

Scott Elliott

Please see attached comments from the Texas Industry Project on proposed 30 Texas Administrative Code Chapter 338, Rule Project Number 2022-015-338-CE.

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*Via Electronic Submittal: <https://tceq.commentinput.com/?id=BAMKe>*

Texas Commission on Environmental Quality

Office of Legal Services

Office of Legal Services

P.O. Box 13087

Austin, Texas 78711-3087

Attn: Gwen Ricco, MC 205

**Re: Texas Industry Project Comments on TCEQ's Proposed 30 Texas  
Administrative Code Chapter 338, Rule Project Number 2022-015-338-CE**

Dear Ms. Ricco:

The Texas Industry Project (“TIP”) appreciates the opportunity to submit comments on the Texas Commission on Environmental Quality’s (“TCEQ”) proposal for new rule 30 Texas Administrative Code Section 338, concerning the safety of aboveground storage vessels (Rule Project Number 2022-015-338-CE). TIP is composed of more than 50 companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility, transportation, and national defense industries with operations in Texas. TIP is pleased to present the following comments.

Importantly, TIP recognizes the agency’s significant work to date on development relating to the implementation of Senate Bill 900, 87<sup>th</sup> Texas Legislature, which established the Aboveground Storage Vessel Safety (ASVS) Program. This program is built upon incorporating by reference numerous safety-related federal rules and national consensus standards and is the first of its kind in the United States. Fundamental to the implementation of SB 900 to achieve the intended purpose of protecting groundwater and surface water resources from a release of substances from a storage vessel in the event of incident is to ensure the proper regulatory framework. Given the precedential nature of the ASVS Program and this rulemaking, TIP advocates that the agency implement the program as directed by the legislature. As such, TIP recommends the following revisions described below for clarity.

**Applicability**

Proposed Section 338.1(b) describes the applicability of the new rule by referring to definitions in proposed Section 338.2. For clarity, TIP recommends incorporating all the definitions relevant to understanding the rule’s applicability by revising proposed Section 338.1(b) as follows:

(b) Applicability. Except as specified in §338.3 of this title (relating to Exemptions) the requirements of this chapter apply to all aboveground existing and future installed storage vessels, ~~as defined in §338.2 of this title (relating to Definitions)~~ that are made of non-earthen materials, have a storage capacity of 21,000 gallons or more, store a regulated substance, and are located at or part of a petrochemical plant, a petroleum refinery, or a bulk storage terminal, as defined in §338.2 of this title (relating to Definitions).

TIP seeks clarification in the applicability section of proposed Section 338.5(a) to make clear that the performance standards listed in subsections (b) and (c) only apply when two criteria are met: (1) the vessel is a Storage Vessel under Texas law (namely has a capacity of 21,000 gallons or more and contains a regulated substance as defined by 338.2(7) of the new rule), and (2) the vessel meets the applicability requirements of the listed performance standards in subsections (b) and (c). TIP recommends that Section 338.5(a) be amended as follows:

- (a) The performance standards identified in subsections (b) and (c) are applicable when both of the following criteria are met: (i) the vessel meets the definition of Storage Vessel as defined in Section 338.2(8); and (ii) the Storage Vessel satisfies the applicability criteria of the performance 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.~~

This change will clarify TCEQ's intent not to expand the scope of the listed performance regulations beyond the statutory phrasing "as delineated in the applicability section" of the federal rules and national consensus standards. This is in keeping with the preamble, which states, "[i]t 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."

Further, the general applicability statement in Section 338.1(b) also eliminates the need for proposed Section 338.5(b)(1)(B)(i)-(ii). TCEQ's current proposal conflicts with the statutory direction in Texas Water Code (TWC) Section 26.3442(d) to apply the regulation to storage vessels "as delineated in the applicability section" of the cited regulation or standard. For example, the definition of regulated substance under TWC Section 26.343 is broader than the list of substances regulated by EPA's Risk Management Program (RMP). The TCEQ's proposed language at Section 338.5(b)(1)(B)(i)-(ii) would not only increase the inspection burden on TCEQ staff but would also require additional time and regulatory evaluation to apply the RMP regulations to tanks not currently covered under the federal RMP program.

In addition, TIP seeks clarification on how the rule will address storage vessels containing mixtures that include a regulated substance. Other regulations contain de minimis cutoffs. For example, RMP regulations trigger applicability only when the weight of a regulated substance in a mixture exceeds one percent. *See* 40 CFR § 68.115.

## Standards

### Risk Management Program Standards – On or Before September 1, 2027

TIP seeks clarity as to the requirements of RMP Program 2 and 3, and how each program's requirements may apply to a given vessel. For instance, proposed Sections 338.5(b)(1)(E), (F) and (G) contain Program 2 requirements, while Sections 338.5(b)(1)(H) through (L) contain Program 3 requirements. Under EPA's Risk Management Program, a facility is subject to either Program 2 or Program 3 requirements based on certain eligibility requirements outlined in 40 C.F.R. § 68.10(g)-(i). TIP recommends the following 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:

(b) Storage Vessels in service before or on September 1, 2027. For an existing storage vessel, as defined in §338.2 of this title (relating to Definitions) that is in service before or on September 1, 2027, all of the following performance standards for safety shall apply to the storage vessel (and not to unrelated or ancillary equipment at the facility) to the extent the Storage Vessel meets the applicability criteria of the performance standard and relevant program under the standard:

(1) 40 Code of Federal Regulations (CFR) Part 68, Chemical Accident Prevention Provisions, including the Program 2 and 3 applicability requirements, are incorporated by reference as stated in the paragraphs below:

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

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

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

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

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

Proposed Section 338.5(b)(1)(C) incorporates by reference all the general requirements for RMP Programs 1, 2, and 3 in 40 C.F.R. § 68.12, as amended through December 19, 2019 (84 FR 69913). Given that the proposed rule already incorporates the applicable individual RMP provisions, TIP recommends removing proposed Section 338.5(b)(1)(C) to avoid being overbroad.

Proposed Sections 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 articulated in proposed Section 338.1(a), TIP recommends removing proposed Sections 338.5(b)(1)(D), (M), (N), and (O).

#### Oil Pollution Prevention Standards – On or Before September 1, 2027

Similarly, proposed Sections 338.5(b)(2)(H) and (I) incorporate by reference 40 C.F.R. § 112.20, Facility Response Plans, and 40 C.F.R. § 112.21, Facility Response Training and Drills/Exercises. TWC Section 26.3442(d)(3) expressly includes Spill Prevention, Control and Countermeasure (SPCC) regulations. While SPCC and facility response regulations are both found in 40 C.F.R Part 112, they are in separate Subparts and the inclusion of the facility response provisions expands the scope of the regulations beyond the legislative intent. Neither of the facility response regulations contain safety requirements aimed at protecting groundwater and surface water resources from an accident or natural disaster. Since these provisions exceed SB 900's legislative intent and the rule's purpose articulated in proposed Section 338.1(a), TIP recommends removing proposed Sections 338.5(b)(2)(H) and (I).

#### National Consensus Standards – On or Before September 1, 2027

Regulation of storage vessels in service on or before September 1, 2027 which are subject to certain National Consensus Standards, as defined in proposed Section 338.2(4), are addressed in proposed Section 338.5(b)(4) API Standard 653 Tank Inspections, Repairs, Alteration and Reconstruction; (5) API 2350 Overfill Prevention; (6) National Fire Protection Association 30, Section 22.8; and (7) API Recommended Practice 2001 Sections 5, 6, 7, 8, 9, 10 and 11.

For each of the National Consensus Standards in these proposed sections, TWC Section 26.3442(e)(1)(A), (B) and (C) references the protocols for each respective performance standard. For example, Section 26.3442(e)(1)(A) for API 653 provides that the commission “shall require *adherence to the protocol* to the applicable tanks[.]” Section 26.3443(e)(1)(B) refers to the API 2350 *assessment protocol* to determining overfill protection provisions. And Subpart (C) likewise requires fire suppression systems *subject to the protocol* in the applicable standard. Emphasis added. To illustrate, API has described protocols in the Process Safety Site Assessment Program as “[i]ndustry-developed protocols designed to address key process safety activities[.]” API 653 also includes many factors that are incorporated into the protocol to evaluate the tank inspection frequency. These factors are considered when establishing intervals between inspections and are evaluated on a tank-by-tank basis. In other words, once a tank has been determined to be subject to a standard, the protocols in that standard may provide additional factors regarding how the tank will comply with the standard based upon the specific use, age, and history of the tank. For example, amendments to a specific standard may not be retroactively applied to facilities, equipment or installations built prior to the effective date of the new standard, except where specified in the standard. Accordingly, as a threshold issue for the ASVS Program, vessel evaluations against each standard should recognize not only the applicability provisions to the standard but also that the respective protocols within the standard may vary compliance for each

tank. It is important to the program's success that implementation of the standards, as informed by the established protocols, will not be compromised by the proposed rule.

TIP seeks clarification on proposed Section 338.5(b)(5) 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 also notes that TWC Section 26.3442(g) provides that the API 2350 overfill provisions only apply to atmospheric storage vessels *as defined in API 650*. Emphasis added. TIP requests TCEQ address how Section 26.3442(g) is addressed in proposed Section 338.5(b)(5).

Similarly, TIP seeks clarification on how TWC Section 26.3442(f), which limits the applicable standard chosen by the commission under National Fire Protection Association (NFPA) 30 Ch. 22 or API recommended Practice 2001 to "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 Sections 338.5(b)(6) and (7).

TIP further recommends that Section 338.5 be amended, consistent with TWC Section 26.3442(e)(1)(B), the above general applicability statement in 338.1(b), and the discussion relating to protocols for national consensus standards, to strike the following language in Subsection (b):

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

Relatedly, TIP requests that TCEQ clarify in the text of the rule or the preamble that any Annexes are non-enforceable and for informational purposes only.

TIP additionally recommends revising proposed Section 338.5(b)(7) to address owners or operators that have voluntarily chosen to install an NFPA 30 compliant fire protection system as follows:

(7) For all storage vessels that are not required to install a fire suppression system under paragraph (6) of this section and have elected to not install such a system, 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.

#### National Consensus Standards – After September 1, 2027

Regulation of storage vessels in service after September 1, 2027 which are subject to certain National Consensus Standards, as defined in proposed Section 338.2(4), are addressed in proposed Section 338.5(c)(2) and (3).

Similar to the recommended change to Section 338.5(b), TIP recommends that proposed Section 338.5(c) be revised to apply to storage vessels, but not ancillary equipment at the site.

- (c) Storage vessels placed into service after September 1, 2027. For a new storage vessel (but not unrelated or ancillary equipment) placed into service after September 1, 2027, all of the following standards for safety shall apply:

Proposed Section 338.5(c)(2) incorporates by reference API 650: Welded Tanks for Oil Storage, Thirteenth Edition, March 2020 (Errata 1, January 2021) and any applicable Annex. TIP requests that the commission clarify that the proposed rule does not prohibit use of a small tanks manufactured to API 12F (generally, tanks up to 750 barrels). Accordingly, TIP recommends the following revision to Subsection (c):

- (2) API 650: Welded Tanks for Oil Storage, Thirteenth Edition, March 2020 (Errata 1, January 2021) and any applicable Annex are incorporated by reference, except for storage vessels up to 750 barrels in capacity, API 12F (January 2019) applies and is incorporated by reference.

Proposed Section 338.5(c)(3) incorporates by reference NFPA 30, Chapter 22 location standards. TWC Section 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.” TIP seeks confirmation that Section 338.5(c)(3) would not apply to a tank built upon the same location as a preexisting tank. Additionally, TIP seeks clarification as to whether replacement of a tank floor and walls, but not the tank roof, constitutes a new vessel for purposes of proposed Section 338.5(c). Finally, NFPA 30 permits owners and operators to employ equivalency measures when managing risk. TIP requests that TCEQ confirm that tank owners and operators can still demonstrate compliance by using such equivalency measures under the ASVS rule.

More generally, TIP also seeks clarification on whether the agency intends to update the incorporated performance standards as they are updated absent a “material conflict” with the implementation of the current standards as provided in TWC Section 26.3443(b). Additionally, TIP seeks clarification on whether a storage vessel owner or operator may opt to follow an updated API or NFPA standard that is not adopted by TCEQ in subsequent amendments to Chapter 338.

### **Notice of Changes to the Regulated Substance in a Storage Vessel**

Proposed Section 338.20(e)(2) provides that an owner or operator must provide notice to the executive director of changes to the substance stored in a storage vessel within 30 days. TIP notes owners and operators frequently rotate between different substances to respond to customer demand and product availability. To avoid repetitive, voluminous notices, TIP recommends proposed Section 338.20(e)(2) be revised to permit owners and operators to register a storage vessel for multiple potential products as follows:

(2) the substance(s) stored in any storage vessel (provided, however, that a tank may be registered to store multiple substances, in which case notice is not required for a switching between registered products);

### **Certification Deadline**

Proposed Section 338.21(b) requires an owner or operator of a storage vessel constructed or brought into service before September 1, 2027 to certify compliance with Section 338.5 upon completion of the next regularly scheduled out-of-service maintenance of the storage vessel, but no later than September 1, 2037. However, some storage vessels may not be scheduled for out-of-service maintenance prior to 2037 under applicable industry consensus standard(s). TIP recommends revising proposed Section 338.3 to allow an owner or operator of a storage vessel 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 as follows:

§338.3(c) The owner or operator of an affected storage vessel may submit a written request to the executive director for a specific storage vessel to receive a temporary extension until the end of the next scheduled out-of-service interval. The executive director must provide written approval of the temporary extension to be effective.

### **Removal from the Program**

Proposed Section 338.20 establishes the registration requirements for the ASVS Program, including subsections (e), relating to changes or additional information, and (h), relating to cancellation. Under proposed subsection (e), an owner or operator is required to notify the agency of a non-exhaustive list of changes within 30 days of the occurrence of the change. Proposed subsection (h) provides that an owner or operator is required to provide notice and certify that a vessel is decommissioned and no longer subject to the definition of storage vessel.

Absent decommissioning a vessel, however, the rules do not address the circumstance in which a vessel is not subject to a performance standard or national consensus standard based on the delineated applicability of the respective standard raising the possibility of a “once in, always in” regulatory regime. While TIP fully recognizes the challenges of regulating an estimated 36,000 vessels impacted by this rulemaking, TIP does not read SB 900 to establish a program in which a defined universe of vessels (based on vessels in service before or on September 1, 2027 and those placed in service on or after September 1, 2027) are subject to regulation unless and until such time as the program ceases to exist.

TIP accordingly recommends that Section 338.20 be revised to establish that a vessel that does not meet the applicability of a performance standard or regulation under proposed Section 338.5(b) or (c), may cancel a registration under subsection (h):



(h) To cancel a registration, the owner or operator must provide notice and certify that the vessel is:

(1) not subject to an applicable standard under §338.5(b) or (c); or

(2) decommissioned and is no longer subject to the definition of storage vessel as defined in this §338.2 of this title.

### **Other Comments**

TIP seeks clarification on why the definitions of “bulk storage terminal,” “petrochemical plant,” and “petroleum refinery” in proposed Section 338.2 are inconsistent with the SIC/NAICS definitions for these facilities.

TIP additionally recommends revisions to proposed Section 338.2(1)’s definition of “bulk storage terminal.” TWC Section 26.3442(a)(2) defines a “bulk storage terminal” to exclude “breakout tanks,” but proposed Section 338.2(1) refers to “breakout vessels.” Further, the Pipeline Safety Act at 49 U.S.C. § 60104(c) preempts TCEQ from regulating any part of an interstate or intrastate pipeline system that is covered by PHMSA’s regulations, including “breakout tanks” as defined in 49 C.F.R. § 195.2. To make the definition of “bulk storage terminal” consistent with SB 900 and avoid federal law preemption, TIP recommends revising proposed Section 338.2(1) to refer to “breakout tanks,” rather than “breakout vessels,” and to specify that “breakout tanks” are as defined by PHMSA regulations at 49 C.F.R. § 195.2:

(1) Bulk storage terminal--A site in the state, including end-of-line pipeline storage terminals (excluding breakout ~~vessels~~ tanks as defined at 49 C.F.R. § 195.2), refinery storage terminals, for-hire storage terminals, rail storage terminals, and barge storage terminals.

Proposed Section 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,” but proposed Section 338.2 does not include a definition of “intermediate bulk container.” Accordingly, TIP recommends adding a definition of “intermediate bulk container” to Section 338.2.

If you have any questions about these comments or would like to discuss them further, please do not hesitate to contact me at 713.229.1344 or [scott.elliott@bakerbotts.com](mailto:scott.elliott@bakerbotts.com).

Respectfully,



Scott Elliott

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