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

New §§338.1, 338.2, 338.3, 338.5, 338.7, 338.9, 338.20, 338.21 and 338.22 are adopted *with changes* to the proposed text as published in the March 10, 2023, issue of the *Texas Register* (48 *TexReg* 1409) and, therefore, will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The adopted 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 based on the 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 the standards used in implementing the program under the conditions identified in the bill.

The commission must establish fees sufficient 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

The commission adopts non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the Texas Legislative Council Drafting Manual, September 2020. These non-substantive changes are not intended to alter the proposed rule requirements in any way and are not specifically discussed in the preamble.

SUBCHAPTER A: General Applicability, Standards, and Recordkeeping

§338.1 Purpose and Applicability

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

Adopted 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.

Adopted subsection (b) specifies that the requirements of new Chapter 338 apply to aboveground storage vessels that are made of non-earthen materials, have a storage capacity of 21,000 gallons (based on overfill level height) or more, store a regulated substance, and are fully or partially located within 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 an aboveground storage vessel, as defined in §338.2 related to Definitions.

Adopted subsection (c) establishes that the owner or operator of an aboveground 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.

Adopted subsection (d) establishes that the owners and operators of aboveground 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 adopts 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 found in §338.5 of this title.

Adopted paragraph (1) defines the term “aboveground 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 that: has a capacity of 21,000 gallons (500 barrels) or more; stores a regulated substance, as defined in the TWC, §26.343, and also defined in this chapter; is located at or is part of a

petrochemical plant, a petroleum refinery, or a bulk storage terminal, as is defined in this chapter; and is not a vessel exempted under §338.3.

Adopted paragraph (2) defines the term “bulk storage terminal” as provided in SB 900, as end-of-line pipeline storage terminals (excluding breakout tanks), refinery storage terminals, for-hire storage terminals, rail storage terminals, and barge storage terminals. The term “breakout tanks” is also defined as tanks which are used to relieve surges in a pipeline system and/or receive/store liquids transported by a pipeline for reinjection and continued transportation by pipeline. Typically, Standard Industrial Classification (SIC) code 5171, along with North American Industry Classification System (NAICS) 424710 would be the codes associated with a bulk storage terminal, however, other codes could apply.

Adopted paragraph (3) defines the term “facility” as a site, tract, or other defined area where one or more aboveground storage vessels are located.

Adopted paragraph (4) 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 from equipment within the process before the material is transferred to other equipment or storage vessel(s) within the

process or to a product or by-product storage vessel. 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.

Adopted paragraph (5) 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 were 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 meet this requirement.

Adopted paragraph (6) defines the term "petrochemical plant." The SIC/NAICS codes were reviewed but no specific definitions were found in the codes or there were multiple codes that could apply. Therefore, the commission used the definition for a petrochemical plant that was found in Title 34 Texas Administrative Code (TAC) 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. In general, the petrochemical plant industry comprises of sites primarily engaged in (1) manufacturing acyclic (i.e., aliphatic) hydrocarbons, such as ethylene, propylene, and butylene made from refined petroleum or liquid hydrocarbons, and/or (2) manufacturing cyclic aromatic hydrocarbons such as benzene, toluene, styrene, xylene, ethyl benzene, and cumene made from refined petroleum or liquid hydrocarbons. Typically, SIC 2865 and 2869, along with NAICS 325110 would be the codes associated with a petrochemical plant, however other codes could apply. The adopted 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 producing a single basic or intermediate chemical product. 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 or chemical plant that manufactures "allied chemical products", or a facility or chemical plant, other than one that produces a basic or an intermediate chemical, that generates any chemical as a waste product or a by-product. The term “allied chemical product” was also defined in Title 34 TAC §3.362 as “a consumer or end-user product

manufacture from basic or intermediate chemicals. Examples include drugs, soaps, detergents, paints, and agricultural chemical formulations." Based on these two definitions, it is not the intent of the commission that ASVs at facilities that are producing end-user product would be subject to these regulations. However, if a general site or complex has multiple facilities within its property boundary, producing a combination of basic, intermediate, or allied chemicals, then each facility is considered individually and any ASVs meeting the applicability of these rules that are producing a basic or intermediate chemical would be subject to these regulations. The Comptroller of Public Accounts definition of a chemical plant could be seen as somewhat confusing, to help resolve this confusion, the commission has revised the definition of a petrochemical plant in §338.2 to remove the sentence "A chemical plant complex may include any combination of distinct facilities that manufacture basic chemicals, intermediate chemicals, or allied chemical products."

Adopted paragraph (7) defines the term "petroleum refinery." The definition was taken from 34 TAC 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 to make the product more marketable.

Typically, SIC 2911 along with NAICS 324110, would be the codes associated with a petroleum refinery. The NAICS code in general states that petroleum refineries are primarily engaged in refining crude petroleum into refined petroleum. Petroleum refining involves one or more of the following activities: fractionation, straight distillation of crude oil, and cracking. The SIC code states that petroleum refining is primarily engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, and lubricants, through fractionation or straight distillation of crude oil, redistillation of unfinished petroleum derivatives, cracking, or other processes.

Adopted paragraph (8) 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. For mixtures containing one percent or greater by weight of a regulated substance, the total mixture would be considered to meet the definition of regulated substance and therefore, be subject to the rules found in this chapter if the ASV meets the other definitions and applicability requirements. 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.

§338.3 Exemptions

The commission adopts 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. It should be noted that the executive director may ask for supporting information that proves that the vessel is exempt from the standards found in this chapter.

Adopted 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.

Adopted 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(4). If there is an ASV that is part of a wastewater treatment systems, the exemption in §338.3(a)(4) for flow-through process vessel could apply.

Adopted paragraph (4) provides an exemption for aboveground storage vessels that are operating above 0.5 pounds per square inch gauge (psig) or are designed or intended to operate above 0.5 psig. To determine status of this exemption the owner or operator 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. In the case of floating roof vessels, the void space between the liquid level and roof is typically small or practically nonexistent since the roof uses seals to minimize the vapor space, with the floating roof nearly sitting on the liquid. The option to calculate the total mixture vapor pressure at the storage temperature may be a preferred option for storage vessels with minimal vapor spaces, such as vessels equipped with a floating roof.

Adopted paragraph (5) provides an exemption for heated vessels. For this exemption

to apply, the storage vessel must be continuously 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 stored in an insulated vessel that is not heated using an external heat source will not be considered a heated vessel. Furthermore, any ASV that is continuously heated, as specified in §338.3(a)(5), would be considered exempt from the program. However, if the tank is intermittently heated, it would be subject to the requirements of the rule and this exemption would not apply.

Adopted paragraph (6) provides an exemption for intermediate bulk containers or similar vessels that can be moved within a facility. Most intermediate bulk containers, which are designed for mechanical handling, are likely below the capacity threshold of 21,000 gallons and therefore would not be subject to Chapter 338. For example, in general, intermediate bulk containers are defined as a pallet mounted, industrial grade reusable container used for storing and transporting bulk liquids and powders also known as totes, which are capable of stacking and can be moved by a pallet jack or forklift. However, a ‘frac’ tank could potentially meet the capacity threshold to be regulated under Chapter 338 but if they are not being used as permanent storage, would qualify for an exemption as an intermediate bulk container.

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

Adopted paragraph (9) provides an exemption for vessels, including associated piping and collection and treatment systems, that are used in the management of leachate, methane gas, or methane gas condensate, unless the vessel is used for storage of a regulated substance, which is defined in §338.2.

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

Adopted paragraph (12) provides an exemption for vessels regulated under 40 CFR Part 262, Standards Applicable to Generators of Hazardous Waste, Part 264, Standards for Owners and Operators of Hazardous Waste Treatment, and Part 265, Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste. The executive director has reviewed the requirements found in 40

CFR Part 264 and compared them to the definitions listed in this rule, along with the language found in SB 900 and has determined that there should not be any storage tanks that would be subject to both the Chapter 338 rules and 40 CFR Part 264.

Adopted subsection (b) provides that the owner or operator of an affected aboveground storage vessel may submit a request for an aboveground specific storage vessel to be exempted from the requirements of this chapter. The request must be submitted in writing to the executive director. The request must demonstrate that the aboveground storage vessel presents a sufficiently low risk from 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 aboveground storage vessel is subject to all 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.

Adopted subsection (c) states that upon the request by 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 adopts 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 adopted standards are taken from national consensus standards and federal statutes/regulations.

In following the requirements found in SB 900, the commission is also adopting 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 adopted 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. The proposed rule was revised to clarify the applicability of the standards. The standards are applicable when both of

the following are met: the vessel meets the definition of an aboveground storage vessel as defined in §338.2, and the ASV satisfies the applicability criteria of the listed standard. 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.

Adopted 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, if the ASV meets the applicability criteria of the listed standard.

The adopted 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. With the adoption of these specific sections concerning the Risk Management Plan requirements (RPM) found in Part 68, it should be noted that it is not the agency's intent to create a separate State RMP program. Adopted subparagraph (A) incorporates by reference as amended through December 19, 2019, 40 CFR §68.3 concerning Definitions (84 Federal Register (FR) 69913). Adopted 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 aboveground storage vessels, which are defined in §338.2.

The revision of §338.5(a) eliminates the need for §338.5(b)(1)(B)(i)-(ii). The proposed language of §338.5(b)(1)(B)(iii), which 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) was moved into §338.5(b)(1)(B), and §338.5(b)(1)(B)(iii) was also removed.

Adopted 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.

Adopted 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.

Adopted 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.

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

Adopted 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 aboveground storage vessels, along with required training.

Adopted 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 and information pertaining to the technology of the process, in this case the storing of the regulated substances.

Adopted 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 meet the applicability of the standard. 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.

Adopted 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 aboveground storage vessels and provides requirements including: written procedures, training, inspection and testing, equipment deficiencies, and quality assurance.

Adopted 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.

Adopted 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 aboveground storage vessel.

Adopted 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.

Adopted 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.

Adopted 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 for 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 adopted paragraph (2) incorporates by reference, 40 CFR Part 112, Oil Pollution Prevention, with the specific sections in that Part that will apply. Adopted 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 an aboveground storage vessel in §338.2 and that meet the applicability requirements of the federal standard. 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) will also apply when determining applicability for this chapter. In 40 CFR §112.1(f), the term 'Regional Administrator' should be considered to be the executive director.

Adopted 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 will be specific to this Part.

Adopted 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.

Adopted 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.

Adopted 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 operational, by providing details of installation and operational start-up information.

Adopted 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.

Adopted 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.

Adopted 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.

Adopted 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 adopted 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) which incorporated by reference sections of 40 CFR Part 264, Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, has been removed. The agency has reviewed the requirements found in 40 CFR Part 264 and compared it to the definitions listed in this rule, along with the language found in SB 900 and TWC, §26.343 and has determined that there should not be any storage tanks that share applicability with the Chapter 338 rules and 40 CFR Part 264. Therefore, the proposed §338.5(a)(3), including §§338.5(a)(3)(A) through (K) have been removed. Furthermore, a new exemption has been added to §338.3 to address a vessel regulated under 40 CFR Parts 262, 264, or 265 and state regulations contained in 30 TAC Chapter 335.

The adopted paragraph (3) 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.

Adopted 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 an aboveground storage vessel in §338.2, are not exempted under §338.3, and meet the applicability of the standard 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.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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 due to settlement of the soil, and anchor bolts.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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

joints, shell design, shell penetrations, wind girders and shell stability, roofs, and seismic design.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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 adopted paragraph (4) 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 aboveground storage vessels as defined in §338.2 with an internal design pressure not more than 0.5 psig and meet the applicability of the standard.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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 overfill 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 overfill 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 overfill prevention system (OPS) procedures, which include procedures for operations, procedures for training on overfill 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.

Adopted 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 an aboveground storage vessel in §338.2, meet the applicability of the standard, 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 overfill prevention system (MOPS) and an automated overfill prevention system (AOPS). Section 5 provides requirements for vessel category criteria and instruments/equipment used for overfill prevention.

SB 900 requires that the commission review and adopt 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 adopted rule language in paragraphs (5) and (6) incorporate by reference specific sections from these two standards. The adopted paragraph (5) 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. Alternatively, an owner or operator may elect to meet API Recommended Practice 2001, 10th Edition, July 2019, Sections 5, 6, 7, 8, 9, 10, 11 and any applicable Annex are subject to the protocol of the applicable standard.

Adopted paragraph (6) requires that for all aboveground storage vessels that have not installed a fire suppression system under paragraph (5) of this section, API Recommended Practice 2001, 10th Edition, July 2019, Sections 5, 6, 7, 8, 9, 10, 11 and any applicable Annex are incorporated by reference and shall apply. Section 5 of API Recommended Practice 2001 concerns the fire considerations design to help prevent potential hazards from resulting, during a fire. Section 6 of API Recommended Practice 2001 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 of API Recommended Practice 2001provides the operating practices, including general requirements to establish standard operating procedures and emergency operating procedures and what needs to occur if a loss of containment should happen. Section 8 of Recommended Practice 2001 provides the maintenance procedures for fire prevention during construction,

turnaround, repair, demolition, and routine/emergency maintenance activities. Section 9 of Recommended Practice 2001 addresses the basic principles of an emergency response and fire protection organization. While Section 10 of Recommended Practice 2001 provides the requirements for the training needed for firefighting. Finally, Section 11 of Recommended Practice 2001 addresses the need for pre-fire incident planning.

It is the commission's intent that an owner or operator that meets the applicability of either NFPA 30 or API Recommended Practice 2001 is required to only follow one of the standards concerning installation of fire suppression equipment and not both.

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

Adopted paragraph (2) incorporates by reference all sections of API 650: Welded Tanks for Oil Storage, Thirteen 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 aboveground storage vessels that are placed into service after September 1, 2027, that meet the definition of an aboveground storage vessel in §338.2, meet the applicability of the standard, and are not exempted under §338.3, are required to comply with all of the applicable requirements found in API 650.

Adopted paragraph (3) incorporates by reference NFPA 30 §22.4: Location of Aboveground Storage Tanks from NFPA 30, Chapter 22 (Edition: 2021). All affected aboveground storage vessels that are placed into service after September 1, 2027, that meet the definition of an aboveground storage vessel in §338.2, meet the applicability of the standard and are not exempted under §338.3 are required to comply with all of the applicable requirements found in NPFA 30, §22.4, which concerns the location of aboveground storage vessels, except for reconstruction standards at an original storage vessel location.

Adopted 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 for an exemption from the executive director if the necessary modifications or retrofits are not technically feasible. The request is

not approved until a written response is received from the executive director. This exemption only 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, of the adopted rules that 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 adopts new §338.7 which establishes the inspection requirements. The executive director will conduct inspections of aboveground storage vessels, that are subject to these regulations to determine current compliance status.

Adopted subsection (a) states that in order to better implement and assess these regulations and 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 aboveground storage vessel, including aboveground storage vessel equipment and contents, and (2) allow the executive director to have access to and

obtain all records relating to the storage vessel.

Adopted subsection (b) establishes when and what actions the executive director may take to develop these regulations further, assess these regulations, or to enforce the requirements of the ASVS program. Adopted paragraph (1) states that the executive director may enter at reasonable times into a facility in which an aboveground storage vessel is located. Adopted paragraph (2) states that the executive director may inspect and obtain samples, which will be collected by the owner or operator at the request of the executive director, of a regulated substance contained in the aboveground storage vessel. Adopted paragraph (3) states that the executive director may conduct monitoring or request that the owner or operator conduct monitoring of the aboveground storage vessel, surrounding soils, air, surface water, or groundwater.

Adopted 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 aboveground storage vessel is located.

§338.9 Recordkeeping

The commission adopts new §338.9(a) to establish the general recordkeeping requirements. Adopted 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 from the standards incorporated by reference.

Adopted 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 on the facility premises. Electronic records may be kept off-premises. The records must be immediately accessible for reference and use by the owner or operator and must be immediately made available for inspection upon request by executive director personnel or an executive director designated agent.

Adopted paragraph (3) establishes that if an owner or operator cannot maintain copies of the required records on the facility premises, then the records may be maintained at an 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.

Adopted subsection (b) specifies that owners and operators of aboveground storage

vessels must meet all recordkeeping requirements in this chapter. Adopted paragraph (1) requires that owners and operators must maintain legible printed copies or readily accessible electronic 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 are necessary for the purpose of this program. Adopted 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 paper format or electronic format at the facility or alternative facility will meet this requirement.

Adopted 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. Adopted subparagraphs (A) through (H) 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, and will make the guidance document available on the agency's website and available for viewing at the agency's headquarters and regional offices.

SUBCHAPTER B: REGISTRATION AND CERTIFICATION REQUIREMENTS

§338.20 Registration

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

Adopted 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.

Adopted subsection (c) specifies that the owner and operator of an aboveground storage vessel are responsible for 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) comply with the ASVS program.

Adopted 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 will be required to pay registration fees from the registration deadline to the date of registration.

Adopted subsection (e) requires the current owner or operator of a storage vessel to notify the executive director of any changes to the registration within 30 days of the change. Changes that require notification include, but aren't limited to, the decommissioning of an aboveground storage vessel, adding to the list of potentially stored substances to be stored in any aboveground storage vessel, change in the ownership of any aboveground storage vessel, update of the compliance status of any aboveground storage vessel, and the location of records for aboveground storage vessels.

Adopted subsection (f) requires the owner or operator of an aboveground storage vessel to provide all the registration information requested by the executive director for each aboveground 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 aboveground storage vessels located within a facility on the same registration form.

Adopted 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.

Adopted subsection (h) specifies the requirements to remove an aboveground storage vessel from the program. To remove an aboveground storage vessel from the program, the vessel must be decommissioned and no longer be subject to the definition of an aboveground storage vessel as defined in §338.2 of this title. Any decommissioned ASV brought back into the ASVS program will be considered a new ASV and the owner or operator would be required to certify the vessel as a new ASV, pay new fees, and follow the standards for a new ASV placed into service. Additional information will be

provided in the guidance document. 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. An aboveground storage vessel registered with the executive director is considered an aboveground storage vessel as long as the vessel has the potential to contain a regulated substance. An aboveground storage vessel that is decommissioned and permanently removed from service will 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 the executive director may remove the aboveground storage vessel from the program.

§338.21 Certification

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

Adopted subsection (a) specifies that for aboveground storage vessels brought into service on or before September 1, 2027, the owner or operator of an aboveground storage vessel must report its compliance status to the executive director by September 1, 2027. The aboveground 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 aboveground storage vessel meets the safety standards.

Adopted subsection (b) establishes the deadline for aboveground 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.

Adopted 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 after the start of operation.

Adopted 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 adopts new §338.22 to establish the fees for the ASVS program.

Adopted subsection (a) includes the costs that the fee will need to cover, as provided in SB 900, including implementing a registration program, reviewing certifications, inspecting sites/facilities, and enforcing compliance with applicable standards.

Adopted subsection (b) establishes the fee assessment. Adopted 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 adopted initial fee schedule consists of 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 will be for various vessel capacities based on this initial adopted fee schedule. The adopted fee schedule is subject to change based on variations in the number of regulated entities, the capacity of the regulated vessels, and the cost of administering the program. Fee changes will be published through the *Texas Register* notification process.

Table 1: Adopted Preliminary Fee Schedule

Capacity in barrels (bbls)	500	10,000	20,000	50,000	100,000	200,000	300,000
Per ASV Flat Fee	$200	$200	$200	$200	$200	$200	$200
Per barrel Fee ($0.0024/ bbl)	-	-	-	$120	$240	$480	$720
Total per ASV Fee	$200	$200	$200	$320	$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 uncertainty. 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.

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

Adopted paragraph (3) establishes that the 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).

Adopted paragraph (4) establishes that the executive director may adjust the fees for aboveground storage vessels registered in this program up to the maximum fee, on an annual basis. The executive director will notify the fee payers 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 certifications, ten-year certifications, and amended certifications, inspect certified facilities, and enforce

compliance with applicable standards of TWC, §26.3442, and rules and orders adopted under those subsections.

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

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

Adopted paragraph (7) specifies that the transfer of ownership of a facility is not grounds for a refund, in 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.

Final Regulatory Impact Determination

The commission reviewed the rulemaking adoption in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that

the rulemaking adoption does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if it did meet the definition, will 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 adopted rules is to implement Senate Bill 900 (87th 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 adoption 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 adoption 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. In addition, the adopted compliance dates provide an adequate amount of time for the owners and operators to make all

necessary installation and adjustments for compliance purposes.

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 adoption 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 adoption 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 invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the regulatory impact analysis determination.

Takings Impact Assessment

The commission reviewed the adopted 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% 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 adopted rulemaking action, as discussed elsewhere in this

preamble, is to adopt rules to promote the safety of certain aboveground storage vessels as required by Senate Bill 900 (87th Legislative Session). The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted 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 adopted 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 foreseeable and justifiable business costs, so the adopted 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 adopted rules. Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these

adopted rules is to establish the new ASVS program in the state. Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted 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 adoption 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 adopted rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted 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 adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the CMP.

Public Comment

The commission held five in-person public hearings: March 23, 2023, in Fort Worth; March 28, 2023, in Beaumont; March 29, 2023, in Houston; April 3, 2023, in Corpus Christi; April 6, 2023, in Midland; and a hybrid in-person/virtual public hearing on April 10, 2023, in Austin. The comment period closed on April 10, 2023. The commission received comments from: the Caring for Pasadena Communities (CPC), the City of Portland (CP), the Fenceline Watch (FW), the Harris County Attorney's Office (HCA), the Texas Chemical Council/Texas Oil and Gas Association (TCC/TXOGA), the Texas Industry Project (TIP), the Texas Pipeline Association (TPA), Stolthaven Houston Inc. (SHI), the Super Neighborhood Council 65 & 82 (SNC), and seven individuals. While all of the comments were in general support of the implementation of SB 900 and the proposed rulemaking, all of the commenters had suggestions on how the rules could be changed or improved depending on their specific concerns, be it from industry or the public that works and lives around the storage vessels.

Response to Comments

General Comments

Comment

CP and HCA generally supported the proposed rulemaking to establish the ASVS Program and that the intent of rulemaking is to implement SB 900.

Response

The commission appreciates the support.

Comment

CP, FW, and HCA commented that the incorporation by reference of the national consensus standards into this rulemaking places an undue financial burden/hardship on the public and regulated community since the standards must be purchased from a third party. The public/regulated community should not have to purchase national consensus standards to determine compliance with TCEQ regulations. It was commented that the commission should make the referenced standards available to the public either at the commission's regional offices or at libraries proximal to affected facilities.

Response

Due to copyright law restrictions, TCEQ cannot incorporate the national consensus standards verbatim into Chapter 338 or make them publicly available. However, the commission will be working to have copies of the applicable standards that the public can view available at the agency's headquarters and regional offices. TCEQ will also develop a guidance document to help the public and the regulated community understand which standards apply to which types of aboveground storage vessels. The final version of the guidance document will then be made

available to the public on the agency's website.

Comment

CPC commented that they were interested in ensuring that the full intent of SB 900 is actualized in this rulemaking to prevent additional accidents in Harris County and across the Gulf Coast of Texas. CPC commented that the ASVS Program doesn't add any new regulations on the safety of the affected ASVs.

Response

It is the commissions intent to fully implement SB 900, with the purpose of promoting the safety of affected aboveground storage vessels through requirements that address the design, construction, operation, and maintenance of ASVs, with the objective of protecting groundwater and surface water resources in the event of accidents and natural disasters. Therefore, no changes were made in response to this comment.

Comment

SNC and several individuals commented that the Chapter 338 rules should require weatherization.

Response

The commission appreciates the comment; however, this is outside the scope of this rulemaking. The purpose of new Chapter 338 is to implement TWC, §26.3442, which does not include weatherization. Therefore, no changes were made in response to this comment.

Comment

SNC and several individuals commented that the ASVS Program should provide public access to information regarding what chemicals are being stored in the applicable ASVs. It was also commented that the emergency response plans should be made available to the public.

Furthermore, it was commented that there needs to be an immediate notification system when an emergency situation has occurred at a site with subject ASVs.

Response

The commission will be following established agency policy on what information can be made available to the public via the agency's website. The commission has not determined which of the information collected as part of this rule, will be made publicly available as some of this information could have homeland security implications or be deemed confidential. Between the effective date of this rulemaking and the September 1, 2027, implementation date, the commission will

be developing the registration/certification program and will be drafting a guidance document for the regulated community. The commission will be using this time to also determine what information may be made publicly available. Senate Bill 900 does require that the commission must keep confidential any information reported to, obtained by, or otherwise submitted to the commission that: is subject to restrictions on dissemination under federal law, including off-site consequence analysis information subject to Title 40, CFR Part 1400, or may otherwise present a security risk, if disclosed publicly. Therefore, this statutory requirement must be taken into consideration when determining what information may be provided publicly.

Concerning the comment about the need to have an immediate notification system in the event of an emergency at a site with ASVs subject to this rule, SB 900 does not provide the commission the authority to establish a notification system, therefore this comment is outside the scope of the rulemaking.

Comment

SNC and several individuals commented that the commission should provide access to the violation history and compliance records for the ASV owners and operators.

Response

Senate Bill 900 did not provide the commission with the authority by the Texas Legislature to set up a system specific to this program to post on its online system the violation history or compliance records for all regulated ASV owners or operators. However, that information can be requested through a public information request (PIR). There is information available on the agency's webpage on how to request a PIR. Information on enforcement orders can be found on the agency's webpage at: https://www.tceq.texas.gov/compliance/enforcement/enforcement-reports. Information is also available concerning compliance history at the following link: https://www.tceq.texas.gov/compliance/enforcement/compliance-history. Therefore, no changes were made in response to this comment.

Comment

An individual commented that cumulative health impacts continue to not be addressed by the commission. Furthermore, the individual commented that the rules need to address air quality around the ASV sites.

Response

The purpose of this rulemaking is to establish an ASVS Program in accordance with SB 900. The commission has not been provided authority by the Texas Legislature to go beyond the requirements found in SB 900, therefore these comments are

beyond the scope of this rulemaking. It should be noted that there are other environmental regulations that would apply to these ASVS. Numerous other state and federal regulations are also in place to protect the public.

§338.1 Purpose and Applicability

Comment

SNC and several individuals noted that the rules should not only protect groundwater and surface water from contamination during disasters and natural events, but the rules should also protect the environmental justice communities near the ASVs.

Response

The commission appreciates the comment; however, this comment is outside the scope of the rulemaking. The purpose of the new Chapter 338 is specified in TWC, §26.341(b). It should be noted that there are other environmental regulations that would apply to these ASVS. Numerous other state and federal regulations are also in place to protect the public.

Comment

An individual commented that the ASVS rules do not address subsidence of vessels.

Response

The rules do not address areawide subsidence, however soil bearing strength and settlement is addressed in API 653, Section 4.3: Tank Shell Evaluation, specifically in Sections 4.3.1.2 and 4.3.5, and settlement is also addressed in Section 4.4: Tank Bottom Evaluation. Therefore, no changes were made in response to this comment.

Comment

TPA and TCC/TXOGA commented that there appears to be an error in Table 1: Proposed Preliminary Fee Schedule found in the proposed preamble. The preamble language discusses a flat fee of $200 per vessel and an additional $0.0024 per barrel of capacity for vessels over 20,000 barrels. However, Table 1 lists the barrel fee as $0.0027 per barrel.

Response

The commission appreciates the comment; the correct barrel fee is $0.0024 per barrel. Table 1 in the preamble has been updated to correct this error.

Comment

FW requested that the commission adopt, as part of the purpose of the ASVS Program, the establishment of a protective standard for those communities co-located within three miles of aboveground storage vessels.

Response

The commission appreciates the comment; however, this is outside the scope of this rulemaking. The purpose of new Chapter 338 is specified in TWC, §26.341(b). Furthermore, the ASVS Program is intended to be a statewide regulation concerning the design, construction, operation, and maintenance of aboveground storage vessels, with the objective of protecting groundwater and surface water resources in the event of accidents and natural disasters. Therefore, all subject ASVs will be regulated under the same set of rules, no matter the location of the ASVs. Therefore, no changes were made in response to this comment.

Comment

TCC/TXOGA and TIP commented that §338.1(b) describes the applicability of the new rules by referring to definitions in §338.2. For clarity, it was commented that incorporating the definitions would help with the understanding of the rule's applicability.

Response

The commission has updated §338.1(b) by adding the term "aboveground" before the term "storage vessel" and has included language that is contained in the definition of an aboveground storage vessel into §338.1(b). The commission agrees that this change should help to clarify the applicability of the rules. Furthermore,

the commission has added the definition for "aboveground storage vessel" and deleted the definition of "storage vessel" in §338.2 and renumbered the section as needed. The definition of aboveground storage vessel is the same as the proposed definition of "storage vessel", simply the term "aboveground" has been added. The term "aboveground" has also been added throughout the rule to be consistent in the use of the term "aboveground storage vessel."

§338.2 Definitions

Comment

TPA commented that the proposed definition of "bulk storage terminal" in §338.2 is unnecessarily vague and there is potential confusion with the proposed language of "A site in the state, including" TPA commented that a strict reading of the definition would be that any site in the state would be considered a bulk storage terminal.

Response

The definition was taken from the definition 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. The term "site" would simply mean to apply to a "Bulk Storage terminal." However, in an effort to remove any potential confusion, the phrase "A site in the state, including" has been removed.

Comment

TIP and TCC/TXOGA commented that the definition of "bulk storage terminal" should be revised to refer to "breakout tank" rather than "breakout vessels" and to specify that "breakout tanks" are as defined by Pipeline and Hazardous Materials Safety Administration (PHMSA) regulation at 49 CFR §195.2. TCC/TXOGA requested that the commission clarify that Texas Railroad Commission (RRC) regulated breakout tanks are also excluded from the definition of a "bulk storage terminal."

Response

The term "breakout tanks" has been added to replace the term "breakout vessels" in the definition of a bulk storage terminal. The definition of a breakout tank, as is cited in 49 CFR §195.2, has not been adopted in full. Under the definition of bulk storage terminal, the term "breakout tanks" is defined as tanks that are used to relieve surges in a pipeline system and receive/store liquids transported by a pipeline for reinjection and continued transportation by pipeline.

RRC regulated breakout tanks would be exempted based on §338.3(a)(1), which exempts a vessel used in or associated with the production or gathering of crude oil or natural gas. Furthermore, if the tank is used to relieve surges in a pipeline system and receive/store liquids transported by a pipeline for reinjection and

continued transportation by pipeline, as is listed in the definition of a bulk storage terminal, then it would not be subject to the regulations.

Comment

FW commented that the definition of petrochemical plant should not exclude "allied chemical products."

Response

The definition for a petrochemical plant was taken from Title 34 Texas Administrative Code (TAC) 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. Title 34 TAC §3.362 also defines "allied chemical product" as "a consumer or end-user product manufacture from basic or intermediate chemicals. Examples include drugs, soaps, detergents, paints, and agricultural chemical formulations."

Based on these two definitions, it is not the intent of the commission to subject these regulations to ASVs located at these facilities, that are producing end-user product. However, if a general site or complex has multiple facilities within its property line, producing a combination of basic, intermediate, or allied chemicals, then each facility would be considered individually and separately for the purpose

of determining applicability of these rules. The Comptroller of Public Accounts definition of a chemical plant could be seen as somewhat confusing, so to help clarify, the commission has revised the definition of a petrochemical plant in §338.2 to remove the sentence "A chemical plant complex may include any combination of distinct facilities that manufacture basic chemicals, intermediate chemicals, or allied chemical products."

Comment

TCC/TXOGA and TIP commented SB 900 and the Chapter 338 rules do not specify whether the requirements apply to ASVs holding a mixture. It was commented that the commission should consider defining a mixture similarly to the Risk Management Plan (RMP) regulation or alternatively provide a de minimis concentration for regulated substances that are components of stored mixtures.

Response

The commission appreciates the comment and agrees that the rule requirements do apply to ASVs designed to hold a mixture of at least one percent or greater by weight of a regulated substance. The definition of regulated substance found in §338.2 has been updated to incorporate this change.

Comment

TIP and TCC/TXOGA commented that clarification is needed as to why the definitions of "bulk storage terminal", "petrochemical plant" and "petroleum refinery" as proposed in §338.2 are not consistent with the SIC/NAICS definitions for these facilities. TCC/TXOGA requested clarification of the definition of petrochemical plant and the terms "basic", "intermediate", and "allied" that are used in the definition.

Response

The definition for the term bulk storage terminal in §338.2 was provided in SB 900: "A site in the state, including end-of-line pipeline storage terminals (excluding breakout tanks), refinery storage terminals, for-hire storage terminals, rail storage terminals, and barge storage terminals." The term "breakout tanks" is defined as tanks that are used to relieve surges in a pipeline system and/or receive/store liquids transported by a pipeline for reinjection and continued transportation by pipeline. Typically, SIC 5171, along with NAICS 424710 would be the codes associated with a bulk storage terminal, however, other codes could apply.

The terms petrochemical plant and petroleum refinery were not defined in SB 900 language. Therefore, the commission used other commonly found definitions for the two terms. The SIC/NAICS codes were reviewed but no specific definitions could be found in the codes or there were multiple codes that could apply.

Therefore, the commission used the definitions for a petrochemical plant and petroleum refinery found in Title 34 TAC 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 commission does agree that, in general, the petrochemical plant industry comprises of sites primarily engaged in (1) manufacturing acyclic (i.e., aliphatic) hydrocarbons such as ethylene, propylene, and butylene made from refined petroleum or liquid hydrocarbons and/or (2) manufacturing cyclic aromatic hydrocarbons such as benzene, toluene, styrene, xylene, ethyl benzene, and cumene made from refined petroleum or liquid hydrocarbons. Typically, SIC 2865 and 2869, along with NAICS 325110, would be the codes associated with a petrochemical plant, however other codes could apply. As previously stated, it is not the intent of the commission that ASVs at facilities that are producing end-user product, also called allied chemicals, be subject to these regulations. However, if a general site or complex has multiple facilities within its property line, producing a combination of basic, intermediate, or allied chemicals, then each facility would be considered individually and separately for the purpose of determining applicability of these rules. The Comptroller of Public Accounts definition of a chemical plant could be seen as somewhat confusing, to help resolve this confusion, the commission has revised the definition of a petrochemical plant in §338.2 to remove the sentence "A chemical plant complex may include any combination of distinct facilities that manufacture basic

chemicals, intermediate chemicals, or allied chemical products."

As stated above, the commission used the Comptroller of Public Accounts definition of petroleum refinery, found in Title 34 TAC §3.362. The term means 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. Typically, SIC 2911, along with NAICS 324110, would be the codes associated with a petroleum refinery. The NAICS code states that petroleum refineries are primarily engaged in refining crude petroleum into refined petroleum. Petroleum refining involves one or more of the following activities: fractionation, straight distillation of crude oil and cracking. The SIC code states that petroleum refining is primarily engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, and lubricants, through fractionation or straight distillation of crude oil, redistillation of unfinished petroleum derivatives, cracking, or other processes. All of these general definitions would appear to be in line with the definition provided in this rulemaking. Therefore, no

changes are made specifically in response to this comment. However, the commission plans to provide additional guidance/information on which specific SIC/NAICS would be covered by these rules and definitions in the guidance document.

§338.3 Exemptions

Comment

FW and several individuals commented that there should be no exemptions or "loopholes" for the ASVS Program. FW furthermore commented that the commission should make publicly available any documentation provided by the owner or operator seeking an exemption for the new regulations.

Response

The exemptions mentioned by the commenter were all part of the statutory language of SB 900, which the commission is required to implement. Therefore, no changes are made in response to these comments.

As to the comment concerning public availability of any documents provided by the owner or operator seeking an exemption, TCEQ intends to follow the Texas Public Information Act, and make documents public as allowed by state law and TCEQ's general policy on posting of information.

Comment

SHI commented that the exemption concerning a vessel that is part of a stormwater or wastewater collection system found in §338.3(a)(2) should be clarified to also include vessels that are associated with wastewater treatment systems, instead of only exempting wastewater collection systems.

Response

The exemption provided in §338.3(a)(2) was taken directly from the statutory language in SB 900. However, if there is an ASV that is part of a wastewater treatment system, the exemption provided in §338.3(a)(3) for flow-through process vessel would apply. Therefore, no changes were made in response to this comment.

Comment

FW commented that ASVs that operate above 0.5 pounds per square inch gage (psig), heated vessels, intermediate bulk containers or similar vessels should not be exempted from these regulations as is provided in §338.3(a)(4), (5), and (6) respectively.

Response

The exemptions that were discussed in the comment were all part of the statutory language of SB 900, which the commission is required to implement. Therefore, no

changes were made in response to this comment.

Comment

SHI commented that the commission should clarify the §338.3(a)(4) exemption concerning vessels operating above 0.5 psig but will not be able to maintain a working pressure that is above 0.5 psig at all times. Specifically, SHI commented that the exemption should apply when the tank is designed to operate above 0.5 psig, instead of the proposed language.

Response

The commission appreciates the comment. The intent of the rule is to exempt pressurized storage vessels that do not typically have vented emissions during routine operations and have static regulated vessels that do not have variable rule applicability based on the vapor pressure of the liquid stored. Storage vessels exempted from the rule include those vessels that are designed or intended to not normally emit vapor emissions to the atmosphere, with the criterion in the proposed rule being those vessels that operate above 0.5 psig. To remove any ambiguity, the final rule is being revised from the proposed rule version to exempt storage vessels that are designed or intended to operate above 0.5 psig in the vapor space.

Comment

TPA and TCC/TXOGA commented that the commission should clarify the §338.3(a)(4) exemption concerning vessels operating above 0.5 psig. Specifically, the commission should clarify what is considered to be the vapor space of the vessel. For floating roof vessels is the vapor space considered to be the space above the floating roof or the space between the liquid surface and the floating roof. TPA commented that the vapor space would be the space above the floating roof.

Response

The commission appreciates the comment and provides the following clarification on what should be considered the vapor space of an ASV. The vapor space in a storage vessel is the void space between the liquid level and the vessel roof. In the case of floating roof vessels, the void space between the liquid level and roof is typically small or practically nonexistent because the roof uses seals to minimize the vapor space, with the floating roof nearly sitting on the liquid. The rule includes a provision in §338.3(a)(4) to calculate the total mixture vapor pressure at the storage temperature, which may be a preferred option for storage vessels with minimal vapor spaces such as vessels equipped with a floating roof.

Comment

SHI commented that the heated tank exemption found in §338.3(a)(5) would provide a

complete exemption from the regulations for vessels that are heated using external heat. It was commented that third-party terminals store a wide variety of compounds and are often equipped with external heating capabilities, but all such vessels are not actively heated unless the cargo in storage requires heating. SHI suggested that the rules allow for an ASV to be routinely added and removed from the program's applicability based on the current external heating status of the vessel. Sites with frequent stored compounds and heating changes need flexibility and clarity of the requirements to ensure compliance and consistency.

Response

The registration and certification requirements under this chapter are intended to be permanent until the ASV is decommissioned. Any ASV that is continuously heated, as specified in §338.3(a)(5), is exempt from the program. However, if the tank is intermittently heated, it would be subject to the requirements of the rule and this exemption would not apply. Therefore, no changes were made in response to this comment.

Comment

TIP commented that while §338.3(6) provides an exemption for "an intermediate bulk container or similar vessel that may be moved within a facility as defined in §338.2 of this title," §338.2 does not define "intermediate bulk container" and suggests that a

definition should be adopted.

Response

Most intermediate bulk containers, which are designed for mechanical handling, are likely below the capacity threshold of 21,000 gallons and therefore not subject to Chapter 338. For example, in general, intermediate bulk containers are defined as a pallet mounted, industrial grade reusable container that is used for storing and transporting bulk liquids and powders, also known as a tote, capable of stacking and be moved by a pallet jack or forklift. However, a 'frac' tank could potentially meet the capacity threshold to be regulated under Chapter 338 but would qualify for an exemption as an intermediate bulk container, as long as they are not being used as permanent storage. The agency has determined it is unnecessary to include a definition for "intermediate bulk containers" and therefore, no changes were made in response to this comment.

Comment

TCC/TXOGA commented that the rule does not provide a definition for methane condensate gathering found in §338.3(9) and is requesting that the commission provide a definition. Additional clarification is needed with regard to application to central gathering points downstream of exploration and production activities.

Response

The exemption found in §338.3(a)(9) concerns methane emissions from landfills. That exemption is not intended to apply to oil and natural gas production or gathering storage tanks. The exemption found in §338.3(a)(1) would apply to these types of production or gathering storage tanks. Furthermore, if the tank is used to relieve surges in a pipeline system and receive/store liquids transported by a pipeline for reinjection and continued transportation by pipeline, as is listed in the definition of a bulk storage terminal then it would not be subject to the regulations. Therefore, no changes to the rules were made in response to this comment.

Comment

CPC, SNC, FW, HCA and several individuals commented that the commission should not exempt ASVs from the requirements of the program to ensure public safety with the intent of SB 900. Furthermore, it was commented there should be very limited circumstances in which an exemption would be needed. The criteria stated in §338.3(b) are overly broad and inadequate to assess a "significantly low risk" for a proposed exemption to ensure that the public is adequately notified or allowed to provide input that the exemption is warranted. Specifically, the commenters requested that the commission remove accidents, fires, and explosions from the exemption language. The commenters provided suggested language which would exclude ASVs located in the Gulf Coast of Texas from being able to obtain an exemption under §338.3(b).

Furthermore, any ASV located in any area in the state receiving an average rain fall in excess of 80 inches per year or experiencing multiple flash flooding events in a year should not be able to obtain an exemption under §338.3(b). HCA commented that facilities with previous ASV failures be excluded from applying for this exemption.

HCA commented that if the §338.3(b) exemption remains in the rules, there should be specific criteria added for what type of demonstration, documentation or "other information" will be needed to support a claim that an ASV is "sufficiently low risk." The commission should consider regional and geographically specific standards, with a higher burden for locations that are disaster-prone or in a flood plain. Finally, HCA is concerned the §338.3(b) exemption creates too much discretion in the program implementation.

CPC furthermore commented that based on past external floating roof failures due to high rainfall events, any ASV with a floating roof should not be entitled to an exemption under §338.3(b).

Response

Section 26.3443 of the TWC specifically states that the commission, in implementing this program, may approve the exemption of specific storage vessels if the owner or operator demonstrates that the ASV 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 program. The agency does not agree with the commenters that the language in §338.3(b) is overly broad; however, the agency will provide additional clarification on what information would be needed to justify this exemption request in the guidance document that will be developed before the implementation date for this program. All exemption requests under §338.3(b) will be subject to a case-by-case review.

The commission did not make the suggested rule change to exclude ASVs located along the Gulf Coast of Texas, in areas receiving extreme rainfall, or in areas experiencing multiple flash floods from being able to obtain an exemption under §338.3(b). All of this information will be considered when the commission reviews an exemption request and will provide additional clarification in the guidance document. Furthermore, for ASVs that have experienced failures in the past, the commission does not see the need for a specific exclusion, information concerning the ASV's service history will be reviewed as part of the exemption request.

Regarding floating roof storage vessels' eligibility for an exemption under §338.3(b), the language in SB 900 was not specific to what type of vessels could request or receive an exemption under §338.3(b). Instead, as with all parts of this exemption request, it is the executive director's role to determine if the owner or

operator has provided an adequate demonstration that the ASV presents a sufficiently low risk from floods, storm surges, hurricanes, accidents, fires, explosions, or other hazards so that it does not warrant regulation under this chapter. The agency does not foresee this type of exemption being widely requested or approved.

Comment

CPC commented that if an ASV is located less than two miles from a region's source of potable water it should not be granted an exemption under §338.3(b). Such an exemption would increase the risk of contaminating water supplies for local communities.

Response

The commission did not make the suggested rule change to not grant an exemption under §338.3(b) for ASVs located less than two miles from a region's source of potable water. The distance to a region's source of potable water may be a consideration in the executive director's review of an exemption request. Additional clarification will be provided in the guidance document. Therefore, no changes were made in response to this comment.

Comment

CPC and FW commented that there should be public notice or an opportunity for the public to comment before an exemption is approved. The commission should allow an opportunity for comment on the requested exemption after publication in the Texas Register to provide opportunity for the public to comment. The public comment period should be at least 30 days after publication with supporting information provided. CPA furthermore commented that the only way to ensure public oversight and that the rules are complying with the original intent of the legislature is to ensure transparency in implementation. HCA commented that local governments should be provided an opportunity to comment on exemption applications from facilities in their county or municipality.

Response

The commission appreciates the comment and acknowledges the significance of these comments, however, while the commission encourages public participation in the rulemaking, there are certain concerns of entities that the commission cannot address in this rulemaking, as the scope of the commission's jurisdiction in the rulemaking process is limited to the issues as set forth in statute. Therefore, no changes to the rules were made in response to this comment.

Comment

CPC commented that the rulemaking is silent to an exemption approval being reversed

by the commission if subsequent events occur that warrant a reconsideration of the relative risk. For example, what if an accident, fire, or explosion occurs at an exempted ASV, is there a process to revoke the exemption. Overall, CPC is concerned that by not providing a procedure to reverse an exemption that there is a risk of "grandfathering" a facility from having to comply with the ASVS Program, which could increase the risk to the public.

Response

The commission appreciates the comment but has not made a change to the rule based on the comment. As previously stated, the commission believes this exemption will only be allowed under limited circumstances. However, if a facility were to qualify for an exemption for an ASV, based on a low risk of either an accident, fire, or explosion, and the conditions that led to that exemption no longer applied (e.g., a change in the regulated substance being stored), the owner or operator would then be required to register and certify the ASV, as per the ASVS rules, and the exemption would no longer be applicable.

Comment

FW and SNC commented that §338.3(c) should not be included in the adopted rule language as the exemptions outlined in §§338.3(a) and (b) do not assure safety of groundwater or surface water in the event of an accident or natural disaster. FW also

commented that the commission should make available online, all exemptions provided by §338.3(c).

Response

The exemptions outlined in §§338.3(a) and (b) are part of the statutory language of SB 900, which the commission is required to implement. Section 338.3(c) states that, upon request by the agency, the owner or operator of a vessel claiming to be exempted under any of the exemptions found in §338.3, must provide documentation to support the exemption claim. For example, when agency investigators conduct inspections, this information will be needed to ensure that the correct ASVs are following the regulations, as required. Therefore, no changes were made in response to this comment.

As to the comment that the commission should make available online, all exemptions provided by §338.3(c), the agency intends to follow the Texas Public Information Act and make documents publicly available to the extent allowed by state law and TCEQ's general policy on posting of information.

§338.5 Standards

Comment

TCC/TXOGA commented that §338.5 references several industry consensus standards

by reference to a specific edition, however TCC/TXOGA recommended that the rules should be revised to allow an owner or operator to use either the specific edition noted in the rule or at the owner's or operator's option a more recent edition of the same standard. TCC/TXOGA furthermore expressed concern that EPA may update the federal regulations that are incorporated by reference in the ASVS rule, and an owner or operator would have to manage a dual RMP program to be in compliance.

Response

The rule incorporates by reference specific standards in place at the time of this rulemaking. Inclusion of revisions to those standards would necessitate additional rulemaking. Furthermore, SB 900 requires that the commission must establish, through rulemaking, the effective date of the standards and that the commission must amend through rulemaking changes if a standard is amended in a way that materially conflicts with the current rules. Therefore, no changes were made in response to these comments.

Comment

TCC/TXOGA requested clarification that a tank will not be subject to API 653 if it doesn't store a regulated substance and is not subject to API 653 currently.

Response

The API standards applicability has not changed due to this rulemaking. If an ASV is not subject to an incorporated standard based on the applicability of the standard, then the ASV will not be required to comply with that standard. Therefore, no changes were made in response to this comment.

Comment

TIP and TCC/TXOGA commented that clarification is needed in §338.5(a) to make it clear that the standards listed in §§338.5(b) and (c) only apply when two criteria are met: the vessel is a storage vessel under Texas law and the vessel meets the applicability requirements of the listed standard in §§338.5(b) and (c). TIP provided suggested revised language for §338.5(a). TIP commented that the suggested revision would clarify that it is not the commission's intent to expand the scope of the listed standards beyond the statutory phrasing "as delineated in the applicability section" of the standards. TCC/TXOGA commented that the commission should clarify in the rule that the intent of the rule is for standards to be required as they are applicable in each underlying standard, and not to expand applicability of any referenced standard or to alter the protocol provided in the standard.

TCC/TXOGA and TIP furthermore commented that the general applicability statement in §338.1(b) eliminates the need for §338.5(b)(1)(B)(i)-(ii), which TIP believes is in conflict with the statutory direction in TWC, §26.3442(d) to apply the regulation to

storage vessels "as delineated in the applicability section" of the cited standard.

Response

The commission appreciates the comment and clarifies that an ASV is subject to an incorporated standard in the Chapter 338 rules based on that standard's applicability criteria. In response to these comments, §338.5(a) has been revised to read:

> **(a) The standards identified in subsections (b) and (c) are applicable when both of the following criteria are met:**
>
> > **(i) the vessel meets the definition of aboveground storage vessel as defined in §338.2; and**
> >
> > **(ii) the aboveground storage vessel satisfies the applicability criteria of the listed standard.**

This text will also address any concern about conflicts with §338.1(b) regarding general applicability. Therefore, no changes were made to §338.1(b) in response to this comment. However, the commission does agree with the comment that the revised language in §338.5(a) eliminates the need for §338.5(b)(1)(B)(i)-(ii). Therefore, the proposed rule language has been revised to remove §338.5(b)(1)(B)(i)-(ii). The proposed language of §338.5(b)(1)(B)(iii) was moved into §338.5(b)(1)(B) and §338.5(b)(1)(B)(iii) was also removed.

Comment

TCC/TXOGA commented that the commission needs to make a clear statement that the listed rules (incorporated by reference standards), and only the listed rules, are applicable. TCC/TXOGA provided 40 CFR §68.69 referenced in 40 CFR §68.75(e) as an example of a standard that is referenced by incorporation but does not appear to be directly incorporated in the Chapter 338 rules.

Response

While the commission appreciates the comment, the commission disagrees. 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. The guidance document will provide additional clarification on which potential separate applicable standards and regulations are included in the standards incorporated by reference. Therefore, no changes were made in response to this comment.

Comment

TIP commented that the commission needs to clarify in the rule text or the preamble that any Annexes, which are incorporated by reference are for informational purposes

only and are non-enforceable.

Response

The commission appreciates the comment, the Annexes, which are incorporated by reference, are for information purposes only and are non-enforceable, unless the Annexes that are listed in the applicable standard is listed as being normative, which would be considered enforceable. For example, in API 2350, Annex A, Automated Overfill Prevention Systems (AOPS), if the owner or operator chooses an AOPS then the Annex A becomes normative and would be enforceable.

Comment

TPA and TCC/TXOGA commented that §338.5(a) only references subsections (c) and (d) of §338.5, while the federal rules are incorporated by reference in §338.5(b).

Response

The commission appreciates the commenter noting the error. The correct citation should have been §338.5(b) and (c). The rules have been updated.

Comment

TCC/TXOGA expressed concern about the omission of MACT standards from the proposed rule. TCC/TXOGA is concerned that facilities will not be able to utilize MACT

Subpart WW, which allow for “in-service” inspection of internal floating storage tanks. Therefore TCC/TXOGA recommended including a reference to the 40 CFR Subpart WW in the rule.

Response

The commission appreciates the comment; however, the MACT or other safety standards cannot be added without the ability of the public/industry to comment on the revised, proposed safety standard. Therefore, no changes were made in response to this comment.

Comment

STI commented that the commission should add additional recognized standards that apply to ASVs to better facilitate implementation of the new requirements and to make the program more consistent with other requirements already in place in the industry. STI requested that the commission add Steel Tank Institute Standard Practice SP001 (6th Edition, 2018) to the standards required for compliance to cover tanks not subject to API 653. Failure to adopt this standard could mean that vessels that currently comply with SP001 will have to change to comply with API 653 against best industry practices.

STI also commented that SP031, Standard for Repair of Shop-Fabricated Aboveground

Tanks for Storage of Flammable and Combustible Liquids is a standard to address the repair of tanks covered under SP001.

Response

The commission appreciates the comments; however, the comments involve standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the American Concrete Institute standard 350.2R-04 except for Section 6.3, which is titled Concrete Structures for Containment of Hazardous Materials, to the standards listed in the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the following American Petroleum Institute (API) Standards to the rules: API 570 (4th edition, 2016) Piping Inspection Code: In-service Inspection, Rating, Repair, Alteration, and Rerating of In-service Piping System; RP 575-14 (3rd edition, 2014) Guidelines and Methods for Inspection of Existing Atmospheric and Low-pressure Storage Tanks; Std 650- with addenda 1 and 2 Welded Steel Tanks for Oil Storage; RP 651 (4th edition, 2014) Cathodic Protection of Aboveground Petroleum Storage Tanks; RP 652 (4th edition, 2014) Lining of Aboveground Petroleum Storage Tank Bottoms; Std 653 (5th edition, 2014) Tank Inspection, Repair, Alteration, and Reconstruction; RP 1621 (5th edition, 1993) Bulk Liquid Stock Control at Retail Outlets; RP 1626 [2nd edition, 2010 (with errata and addendum)] Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Filling Stations; Std 2000 (7th edition, 2014) Venting Atmospheric and Low-Pressure Storage Tanks; Std 2015 (8th edition, 2018) Requirements for Safe Entry and Cleaning of Petroleum Storage Tanks; Std 2350 (4th edition, 2012) Overfill Protection for Storage Tanks in Petroleum Facilities; and Std 2610 (2nd edition, 2005) Design, Construction, Operation, Maintenance, and Inspection of Terminal and Tank Facilities.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this

rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the following American Society of Mechanical Engineers Standards B16.5 Pipe Flanges and Flanged Fittings, B31.1 Power Piping, B31.3 Process Piping, and B31.4 Pipeline Transportation Systems for Liquids and Slurries to the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add H.I.R. Technical Services Standard HIR FTV RP 2007 titled In-service Inspection of Aboveground Atmospheric Fiberglass Reinforced Plastic Tanks and Vessels to the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the following National Association of Corrosion Engineers Standards to the rules: SP0169-2013 Control of External Corrosion on Underground or Submerged Metallic Piping Systems, SP0193-2016 Application of Cathodic Protection to Control External Cathodic Protection of Carbon Steel On-Grade Storage Tank Bottoms, and TM0497-2012 Measurement Techniques Related to Criteria for Cathodic Protection on Underground or Submerged Metallic Piping Systems, to the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the following National Fire Protection Association Standards (NFPA): 30 (2021) Flammable and Combustible Liquids Code, 37 (2018) Standard for the Installation and Use of Stationary Combustion Engines and Gas Turbines, 68 (2018) Standard on Explosion Protection by Deflagration Venting, 110 (2016) Standard for Emergency and Standby Power Systems, 326 (2015) Standard for the Safeguarding of Tanks and Containers for Entry, Cleaning, or Repair, 407 (2017) Standard for Aircraft Fuel Servicing, and 704 (2017) Standard System for the Identification of the Hazards of Materials for Emergency Response, to the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the following Petroleum Equipment Institute Standards: RP800-20 Recommended Practices for Installation of Bulk Storage Plants, RP1200-19 Recommended Practices for the Testing and Verification of Spill, Overfill, Leak Detection and Secondary Containment Equipment, RP1300-20 Recommended Practices for the Design, Installation, Service, Repair and Maintenance

of Aviation Fueling Systems, and RP1400-21 Recommended Practices for the Design and Installation of Fueling Systems for Emergency Generators, Stationary Diesel Engines and Oil Burner Systems to the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the following Steel Tank Institute Standard R912 2022 Installation Instructions for ASTs to the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the following Underwriters Laboratories Inc. Standards: UL 142 (2019) Standard for Steel Aboveground Tanks for Flammable and Combustible Liquids, UL 971 (1995) Nonmetallic Underground Piping for Flammable Liquids, UL 2080 (2000) Standards for Fire Resistant Tanks for Flammable and Combustible Liquids, and UL 2085 (1997) Standard for Protected Aboveground Tanks for Flammable and Combustible Liquids to the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

STI commented that the commission should add the following U.S. Department of Energy Standards: DOE/GO 102016-4854 (February 2016) Handbook for Handling, Storing, and Dispensing E85 and Other Ethanol-Gasoline Blends and DOE/GO 102016-4875 (Fifth Edition, Revised, November 2016) Biodiesel Handling and Use Guide, to the rules.

Response

The commission appreciates the comment; however, the comment involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language, as provided in statute.

Comment

TCC/TXOGA commented that it is not clear that the commission intends the RMP to only apply to vessels already governed by the RMP rules. Furthermore TCC/TXOGA commented it was unclear how the commission will limit their investigations in the future to just the tanks portion of the RMP.

Response

The commission appreciates the comments; to provide clarification, the applicability of the federal RMP rules do not change because of this rule. As previously stated, it is not the commission's intent to expand the applicability of either the national consensus standards, or the federal statutes/regulations beyond the applicability provided in those specific standards. Only parts of the RMP that address ASVs are covered by this rule, not the complete site. This will be the information that the agency will be reviewing for this program. The guidance document will provide clarification on what information will need to be maintained. Therefore, no changes were made in response to this comment.

Comment

TCC/TXOGA and TPA commented that while SB 900 directs the commission to include safety elements for *inter alia* the EPA Risk Management Plan (RMP) rules, the statute requires the commission to only include those critical safety elements that are applicable to a storage vessel, and that the commission determines to be critical in this state to protect water resources. TPA commented that the commission should review the RMP rules that would be incorporated into §338.5(b)(1)(B) to ensure that the final rules do not go beyond the intent of SB 900. TPA does not understand the intent of SB 900 to have been to require implementation of RMP requirements generally on ASVs, but rather to incorporate only those particular rule provisions that are most relevant to improving the safety of the ASVs covered by the statute. Specifically, the commission should reconsider the incorporation of 40 CFR Section 68.10 in its entirety into the ASVS Program. TCC/TXOGA expressed concern that the commission is drastically expanding the RMP requirements by ignoring TWC, §26.3442(d) and proposed §338.5(a), which limits applicability to the applicability section in each regulation.

TIP requested clarity as to the requirements of RMP Program 2 and 3 and how each program's requirements may apply to a given vessel. Under EPA's RMP, a facility is subject to either Program 2 or Program 3 requirements based on certain eligibility

requirements outlined in 40 CFR §68.10(g)-(i). TIP suggested rule language to clarify that the facility's storage vessels will be subject to the requirements of the program level the facility is currently subject to.

Response

The commission appreciates the comments, and the commission agrees that SB 900 directed the commission to adopt 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. Furthermore, SB 900 directed the commission to include all and only those critical safety elements that are applicable to ASVs and that the commission determines to be critical for the protection of groundwater and surface water resources. The commission does not believe that the incorporated standards in the Chapter 338 rules expand the statutory authority of SB 900. The commission reviewed the RMP requirements and incorporated specific requirements it deems critical for the protection of groundwater and surface water resources. Concerning the incorporation of 40 CFR §68.10 in its entirety into the ASVS program, 40 CFR §68.10 provides the applicability requirements and will inform an owner or operator if they are required to comply with the incorporated portions of the 40 CFR Part 68 standards.

As additional clarification, the RMP is a federal requirement under Section 112(r) of the Clean Air Act. The applicability of the regulation is not changed from the federal requirement. These plans are considered to be critical safety elements, and so are a reasonable requirement under this regulation. An RMP includes: a hazard assessment that details potential effects of an accidental release, accident history for the last 5 years, and an evaluation of the worst-case and alternative accidental releases. Also included is a prevention program that includes safety precautions along with maintenance, monitoring, employee training procedures, and an emergency response program that spells out the emergency health care, employee training measures, and procedures for informing the public and response agencies. With the adoption of these specific sections concerning the Risk Management Plan requirements (RPM) found in Part 68, it should be noted that it is not the agency's intent to create a separate State RMP program. **Therefore, no changes were made in response to these comments.**

Comment

TIP commented that §338.5(b)(1)(C) incorporates by reference all of the general requirements for RMP Programs 1, 2, and 3 in 40 CFR §68.12. TIP recommended that because the proposed rule already incorporates the applicable individual RMP provisions, §338.5(b)(1)(C) should be removed to avoid being overbroad.

Response

The commission appreciates the comment and agrees that the incorporated language from 40 CFR §68.12 provides the information needed for an owner or operator to determine if their ASV will be subject to the Program 1, 2, or 3 requirements. The requirement referenced in §338.5(b)(1)(C) is set in federal rule and is only as broad as the federal rules allow, the commission is not expanding the applicability of the standard. Therefore, no change is made in response to this comment.

Comment

TPA and TCC/TXOGA commented that incorporation of 40 CFR §68.12, which is referenced in §338.5(b)(1)(C) runs the risk of causing confusion and increasing the burden on the owner or operator without commensurate safety improvements. Additionally, TPA commented that the incorporation of 40 CFR §68.12, itself contains numerous instances of incorporation by reference of other federal provisions, resulting in layers of incorporation by reference that would be difficult to follow. TCC/TXOGA commented that the incorporation by reference goes against the intent behind SB 900 to improve the safety of tank operations regardless of what RMP Program level the tank might fall into.

Response

The requirement of §338(b)(1)(C) applies as set forth in the current federal rule. The burden for the federal requirement does not change due to its incorporation into this rule. 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. The guidance document will provide additional clarification on which potential separate applicable standards and regulations are included in the incorporations by reference standards. Therefore, no change is made in response to this comment.

Comment

TIP commented that §338.5(b)(1)(D), (M), (N), and (O) all incorporate by reference RMP provisions that do not contain safety requirements aimed at protecting groundwater and surface water resources from an accident or natural disaster. Since these provisions go beyond the rule's purpose provided in §338.1(a), TIP recommended §338.5(b)(1)(D), (M), (N), and (O) be removed.

TCC/TXOGA request verification that this only applies to RMP Programs 2 and 3, and whether the commission intended this section to apply to Program 1 also. TCC commented that it does not believe that this section tangibly improves the safety of

tank operations.

TCC/TXOGA commented that the incorporated language would eliminate the purpose of the proposed rule and require facilities to comply with RMP.

TCC/TXOGA commented that no parts of the incorporated language tangibly improve the safe operation of tanks. Furthermore, the audit section in the subpart is already covered by other portions of the proposed rule. TCC/TXOGA also expressed concerns regarding potential security concerns by increasing the amount of information made publicly available.

Response

The applicability for determining appropriate Program type under the federal RMP requirement is set forth by federal rule. Furthermore, SB 900 directed the commission to adopt 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. SB 900 further directed the commission to include all and only those critical safety elements that are applicable to ASVs that the commission determines to be critical for the protection of groundwater and surface water resources. The commission determined that §338.5(b)(1)(D), (M), (N), and (O) are either part of the design,

construction, operation, or maintenance of ASVs and are critical for the protection of groundwater and surface water resources. Therefore, no changes were made in response to these comments.

Comment

TPA commented that the standards found in 40 CFR §68.48, which is incorporated by reference in §338.5(b)(1)(E) are more applicable to process equipment than to storage vessels and reference recognized and generally accepted good engineering practices which are found in more detail in other sections of the rules being incorporated by the commission. TCC/TXOGA commented that 40 CFR §68.48 does not tangibly improve safety. Therefore, TPA and TCC/TXOGA commented that the commission should reconsider whether it is appropriate to incorporate 40 CFR §68.48 into the rules.

Response

The requirements of 40 CFR §68.48 apply to regulated substances, processes, and equipment, and ASVs are not excluded from this federal rule. Only ASVs are subject to the requirements incorporated into §338.5(b)(1)(E). The applicability of 40 CFR §68.48 is limited by the applicability statement in §338.1 as revised. The commission determined that 40 CFR §68.48, which is incorporated by reference in §338.5(b)(1)(E), is either part of the design, construction, operation, or maintenance of ASVs and are critical for the protection of groundwater and surface water

resources. Therefore, no changes were made in response to these comments.

Comment

TCC/TXOGA commented that 40 CFR §68.50, incorporated into §338.5(b)(1)(F) and 40 CFR §68.67, incorporated into §338.5(b)(1)(I), are not needed if the Recognized and Generally Accepted Good Engineering Practices (RAGAGEP) is followed. It was commented that the RAGAGEP was developed as a result of incidents that happened and addresses the hazards of tank operations.

Response

The commission appreciates the comment; however, inclusion or reference to RAGAGEP involves standards not specified in SB 900 and therefore, are outside the scope of this rulemaking. The commission must implement the authority or language as provided in statute. However, 40 CFR §68.50 and 40 CFR §68.67 are within the scope of the rulemaking and subject to the applicability statement of §338.1. Therefore, no changes were made in response to these comments.

Comment

TPA and TCC/TXOGA commented that with respect to 40 CFR §68.56, which is incorporated by reference in §338.5(b)(1)(G), that the maintenance specific to storage vessels is adequately covered by API 653, which is also incorporated by reference into

these rules. Therefore, TPA commented that, to reduce inconsistency and undue burden, the rules should focus on the API standard rather than the more general provisions of 40 CFR §68.56.

Response

The commission appreciates the comment but disagrees. It is possible for an ASV to be subject to 40 CFR §68.56 but not be required to follow the requirements of API standard 653, therefore both standards are listed. For ASVs that are subject to both standards, the commission's guidance document will provide guidance on how to comply with both standards without being duplicative and overly burdensome. Therefore, no changes were made in response to this comment.

Comment

TPA commented that with respect to 40 CFR §68.65, which is incorporated by reference into §338.5(b)(1)(H), it is only applicable to Program 3 facilities and making 40 CFR applicable to other facilities in the ASVS rules is a potential point of confusion. TPA commented that most of the other process safety information requirements found in 40 CFR §68.65 would be captured by API 650 and API 653 standards, which are also incorporated into the ASVS rules. It was also commented that adherence to API 653 would also result in compliance with the majority of 40 CFR §68.73 mechanical integrity standards, resulting in potential redundancy and possible confusion and

conflict between the EPA standards and the API standards. TPA commented that the commission should only incorporate those parts of 40 CFR §68.73 that pertain to storage vessel safety and that are not addressed by API standards being incorporated.

Response

The commission appreciates the comment but disagrees. It is possible for an ASV to be subject to 40 CFR §68.65 but not be required to follow the requirements of API standards 650 or 653, therefore both standards are listed. For ASVs that are subject to both standards, the commission's guidance document will provide guidance on how to comply with both standards without being duplicative and overly burdensome. Therefore, no changes were made in response to this comment. Related to 40 CFR §68.65, which is incorporated by reference into §338.5(b)(1)(H), the applicability for the RMP rules, including 40 CFR §68.65, does not change because of this rulemaking. Therefore, no changes were made in response to this comment.

Comment

TPA commented/questioned that if a site qualifies as a Program 1 facility under 40 CFR §68.10 does it still have to comply with 40 CFR §68.65, which is incorporated by reference in §338.5(b)(1)(H). Furthermore, TPA commented that in general the incorporation by reference is potentially confusing and will be hard to navigate.

TCC/TXOGA commented that 40 CFR §68.65 contains a large amount of material that is not relevant to improvement of safety tank operation such as block flow diagrams. Furthermore, the majority of the Process Safety Information requirements that apply to safety tank operations are captured through API 650 and 653.

Response

The commission appreciates the comment. The applicability criteria for determining appropriate Program type under the federal RMP requirement is as set forth by federal rule and is limited in the same way by the applicability statement in §338.1 as revised. If a site qualifies as a Program 1 facility under 40 CFR §68.10 and 40 CFR §68.65 does not affect Program 1 facilities, then the facility would not be required to comply with §338.5(b)(1)(H). The commission's guidance document should help to clarify this requirement.

Comment

TCC/TXOGA commented that the incorporation of 40 CFR §68.73 into §338.5(b)(1)(J) is not necessary, as all of the requirements therein are covered under API 653. TCC/TXOGA suggested that the commission only incorporate those parts of 40 CFR §68.73 that pertain to storage vessel safety and that are not addressed by API standards being incorporated.

Response

The commission appreciates the comment but disagrees. It is possible for an ASV to be subject to 40 CFR §68.73 but not be required to follow the requirements of API standard 653, therefore both standards are listed. For ASVs that are subject to both standards, the commission's guidance document will provide guidance on how to comply with both standards without being duplicative and overly burdensome. Therefore, no changes were made in response to this comment.

Comment

TCC/TXOGA commented that 40 CFR Part 112, which is incorporated by reference in §338.5(b)(2), is already being complied with and is redundant and unnecessary in the rules.

TCC/TXOGA and TIP commented that the reference to the Facility Response Plan which is incorporated in §338.5(b)(2)(H) and the Facility Response Training and Drills/Exercises that are incorporated in §338.5(b)(2)(I) are an expansion of the list of the prescribed standards in SB 900. TIP commented that neither regulation contain safety requirements aimed at protecting groundwater and surface water resources from an accident or natural disaster and therefore TIP recommended the removal of §§338.5(b)(2)(H) and (I).

Response

The commission appreciates the comment but disagrees. It is possible for an ASV to be subject to 40 CFR Part 112 but not be required to follow the requirements of other standards incorporated into this program, therefore potential duplicate standards are listed. For ASVs that are subject to multiple standards, the commission's guidance document will provide guidance on how to comply with both standards without being duplicative and overly burdensome.

The regulations at 40 CFR Part 112 were set out in SB 900, which stated that the commission must adopt 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. Senate Bill 900 furthermore stated that the commission must include all and only those critical safety elements that are applicable to ASVs and that the commission determines to be critical for the protection of groundwater and surface water resources. The commission has determined that the incorporated sections of 40 CFR Part 112, are either part of the design, construction, operation or maintenance of ASVs and are critical for the protection of groundwater and surface water resources. Specifically, it is noted the purpose for an Emergency Response Plan and associated training is to address a release from a facility in order to protect human health and the

environment. This purpose includes preventing impacts to the soil, surface water and groundwater to the extent possible. Therefore, no changes were made in response to this comment.

Comment

TPA commented that 40 CFR Part 264, that is incorporated by reference in §338.5(b)(3) contains numerous requirements appropriately tailored to facilities dealing with hazardous waste. TPA commented that it is presumed that the ASVS rules would not apply to a ASV that is not handling hazardous waste as defined by the rules and therefore the 40 CFR Part 264 rules would not apply. TPA commented that the rules need to be clear.

TCC/TXOGA commented that the definition of "regulated substance" does not include a substance regulated as a hazardous waste, therefore there will be no storage tanks that share applicability with these rules and 40 CFR Part 264, Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities. TCC/TXOGA requested that the incorporation of 40 CFR Part 264 be removed.

Response

The agency has reviewed the requirements found in 40 CFR Part 264 and compared it to the definitions listed in the Chapter 338 rules, along with the language found in

SB 900 and agrees with the comments that there should not be any storage tanks that share applicability of the Chapter 338 rules and 40 CFR Part 264. Therefore, the proposed §338.5(a)(3), including §§338.5(a)(3)(A) through (K) have been removed and the paragraphs will be renumbered as needed.

Comment

TPA commented that the 40 CFR §264.15, which is incorporated by reference in §338.5(b)(3)(C), concerning general inspection requirements, are broad and contain provision that would go beyond storage vessels in their applicability. TPA suggested that the commission should reconsider the incorporation of 40 CFR into §338.5(b)(3)(C) and that incorporated API 653 standards would be sufficient.

Response

The agency has reviewed the requirements found in 40 CFR Part 264 and compared it to the definitions listed in the Chapter 338 rules, along with the language found in SB 900 and agrees with the comments that there should not be any storage tanks that share applicability of the Chapter 338 rules and 40 CFR Part 264. Therefore, the proposed §338.5(a)(3), including §§338.5(a)(3)(A) through (K) have been removed.

Comment

TIP and TCC/TXOGA commented that the commission needs to clarify that automatic overfill protections (AOPs) will only be required per API 2350 applicability and not on all tanks. TIP requested clarification regarding the basis for the reference to storage vessels with an internal design pressure not more than 2.5 psig that contain a Class I liquid or a Class II liquid. TIP noted that TWC, §26.3442(g) provides that the API 2350 overfill provisions only apply to atmospheric storage vessels as defined in API 650. TIP requested that the commission address how TWC, §26.3442(g) is addressed in the proposed §338.5(b)(5).

Response

The commission appreciates these comments. The applicability of a given standard, as set out in §338.1(b), is based on the applicability established by that standard. Based on the revisions/clarifications to §338.5(a) concerning applicability and the statutory language found in TWC, §26.3442(g), stating "The appliable standard in Subsection (e)(2)(B) only applies to atmospheric storage vessels as defined in API 650", the commission has revised §338.5(b)(5) to indicate that the standards only apply to atmospheric storage vessels as defined in API 650, which is designed or intended to operate at or below 0.5 psig.

Comment

TIP requested clarification on TWC, §26.3442(f), which limits the standard chosen by

the commission under National Fire Protection Association (NFPA) 30 Chapter 22 or API Recommended Practice 2001 “material stored at atmospheric pressure with a flashpoint less than or equal to 100 Fahrenheit as defined by [OSHA] Process Safety Management” is addressed in proposed §338.5(b)(6) and (7). TIP furthermore recommended based on TWC, §26.3442(e)(1)(B), the general applicability statement in §338.1(b), and the protocols for national consensus standards, to strike “Applicability of the Standard is based on NFPA 30 §22.8(1)-(4)” in §338.5(b)(6).

TCC/TXOGA commented that the commission needs to clarify that fixed and semi-fixed fire suppression is only required when specified per the protocol in the applicable standard. TCC/TXOGA also noted that the NFPA 30 Chapter 22 and API 2001 standards may have different requirements based on the date of construction and that amendments to a specific standard are not applied retroactively except where specified in the standard. TCC/TXOGA furthermore commented that the commission should clarify that it is not the intent to expand the applicability of any referenced standard.

Response

The commission appreciates the comment. Based on the revisions/clarifications to §338.5(a) concerning applicability and the statutory language found in TWC, §26.3442(e)(1)(C), stating "from either National Fire Protection Association (NFPA)

30 Ch. 22 or API Recommended Practice 2001, the commission shall require fire suppression systems on storage vessels subject to the protocol in the applicable standard," the rule language found in renumbered §338.5(b)(5) and renumbered (6) have been revised to require that a ASV meet the requirements of either NFPA 30 Chapter 22, which is incorporated into renumbered §338.5(b)(5) or API 2001, which is incorporated into renumbered §338.5(b)(6), as appropriate.

Comment

TIP recommended revising §338.5(b)(7) to address owners or operators that have voluntarily chosen to install an NFPA 30 compliant fire protection system.

Response

The commission appreciates the comment. TCEQ has updated renumbered 338.5(b)(6) to address owners or operators that have voluntarily chosen to install an NFPA 30 compliant fire protection system. The rule language has been revised to clarify that an owner or operator that meets the applicability of either NFPA 30 or API Recommended Practice 2001 is required to only follow one of the requirements concerning installation of fire suppression equipment and not both. The revised language in the renumbered §338.5(b)(6) now reads:

> **For all aboveground storage vessels that have not installed a fire suppression system under paragraph (5) of this section, API Recommended Practice 2001,**

10th Edition, July 2019, Sections 5, 6, 7, 8, 9, 10, 11 and any applicable Annex are incorporated by reference and shall apply.

Comment

TIP and TCC/TXOGA recommended revising §§338.5(b) and (c) to apply to storage vessels, but not ancillary equipment at the site.

Response

The commission appreciates this comment. An ASV is defined in §338.2(1). The definition does not include ancillary equipment (such as piping, pumps, etc.). The applicability as set forth in §338.1 includes ASVs as defined in §338.2. Therefore, no changes were made in response to this comment.

Comment

TCC/TXOGA and TIP commented that the incorporation by reference of API 650 into §338.5(c)(2) could be misinterpreted to prohibit the use of a small tank (up to 750 barrels) manufactured to API 12F. Therefore, clarification on the use of API 12F is being requested for ASVs between 500 barrels and 750 barrels.

Response

The commission appreciates the comment; however, API Standard 12F was not

specified in SB 900 and therefore, is outside the scope of this rulemaking. The purpose of new Chapter 338 is specified in TWC, §26.341(b). The commission must implement the authority or language provided in statute. It is not the commission's intent to prohibit the use of small tanks, between the capacity of 500 and 750 bbl, but if the small tank meets the definition of an ASV and also meets the applicability of a given standard, then that tank would be subject to the requirements of the program.

Comment

TIP commented that TWC, §26.3442(e)(2)(C) provides that NFPA 30, Chapter 22 location standards shall apply to in-service storage vessels constructed after September 1, 2027, except for reconstruction standards at an original storage vessel location. Therefore, TIP is requesting confirmation that §338.5(c)(3) would not apply to a tank built upon the same location as a preexisting tank and is seeking clarification as to whether replacement of a tank floor and walls, constitutes a new vessel for purposes of proposed §338.5(c).

Response

If an existing tank is removed and a new tank is built on the same tank pad, the new tank must meet all other applicable requirements, but the NFPA 30, Chapter 22 §22.4 would not be applicable. To help clarify this, the commission is revising

§338.5(c)(3) to include the language found in TWC, §26.3442(e)(2)(C) that address NFPA 30, Chapter 22 location standards, in that the standard applies except for reconstruction standards at an original storage vessel location. The agency's guidance document will provide additional information on what constitutes the reconstruction standards at an original storage vessel location.

Comment

TIP requested confirmation that owners or operators can demonstrate compliance for the ASVS rules by using equivalency measures when managing risk as is allowed in NFPA 30.

Response

Chapter 338 specifically only incorporates Section 22.8, Fire Protection for Aboveground Storage Tanks from NFPA 30. Because the reference to NPFA 30 is specific, the equivalency measures described in NFPA 30 Section 1.5 do not apply. Therefore, no changes have been made in response to this comment.

Comment

TIP requested clarification on whether the commission intends to update the incorporated by reference standards as they are updated, as long as there is not a material conflict with the implementation of the revised standard as provided in TWC,

§26.3443(b). Additionally, TIP requested clarification on whether owners or operators may opt to follow an updated API or NFPA standard that is not adopted by the commission in subsequent amendments to Chapter 338.

Response

The rule incorporates by reference specific standards in place at the time of this rulemaking. Inclusion of revisions to those standards would necessitate additional rulemaking. SB 900 requires that the commission must establish through rulemaking, the effective date of the standards, and must amend through rulemaking changes if a standard is amended in a way that materially conflicts with the current rules. An owner or operator must follow the regulations as incorporated in this chapter and may not opt to follow other versions of the standard that have not been incorporated into the chapter. Therefore, no changes were made in response to these comments.

Comment

FW commented that the commission should not allow owners/operators to seek an exemption for retrofitting or modifications to ASVs if the retrofitting or modifications are not technically feasible as is provided in §338.5(d).

Response

The exemptions discussed by FW in its comment are part of the statutory language of SB 900, which the commission is required to implement. Therefore, no changes were made in response to this comment.

Comment

FW commented that the documentation required by 40 CFR Part 68 and Part 112 should be publicly available online and in writing at local libraries or by request. In incorporating these plans into Chapter 338, the commission has the opportunity to greatly increase transparency for communities that are co-located with regulated ASVs by providing access to the required information.

Response

The commission will be working to provide copies of the applicable Federal standards that the public can view at the agency's headquarters and regional offices. TCEQ will also develop a guidance document to help the public and regulated community understand which standards apply to which types of aboveground storage vessels. The final version of the guidance document will be made available to the public on the agency's website. Because the federal standards are not copyrighted the commission will include the exact wording of the applicable federal standards.

As to providing the documentation provided by the owner or operators via the agency's website, the commission will be following state law and established agency policy on what information can be made available to the public. The commission has not determined what information, that will be collected as part of this rule, will be publicly available as some of this information could have homeland security implications or be deemed confidential. Between the effective date of this rulemaking and the September 1, 2027, implementation date, the commission will be developing the registration/certification program and will be drafting a guidance document for the regulated community. The commission will be using this time to also determine what information can be made publicly available. SB 900 requires that the commission keep confidential any information reported to, obtained by, or otherwise submitted to the commission that is subject to restrictions on dissemination under federal law, including off-site consequence analysis information subject to Title 40, CFR Part 1400, or may otherwise present a security risk, if disclosed publicly. Therefore, this statutory requirement must be taken into consideration when determining what information can be provided publicly.

338.7 Inspections

Comment

FW commented that the commission should conduct on-site inspections of registered

vessels at least once every three years and annually for those owners/operators that have experienced a failure or have a history of non-compliance.

Response

The language of SB 900 requires that the agency conduct on-site inspections of the registered/certified facilities at least once every five years to determine compliance with the standards. The statute did not limit the agency for conducting inspections at a more frequent time period at specific ASVs. However, lowering the inspection frequency from five to three years for all facilities and annually for those that have experienced a failure would require additional workforce and funding, which would require legislative approval. Therefore, no changes were made in response to this comment.

Comment

TCC/TXOGA commented that §338.7(b)(1) states that agency staff may enter at reasonable times to a facility in which an ASV is located. TCC/TXOGA requested clarification as to whether agency staff can come onto any site with a storage vessel/tank or only those with registered ASVs. Furthermore, TCC/TXOGA commented that the rules do not provide any basis for what samples will be used for, what type of analysis will be done, how confidential business information will be respected for these samples, or how sites are supposed to grant sufficient access to obtain the

sample.

Response

The agency is the delegated authority for many different state and federal rules that allow the agency to enter a site, and the ASVS program is no different than those other delegated programs. There could be times when an agency investigator would need to discuss with an owner or operator on the status of an ASV that might be claiming an exemption. The agency will work with the owner or operator to establish a reasonable time to review the information concerning the ASV.

Concerning TCEQ obtaining samples from an ASV, the rule language has been revised to make it clear that TCEQ can require that an owner or operator conduct the requested sampling, but the agency will not be directly conducting the sampling.

Comment

TCC/TXOGA commented that §338.7(b)(3) states that agency staff can come on site to test the ASV. TCC/TXOGA expressed concerns with agency staff performing tests on equipment located at the site. TCC/TXOGA recommended that the rule language be revised to provide the commission the authority to require the owner or operator to do testing and certify compliance.

Response

The commission appreciates the comment and has revised §338.7(b)(3) to make it clear that depending on the monitoring that needs to be conducted, TCEQ will conduct the monitoring or require that an owner or operator conduct the requested monitoring. The terms "associated equipment" and "contents" have been removed, since the ASVS rules only apply to ASVs and if the contents of an ASV need to be tested, that will be requested under §338.7(b)(2).

Comment

TCC/TXOGA commented that §338.7(e) does not state what constitutes "reasonable cause to believe that a release has occurred." TCC/TXOGA requested clarity on what constitutes "reasonable cause."

Response

As with all TCEQ programs, agency staff are authorized to enter a site at any reasonable time for the purpose of investigating compliance with any rule, regulation, permit, or other order of the commission. The term reasonable cause would be a standard of proof that is applied to a set of facts or actions to prove whether a reasonable person would have come to the same conclusion or acted in the same way given the totality of the circumstances. Therefore, no changes were

made in response to this comment.

§338.9 Recordkeeping

Comment

TCC/TXOGA commented that §338.9(a)(2) and (3) should allow as an alternative to keeping records onsite, an owner or operator may maintain records electronically or at a readily accessible alternate site, provided the records are readily accessible for use by the owner or operator and are readily accessible and available for inspection upon request by agency staff.

Response

The commission appreciates the comment and agrees with the commenter. The rule language has been revised with the addition of the following sentence, "Electronic records may be kept off-premises."

Comment

TCC/TXOGA commented that §338.9(b)(1) removes the five-year record retention requirement in RMP and what is usually standard for most environmental records and replaces it with a requirement to keep records "for the operational life of the aboveground storage vessel." TCC/TXOGA is concerned that the requirement is excessive and recommends retaining the five-year retention period.

Response

The commission does not consider this requirement to be excessive. TCEQ agrees that the requirement to maintain copies of the records for the storage vessel's operational life is different from other TCEQ recordkeeping requirements. However, the ASVS program is different because its main goal concerns design performance standards for safety. How the storage vessel was originally designed, located, and what disaster plans were developed is necessary for this program's purpose. Therefore, no changes were made in response to this comment.

Comment

TPA commented that §338.9(b)(2)(H) should reference §338.5(b)(7) instead of just referencing only §338.5(b).

Response

The commission appreciates the comment and agrees with the commenter. Section 338.9(b)(2)(H) has been revised to cite to §338.5(b)(6) instead of §338.5(b).

§338.20 Registration

Comment

TCC/TXOGA recommended that commission work with industry to allow for data

uploads to the agency directly from existing facility equipment databases.

Response

The commission will be developing an electronic application and database for the registration of ASVs. Because this database has yet to be developed, TCEQ cannot comment on the future integration with other databases. However, once developed, initial registrations and updates will be through the State of Texas Environmental Electronic Reporting System (STEERS).

Comment

SHI, TIP, and TCC/TXOGA commented that §338.20(e) requires an owner or operator to provide notice of changes to the registration of an ASV within 30-days of the change, including operation status and the substance stored. SHI requested that the commission provide a mechanism that provides quick and efficient reporting, such as reporting in the STEERS system, email, or some other method.

TCC/TXOGA commented that the phrase "operational status" is not defined and needs to be clarified and state if the phrase applies to swing tanks. TIP recommended that §338.20(e) be revised to allow owners or operators to register an ASV for multiple potential products by adding the following language, "provided, however, that a vessel may be registered to store multiple substances, in which case notice is not required for

a switching between registered products."

TCC/TXOGA commented that the 30-day notification requirement in §338.20(e) is not realistic and recommended a longer time of six months or an initial notification with details provided later. Reasoning being that some of the information is temporary and/or conditional during these changes and all data might not be available within the 30-day time period and the RMP and SPCC standards allow for up to six months for making the required updates.

Response

Section 338.20(e)(1) has been revised to clarify that an owner or operator of an ASV is required to notify TCEQ if the ASV has been decommissioned. The term "operational status" is no longer included in Chapter 338. Any decommissioned ASV brought back into the ASVS program will be considered a new ASV and the owner or operator would be required to certify the vessel as a new ASV, pay new fees, and follow the standards for a new ASV placed into service. Additional information will be provided in the guidance document.

Once developed, initial registrations and updates will be through the State of Texas Environmental Electronic Reporting System (STEERS). TCEQ intends to allow an owner or operator to indicate on the initial registration a list of potential products

to be stored. Switching between any of the substances included in the registration does not require notification to TCEQ. TCEQ has revised §338.20(e)(2) to reflect this. An owner or operator of an ASV would be required to notify TCEQ of additional substances that are not currently included on the registration. However, the 30-day notification requirement remains the same.

Comment

TIP and TCC/TXOGAS commented that §338.20(h) provides that an owner or operator is required to provide notice and certify that an ASV is decommissioned and no longer subject to the definition of an ASV. However, the rules do not address the circumstance in which a vessel is not subject to the standards based on delineated applicability of the respective standard. TIP commented that it does not read SB 900 to establish a program in which a defined universe of vessels is subject to regulation unless and until the program ceases to exist. TIP recommended that §338.20(h) be revised to establish that an ASV that does not meet the applicability of a standard may cancel a registration under §338.20(h). TCC/TXOGA recommended that §338.20(h) be revised to address ASVs that should be deregistered and newly meets an exemption in §338.3.

Response

It is the intent of SB 900 and this rulemaking for all vessels meeting the definition

of an aboveground storage vessel, except those that meet the exemptions in §338.3, to register with TCEQ and undergo inspections. The exemptions in §338.3 are the only exemptions from the requirement to register. Therefore, no changes were made in response to this comment.

§338.21 Certification

Comment

TIP and TCC/TXOGA commented that some ASVs may not be scheduled for out-of-service maintenance prior to September 1, 2037, under applicable industry consensus standards. TIP and TCC/TXOGA recommended that §338.3(c) be revised to allow an owner or operator of an ASV that is not scheduled for out-of-service maintenance until after September 1, 2037, to obtain a temporary exemption from proposed certification requirement until the end of the next scheduled out-of-service interval. Furthermore, TCC/TXOGA suggested that ASVs that are out-of-service on September 1, 2037, be allowed to defer the compliance certification until immediately prior to the ASV reentering service after September 1, 2037.

TCC/TXOGA has similar concerns that §338.21(b) indicates that every existing ASV subject to these rules must be taken out of service before September 1, 2037, and then each tank will be required to be taken out of service every 10 years after that. TCC/TXOGA have concerns that this is excessive for fixed roof storage tanks, which

typically operate with a 20-year inspection cycle as allowed by API 650/653.

Response

The commission appreciates the comments; however, the language of SB 900 is clear that all facilities must certify their compliance status by no later than September 1, 2037. Unless an owner or operator provides to the commission and receives approval from the commission on a demonstration of technical impracticability, SB 900 requires that any modifications or retrofits necessary for compliance with the ASVS program must be made during the out-of-service maintenance period before September 1, 2037. The commission will evaluate any impracticability requests with the information provided to TCEQ, however, simply delaying the out-of-service maintenance is not considered a demonstration of technical impracticability. Therefore, no changes were made in response to this comment.

§338.22 Fees for Aboveground Storage Vessels

Comment

FW requested that up to 15% of the collected fees required by §338.22(b) be allocated to municipal, county, or city emergency response and first responders. SB 900 requires the new program to be self-sustaining, as the proposed rules require emergency coordination with local emergency teams and first responders, money allocated to

these agencies would be going directly to satisfying the requirements of the law.

Response

The purpose of this rulemaking is to establish the ASVS Program, while implementing SB 900. The commission has not been provided authority by the Texas Legislature to go beyond the requirements found in SB 900. The statute language of SB 900 was very prescriptive on what the collected fee could be used for. Specifically, the fees are to be used to recover the cost to implement a registration program, review initial and ten-year certifications, amend certifications, inspect certified facilities, and enforce compliance applicable standards of statute, rules and orders adopted by the commission. Therefore, these comments are beyond the scope of this rulemaking and no changes were made in response to this comment.

Comment

TCC/TXOGA requested that the commission provide clarity on how the fee schedule is structured.

Response

The estimated number of vessels subject to the new regulation is 36,000. This estimate is based on the review of Tier II and Air Quality Division emissions data.

TCEQ developed a survey for trade associations to gain a better understanding of the vessel size distribution and number of potentially regulated entities by facility type (refineries, petrochemical plants, and bulk storage terminals). TCEQ used the information gathered through this survey to get a better understanding of the size distribution of ASVs.

TCEQ estimates the program to cost approximately $9 million annually. Using the estimated universe and size distribution, TCEQ established a revenue neutral tier-based fee structure to fund the administration of the program. TCEQ included a flat fee for all ASVs since all ASVs will require registration and inspection regardless of their size. The majority of the fees will be collected through the flat per vessel fee. The number of inspectors and investigators, and thus the overall cost of the program, will depend more on the number of vessels than the overall capacity. However, TCEQ also included a per barrel fee to account for the fact that larger vessels are more complex, have additional controls, and will require more time to inspect.

The adopted fee schedule is subject to change based on information as it is available and will be finalized through the *Texas Register* notification process. TCEQ will encourage ASVs to register as soon as possible so that TCEQ has accurate information on the number and size of the ASVs, to be able to adjust the fee as

needed to remain fee neutral.

Comment

SHI commented that since the proposed fee structure is variable for vessels over 20,000 barrels in capacity, the commission should define how a vessel's capacity is determined for purposes of these fee payments. Would the capacity be determined on maximum shell capacity (nominal capacity) or the maximum working fill capacity (overfill level height) or the preferred working fill capacity, which could be less than the nominal capacity and the maximum working fill capacity?

Response

The design capacity will be used to determine the per barrel fee for the ASV. The maximum working fill capacity or overfill level height would be considered the design capacity for this fee calculation. The definition for an ASV found in §338.2(1) has been updated for clarity.

SUBCHAPTER A: GENERAL APPLICABILITY, STANDARDS, AND RECORDKEEPING

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

STATUTORY AUTHORITY

The new sections are adopted under the Texas Water Code (TWC). TWC, §5.013, establishes the general jurisdiction of the Texas Commission on Environmental Quality (TCEQ), while TWC, §5.102, provides 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 TCEQ to administer the law for the maximum conservation and protection of the environment and natural resources of the state. TWC, §26.041, gives 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 adopted 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 adopted 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 adopted 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 adopted 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 aboveground 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 aboveground

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 aboveground storage vessels, as defined in §338.2 of this title (relating to Definitions) which includes aboveground storage vessels that are made of non-earthen materials, have a storage capacity of 21,000 gallons (based on overfill level height) or more, store a regulated substance, and are 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~~an aboveground 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 aboveground 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~~an aboveground 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) Aboveground 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 (based on overfill height) of 21,000 gallons or more;

(B) stores a regulated substance as defined in subsection (8);

(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).

(2) Bulk storage terminal-- ~~A site in the state, including~~ means an end-of-line pipeline storage terminals (excluding breakout ~~vessels~~tanks, which are used to relieve surges in a pipeline system and/or receive/store liquids transported by a pipeline for reinjection and continued transportation by pipeline), refinery storage terminals, for-hire storage terminals, rail storage terminals, and barge storage terminals.

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

(4) 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.

(5) 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.

(6) 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 or chemical plant that manufactures "allied chemical products"; or

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

(7) 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.

(8) 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, and

(D) a mixture containing one percent or greater by weight of a regulated substance would be considered to meet this definition.

~~(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 aboveground 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~~an aboveground storage vessel operating above 0.5 pounds per square inch gauge (psig), or designed or intended to operate above 0.5 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 in §338.2 of this title ~~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.); or

(12) a vessel regulated under 40 CFR Parts 262, 264 and 265, as incorporated into 30 TAC §§335.55, 335.112(a)(9) and 335.152(a)(8).

(b) The owner or operator of an affected aboveground storage vessel may submit a written request to the executive director for a specific aboveground storage vessel to be exempted from the requirements of this chapter. The request must provide a demonstration that the aboveground 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 aboveground 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) The standards identified in subsections (b) and (c) are applicable when both of the following criteria are met:

(i) the vessel meets the definition of an aboveground storage vessel as defined in §338.2; and

(ii) the aboveground storage vessel satisfies the applicability criteria of the listed standard. ~~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) Aboveground Storage Vessels in service before or on September 1, 2027. For an existing aboveground 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). The compliance dates specified in this chapter apply instead of the dates listed in 40 CFR §68.10,

~~(i) The regulated substances as defined in §338.2 of this title (relating to definitions) as it relates to aan aboveground 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 aboveground 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, 68165, 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).~~

(3~~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 aboveground 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 653,

(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.

(4~~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 aboveground storage vessels as defined in §338.2 of this title (relating to Definitions) with an internal design pressure not more than 0.5 psig ~~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.

(5~~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 NFA 30 §22.8(1)-(4),~~or API Recommended Practice 2001, 10th Edition, July 2019, Sections 5, 6, 7, 8, 9, 10, 11 and any applicable Annex are subject to the protocol of the applicable standard.

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

(c) Aboveground storage ~~Storage~~ vessels placed into service after September 1, 2027. For a new aboveground 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, except for reconstruction standards at an original storage vessel location.

(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~~an aboveground storage vessel, on the request of the executive director must:

(1) furnish information related to the aboveground storage vessel, including aboveground 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 aboveground 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~~an aboveground storage vessel is located;

(2) inspect and obtain samples, which will be collected by the owner or operator at the request of the executive director, of a regulated substance contained in the aboveground storage vessel; and

(3) conduct monitoring or request that the owner/operator conduct monitoring~~or testing~~ of the aboveground 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~~an aboveground 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 aboveground 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. Electronic records may be kept off-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 immediately:

(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);~~

(D~~E~~) records supporting the implementation of the applicable sections of API Standard 653 listed in §338.5(b)(3~~4~~);

(E~~F~~) records supporting the implementation of the applicable sections of API Standard 2350 listed in §338.5(b)(4~~5~~);

(F~~G~~) records supporting the implementation of the applicable sections of NFPA 30, Chapter 22 listed in §338.5(b)(5~~6~~) and §338.5(c)(3);

(G~~H~~) records supporting the implementation of the applicable sections of API Recommended Practice 2001 listed in §338.5(b)(6)~~§338.5(b)~~;

(H~~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 adopted under the Texas Water Code (TWC). TWC, §5.013, establishes the general jurisdiction of the Texas Commission on Environmental Quality (TCEQ), while TWC, §5.102, provides 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 TCEQ to administer the law for the maximum conservation and protection of the environment and natural resources of the state. TWC, §26.041, gives 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 adopted 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 adopted 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 adopted 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 adopted 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 aboveground storage vessels. Any person who owns or operates an existing aboveground 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 aboveground storage vessels using the

method authorized by the executive director.

(b) New or replacement aboveground storage vessels. Any person who owns or operates a new or replacement aboveground 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~~an aboveground 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 aboveground 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~~an aboveground 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~~an

aboveground 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 decommissioning of an ~~the operational status of any~~ aboveground storage vessel;

(2) adding a potential ~~the~~ substance stored in an ~~any~~ aboveground storage vessel ~~to the registration~~;

(3) change in ownership of any aboveground storage vessel;

(4) compliance status of any aboveground storage vessel;

(5) the location of records for aboveground storage vessels.

(f) Registration information.

(1) An owner or operator must provide all the registration information requested by the executive director for each regulated aboveground 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 aboveground storage vessels located at a particular facility on the same registration form.

(4) Owners or operators who own or operate aboveground 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 aboveground 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~~an aboveground storage vessel from the program until all outstanding fees for the facility are paid in full.

§338.21 Certification.

(a) For aboveground 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 aboveground 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 (relating to Standards) upon completion of the next regularly scheduled out-of-service maintenance of the aboveground storage vessel, but no later than September 1, 2037.

(c) For aboveground storage vessels constructed and brought into service after

September 1, 2027, an owner or operator of ~~a~~an aboveground storage vessel shall certify compliance under §338.5 of this title (relating to Standards) 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 (relating to Standards) every 10 years.

§338.22. Fees for Aboveground 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 aboveground 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 aboveground 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 Texas Water Code §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 aboveground 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 may ~~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 aboveground storage vessels~~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.