

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** July 14, 2023

Thru: Laurie Gharis, Chief Clerk
Kelly Keel, Interim Executive Director

From: Craig Pritzlaff, Director
Office of Compliance and Enforcement

Docket No.: 2022-0989-RUL

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

Background and reason(s) for the rulemaking:

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

SB 900 requires that TCEQ must promulgate rules and establish the ASVS Program by September 1, 2023. The bill requires the program to include all critical safety elements applicable to a storage vessel and those elements that TCEQ determines to be critical for the protection of ground water and surface water resources following federal statutes/regulations and national consensus standards identified in the bill, ensuring that the correct critical safety elements are applied to the correct types of storage vessels as delineated in the applicability section of each federal statute/regulation and national consensus standards.

Scope of the rulemaking:

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

TCEQ estimates there are approximately 36,000 storage vessels subject to the ASVS Program. The TCEQ, per the SB 900 bill language, is required to conduct on-site inspections of the registered and certified facilities at least once every five years to determine compliance. The rulemaking does allow the agency to approve exemptions from specific storage vessel regulations, if the owner or operator of the storage vessel demonstrates that the vessel presents a sufficiently low risk of hazards such that it does not warrant regulation under the program.

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

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

A.) Summary of what the rulemaking would do:

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

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

This rulemaking is not required to satisfy any federal regulations. However, the rulemaking is needed to implement SB 900 bill language from the 87th Legislative Regular Session.

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

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

Statutory authority:

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

Effect on the:

A.) Regulated community:

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

B.) Public:

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

C.) Agency programs:

This is a new program that the agency must implement. Before the program is fully in place it is estimated that the agency will need an additional 73 Full Time Employees (FTEs) and would need funding to develop the electronic registration/certification system well before the September 1, 2027, program start date. Two FTEs were hired in Fiscal Year 2023 (FY23), with funding from the Legislature. Three FTEs are provided in FY24, also with funding from the Legislature. Once the

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ASVS program is operational starting September 1, 2027, the collected fees will be used to fund the necessary FTEs, including those hired in FY23 and FY24.

Stakeholder meetings:

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

Significant changes from proposal:

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. There were approximately 123 different comments received, with some duplication of comments. Based on a comment received, §338.1(b) was revised to include language to clarify that the applicability of the rules applies to aboveground storage vessels as defined and provided language that is specific to that definition. This change should help to clarify the applicability of the standards to ASVs.

The definition of a bulk storage terminal was modified based on a comment received to clarify the intent or definition of a breakout tank. The revised language states that a breakout tank is used to relieve surges in a pipeline system and/or receive/store liquids transported by a pipeline for reinjection and continued transportation by pipeline.

The definition for the term petrochemical plant was revised to make it clear that allied chemical products, otherwise known as end-user products, such as drugs, soaps, and detergents, are not considered part of the definition of a petrochemical plant. There was a potentially confusing sentence that was provided in the proposed definition. The sentence concerning allied chemical products has been removed.

Based on a comment received, the definition of a regulated substance has been revised to address mixtures containing a regulated substance. 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 the owner or operator would have to comply with the rules found in this chapter if the ASV meets the other definitions and applicability requirements.

Commenters requested clarification on the meaning of the exemption for ASVs operating above 0.5 pounds per square inch gauge (psig) and how the pressure should be determined. For floating roof vessels, it was explained in the preamble that to determine the vapor pressure of these types of vessels, the option of calculating the total mixture vapor pressure may be more practical than trying to measure the vapor pressure with a pressure gauge.

A new exemption was provided in §338.3 that exempts vessels that are regulated under 40 Code of Federal Regulations (CFR) Parts 262, 264, and 265, along with state rules 30 Texas Administrative Code §§335.55, 335.112(a)(9), and 335.152(a)(8). It was determined that there should not be any ASVs that would be subject to both the Chapter 338 rules based on the definition of a regulated substance and the 40 CFR Parts 262, 264, and 265 regulations. Therefore, these standards have been removed from Chapter 338 for vessels regulated under 40 CFR Parts 262, 264, and 265.

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The applicability requirements found in §338.5(a) were revised, based on a comment received, to clearly state that the standards are only applicable when both the vessel meets the definition of an ASV and the ASV satisfies the applicability criteria of the listed standard. A guidance document is being planned that will provide additional information/clarification on the intent of the rules. However, to be clear, 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.

Rule language was revised in §338.7(b)(2) to clarify that the agency will not be collecting samples itself at an ASV, but instead will be requesting the owner or operator to conduct sampling. This revision was based on a comment received.

Potential controversial concerns and legislative interest:

The rulemaking is to implement SB 900 from the 87th Legislative Regular Session. Updates on the implementation of this bill have been requested by the legislators during interim hearings and during the 88th Legislature Regular Session. It can be expected that legislative interest in this new program will continue until the ASVS Program is implemented.

Affected industries commented that some ASVs would not be scheduled for an out-of-service maintenance prior to September 1, 2037, and requested that the rules allow for a temporary exemption from certification with the rules, until the end of the next scheduled out-of-service, with no final compliance date suggested. An exemption past the September 1, 2037, certification date was not proposed in the rules and was not addressed in SB 900, which had a hard certification date. Therefore, the change to the rules was not made, but is one that could be controversial.

There were numerous comments concerning the listed requirements found in 40 CFR Part 68 that were incorporated into §338.5. Specifically, that some of the incorporations by reference could cause confusion or were believed to not contain safety requirements aimed at protecting groundwater and surface water resources. The planned guidance document will lay out the specific requirements that have been incorporated by reference and describe in detail which standard should be followed if there are two overlapping standards. This should remove any confusion. Agency staff does not believe that there are any standards being adopted that do not contain safety requirements for the design, construction, operation, and maintenance of storage vessels, with the objective of protection groundwater and surface water resources in the event of accidents and natural disasters.

Finally, numerous standards were suggested as potential alternative standards for compliance. However, none of the standards were proposed in the rules and were not addressed in SB 900, which had a specific list of standards that the agency must develop the program from. Therefore, these changes to the rules were not made, but this could be controversial with the affected industry.

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Will this rulemaking affect any current policies or require development of new policies?

Yes, this is a new program for the agency.

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

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

Key points in the proposal rulemaking schedule:

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

Anticipated *Texas Register* adoption publication date: August 18, 2023

Anticipated effective date: August 24, 2023

Six-month *Texas Register* filing deadline: September 10, 2023

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Attachments: None

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