

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§324.4 and 324.11-324.14, the repeal of §§324.17-324.20, and a new §324.22, concerning used oil recycling. Sections 324.12 and 324.22 are adopted with changes to the proposed text as published in the October 17, 1997, issue of the *Texas Register* (22 TexReg 10240). Sections 324.4, 324.11, 324.13, and 324.14, and the repeal of §§324.17-324.20 are adopted without changes and will not be republished.

EXPLANATION OF ADOPTED RULE

The primary purpose of the adopted amendments and new section is to incorporate requirements necessary pursuant to Texas Health and Safety Code Chapter 371, §371.026, concerning Registration and Reporting Requirements of Used Oil Handlers Other Than Generators. One minor additional amendment is adopted to delete some unnecessary and confusing language. Also, the repeal of several sections is adopted to remove unnecessary requirements already clearly stated in statute.

In response to comment, adopted §324.12(4) has been revised to eliminate the need to send a written request for an extension from December 1 to January 25 of the following year if the used oil activities of the processor/rerefiner continue through December 31.

In response to comment, adopted §324.22(d)(1)(B) (relating to Financial Responsibility Technical Requirements), has been changed from the proposed language to delete the requirement that a certifying engineer or other qualified professional be “independent.” In 324.22(d)(3), in the first sentence after the phrase “or otherwise handled”, the proposed language has been changed to add this additional clarification: “including but not limited to loading docks, parking areas, storage areas, and any other

areas where shipments of used oil are held for more than 24 hours.” In §324.22(d)(3)(B), the proposed language has been changed to add the word “either” after the word “plus.” In §324.22(d)(3)(D), the proposed language has been changed to add the words “from discovery” after the words “within 24 hours.”

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant Texas Government Code, §2007.043. The following is a summary of that assessment. The specific adoption of the amendments and new section is to bring 30 TAC Chapter 324 on Used Oil into compliance with Health and Safety Code Chapter 371, Section 371.026, Registration and Reporting Requirements of Used Oil Handlers Other Than Generators. The rule amendments and new section will substantially advance this specific purpose by eliminating biennial registration and annual reporting requirements and implementing in rule the state statutory requirement for financial responsibility. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rule amendments because financial responsibility was already required by state statute but not federal rule, and the new state rule financial assurance requirements do not affect property values; they just provide funds for cleanup of contamination, if any, at site closure.

Also, the following exception to the application of Chapter 2007 of the Texas Government Code listed in Texas Government Code §2007.003 apply to these rules: the rulemaking is reasonably taken to fulfill an obligation mandated by federal law in 40 Code of Federal Regulations, Part 279, Standards for the Management of Used Oil.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The executive director has reviewed the adopted rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the Coastal Management Program.

HEARINGS AND COMMENTERS

A public hearing was not held for this rulemaking. The comment period closed November 17, 1997. Safety-Kleen Corporation was the only commenter. Some of the comments were in support of the adopted changes and others recommended revisions.

ANALYSIS OF COMMENTS

Concerning §324.12(4), Safety-Kleen recommended changing the biennial reporting date from December 1 to January 25 or March 1 of the following year to avoid unnecessary written requests for an extension of the filing date.

The commission agrees with this comment. Section 324.12(4) has been revised to eliminate the need to send a written request for an extension from December 1 to January 25 of the following year if the used oil activities of the processor/rerefiner continue through December 31.

Concerning §324.22(a), Safety-Kleen commented: “Additionally, §324.22(a) defines ‘used oil handlers’ as owners and operators of used oil transfer, processing, refining, and off-specification used

oil burning facilities, however, the ‘active area’ in which the financial assurance must be provided includes any transportation related area, while §324.11 provides requirements for Transporters and Transfer Facilities, should be subject only to §324.11 and not §324.22.”

The commission does not agree with this comment. Section 324.11 provides the registration and federal requirements for used oil transporters and transfer facilities; it does not state that these are the only requirements that transporters and transfer facilities must meet. Section §324.22(a) (relating to Financial Responsibility Technical Requirements) clearly states that it “applies to owners and operators of used oil transfer, processing, rerefining, and off-specification used oil burning facilities, hereinafter referred to as ‘used oil handlers’.” State law applies the financial responsibility requirement to all used oil handlers other than generators (Texas Health and Safety Code, §371.026 (a)(C)). Therefore, §324.22 applies to owners and operators of used oil transfer facilities, as it does to other used oil handlers; and since this is the intent of state law, no change has been made in response to this comment.

Concerning §324.22(c), Safety-Kleen proposed that Used Oil Handlers who conduct used oil management in facilities that already provide financial assurance for closure under hazardous waste permits should be exempt from this rule.

The commission agrees with this comment. A used oil handler who already provides financial assurance for soil remediation of its used oil management facility under a separate commission permit would not have to secure financial assurance per new Chapter 37, Subchapter L (relating

to Financial Responsibility for Used Oil Recycling). No change is required to §324.22(c) in response to this comment.

Concerning §324.22(c), Safety-Kleen commented that the “active area” for which financial responsibility is to be provided is poorly defined and proposed that the commission provide more definition of the “earthen area.”

The commission does not agree with this comment. The commission offers the following clarification. Under §324.22(c), the active area is “the earthen area at the facility over which any transportation, storage, or processing of used oil occurs.” A straightforward interpretation of this definition, which is the commission’s intent, is that the active area is any earthen (e.g., not paved or lined with non-earthen material) area, or ground, at the facility where used oil is taken, stored, or can contaminate. It includes earthen area over which used oil trucks travel. It includes ground where used oil storage, processing, or transfer activities take place. It includes land under or around the surface of any ponds that contain any used oil, such as could be the case if the pond is used as a spill containment unit, or if the pond is contaminated from rainfall runoff containing used oil. These are examples of “active areas” because this land would be an earthen area over which used oil transportation, storage, or processing occurs. It does not include ground such as unused or vacant areas at the facility which have no potential to be contaminated with used oil, whether by spill or *de minimis* loss. The intent is to include as active areas all land areas that have the potential to become contaminated with used oil. Therefore, anywhere used oil is taken, anywhere used oil “goes,” or anywhere used oil is handled in any way over the land at the facility

qualifies as “active area.” The commission believes that the meaning of the term “active area” is sufficiently clear as written in the proposed rule, so no change has been made in response to this comment.

Concerning §324.22(d)(1)(B), Safety-Kleen did not feel that the certifying engineer had to be an “independent” engineer.

The commission agrees with this comment. The word “independent” has been deleted.

Concerning §324.22(d)(3), Safety-Kleen stated: “Facilities that are managed under 40 CFR Subpart E, as Transfer Facilities, should be subject only to §324.11 and not §324.22. The phrase ‘or otherwise handled’ is vague and should be clarified. Safety-Kleen proposes significant clarification of ‘otherwise handled’ or deletion of the phrase.”

The commission does not agree with all of these comments. It has already responded to the first sentence in its response to Safety-Kleen’s comments concerning §324.22(a).

In response to the comment that the phrase “or otherwise handled” under the optional or alternate requirements of §324.22(d)(3) is vague, a revision has been incorporated to help clarify the meaning, based upon the federal definition of “used oil transfer facility.” The revised language now reads: “Used oil handler facilities must be provided with secondary containment for all areas where used oil is stored, transferred, or otherwise handled, *including but not limited*

to loading docks, parking areas, storage areas, and any other areas where shipments of used oil are held for more than 24 hours....”

With regard to §324.22(d)(3)(A), Safety-Kleen quoted Texas Health and Safety Code §371.028 This section states: “Unless otherwise required by federal or state law, the rules, standards, and procedures must be consistent with and not more stringent than the used oil management standards under the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901 et seq.).” Safety-Kleen further stated that they believe that the secondary containment requirement portions of the proposed rules are more stringent than the federal used oil management standards, and are thus precluded. They went on to note that 40 CFR Part 279 requires secondary containment systems to be “sufficiently impervious to used oil” to prevent release to the soil, groundwater, or surface water. They stated: “The secondary containment requirements in §324.22(d) to meet requirements for hazardous waste secondary containment are more stringent than the federal §279 requirements and are not consistent with Texas Health and Safety Code §371.028.” They then contended that the secondary containment requirements in §324.22(d)(3)(A) (i.e. “a synthetic liner with a thickness of at least 40 mils”) are more stringent than the hazardous waste secondary requirements.

The commission does not agree that these requirements are precluded by state statute. The requirements in §324.22(a)-(d) implement the state statutory requirement for financial responsibility in Texas Health and Safety Code §371.026(a)(1)(C). Section 324.22(d) provides a “voluntary” alternative to provide a smaller amount of financial assurance in exchange for meeting requirements that are more protective of the environment. The commission does not

interpret this voluntary alternative for a smaller amount of financial assurance than would otherwise be required to be in conflict with state law.

Concerning §324.22(d)(3)(B), Safety-Kleen proposed changing the language to add “either” after the word “plus.”

The commission agrees with this comment. The proposed change has been made.

Concerning §324.22(d)(3)(D), Safety-Kleen proposed adding the words “from discovery” after the words “within 24 hours.”

The commission agrees with this comment. The proposed change has been made.

Concerning §324.22(d)(4), Safety-Kleen believes the wording is not clear on how the capability is to be met to provide “spill response capability to adequately respond to a catastrophic spill” and requests further clarification.

The commission does not agree with this comment. The commission offers the following explanation. A catastrophic spill would be one that occurs suddenly, as opposed to a slow leak resulting in a relatively small spill. A sudden rupture of a tank or container resulting in a significant portion of the contents being released rapidly from the unit would be an example of a catastrophic spill. To meet the requirement of providing spill response capability to adequately

respond to a catastrophic spill, the owner or operator would need to be able to adequately respond to this sudden release by discovering it in a timely manner, containing it, and cleaning it up.

Catastrophic spills could, in severe cases, breach secondary containment. The owner or operator would need to be able to quickly respond, contain, and clean up the release. There are so many used oil facility types, designs, and configurations that the commission believes it is simply not feasible to craft a rule which addresses each type of facility with regard to what types of procedures, equipment, and provisions its owner or operator would need to be able to provide adequate catastrophic spill response capability. Therefore, no change has been made in response to this comment.

Concerning state registration, Safety-Kleen stated: “Since the used oil activity has to be notified to the United States Environmental Protection Agency (EPA) using Form 8700-12, Safety-Kleen proposes that the TNRCC eliminate the requirement for a separate form provided by the commission.

The commission does not agree with this comment. Health and Safety Code §371.026(1) (relating to Registration and Reporting Requirements of Used Oil Handlers Other Than Generators) mandates registration with the commission and makes providing proof of financial responsibility a requirement for registration. Because the EPA does not have a used oil handler financial responsibility requirement as a condition of registration, satisfaction of this state statutory requirement is not included on their registration Form 8700-12.

STATUTORY AUTHORITY

The amended and new sections are adopted under Texas Health and Safety Code, Chapter 371, §371.026, which provides the commission with the authority to establish rules on Registration and Reporting Requirements of Used Oil Handlers Other Than Generators. The amended and new sections are also proposed under Texas Water Code, §§5.103, 5.105, and 26.011, which provide the commission the authority to adopt rules necessary to carry out its powers, duties, and policies and to protect water quality in the state.

SUBCHAPTER A : USED OIL RECYCLING

§324.4. Prohibitions.

Prohibitions will be as in 40 CFR Subpart B, §279.12 and as specified herein.

(1) (No change.)

(2) A person commits an offense if the person:

(A)-(F) (No change.)

(3)-(4) (No change.)

§324.11. Transporters and Transfer Facilities.

Standards for used oil transporters and transfer facilities shall be as in 40 CFR Part 279, Subpart E and as specified in this section.

(1) (No change.)

(2) Registration. Transporters must register with the United States Environmental Protection Agency (EPA) and the commission one time on their used oil activities. Transporters must register their used oil activities within 90 days of initiation under this rule if they have not previously registered their specific used oil activities with the commission and the EPA prior to the effective date of this rule. Transporters must register, through the commission, using EPA Form 8700-12 (one time) and a form provided by the commission. Registration forms should be mailed to the Texas Natural Resource Conservation Commission, Municipal Solid Waste Division, MC 125, P.O. Box 13087, Austin, Texas 78711-3087.

§324.12. Processors and Rerefiners.

Standards for used oil processors and rerefiners shall be as in 40 CFR Part 279, Subpart F and as specified in this section.

(1) (No change.)

(2) Registration. Processors and rerefiners must register with the EPA and the commission one time on their used oil activities. Processors and rerefiners must register their used oil activities within 90 days of initiation under this rule if they have not previously registered their specific used oil activities with the commission and the EPA prior to the effective date of this rule. Processors and rerefiners must register, through the commission, using the EPA Form 8700-12 (one time) and a form provided by the commission. Registration forms should be mailed to the Texas Natural Resource

Conservation Commission, Municipal Solid Waste Division, MC 125, P.O. Box 13087, Austin, Texas 78711-3087.

(3) (No change.)

(4) Biennial report. The processor/rerefiner biennial report required by 40 CFR §279.57(b) covering each odd numbered year shall be provided to the commission by December 1 of the odd numbered year if all used oil operations have been completed for that year; if not, the processor/rerefiner shall submit the report by January 25 of the following even numbered year. The information shall be entered on a commission-prescribed form and forwarded to the commission. Mail the report form to the Texas Natural Resource Conservation Commission, Municipal Solid Waste Division, MC 125, P.O. Box 13087, Austin, Texas 78711-3087.

§324.13. Burners of Off-specification Used Oil for Energy Recovery.

Standards for burners of off-specification used oil for energy recovery shall be as in 40 CFR Part 279, Subpart G and as specified in this section.

(1) (No change.)

(2) Registration. Burners of off-specification used oil for energy recovery must register with the EPA and the commission one time on their used oil activities. Burners must register

their used oil activities within 90 days of initiation under this rule if they have not previously registered their specific used oil activities with the commission and the EPA prior to the effective date of this rule. Burners must register, through the commission, using the EPA Form 8700-12 (one time) and a form provided by the commission. Registration forms should be mailed to the Texas Natural Resource Conservation Commission, Municipal Solid Waste Division, MC 125, P.O. Box 13087, Austin, Texas 78711-3087.

§324.14. Marketers of Used Oil Fuel.

Standards for marketers of used oil which will be burned for energy recovery shall be as in 40 CFR Part 279, Subpart H, and this subchapter. Marketers of used oil which will be burned for energy recovery must register with the EPA and the commission one time on their used oil activities. Marketers must register their used oil activities within 90 days of initiation under this rule if they have not previously registered their specific used oil activities with the commission and the EPA prior to the effective date of this rule. Marketers must register, through the commission, using the EPA Form 8700-12 (one time) and a form provided by the commission. Registration forms should be mailed to the Texas Natural Resource Conservation Commission, Municipal Solid Waste Division, MC 125, P.O. Box 13087, Austin, TX 78711-3087.

§324.22. Financial Responsibility Technical Requirements

(a) This section applies to transporters of used oil who are seeking registration under this chapter. It also applies to owners and operators of used oil transfer, processing, rerefining, and off-specification used oil burning facilities, hereinafter referred to as “used oil handlers”. It does not apply to a used oil handler which is owned or otherwise effectively controlled by the owners or operators where the used oil is generated.

(b) Within 90 days after the effective date of this rule, transporters of used oil must meet the financial responsibility requirements provided in 30 Texas Administrative Code Chapter 37, §37.2021 and used oil handlers subject to the requirements of either subsection (c) or (d) of this section must meet the financial responsibility requirements provided in §37.2011 of this title (relating to Financial Responsibility Requirements for Used Oil Handlers).

(c) Used oil handlers meeting the requirements of this subsection must provide financial assurance for soil remediation in the amounts specified. A used oil handler subject to this subsection must, within 30 days after an increase in the active area of the facility which results in a higher financial assurance requirement, provide for increased financial assurance. Additionally, a used oil handler must, at a minimum, update its financial assurance annually to cover any increased cost due to inflation and to account for any other appropriate adjustments, including a lower financial assurance amount due to a decrease in the active area of the facility. The active area of the facility is the earthen area at the facility over which any transportation, storage, or processing of used oil occurs. Records

demonstrating the size of the active area of the facility and related financial assurance are to be maintained in the operating record of the facility. (Also, see 30 TAC §37.2011(c) of this title (relating to Financial Responsibility Requirements for Used Oil Handlers.)) The specified amount for which financial assurance must be provided is as follows:

(1) for a facility with an active area of over 1,000 square feet up to 10,000 square feet, \$410 for each 1,000-square-foot increment;

(2) for a facility with an active area of over 10,000 square feet up to 100,000 square feet, \$4,100 for each 10,000-square-foot increment;

(3) for a facility with an active area of over 100,000 square feet up to 1,000,000 square feet, \$41,000 for each 100,000 square-foot increment and \$4,100 for each 10,000 square-foot increment;

(4) for a facility with an active area of over 1,000,000 square feet, \$410,000 for each 1,000,000-square foot increment, \$41,000 for each 100,000 square-foot increment, and \$4,100 for each 10,000 square-foot increment; or

(d) Used oil handlers may meet the following alternate requirements:

(1) used oil handlers must demonstrate compliance with this chapter, as follows:

(A) used oil handlers must annually provide a certification statement to the executive director that the used oil handler is in compliance with the applicable requirements of this chapter; and

(B) all used oil handlers must obtain certification from a Registered Professional Engineer or other qualified independent professional that the used oil facility units have been designed and constructed in accordance with appropriate design standards, and that the units exhibit mechanical integrity. Such a certification must be obtained for each unit added to the facility, and for each unit that has undergone repair to restore mechanical integrity, within 90 days of the addition or completion of repair;

(2) Used oil handlers must ensure that used oil spills in quantities of 25 gallons or greater are reported to the agency in accordance with the spill reporting requirements of Chapter 327 of this title (relating to Spill Prevention and Control);

(3) Used oil handler facilities must be provided with secondary containment for all areas where used oil is stored, transferred, or otherwise handled, including but not limited to loading docks, parking areas, storage areas, and any other areas where shipments of used oil are held for more than 24 hours; and the facility's used oil tanks, containers, and secondary containment must be constructed, operated, and maintained to conform to the requirements of Title 40 Code of Federal Regulations §§264.174, 264.193(c)-(f), and 264.195(b), as if the used oil were hazardous waste, or to conform to the following:

(A) the secondary containment must be stationary and constructed of non-earthen material (e.g., concrete) and which is maintained to be free of cracks, gaps, or holes, and which is overlain with a synthetic liner with a thickness of at least 40 mils;

(B) the secondary containment must be large enough to contain a catastrophic spill of 100% of the capacity of the largest used oil storage, transfer, or other handling equipment or device within the containment area, plus either at least 12 inches of freeboard or sufficient freeboard to hold the precipitation which would be collected within the containment area, including any run-on or infiltration of precipitation, which would occur as a result of a 25-year, 24-hour rainfall event;

(C) the secondary containment system must prevent the release of used oil or other accumulated liquid from the secondary containment system to the soil, ground water, or surface water until the collected material is removed;

(D) used oil or other accumulated liquid must be removed from the secondary containment system within 24 hours from discovery, or in as timely manner as possible;

(4) Used oil handlers must provide spill response capability to adequately respond to a catastrophic spill of 100% of the capacity of the largest used oil storage, transfer, or other handling equipment or device, plus 10% of the capacity of the remaining used oil, storage, transfer, and other handling equipment and devices; and

(5) Used oil handlers must meet the requirements of subsection (c) of this section, except the specified amount for which financial assurance must be provided is 10% of the amount that would otherwise be required under subsection (c).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on

Chapter 324 : USED OIL RECYCLING

§§324.17-324.20

The repeal is adopted under Texas Health and Safety Code, Chapter 371, §371.026, which provides the commission with the authority to establish rules on Registration and Reporting Requirements of Used Oil Handlers Other Than Generators. The repeal is also proposed under Texas Water Code, §§5.103, 5.105, and 26.011, which provide the commission the authority to adopt rules necessary to carry out its powers, duties, and policies and to protect water quality in the state.

The proposed repeal implements Texas Health and Safety Code, Chapter 371.

§324.17. Criminal Penalties.

§324.18. Civil Penalty.

§324.19. Injunctive Relief.

§324.20. Venue.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on