fees for Aboveground Storage Vessels.*

The commission proposes new §338.22 to establish the fees for the ASVS program.

Proposed subsection (a) includes the costs that the fee would need to cover, as provided in SB 900, including implementing a registration program, reviewing

certifications, inspect sites/facilities, and enforce compliance with applicable standards.

Proposed subsection (b) establishes the fee assessment. Proposed paragraph (1) establishes that the maximum fee for an aboveground storage vessel is \$2,000. The agency will publish a fee schedule based on a combination of a flat fee per vessel and a per barrel fee based on vessel capacity for vessels over 20,000 barrels, not to exceed the maximum of \$2,000 per vessel established in this section.

Based on the preliminary estimate of the number and capacity of the regulated vessels, the proposed preliminary fee schedule would be a flat fee of \$200 per vessel and an additional \$0.0024 per barrel of capacity for vessels over 20,000 barrels. Table 1 below shows what the total fee would be for various vessel capacities with the proposed fee. The proposed fee schedule is subject to change and will be finalized through the *Texas Register* notification process.

Table 1: Proposed Preliminary Fee Schedule

<b>Capacity in barrels (bbls)</b>	500	10,000	20,000	50,000	100,000	200,000	300,000
<b>Per ASV Flat Fee</b>	\$200	\$200	\$200	\$200	\$200	\$200	\$200
<b>Per barrel Fee (\$0.0027/ bbl)</b>	-	-	-	\$48	\$240	\$480	\$720
<b>Total per ASV Fee</b>	\$200	\$200	\$200	\$248	\$440	\$680	\$920

Larger capacity storage vessels are more complex, will require additional time and



resources to inspect and review, and present a greater risk to public health and the environment; therefore, larger vessels will be assessed a larger fee. The estimated number of vessels and associated size distribution the executive director used for the preliminary fee calculations have an unknown degree of certainty. Due to this uncertainty, it is highly probable that the fees will need adjustment in the future. Publishing the fee schedule outside of the rulemaking will allow the executive director to adjust the fees more easily to remain revenue neutral.

Proposed paragraph (2) specifies that the owner or operator must pay the fee upon initial registration and annually.

Proposed paragraph (3) establishes that owner or operator shall pay fees by check, money order, electronic funds transfer, or through the executive director's payment portal. This subsection also authorizes the executive director to assess penalties and interest for late payments, in accordance with 30 TAC Chapter 12, relating to Payment of Fees).

Proposed paragraph (4) establishes that the executive director may adjust the fees for storage vessels registered in this program up to the maximum fee, on an annual basis. The executive director will notify the responsible parties of the fee changes through an appropriate notification process, such as through publication in the *Texas Register*.

The fees may be adjusted to cover the reasonable costs to implement a registration program for affected facilities, review initial and ten-year certifications, amend certifications, inspect certified facilities, and enforce compliance with applicable standards of TWC § 26.3442 and rules and orders adopted under those subsections.

Proposed paragraph (5) establishes that the executive director will bill the responsible party based on the storage vessels that are registered on September 1. If a facility's registration anniversary falls in December, the billing for that year will be determined by the number and capacity of storage vessels that were registered on September 1. For this example, if a storage vessel is decommissioned in October, it would still be billed for that fiscal year.

Proposed paragraph (6) establishes that the cancellation of a registration does not constitute grounds for a refund.

Proposed paragraph (7) specifies that the transfer of ownership of a facility is not grounds for a refund, whole or in part, for fees paid. The new owner or operator will be responsible for paying any outstanding fees and penalties associated with the facility that are owed to the commission.

**Fiscal Note: Costs to State and Local Government**

Jené Bearse, Deputy Director of the Budget and Planning Division, has determined that

for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule.

The Texas Water Code, §26.3444 requires the commission to establish fees in amounts sufficient to recover the reasonable costs to implement and enforce the program. On May 24, 2021, the Legislative Budget Board estimated the fiscal impact of the legislation, which prompted this rulemaking would be \$6.29 million in FY 2027. After further analysis, including analysis on the impact of recent legislation requiring legacy payments to the Employees Retirement System (ERS), the fiscal impact of this proposed rulemaking is estimated to be \$10 million in FY 2028 and \$9 million in subsequent years.

The program costs include salaries and benefits for 73 full time equivalent employees (FTEs), equipment, vehicles, travel, training, and other operating expenses. This estimate includes increased salaries, three additional FTEs for accounts receivable, additional funds for regional office rent and utilities, fringe benefits, additional funds for retiree health insurance, and legacy payments to ERS (as required by SB 321, 87<sup>th</sup> Regular Legislative Session). The increased estimate for salaries is due to the ongoing difficulties in hiring and retaining staff at the mid-point of the salary range.

The executive director is not aware of any potential fiscal implications to other units of state government or any local governmental entity as a result of the administration or enforcement of the proposed rule.

### **Public Benefits and Costs**

Ms. Bears determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with state law and the additional protection of groundwater and surface water resources in the event of an accident or natural disaster.

The proposed rulemaking is anticipated to result in fiscal implications for businesses or individuals that are owners or operators of affected storage vessels located at a petrochemical plant, a petroleum refinery, or a bulk storage terminal. Proposed §338.22 provides for an annual fee set by the executive director not to exceed \$200.00 per storage vessel.

An owner or operator of a storage vessel must register with the commission, assess, and report its compliance status with the ASVS Program no later than September 1, 2027, with any storage vessels constructed or brought into service after that date required to register and certify compliance no later than 30 days following start of their operations. The ASVS program would require owners and operators of storage

vessels to comply with the standards upon completion of the next regularly scheduled out-of-service maintenance that occurs after September 1, 2027, with all facilities required to certify compliance status no later than September 1, 2037. The executive director estimates there are approximately 36,000 storage vessels that will be impacted by this rulemaking.

#### **Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

#### **Rural Communities Impact Assessment**

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect.

### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does create a new government program and will require an increase in future legislative appropriations to the agency; however, as required by state law, the executive director will establish a fee in amounts sufficient to recover the reasonable costs of the program. The proposed rulemaking does require the creation of new employee positions and will require an increase in fees paid to the agency. The proposed rulemaking creates a new chapter in the Texas Administrative Code with new regulations and will increase the number of individuals

subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, that may 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 specific intent of these proposed rules is to implement Senate Bill 900 (87<sup>th</sup> Legislative Session) the purpose of which was to promote the safety of certain storage vessels, by adopting requirements for the design, construction, operation, and maintenance of storage vessels, with the objective of protecting groundwater and surface water resources in the event of accidents and natural disasters. Next, this rule proposal will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, for the reason that this

rule proposal implements safety standards detailed in existing industry guidance and other applicable laws such that any additional compliance costs for the regulated community are not expected to be excessive and not expected to negatively affect the economy in general. Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. Regarding the first of these factors, this rule is specifically required by state law. Regarding the second, this rulemaking proposal is narrowly tailored to implement the new statutory sections added by SB 900. Regarding the third factor, it does not exceed a requirement of a delegation agreement or contract between state or federal government. Regarding the fourth factor, this rulemaking proposal is intended to implement SB 900 and is not adopted solely under the powers of the agency. Accordingly, the commission has determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a).



The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission reviewed the proposed rulemaking in light of the takings impact requirements of Texas Government Code § 2007.043. Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to propose rules to promote the safety of certain storage vessels as required by Senate Bill 900 (87<sup>th</sup> Legislative Session). The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The proposed rulemaking is in response to a real and substantial threat because it requires the commission to create and enforce safety requirements to protect ground and surface water and mitigate potential safety hazards and minimize catastrophic incidents in the event of an accident or natural disaster. The program incorporates all critical safety elements from federal statutes, regulations and national consensus standards that are applicable and necessary to provide protection in the event of an incident. Many of the storage vessels that will be regulated by this program already meet these safety standards, or if they don't, then additional costs could reasonably be considered to be foreseeable and justifiable business costs, so the proposed regulations do not impose a greater burden than is necessary to achieve the health and safety purpose. Therefore, Texas Government Code, Chapter 2007 does not apply to these proposed rules. Nevertheless, the commission further evaluated these proposed rules and performed an assessment of

whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to establish the new ASVS program in the state. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

#### **Consistency with the Coastal Management Program**

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Announcement of Hearing**

The commission will offer six public hearings on this proposed rulemaking. The first public hearing will be offered on Thursday, March 23, 2023, at 6:00 p.m. at the TCEQ's Dallas/Fort Worth regional office, located at 2309 Gravel Drive in Fort Worth. A second public hearing will be offered on Tuesday, March 28, 2023, at 6:00 p.m. at the South East Texas Regional Planning Commission, located at 2210 Eastex Freeway in Beaumont, a third public hearing will be offered on Wednesday, March 29, 2023, at 6:00 p.m. at the Magnolia Multi-Service Center, located at 7037 Capitol Street in Houston. A fourth public hearing will be offered on Monday, April 3, 2023, at 6:00 p.m. at the TCEQ's Corpus Christi's regional office located at 500 N. Shoreline Blvd., Ste. 500, in Corpus Christi, a fifth public hearing will be offered on Thursday, April 6, 2023, at 6:00 p.m. at the TCEQ's Midland regional office in Conference Room A, located at 10 Desta Drive, in Midland. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

The commission will hold a sixth, hybrid in-person and virtual public hearing on this proposal in Austin on Monday, April 10, 2023, at 10:00 a.m., in Building E, Room 201S,

at the commission's central office located at 12100 Park 35 Circle in Austin.

As with the other hearings, this hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the Austin public hearing virtually and want to provide oral comments and/or want their attendance on record must register by Friday, March 31, 2023. To register for the hearing, please email [Rules@tceq.texas.gov](mailto:Rules@tceq.texas.gov) and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on Wednesday, April 5, 2023, to those who register for the hearing. Members of the public who do not wish to provide oral comments but would like to view the hearing virtually may do so at no cost at:

[https://teams.microsoft.com/l/meetup-join/19%3ameeting\\_NTBhZDZjYjMtNWY3YS00NjY0LTg2ZTItYTU2YjY1NDJjOWUz%40tbread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3a%22true%22%7d](https://teams.microsoft.com/l/meetup-join/19%3ameeting_NTBhZDZjYjMtNWY3YS00NjY0LTg2ZTItYTU2YjY1NDJjOWUz%40tbread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3a%22true%22%7d)

Persons who have special communication or other accommodation needs who are planning to attend any of the hearings should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. **All comments should reference Rule Project Number 2022-015-338-CE.** The comment period closes on April 10, 2023. Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Keith Sheedy, Critical Infrastructure Division, (512) 239-1556.

**SUBCHAPTER A:**

**§§338.1, 338.2, 338.3, 338.5, 338.7, AND 338.9**

**STATUTORY AUTHORITY**

The new sections are proposed under the Texas Water Code (TWC). TWC, §5.013, establishes the general jurisdiction of the TCEQ, while TWC, §5.102, provides the TCEQ with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103. TWC, §5.103, requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state. TWC, §5.105, requires the commission, by rule, to establish and approve all general policies of the commission. TWC, §5.120, requires the TCEQ to administer the law for the maximum conservation and protection of the environment and natural resources of the state. TWC, §26.041, gives the TCEQ the authority to use any means provided by Chapter 26 to prevent a discharge of waste that is injurious to public health. The new sections are also proposed under Texas Health and Safety Code (THSC). THSC, §382.017, concerning Rules, authorizes the agency to adopt rules consistent with the policy and purpose of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the agency's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the agency to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the agency to prepare and develop a general, comprehensive

plan for the proper control of the state's air; THSC. §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the agency to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants, as well as require recordkeeping. The new sections are also proposed under the TWC, §7.002, Enforcement Authority, which authorizes the agency to institute legal proceedings to compel compliance; TWC, §7.032, Injunctive Relief, which provides that injunctive relief may be sought by the executive director; and TWC, §7.303 Grounds for Revocation or Suspension of License, Certificate, or Registration, which authorizes the agency to suspend or revoke a license, certificate, or registration the commission has issued.

The proposed new sections implement Senate Bill 900 (87th Legislative Session, 2021), TWC, §§26.341, 26.3442, 26.3443, and 26.3444.

§338.1. Purpose and Applicability.

(a) Purpose. The goal of the Aboveground Storage Vessel Safety (ASVS) Program is to promote the safety of affected storage vessels, as defined in §338.2 of this title (relating to Definitions) through the requirements of this chapter concerning the design, construction, operation, and maintenance of storage vessels, with the objective of protecting groundwater and surface water resources in the event of accidents and natural disasters.



(b) Applicability. Except as specified in §338.3 of this title (relating to Exemptions) the requirements of this chapter apply to all existing and future installed storage vessels, as defined in §338.2 of this title (relating to Definitions) located at or part of a petrochemical plant, a petroleum refinery, or a bulk storage terminal (relating to Definitions).

(c) Relationship to other regulations. Compliance with the provisions of this chapter by an owner or operator of a storage vessel shall not relieve the owner or operator from the responsibility of compliance with any other laws and regulations directly and/or indirectly affecting these storage vessels, including, but not necessarily limited to, all applicable regulations legally promulgated by the commission and any other federal, state, and local governmental agencies or entities having appropriate jurisdiction.

(d) Responsibilities of owners and operators. The owners and operators of a storage vessel subject to the provisions of this chapter are responsible for ensuring compliance with all applicable provisions of this chapter. Owners and operators are responsible for any violations or noncompliant activities resulting from the actions or inactions by any person who is employed or otherwise engaged by the owner or operator.

§338.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. The words and terms used in the specific standards found in §338.5 of this title (relating to Standards) shall have the meaning of that standard, if defined. However, the words and terms as defined in this section shall supersede a definition if provided in a specific standard found in §338.5 of this title.

(1) Bulk storage terminal--A site in the state, including end-of-line pipeline storage terminals (excluding breakout vessels), refinery storage terminals, for-hire storage terminals, rail storage terminals, and barge storage terminals.

(2) Facility--A site, tract, or other defined area where one or more aboveground storage vessels are located.

(3) Flow-through process vessel--A vessel through which regulated substances as defined by Texas Water Code § 26.343 flows as an integral part of a production process such as petroleum refining or petrochemical production. These vessels collect material discharged from a feedstock storage vessel, or equipment within the process before the material is transferred to other equipment or storage

vessel(s) within the process or to product or by-product storage vessel(s). This term excludes any vessel:

(A) Used for the static storage of regulated substances prior to their introduction into the production process; or

(B) Used for the static storage of regulated substances that are products or by-products of the production process.

(4) National consensus standard--Any performance standard for storage tanks, or a modification thereof, that:

(A) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures where it can be determined by the executive director that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption; and

(B) was formulated in a manner that afforded an opportunity for diverse views to be considered.

(5) Petrochemical plant--

(A) A facility that in a single continuous operation or using a batch processing method manufactures a petrochemical.

(B) A petrochemical plant may be either a single facility existing by itself or a facility within a chemical plant complex consisting of a number of separate chemical plants each of which produces a single basic or intermediate chemical product. A chemical plant complex may include any combination of distinct facilities that manufacture basic chemicals, intermediate chemicals, or allied chemical products. In a chemical plant complex, each facility is considered individually to determine whether it qualifies as a petrochemical plant.

(C) The term does not include:

(i) a facility that manufactures "allied chemical products"; or

(ii) a facility, other than one that produces a basic or an intermediate chemical, that generates any chemical as a waste product or a by-product.

(6) Petroleum refinery--A facility that manufactures finished petroleum products from crude oil, unfinished oils, natural gas liquids, other hydrocarbons, and oxygenates. Products of these refineries include gasoline, diesel, kerosene, distillate fuel oils, liquefied petroleum gas (LPG), residual fuel oils, lubricants, and other

products refined through alkylation, coking, cracking, dewaxing, desulphurization, distillation, hydrotreating, isomerization, polymerization, or other chemical processes. These facilities also produce petrochemical feedstock for use by chemical plants. The term does not include facilities at an oil or gas lease site that removes water or other impurities and merely makes the product more marketable.

(7) Regulated substance -- as defined by Texas Water Code § 26.343 to include:

(A) a substance defined in Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. Section 9601 et seq.), but does not include a substance regulated as a hazardous waste under the federal Solid Waste Disposal Act (42 U.S.C. Section 6921 et seq.);

(B) petroleum, including crude oil or a fraction of it, that is liquid at standard conditions of temperature and pressure; and

(C) any other substance designated by the executive director.

(8) Storage vessel--A vessel made of non-earthen materials (e.g., concrete, steel, or plastic) located on or above the surface of the ground and that:

(A) has a capacity of 21,000 gallons or more;

(B) stores a regulated substance as defined in subsection (7);

(C) is located at or is part of a petrochemical plant, a petroleum refinery, or a bulk storage terminal as defined by this subsection;

(D) is not a vessel exempted under §338.3 of this title (relating to Exemptions).

§338.3. Exemptions.

(a) Complete exemption. The following vessels, as defined in §338.2 of this title (relating to Definitions) including any pipe that is connected to the vessel, are not considered to be storage vessels and are exempt from the regulation of this chapter:

(1) A vessel used in or associated with the production or gathering of crude oil or natural gas;

(2) a vessel that is part of a stormwater or wastewater collection system;

(3) a flow-through process vessel, including a pressure vessel or process vessel and oil and water separators;

(4) a storage vessel operating above 0.5 pounds per square inch gauge (psig), as measured with a pressure gauge in the vapor space of the vessel or calculated as the total mixture vapor pressure at the storage temperature converted to gauge pressure;

(5) heated vessels that are heated using external heat, including but not limited to steam, an electric heating element, or a heat medium such as hot oil. Heated vessels do not include vessels that contain process fluid that are received above ambient temperatures;

(6) an intermediate bulk container or similar vessel that may be moved within a facility as defined in §338.2 of this title;

(7) a vessel regulated under the federal Surface Mining Control and Reclamation Act (30 U.S.C. Section 1201 et seq.);

(8) a vessel used for the storage of products regulated under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 301 et seq.);

(9) a vessel, including piping and collection and treatment systems, that is used in the management of leachate, methane gas, or methane gas condensate,

unless the vessel is used for storage of a regulated substance, as defined by Texas Water Code § 26.343;

(10) a vessel or pressure vessel that is used to store liquified petroleum gas; or

(11) a vessel regulated under the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (49 U.S.C. 60101 et seq.).

(b) The owner or operator of an affected storage vessel may submit a written request to the executive director for a specific storage vessel to be exempted from the requirements of this chapter. The request must provide a demonstration that the storage vessel presents a sufficiently low risk of floods, storm surges, hurricanes, accidents, fires, explosions, or other hazards so that it does not warrant regulation under this chapter. The executive director must provide written approval before the storage vessel is considered to be exempt from the requirements of this chapter.

(c) Upon request by the executive director, the owner or operator of a vessel claiming to be exempted under this section must provide appropriate documentation or other information in a timely manner to support that claim.

§338.5 Standards.



(a) For the standards provided in this section, applicability is based on the applicability section for each of the incorporated by reference standards provided in subsections (c) and (d) of this section.

(b) Storage Vessels in service before or on September 1, 2027. For an existing storage vessel, as defined in §338.2 of this title (relating to Definitions) that is in service before or on September 1, 2027, all of the following performance standards for safety shall apply:

(1) 40 Code of Federal Regulations (CFR) Part 68, Chemical Accident Prevention Provisions are incorporated by reference as stated in the paragraphs below:

(A) 40 CFR §68.3, Definitions, is incorporated by reference as amended through December 19, 2019 (84 FR 69913),

(B) 40 CFR §68.10, Applicability, is incorporated by reference as amended through December 19, 2019 (84 FR 69913).

(i) The regulated substances as defined in §338.2 of this title (relating to definitions) as it relates to a storage vessel shall be used instead of the regulated substances referenced in 40 CFR §68.10.

(ii) The threshold quantity that is referenced in 40 CFR §68.10 does not apply and applicability is based on the volume of the storage vessel as defined in §338.2 of this title (relating to definitions).

(iii) The compliance dates specified in this chapter apply instead of the dates listed in 40 CFR §68.10.

(C) 40 CFR §68.12, General Requirements, is incorporated by reference as amended through December 19, 2019 (84 FR 69913).

(D) 40 CFR §68.15, Management, is incorporated by reference as amended through June 20, 1996 (61 FR 31718).

(E) 40 CFR §68.48, Safety Information, is incorporated by reference as amended through June 20, 1996 (61 FR 31718).

(F) 40 CFR §68.50, Hazard Review, is incorporated by reference as amended through December 19, 2019 (84 FR 69914).

(G) 40 CFR §68.56, Maintenance, is incorporated by reference as amended through January 31, 1994 (59 FR 4493).

(H) 40 CFR §68.65, Process Safety Information, is incorporated by reference as amended through December 19, 2019 (84 FR 69914),

(I) 40 CFR §68.67, Process Hazard Analysis, is incorporated by reference as amended through December 19, 2019 (84 FR 69914),

(J) 40 CFR §68.73, Mechanical Integrity, is incorporated by reference as amended through January 31, 1994 (59 FR 4493),

(K) 40 CFR §68.75, Management of Change, is incorporated by reference as amended through January 31, 1994 (59 FR 4493),

(L) 40 CFR §68.77, Pre-Startup Review, is incorporated by reference as amended through January 31, 1994 (59 FR 4493),

(M) All sections of 40 CFR Part 68, Subpart E, Emergency Response, (40 CFR §§68.90, 68.93, 68.95, 68.96) are incorporated by reference as amended through December 19, 2019 (84 FR 69915),

(N) All sections of 40 CFR Part 68, Subpart G, Risk Management Plan, (40 CFR §§68.150, 68.151, 68.152, 68.155, 68.160, 68.165, 68.168, 68.170, 68.175,

68.180, 68.185, 68.190, 68.195) are incorporated by reference as amended through April 9, 2004 (69 FR 18832), and

(O) All sections of 40 CFR Part 68, Subpart H, Other Requirements, 40 CFR (§§68.200, 68.210, 68.215, 68.220) are incorporated by reference as amended through December 19, 2019 (84 FR 69916).

(2) 40 CFR Part 112, Oil Pollution Prevention standards are incorporated by reference as stated in the paragraphs below:

(A) 40 CFR §112.1, General Applicability, is incorporated by reference as amended through April 18, 2011 (76 FR 21550),

(B) 40 CFR §112.2, Definitions, is incorporated by reference as amended through April 21, 2020 (85 FR 223399),

(C) 40 CFR §112.3, Requirement to Prepare and Implement a Spill Prevention, Control, and Countermeasure Plan, is incorporated by reference as amended through November 22, 2011 (76 FR 72124),

(D) 40 CFR §112.6, Qualified Facilities Plan Requirements, is incorporated by reference as amended through November 13, 2009 (74 FR 58810),

(E) 40 CFR §112.7, General Requirements for Spill Prevention, Control, and Countermeasure Plans, is incorporated by reference as amended through November 13, 2009 (74 FR 58810),

(F) 40 CFR §112.8, Spill Prevention, Control, and Countermeasure Plan requirements for onshore facilities (excluding production facilities) is incorporated by reference as amended through December 5, 2008 (73 FR 74304),

(G) 40 CFR §112.12, Spill Prevention, Control, and Countermeasure Plan Requirements, is incorporated by reference as amended through December 5, 2008 (73 FR 74305),

(H) 40 CFR §112.20, Facility Response Plans, is incorporated by reference as amended through July 17, 2002 (67 FR 47151), and

(I) 40 CFR §112.21, Facility Response Training and Drills/Exercises, is incorporated by reference as amended through June 30, 2000 (65 FR 40798). Note the term 'Regional Administrator' should be replaced with 'executive director',

(3) 40 CFR Part 264, Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities are incorporated by reference as stated in the paragraphs below:

(A) 40 CFR §264.10, Applicability, is incorporated by reference as amended through December 10, 1987 (52 FR 46963),

(B) 40 CFR §264.14, Security, is incorporated by reference as amended through January 31, 1985 (50 FR 4514). Note the term ‘Regional Administrator’ should be replaced with ‘executive director’.

(C) 40 CFR §264.15, General Inspection Requirements, is incorporated by reference as amended through November 28, 2016 (81 FR 85826),

(D) 40 CFR §264.16, Personnel Training, is incorporated by reference as amended through April 4, 2006 (71 FR 16903),

(E) 40 CFR §264.17, General Requirements for Ignitable, Reactive or Incompatible Wastes, is incorporated by reference as amended through July 14, 2006 (71 FR 40272),

(F) 40 CFR §264.18(b), Floodplains, is incorporated by reference as amended through July 14, 2006 (71 FR 40272),

(G) 40 CFR §264.31, Design and Operation of Facility, is incorporated by reference as amended through May 19, 1980 (45 FR 33221),

(H) 40 CFR §264.32, Required Equipment, is incorporated by reference as amended through April 1, 1983 (48 FR 14294),

(I) 40 CFR §264.33, Testing and Maintenance of Equipment, is incorporated by reference as amended through April 1, 1983 (48 FR 14294),

(J) 40 CFR §264.34, Access to Communications or Alarm System, is incorporated by reference as amended through May 19, 1980 (45 FR 33221), and

(K) 40 CFR §264.37, Arrangements with Local Authorities, is incorporated by reference as amended through May 19, 1980 (45 FR 33221).

(4) The following sections from American Petroleum Institute (API) Standard 653: Tank Inspection, Repairs, Alteration, and Reconstruction, Fifth Edition, November 2014 (Addendum 1, April 2018 and Addendum 2, May 2020) are

incorporated by reference, as stated in the paragraphs below for storage vessels as defined in §338.2 of this title (relating to Definitions):

(A) Section 4.3: Tank Shell Evaluation and any applicable Annex found in API 653,

(B) Section 4.4: Tank Bottom Evaluation and any applicable Annex found in API,

(C) Section 4.5: Tank Foundation Evaluation and any applicable Annex found in API 653,

(D) Section 6.2: Inspection Frequency Considerations and any applicable Annex found in API 653,

(E) Section 6.3: Inspections from the Outside of the Tank and any applicable Annex found in API 653,

(F) Section 6.4: Internal Inspection and any applicable Annex found in API 653,



(G) Section 8: Design Considerations for Reconstructed Tanks and any applicable Annex found in API 653, and

(H) Section 9: Tank Repair and Alteration and any applicable Annex found in API 653.

(5) The following Sections from API Standard 2350: Overfill Prevention for Storage Tanks in Petroleum Facilities, Fifth Edition, September 2020 (Errata 1, April 2021), are incorporated by reference, as stated in the paragraphs below for storage vessels as defined in §338.2 of this title (relating to Definitions) with an internal design pressure not more than 2.5 psig, that contain either a National Fire Protection Association (NFPA) Class I liquid (a liquid that has a flash point below 100 degrees Fahrenheit) or a Class II liquid (any liquid that has a flash point at or above 100 degrees Fahrenheit and below 140 degrees Fahrenheit):

(A) Section 4: Overfill Prevention System (OPS) and any applicable Annex found in API 2350, and

(B) Section 5: Overfill Prevention Systems and any applicable Annex found in API 2350.

(6) National Fire Protection Association (NFPA) 30, Chapter 22 (Edition: 2021) Section 22.8: Fire Protection for Aboveground Storage Tanks and any applicable Annex are incorporated by reference. Applicability of the standard is based on NFPA 30 §22.8(1)-(4).

(7) For all storage vessels that are not required to install a fire suppression system under paragraph (6) of this section, API Recommended Practice 2001, 10<sup>th</sup> Edition, July 2019, Sections 5, 6, 7, 8, 9, 10, 11 and any applicable Annex are incorporated by reference and shall apply.

(c) Storage vessels placed into service after September 1, 2027. For a new storage vessel placed into service after September 1, 2027, all of the following performance standards for safety shall apply:

(1) All of the standards listed in subsection (b) of this section,

(2) API 650: Welded Tanks for Oil Storage, Thirteen Edition, March 2020 (Errata 1, January 2021), and any applicable Annex are incorporated by reference, and

(3) NFPA 30, Chapter 22 (Edition: 2021) Section 22.4: Location of Aboveground Storage Tanks and any applicable Annex are incorporated by reference.

(d) The owner or operator shall make any modifications or retrofits necessary for compliance with the standards in subsection (b) during the next out-of-service maintenance periods, unless the owner or operator obtains written approval from the executive director that the necessary modifications or retrofits are not technically feasible.

§338.7 Inspections.

(a) For the purposes of developing or assisting in the development of a regulation, conducting a study, or enforcing this chapter, an owner or operator of a storage vessel, on the request of the executive director must:

(1) furnish information related to the storage vessel, including storage vessel equipment and contents; and

(2) allow the executive director at all reasonable times to have access to and to obtain all records relating to the storage vessel.

(b) For the purposes of developing or assisting in the development of a regulation, conducting a study, or enforcing this chapter, the executive director may:

(1) enter at reasonable times a facility in which a storage vessel is located;

(2) inspect and obtain samples of a regulated substance contained in the storage vessel; and

(3) conduct monitoring or testing of the storage vessel, associated equipment, contents, or surrounding soils, air, surface water, or groundwater.

(c) The executive director may direct an owner or operator of a storage vessel to conduct monitoring and testing if the executive director finds that there is reasonable cause to believe that a release has occurred in the area in which the storage vessel is located.

#### §338.9. Recordkeeping

(a) General recordkeeping requirements.

(1) Owners and operators of aboveground storage vessels must develop and maintain all records required by the provisions of this chapter.

(2) Except as provided in paragraph (3) of this subsection, owners or operators must maintain legible copies of all required records pertaining to an

aboveground storage vessel in a secure location on the facility premises. The records must be immediately:

(A) accessible for reference and use by the owner or operator; and

(B) available for inspection upon request by executive director personnel or an executive director -designated agent.

(3) If an owner or operator cannot reasonably maintain copies of the required records on the facility's premises, then the owner or operator may maintain the records at a readily accessible alternate site, provided that the records are:

(A) readily accessible for reference and use by the owner or operator; and

(B) readily accessible and available for inspection upon request by executive director personnel or an executive director-designated agent.

(b) Required records and documents. Owners and operators of aboveground storage vessels must meet all recordkeeping requirements in this chapter, including the following records and documentation (as applicable).

(1) Owners and operators must maintain legible printed copies or readily accessible electronic copies of the following general records for the operational life of the aboveground storage vessel:

(A) original and amended registration documents, in accordance with §338.20 of this title (relating to Registration);

(B) original and amended certifications, in accordance with §338.21 of this title (relating to Certification).

(2) Owners and operators must maintain legible printed copies or readily accessible electronic copies of records and documents demonstrating compliance with all applicable standards in §338.5 of this title (relating to Standards) in accordance with the following provisions:

(A) records supporting the implementation of the applicable sections of 40 CFR Part 68 listed in §338.5(b)(1);

(B) the Spill Prevention, Control, and Countermeasure (SPCC) Plan, and records supporting implementation of the SPCC Plan, as required by the applicable sections of 40 CFR Part 112 listed in §338.5(b)(2)(A)-(G);

(C) the Facility Response Plan, and records supporting implementation of the plan, including a facility response training program and a drill/exercise program, as required by the applicable sections of 40 CFR Part 112 listed in §338.5(b)(2)(H) and (I);

(D) records supporting the implementation of the applicable sections of 40 CFR Part 264 listed in §338.5(b)(3);

(E) records supporting the implementation of the applicable sections of API Standard 653 listed in §338.5(b)(4);

(F) records supporting the implementation of the applicable sections of API Standard 2350 listed in §338.5(b)(5);

(G) records supporting the implementation of the applicable sections of NFPA 30, Chapter 22 listed in §338.5(b)(6) and §338.5(c)(3);

(H) records supporting the implementation of the applicable sections of API Recommended Practice 2001 listed in §338.5(b);

(I) records supporting the implementation of the applicable sections of API Standard 650 listed in §338.5(c)(2).

## **SUBCHAPTER B: REGISTRATION AND CERTIFICATION REQUIREMENTS**

### **§§338.20, 338.21, AND 338.22**

#### **STATUTORY AUTHORITY**

The new sections are proposed under the Texas Water Code (TWC). TWC, §5.013, establishes the general jurisdiction of the TCEQ, while TWC, §5.102, provides the TCEQ with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103. TWC, §5.103, requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state. TWC, §5.105, requires the commission, by rule, to establish and approve all general policies of the commission. TWC, §5.120, requires the TCEQ to administer the law for the maximum conservation and protection of the environment and natural resources of the state. TWC, §26.041, gives the TCEQ the authority to use any means provided by Chapter 26 to prevent a discharge of waste that is injurious to public health. The new sections are also proposed under Texas Health and Safety Code (THSC). THSC, §382.017, concerning Rules, authorizes the agency to adopt rules consistent with the policy and purpose of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the agency's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the agency to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the agency to prepare and develop a general, comprehensive



plan for the proper control of the state's air; THSC. §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the agency to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants, as well as require recordkeeping. The new sections are also proposed under the TWC, §7.002, Enforcement Authority, which authorizes the agency to institute legal proceedings to compel compliance; TWC, §7.032, Injunctive Relief, which provides that injunctive relief may be sought by the executive director; and TWC, §7.303 Grounds for Revocation or Suspension of License, Certificate, or Registration, which authorizes the agency to suspend or revoke a license, certificate, or registration the commission has issued.

The proposed new sections implement Senate Bill 900 (87th Legislative Session, 2021), TWC, §§26.341, 26.3442, 26.3443, and 26.3444.

#### §338.20 Registration

(a) Existing storage vessels. Any person who owns or operates an existing storage vessel, as defined in §338.2 of this title (relating to Definitions) that is in service on or before September 1, 2027, must be registered with the executive director. Facilities must register storage vessels using the method authorized by the executive director.

(b) New or replacement storage vessels. Any person who owns or operates a new or replacement storage vessel placed into service on or after September 1, 2027, must register the vessel using the method authorized by the executive director no later than 30 days after start of operation.

(c) The owner and operator of a storage vessel are responsible for compliance with the registration requirements of this section. An owner or operator may designate an authorized representative to complete and submit the required registration information. However, the owner and operator remain responsible for compliance with the provisions of this section.

(d) All storage vessels subject to the registration requirements of this section are also subject to the fee provisions in §338.22 of this title (relating to Fees for Storage Vessels). Failure of owner or operator to register a storage vessel shall not exempt the owner or operator from fee assessment and payment.

(e) Changes or additional information. The owner or operator of a storage vessel must provide notice to the executive director of any changes to the registration for the facility within 30 days of the occurrence of the change. The owner or operator must provide the notice using the method authorized by the executive director. Changes that require notification include, but are not limited to:

(1) the operational status of any storage vessel;

(2) the substance stored in any storage vessel;

(3) ownership of any storage vessel;

(4) compliance status of any storage vessel;

(5) the location of records for storage vessels.

(f) Registration information.

(1) An owner or operator must provide all the registration information requested by the executive director for each regulated storage vessel owned.

(2) The owner or operator must fill out the registration information completely and accurately.

(3) The owner or operator must provide the registration information for all storage vessels located at a particular facility on the same registration form.

(4) Owners or operators who own or operate storage vessels located at multiple facilities must complete and file a separate registration form for each facility.

(g) Inadequate information. If the executive director determines that the registration information submitted is inaccurate, unclear, illegible, incomplete, or otherwise inadequate, the executive director may require the owner or operator to submit additional information. An owner or operator must submit any additional information within 30 days of receipt of a request.

(h) To cancel a registration, the owner or operator must provide notice and certify that the vessel is decommissioned and is no longer subject to the definition of storage vessel as defined in §338.2 of this title. The owner or operator must provide the notice using the method authorized by the executive director. The executive director shall not approve any request to remove a storage vessel from the program until all outstanding fees for the facility are paid in full.

#### §338.21 Certification.

(a) For storage vessels constructed and brought into service on or before September 1, 2027, an owner or operator must report to the executive director its compliance status with the standards under §338.5 of this title (relating to Standards) no later than September 1, 2027.

(b) For storage vessels constructed and brought into service on or before September 1, 2027, an owner or operator shall certify compliance under §338.5 of this title upon completion of the next regularly scheduled out-of-service maintenance of the storage vessel, but no later than September 1, 2037.

(c) For storage vessels constructed and brought into service after September 1, 2027, an owner or operator of a storage vessel shall certify compliance under §338.5 of this title no later than 30 days after the start of operation.

(d) The owner or operator shall re-certify compliance with the standards under §338.5 of this title every 10 years.

§338.22. Fees for Storage Vessels.

(a) Purpose. This section establishes a fee in amounts sufficient to recover the reasonable costs to:

(1) implement a registration program for affected facilities;

(2) review of any certifications submitted under §338.21 of this title (relating to Certification);

(3) inspect sites/facilities regulated under this chapter; and

(4) enforce compliance with applicable standards of §338.5 of this title  
(relating to Standards.)

(b) Fee assessment.

(1) The executive director will assess fees for each storage vessel subject  
to §338.20 of this title (relating to Registration) up to a maximum fee of \$2,000.00.

(2) The owner or operator must pay the registration fee upon initial  
registration and annually.

(3) The executive director will bill the owner or operator for the storage  
vessels on their site(s) annually. The owner or operator shall pay all fees by check,  
money order, electronic funds transfer, or through the executive director's payment  
portal. The owner or operator shall make any payments payable to the Texas  
Commission on Environmental Quality. If the executive director does not receive  
assessment by the invoice due date, the executive director shall assess penalties and  
interest for the late payment of fees in accordance with Chapter 12 of this title  
(relating to Payment of Fees).

(4) The executive director may adjust fees up to the maximum in this subsection, on an annual basis, and will notify fee payers through an appropriate notification process, such as but not limited to *Texas Register* publication with public comment. The executive director may adjust fees in this subsection in amounts sufficient to recover the reasonable costs to:

(A) implement a registration program for affected facilities;

(B) review initial and ten-year certifications;

(C) amend certifications;

(D) inspect certified facilities; and

(E) enforce compliance with applicable standards of Section 26.3442 and rules and orders adopted under those subsections.

(5) Regardless of actual billing date, the executive director will base the billing for registration fees on storage vessels listed on the registration as of September 1 of each year.

(6) Cancellation of a registration, whether by voluntary action on the part of the owner or as a result of involuntary proceedings initiated by the executive director, will not constitute grounds for refund, in whole or in part, of any fee paid under this section.

(7) Transfer of facility ownership will not entitle the transferring entity to a refund, in whole or in part of any fee already paid under this section. The executive director shall not process a transfer request until the owner or operator has paid in full all fees owed to the commission by the owner or operator or for the registered facility. Any owner or operator to whom a registration is transferred shall be liable for payment of any associated outstanding fees and penalties owed to the commission.